

BALANCING INVESTOR RIGHTS
IN PAKISTAN THROUGH THE
USE OF BILATERAL
INVESTMENT TREATIES

A SEMINAR CONDUCTED BY
RESEARCH SOCIETY OF INTERNATIONAL LAW
IN COLLABORATION WITH
KONRAD-ADENAUER STIFTUNG

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ABOUT THE RESEARCH SOCIETY OF INTERNATIONAL LAW, PAKISTAN

Founded in 1993, the Research Society of International Law [RSIL] is a research and policy institution whose mission is to conduct research into the intersection between international law and the Pakistani legal context, to formulate perspectives and inform policy formulation on a national level. RSIL is a non-partisan and apolitical organization, dedicated to examining the critical issues of law – international as well as domestic – with the intention of informing discourse on issues of national importance and effecting positive change in the domestic legal space.

To this end, RSIL engages in academic research, policy analysis and an approach of engagement with policy-makers and stakeholders in the domestic and international politico-legal contexts in order to better articulate meaningful and insightful national positions on these matters.

RSIL is staffed by a team of highly competent legal scholars with a broad spectrum of specializations within international law, whose expertise covers the major policy areas and significant issues arising out of the intersection between the international and domestic legal spaces. The team contributes to the domestic legal policy discourse by conducting research and analysis into the challenges faced, both domestic as well as international, which arise out of the operation of the law.

ABOUT KONRAD-ADENAUER-STIFTUNG

The Konrad-Adenauer-Stiftung [KAS] is a political foundation. In Germany, 16 regional offices and two conference centres offer a wide variety of civic education conferences and events. Our offices abroad are in charge of over 200 projects in more than 120 countries. The foundation's headquarters are situated in Sankt Augustin near Bonn, and also in Berlin. There, an additional conference centre, named "The Academy", was opened in 1998.

We are proud to bear the name of Konrad Adenauer. The first chancellor of the Federal Republic of Germany's name and principles are our guidelines, duty, and obligation. Established in 1955 as "Society for Christian-Democratic Civic Education", the Foundation took on the name of the first Federal Chancellor in 1964.

At home as well as abroad, our civic education programs aim at promoting freedom and liberty, peace, and justice. We focus on consolidating democracy, the unification of Europe and the strengthening of transatlantic relations, as well as on development cooperation.

As a think-tank and consulting agency, our soundly researched scientific fundamental concepts and current analyses are meant to offer a basis for possible political action. The Berlin Academy is the national forum of dialogue between the spheres of politics, economy, science, and society.

Our conferences and events attract people who 'have something to say'. In Germany, we offer more than 2,500 events per year which attract 145,000 participants. We provide moral and material support to intellectually gifted young people, not only from Germany, but also from Central and Eastern Europe and developing countries. We stay in close contact with our more than 10.000 alumni.

Exhibitions, readings, and awards are also distinctive elements of our work. We promote young artists, and annually award our prestigious Literary Prize. Our scholarship programs help young journalists by offering them projects specifically geared to their needs. Since 1980, we have annually awarded a prize for excellent local journalism. Since 2002, the

Konrad-Adenauer-Stiftung has awarded its “Prize Social Market Economy” to personalities of exceptional merit in safeguarding and developing the social market economy.

The Archive for Christian Democratic Politics researches and studies the history of Christian Democracy in Germany and Europe. Interested readers profit from an enormous number of documents, modern media, and a library containing more than 157,000 publications on politics and contemporary history.¹

¹ Konrad-Adenauer-Stiftung. 2012. *About Us, Konrad-Adenauer-Stiftung*. [online] Available at: <https://www.kas.de/wf/en/71.3628/>.

WHY THIS SEMINAR?

In the contemporary international trade context, State economies are becoming increasingly interdependent and national markets are drawn closer to competing and complementary markets worldwide. In this context, the need to formulate new trade arrangements – and new ways of forming such arrangements – between States becomes increasingly pressing.

Bilateral Investment Treaties [BITs] arise out of this background and have increasingly been seen as a positive step towards ensuring the rights of foreign investors and attracting foreign investment to the domestic market. As a member of the comity of nations, Pakistan both benefits greatly from the body of international trade as well as contributes thereto, yet there is a general lack of awareness regarding the significance of BITs in international trade law as it pertains to the Pakistani context. This lack of clarity on the matter adversely affects constructive dialogue on the subject, making it more difficult for the stakeholders to effect positive change in Pakistan's international trade law regime.

“Balancing Investor Rights in Pakistan Through the use of Bilateral Investment Treaties”, therefore, is a seminar aimed at generating awareness and fuelling discourse on the matter of BITs. It seeks to provide an overview of what BITs are and how they work, as well as to discuss the unique issues which arise out of the intersection of BITs and domestic legal frameworks. The intent is to provide the participants with comprehensive insight into the operation of BITs, drawing upon the skills and experiences of the speakers invited.

