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Time for a Change

Germany's Bilateral Investment Treaty Programme and Development Policy

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Dialogue on Globalization

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1. Preface

The first modern bilateral investment treaty was entered into between Germany and Pakistan in 1959. Notwithstanding a series of high-profile failures at the multilateral level, like the OECD Multilateral Agreement on Investment (MAI) that failed in 1995 or moves to install multilateral investment rules at the World Trade Organization (WTO) that had to be abandoned at the Cancun Ministerial Conference in 2003, there has been steady growth in bilateral investment treaties (BITs) for the protection of foreign direct investment, the total number now having reached a figure of more than 2300. In a way, Germany created the "mould" for such agreements between industrialized and developing countries for the promotion and legal protection of foreign investment that have come to be universally accepted legal instruments since the late 1980s. The number of countries that have so far refrained from concluding BITs is continuously shrinking, and BITs are concluded no longer exclusively between capital-exporting and capital-importing countries but increasingly between developing countries as well. Almost all BITs cover 4 substantive areas: admission, treatment, expropriation and dispute settlement. These treaties reach well behind borders and have led to sometimes unforeseen uses of existing investment treaties by foreign investors against government decisions or actions, leading to increasing numbers of arbitrations and litigation, which often lack transparency and result in host governments having to pay substantial compensations. Whereas investor protection is a legitimate goal and certainly an essential dimension of investment promotion, there is a need to achieve a balance against other compelling public interests and to provide adequate safeguards for the exercise of legitimate government policy.

Mahnaz Malik, an international lawyer admitted to practice law in New York, England and Pakistan and an Associate with the International Institute of Sustainable Development (IISD), has analyzed the German bilateral investment treaties against the backdrop of the linkage between investment and sustainable development. According to her analysis, the German investment treaties concentrate solely on enhancing investor protection, without giving due consideration to the development policy aims of the German government as defined by the German Ministry for Economic Cooperation and Development (BMZ). She deplores the restrictive impact on host governments' "policy space" and their ability to regulate in order to protect their development interests. And she calls for a revision of the German BIT programme involving both the Ministry of Economics and the Ministry of Economic Cooperation and Development, with a focus on criteria of "policy coherence." And she confronts the German Model Treaty with the IISD Model, which aims to strike a balance between rights and obligations of investors and states.

The aim of the publication of this study is to contribute to a necessary debate on bilateral investment treaties with a view to broader policy considerations. Since globalization is seen as limiting the scope of government policy action in both developing and industrialized countries, there is a growing need to define and agree on international standards that balance the rights and obligations of international investors and governments's space to pursue legitimate domestic policies and to comply with obligations deriving from international law as regards human rights and social or environmental policies.

Dr. Erfried Adam
Director, Geneva Office
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2. Executive Summary

By signing the first bilateral investment treaty (BIT