This seminar also seeks to provide a platform for stakeholders and experts in the field of international trade law – particularly those viewing the subject from a Pakistani perspective – to discuss pressing issues pertaining to Pakistan's experiences with BITs and the ways in which such agreements inform Pakistan's legal stance *vis-à-vis* international trade.

The speakers invited to contribute to this seminar are all experts in the fields contiguous with international trade law in general – and BITs and their effects on the Pakistani trade environment in particular - and will be providing both the abstract and academic perspective on BITs as well as the practical realities such agreements have in the domestic trade law

context. It is also hoped that this seminar will provide the participants with valuable networking opportunities with those working in the field of international trade law here in Pakistan.

BILATERAL INVESTMENT TREATIES: A BRIEF BACKGROUND

Simply put, Bilateral Investment Treaties are international agreements establishing the terms and conditions for private investment by nationals and companies of one state in another state.² Such agreements operate within the broader international trade law regime instituted by the World Trade Organization [WTO] and its series of agreements, and seek to provide legal protections to investors (interested in investing into the counterpart domestic market) from States parties.

BITs generally consist of three main portions: (1) the scope of the agreement, (2) substantive protections and treatment standards and (3) alternate dispute resolution mechanisms [ADR].

(1) The Scope of a BIT:

The provisions of a BIT which define its scope generally describe the entities which can invoke the terms of the BIT, the assets which are covered under the BIT and – as most BITs have pre-defined periods of operation – the time-frame for the operation of the agreement.

Most BITs afford protections to all nationals – natural or corporate – of the States party to the agreement investing in the counterpart member State, in accordance with the laws of the two contracting States. Additionally, in most cases a BIT will also extend to companies incorporated under the laws of the contracting parties as well as protect corporations controlled by foreign nationals or companies from a contracting country; even if such companies are incorporated under the laws of the host or a third country. Another characteristic of BITs is the broad definition of the term “investment”, covering not only the capital that has crossed

² Legal Information Institute - Cornell Law School. n.d. *Bilateral Investment Treaty* | LII / Legal Information Institute. [online] Available at: http://www.law.cornell.edu/wex/bilateral_investment_treaty.

borders, but also practically all other kinds of assets of an investor in the territory of the host market.³

Finally, as mentioned above, one of the main characteristics of BITs is their fixed time period. Such terms are, however, usually set as minimums in order to provide foreign investors with a high level of certainty and predictability regarding the international legal framework applicable to their investments which, in turn, establishes a stable environment within which they can conduct their business.⁴

(2) Standards of Treatment:

The substantive portion of a BIT relates to the obligations specifying the treatment the contracting parties are required to provide to foreign investors. These obligations themselves take two distinct forms: general treatment standards, which are standards informing all aspects of foreign investments in a host market; and specific treatment standards which seek to address particular concerns foreign investors may have in the host market.⁵

Even among the general standards of treatment a further differentiation can be made. First are the “absolute standards” of treatment, so called because they are non-contingent and establish the treatment to be accorded to the investment without referring to the manner in which other investments are treated. Such absolute standards include the provisions on fair and equitable treatment, full protection and security, protections against expropriation, the free transfer of funds, protections of a foreign investor’s physical integrity against actions of the host state’s agents and – in certain instances – market-access rights.⁶

³ United Nations Conference on Trade and Development. 2003. *Volume VIII - Central and Eastern Europe*. World Investment Directory. [report] Geneva: United Nations. Available at http://unctad.org/en/Docs/iteiit20032_en.pdf. p.7

⁴ United Nations Conference on Trade and Development. 2007. *Bilateral Investment Treaties 1995–2006: Trends in Investment Rulemaking*. [report] Geneva: United Nations. Available at http://unctad.org/en/docs/iteiia20065_en.pdf. p.20

⁵ Vandeveld, K. 1992. *United States Investment treaties*. Deventer [Netherlands]: Kluwer Law and Taxation

⁶ United Nations Conference on Trade and Development. 2005. *International Investment Instruments: A Compendium*. (XIV) [report] Geneva: United Nations. Available at http://unctad.org/en/Docs/dite4volxiv_en.pdf

The second form taken by these standards is that of “relative standards” of treatment, which define the required treatment to be extended to foreign investors by reference to the treatment accorded to other investments. Such standards include the principles of national treatment and the ‘Most Favored Nation’ [MFN], both of which loom large in the broader international trade law framework informed by the General Agreements on Tariffs and Trade [GATT] and its associated agreements. Thus, in the case of national treatment, reference must be made to the treatment of nationals of the host country. Similarly, in determining the content of the MFN standard, reference must be made to the treatment granted to investments from the “most favored nation”.⁷

As discussed above, several of these protections already inhere within the WTO’s legal regime; BITs, however, seek to address more specifically the issue of foreign investments rather than to inform the broader legal regime of international trade *per se*.

(3) Alternate Dispute Resolution [ADR] Mechanisms:

Most recent BITs allow investors to enforce the provisions of the agreement – most particularly its protections – by means of international arbitral tribunals. Under such agreements an investor generally has total control over its claim and, typically, is not required to exhaust local remedies. This is a revolutionary development as, historically, the international remedies to aggrieved foreign investors were typically that the investor exhaust all available remedies in the host State’s domestic legal system before the foreign national’s State could intervene in the investor’s favor. Such provisions reassure investors

⁷ *Most-Favored-Nation Treatment*. UNCTAD Series of Issues in International Investment Agreements (New York and Geneva: United Nations), United Nations publication, Sales No. E.99.II.D.11. Available at <http://unctad.org/en/docs/psiteiitd10v3.en.pdf>

And

National Treatment. UNCTAD Series on Issues in International Investment Agreements (New York and Geneva: United Nations), United Nations publication, Sales No. E.99.II.D.16. Available at <http://unctad.org/en/docs/psiteiitd11v4.en.pdf>

And

Fair and Equitable Treatment. UNCTAD Series on Issues in International Investment Agreements (New York and Geneva: United Nations), United Nations publication, Sales No. E.99.II.D.15. Available at <http://unctad.org/en/docs/psiteiitd11v3.en.pdf>

who might otherwise be ill at ease relying on the host State's legal infrastructure in order to affect their rights vis-à-vis their investments.⁸

While GATT and its associated agreements – which form the legal framework underpinning the WTO regime – provide certain protections to goods originating in a foreign market, this legal regime does not specifically cover the subject of foreign investments within a domestic economy. While some have argued that the WTO legal regime – coupled with most domestic legal regimes – can be construed as being sufficient to provide foreign investors with the legal reassurances they require in order to invest,⁹ the counterpoint has been that BITs explicitly provide such legal guarantees to foreign investors and thus promote Foreign Direct Investment [FDI].¹⁰

BITs are a relatively new phenomenon in international jurisprudence, with the first BIT entered into between Germany and Pakistan in 1959;¹¹ similar agreements containing investor protections have, however, existed prior to this. Known as “Friendship, Commerce and Navigation” treaties [FCNs], the first such agreement was entered into between the United States and France in 1778¹² and incorporated provisions which operated to guarantee investors from one State party legal protections in the counterpart market.

There are currently almost three thousand BITs which have been entered into¹³ and these agreements are typically initiated by the developed, capital-exporting country, with the

⁸ *The Rise of Bilateral Investment Treaties - Protecting Foreign Investments and Arbitration*. Summer 2010. [e-book] DRI - In-House Defense Quarterly. Available through: Chadbourne & Park, LL.P <http://www.chadbourne.com/files/Publication/f1898f01-febc-4fba-bb94-87ff36d1b1a2/Presentation/PublicationAttachment/8c6065d3-c22f-4a1e-a187-8c94079e98bc/IDQ-2010-03-SuarezAnzorenaPerry.pdf>. p.59

⁹ Yackee, J. 2008. Pacta Sunt Servanda and State Promises to Foreign Investors Before Bilateral Investment Treaties: Myth and Reality. *Fordham Int'l LJ*, 32 p. 1550.

¹⁰ Busse, M., K\"Oniger, J. and Nunnenkamp, P. 2010. FDI promotion through bilateral investment treaties: more than a bit?. *Review of World Economics*, 146 (1), pp. 147--177.

¹¹ Guzman, A. and Sykes, A. 2007. *Research handbook in international economic law*. Cheltenham, UK: E. Elgar. p.215

¹² Vandevelde, K. 1992. *United States investment treaties*. Deventer [Netherlands]: Kluwer Law and Taxation. Cited in:

Mosoti, V. 2005. Bilateral Investment Treaties and the Possibility of a Multilateral Framework on Investment at the WTO: Are Poor Economies Caught in Between. *Nw. J. Int'l L. \& Bus.*, 26 p. 108.

¹³ United Nations Conference on Trade and Development. 2013. *Global Value Chains: Investment and Trade for Development*. World Investment Report. [report] Geneva: United Nations. Available at http://unctad.org/en/PublicationsLibrary/wir2013_en.pdf

objective of securing higher standards of legal protection and guarantees for the investments of its firms than those extended by the capital-importing, developing country, under the latter's domestic legal regime.¹⁴ Such agreements are formally reciprocal, applying equally to investors from and the governments of each State party to the agreement. In addition, these agreements also seek to inure foreign investors from the risks associated with investing in the domestic market by guaranteeing certain standards of treatment which are enforceable ADR mechanisms. Thus, such agreements arguably provide a more secure environment for investors within which to invest; in fact, in certain instances it has been argued that BITs, offering an alternative legal regime to foreign investors, may operate as substitutes for domestic institutions – particularly where such institutions are either weak or lacking entirely.¹⁵

¹⁴ Voss, J. 1981. The Protection and Promotion of European Private Investment in Developing Countries. *Common Market Law Review*, 18 (3), p. 363.

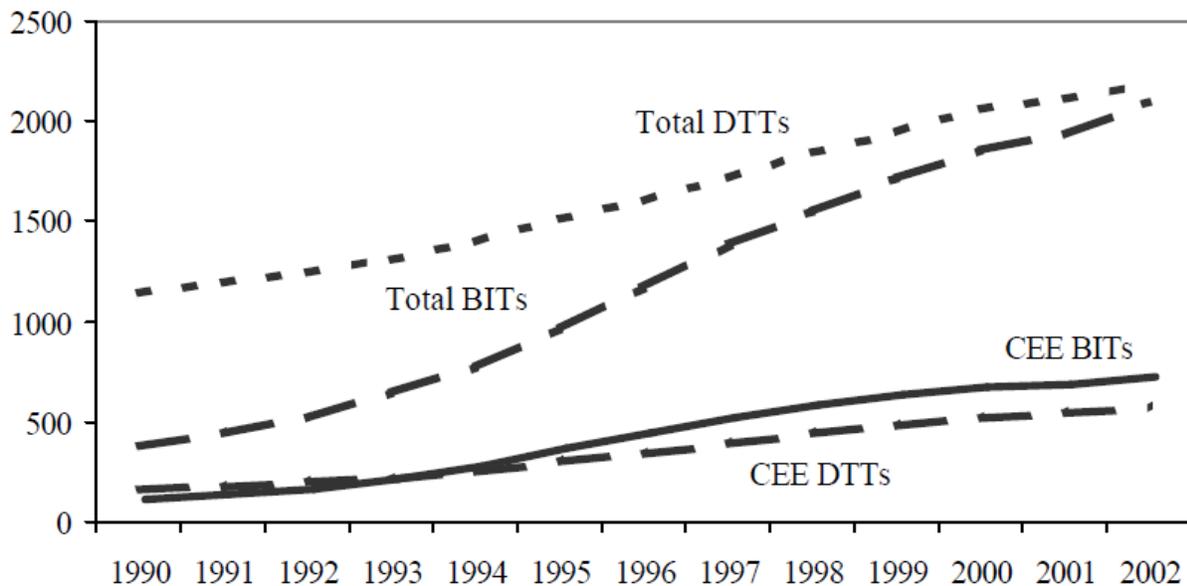
And

Salacuse, J. 1990. BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries. *The International Lawyer*, 24 pp. 655--675.

¹⁵ Neumayer, E. and Spess, L. 2005. Do bilateral investment treaties increase foreign direct investment to developing countries?. *World Development*, 33 (10), pp. 1567--1585.

THE VALUE OF BILATERAL INVESTMENT AGREEMENTS

Given their relatively recent inception within the framework of international law, BITs have had a turbulent history. Though the first BIT was – as mentioned above – entered into in 1959, such agreements only began to gain traction two decades later, with the number of BITs growing rapidly in the 1990s from 389 to 2181 by the year 2002.¹⁶



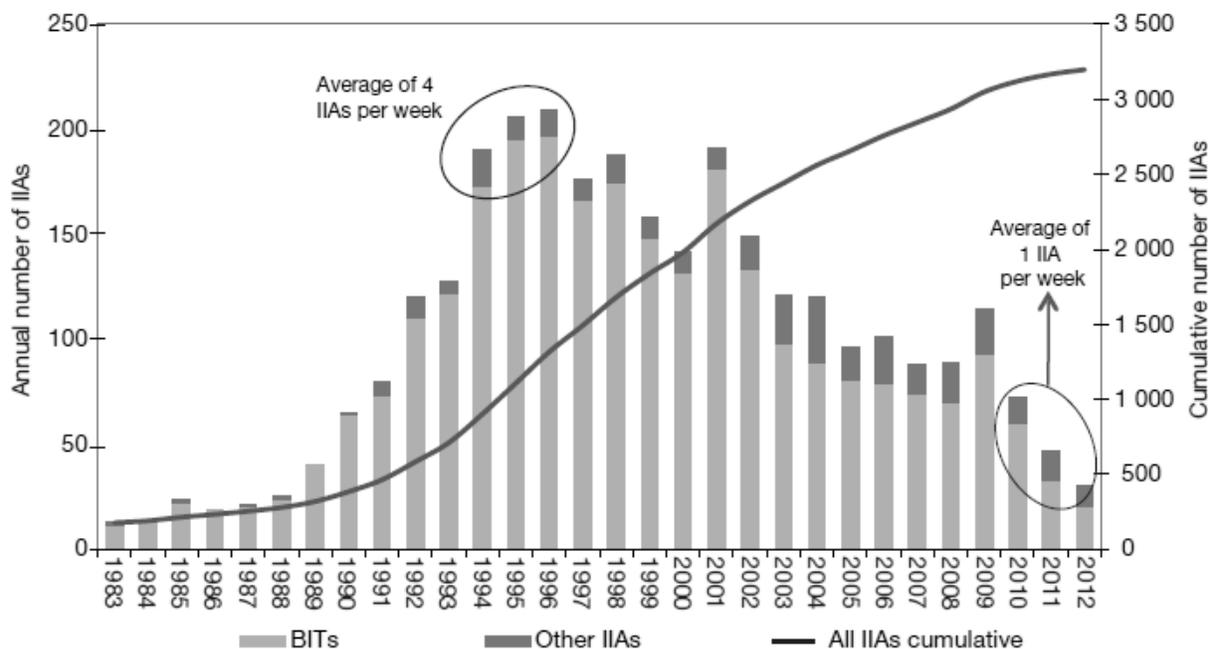
Cumulative number of Bilateral Investment Treaties [BITs] and Double Taxation Treaties [DTTs] concluded by Central and Eastern European countries and the World, 1990-2002. *Source:* UNCTAD, BIT/DTT database¹⁰.

More recently, however, trends indicate a decrease in the general popularity of BITs as a means of encouraging FDI by courting foreign investors. By the end of 2012 there were 2857 BITs between the various countries of the world, with the year seeing only 20 BITs concluded – the lowest annual number of such agreements entered into in twenty-five years.¹⁷

¹⁶ United Nations Conference on Trade and Development. 2003. *Volume VIII - Central and Eastern Europe*. World Investment Directory. [report] Geneva: United Nations. Available at http://unctad.org/en/Docs/iteit20032_en.pdf

¹⁷ United Nations Conference on Trade and Development. 2013. *Global Value Chains: Investment and Trade for Development*. World Investment Report. [report] Geneva: United Nations. Available at http://unctad.org/en/PublicationsLibrary/wir2013_en.pdf. pp.xix-xx

Furthermore, by the end of 2013 more than 1,300 BITs will be at the stage where they could be terminated or renegotiated at any time.¹⁸



Trends in International Investment Agreements [IIAs], 1983 – 2012.¹⁷

In this environment, therefore, it is imperative to discuss the merits and demerits of BITs as a tool of both investor protection as well as a means of encouraging FDI.

The Merits of BITs:

Beginning with the arguments in favour of BITs, it has been argued that such agreements are predicated on ensuring that foreign investors are adequately protected against externalities in the host market which might adversely affect their investments therein. Political risks, in particular, are a significant cause of concern for foreign investors, especially in situations where the host State’s institutions are weak or otherwise lacking.

Political risks involve unilateral interventions on the part of the host State which adversely affect the investments of foreign investors; examples of such interventions include

¹⁸ United Nations Conference on Trade and Development. 2013. *Global Value Chains: Investment and Trade for Development*. World Investment Report. [report] Geneva: United Nations. Available at http://unctad.org/en/PublicationsLibrary/wir2013_en.pdf. p.xxi

governmental expropriation of the investment or any related assets, altering the domestic tax regime to disadvantage foreign participants in the domestic market or instituting domestic regulations which – though tangential – nonetheless operate to adversely affect the foreign investment.

Investing States, therefore, perceive BITs as an institutional check against uncompensated expropriation and a means of insuring its investors from externalities which may arise in the context of the host market. Conversely, host States also perceive an incentive in employing BITs to attract FDI and increase trade. Additionally, for many host States such investment treaties are not just instrumental in boosting FDI and international trade but are also seen as means of effecting key political objectives, including shoring up human rights and entrenching democracy – goals that encourage developing countries to sign many of these institutions.¹⁹

It has been argued that where international trade agreements such as BITs link human rights standards to commercial sanctions, they may enable repressive governments to affect such rights which would otherwise be opposed domestically.²⁰ Furthermore, joining international institutions – such as international trade agreements – may assist autocracies in making the transition to a more democratic form of governance when the membership of such international institutions is comprised largely of more politically liberal States as such institutions have conditionality clauses pertaining to membership thereto – subject to dispute settlement – and also due to the broader reputational cost incurred in the event of a defection.²¹

Concerns Arising out of the BIT Framework:

¹⁹ Tobin, J. and Busch, M. 2009. A bit is better than a lot: Bilateral investment treaties and preferential trade agreements. *World Politics*, 62 (1), p. 2.

²⁰ Hafner-Burton, E. 2005. Trading human rights: How preferential trade agreements influence government repression. *International Organization*, pp. 598.

²¹ Thompson, A. and Er. 2006. Jon C. Pevehouse, *Democracy from Above: Regional organizations and democratization* (New York: Cambridge University Press, 2005). *The Review of International Organizations*, 1 (3), pp. 309--311

The counterpoint to BITs is the fact that, as they are predicated upon investor unease at the legal infrastructure and political stability of the host State, such agreements arguably often operate to dilute the sovereignty of the host State, often excluding the jurisdiction of domestic courts and placing the costs of contesting the investor's claims at an arbitral tribunal upon the taxpayers of the host State. To cite a prominent example of the lattermost, an economic crisis in Argentina between the years 2001 and 2002 impaired investor rights secured under a number of BITs the country had entered into with several other countries, and the outcomes of several arbitral claims arising out of those BITs placed a liability of billions of dollars on Argentina. One of the most significant outcomes of these arbitral decisions was the erosion of the customary legal defence of 'necessity', which Argentina invoked in defence of its responses to its domestic economic crisis. This constituted an encroachment on one of the primary means by which States could avoid wrongfulness and liability for actions taken in response to serious domestic emergencies which, inadvertently, adversely affect foreign investors.²²

Furthermore, it has been argued that such agreements prioritize the protections extended to foreign investors over domestic concerns regarding environment protections, labor rights, social rights or the management of natural resources within the host State²³. It has also been argued – particularly within the context of developing States – that where the host State emphasizes special agreements with foreign States for the purpose of attracting FDI - agreements such as BITs - the possibility arises of the host State neglecting measures which would otherwise operate to improve the overall investment climate within the host market.²⁴

²² Burke-White, W. 2008. Argentine Financial Crisis: State Liability under BITs and the Legitimacy of the ICSID System, *The Asian J. WTO & Int'l Health L & Pol'y*, 3 p. 199. Available at http://lsr.nellco.org/cgi/viewcontent.cgi?article=1207&context=upenn_wps

²³ The Transnational Institute of Policy Studies. 2011. *Public Interest, Social and Environmental Policies Under Threat*. European Union Investment Briefing. [report]. Available at http://www.tni.org/sites/www.tni.org/files/download/Investment_Briefing_S2B-et-al_Jan2011.pdf

²⁴ Rose-Ackerman, S. and Tobin, J. 2005. Foreign direct investment and the business environment in developing countries: The impact of bilateral investment treaties. *Yale Law & Economics Research Paper*, (293). Available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=557121

Opponents of BITs have also characterized the underlying presumption that BITs qualitatively improve a foreign investor's legal recourses in a host market as 'mythical'. Indeed, a series of international jurisprudence demonstrates that historically a host State's contractual obligations *viz* foreign investors have been enforceable as a matter of consistent international law and practice. This line of jurisprudence finds its inception in the 1930s, consolidating in the 1970s with a series of arbitral decisions in which international tribunals, charged with resolving legal claims arising from petroleum concession nationalizations in Libya and Kuwait, forcefully rejected extravagant claims by certain developing countries that foreign investment contracts could be freely breached as a matter of sovereign right.

This corpus of jurisprudence demonstrates that if a foreign investor could demonstrate to the satisfaction of a neutral, authoritative decision maker – typically, an international arbitral tribunal – that a host State had breached a promise to the investor, the investor would almost certainly be awarded meaningful compensation. In this light, therefore, it is argued that BITs have had little to do with the widespread and longstanding acceptance of this rule of presumptive enforceability which, instead, finds its genesis in the customary international principle of *pacta sunt servanda*: literally '*agreements must be honored*'.²⁵

²⁵ Yackee, J. 2008. *Pacta Sunt Servanda and State Promises to Foreign Investors Before Bilateral Investment Treaties: Myth and Reality*. *Fordham Int'l LJ*, 32 p. 1550.

BILATERAL INVESTMENT TREATIES IN THE PAKISTANI CONTEXT

At present Pakistan is party to 46 BITs,²⁶ which – as discussed above – have been entered into with the intent of extending legal protections to foreign investors. Such agreements are felt to be necessary in order to attract FDI as the current investment climate is, arguably, a hostile one. At present the country faces several significant challenges which pose external risks to foreign investors considering Pakistan: the threat of domestic terrorism, severe energy shortages, a crumbling economy, an inefficient legal system and bureaucratic red tape all raise concerns regarding foreign investment within the country and as such, these concerns must inform discussions on the role BITs will play in Pakistan’s engagement with foreign investors going forward.

The subject of BITs is especially important in light of recent events. Despite the recent resumption of talks on forming a BIT between the US and Pakistan²⁷ – negotiations which have been ongoing since 2005²⁸ but which stalled in 2011²⁹ – the subject of BITs is still a contentious one domestically. Notwithstanding the existence of several BITs between Pakistan and other States, arguments have been raised in the domestic context that BITs questioning the value, such agreements have in contributing to Pakistan’s capital inflow.³⁰

Additionally, domestic concerns persist *vis-à-vis* the impact international arbitral decisions may have on the domestic economy³¹ and the utility such dispute resolutions have for domestic stakeholders. Given the recent – and ongoing – arbitral cases involving Turkish

²⁶ UNCTAD Country-specific Lists of Bilateral Investment Treaties. Available at http://unctad.org/Sections/dite_pcbb/docs/bits_pakistan.pdf

²⁷ The Express Tribune. 2013. *Pakistan, US to Resume Investment Treaty Talks*. [online] Available at: <http://tribune.com.pk/story/578004/pakistan-us-to-resume-investment-treaty-talks/>.

²⁸ The American Enterprise Institute. 2013. *Pakistan Security Brief - July 17, 2013 | Critical Threats*. [online] Available at: <http://www.criticalthreats.org/pakistan-security-brief/pakistan-security-brief-july-17-2013>.

²⁹ The Express Tribune. 2012. *After 18 months, US-Pakistan Dialogue on Economics, Finance to Resume*. [online] Available at: <http://tribune.com.pk/story/468882/after-18-months-us-pakistan-dialogue-on-economics-finance-to-resume/>.

³⁰ The Dawn. 2013. *Bilateral Investment Treaty Model*. [online] Available at: <http://dawn.com/news/1038303/bilateral-investment-treaty-model>.

³¹ The Express Tribune. 2010. *Bilateral investment : Unfair Treaties Could Drain National Exchequer*. [online] Available at: <http://tribune.com.pk/story/93950/bilateral-investment-unfair-treaties-could-drain-national-exchequer/>.

ship-based power firm *Karkey Karadeniz Elektrik Uretim* and the *Tethyan Copper Company* – i.e. the infamous ‘Reko-Diq’ arbitration, and in light of the arbitral outcomes for Argentina and Bolivia in the late 1990s and early 2000s, there is a general wariness in the domestic context towards BITs, particularly their exclusion of the jurisdiction of domestic courts.³²

More importantly, there have been talks at the federal level regarding a draft template focusing on BITs and arbitration clauses. The draft template will lay down a mechanism whereby investment disputes – arising out of BITs - are referred to domestic courts as opposed to an automatic and inherent right of investors to take the host State to arbitration under international jurisdictions.³³

Also, of particular significance are recent remarks made by the Supreme Court of Pakistan [SC] and by the former caretaker Law Minister Ahmer Bilal Soofi. Reiterating directions issued by the SC, Mr. Soofi stated in a letter addressed to the President, the Prime Minister, the Ministry of Foreign Affairs, the Ministry of Commerce and the Pakistani Board of Investment that BITs “[provide] unfair advantages to the investors” and that it would be “appropriate to avoid BITs”.

Continuing with his remarks Mr. Soofi noted that – in light of the recent revival of talks with the US on forming a BIT – it would be prudent to slow down the process of negotiation and execution of future BITs. One of the concerns Mr. Soofi highlighted was the fact that the State of Pakistan was being held responsible for the wrongful actions of private persons – natural or corporate. Furthermore, BITs enable investors to rely on a more favorable legal framework at the time of negotiation and execution of such agreements. Given the recent devolution of powers – including control over economic affairs – from the Federation to the Provincial Governments via the 18th Amendment to the Constitution of Pakistan, Mr. Soofi also emphasized the need to involve provincial stakeholders in discussions on initiating BIT

³² The Dawn. 2013. *Costly International Litigations*. [online] Available at: <http://dawn.com/news/1029127/costly-international-litigations>.

³³ The Dawn. 2013. *Bilateral Investment Treaty Model*. [online] Available at: <http://dawn.com/news/1038303/bilateral-investment-treaty-model>.

arrangements with other States.³⁴ The premise behind this idea being that Provincial Governments must be kept in the loop whilst negotiating BITs – a consultation process whereby the decision to move forward with any potential BIT is unanimous, both at federal and provincial levels.

Conversely, Pakistan is – as mentioned above – currently resuming negotiations with the US for the inception of a new BIT arrangement between the two countries. Emphasizing the critical need for investment in energy sector, the current round of negotiations between the current Pakistani government and the US raises the possibility of breaking new ground in the trade arrangements between the two States.³⁵ While concerns have been raised in domestic quarters regarding certain terms of the arrangement – particularly provisions affecting Pakistan’s security arrangements – officials from both States are cautiously optimistic regarding the current negotiations, with Pakistan currently expressing keen interest in entering into the BIT.³⁶

CONCLUSION

Given the diversity in political, legal and institutional contexts among States party to BITs, the impact of such agreements upon the capital flows of State parties must be examined on a case by case basis, against the backdrop of the particular States party to the agreement.³⁷ The unique politico-economic context of Pakistan, therefore, makes it impossible to speak of BITs and their intersection with the domestic economic and legal infrastructures in generalities. Furthermore, examining the corpus of academic writing on the subject of BITs

³⁴ The News International, Pakistan. 2013. *Bilateral Investment Treaties Need Reexamination*. [online] Available at: <http://www.thenews.com.pk/Todays-News-3-187324-Bilateral-investment-treaties-need-reexamination>.

³⁵ The News International, Pakistan. 2013. *Pakistan, US Deal on Bilateral Investment Likely: Dar*. [online] Available at: <http://www.thenews.com.pk/Todays-News-3-190318-Pakistan,-US-deal-on-bilateral-investment-likely:-Dar>.

³⁶ The Express Tribune. 2013. *Pakistan, US to Resume Investment Treaty Talks*. [online] Available at: <http://tribune.com.pk/story/578004/pakistan-us-to-resume-investment-treaty-talks/>.

³⁷ Tobin, J. and Rose-Ackerman, S. 2011. When BITs have some bite: The political-economic environment for bilateral investment treaties. *The Review of International Organizations*, 6 (1), pp. 1--32.

yields no consistent perspective; instead, one finds that academic consensus is lacking on the value such agreements contribute towards the capital inflow of the host market.

A similar debate rages within the domestic context of Pakistan, with proponents and opponents of BITs engaging in one another on various public fora. Given the complexity of the subject however this debate is often unfortunately predicated upon incomplete or incorrect assumptions or data. It is against the backdrop of this current problematic discourse, therefore, that this seminar seeks to provide clarity on the concept of BITs, their role in the international trade law regime, the ways in which such agreements intersect with the domestic legal and economic contexts and the value they bring to the Pakistani economy. Given the debate in academic circles over the role and utility such arrangements have in host economies the world over, this seminar seeks to inform domestic discourse on the topic, infusing it with an accurate assessment of the content and value of BITs to Pakistan and its trading partners.

This seminar, therefore, will provide the Pakistani perspective on BITs, embedding the agreements within the practical realities of the broader domestic legal and economic contexts in order to generate awareness and provide clarity on a particularly complex area of international law.

SUGGESTED READING

JOURNAL ARTICLES/REPORTS

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- ❖ Salacuse, J. 1990. BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries. *The International Lawyer*, 24 pp. 655--675.

- ❖ *The Rise of Bilateral Investment Treaties - Protecting Foreign Investments and Arbitration*. Summer 2010. [e-book] DRI - In-House Defense Quarterly. Available through: Chadbourne & Park, LLP <http://www.chadbourne.com/files/Publication/f1898f01-febc-4fba-bb94-87ff36d1b1a2/Presentation/PublicationAttachment/8c6065d3-c22f-4a1e-a187-8c94079e98bc/IDQ-2010-03-SuarezAnzorenaPerry.pdf>

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- ❖ Tobin, J. and Rose-Ackerman, S. 2011. When BITs have some bite: The political-economic environment for bilateral investment treaties. *The Review of International Organizations*, 6 (1), pp. 1--32.

- ❖ Thompson, A. and Er. 2006. Jon C. Pevehouse, Democracy from Above: Regional organizations and democratization (New York: Cambridge University Press, 2005). *The Review of International Organizations*, 1 (3), pp. 309—311

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RELEVANT LEGISLATION

- ❖ Foreign Private Investment (Promotion and Protection) Act 1976
- ❖ Furtherance and Protection of Economic Reforms Act 1992
- ❖ ICSID Arbitration Act 2011
- ❖ Companies Ordinance 1984
- ❖ Companies (Issue of Capital) Rules 1996
- ❖ Income Tax Ordinance 2001
- ❖ Income Tax Rules 2002

- ❖ Finance (Amendment) Ordinance 2009
- ❖ Industrial Relations Ordinance 2008
- ❖ Employees Old Age Benefits Act 1976
- ❖ Employees Cost of Living (Relief) Act 1973
- ❖ Worker's Welfare Fund Ordinance 1971
- ❖ The Minimum Wages for Unskilled Workers Ordinance 1969
- ❖ West Pakistan Shops and Establishment Ordinance 1969
- ❖ Companies Profits (Worker's Participation) Act 1968
- ❖ Industrial and Commercial Employment (Standing Order) Ordinance 1968
- ❖ Provincial Employees Social Security Ordinance 1965
- ❖ Factories Act 1934
- ❖ Insurance Ordinance 2000
- ❖ Contract Act 1872
- ❖ Sales of Goods Act 1930
- ❖ Investment Policy 2013
- ❖ SECP Guidebook on Foreign Companies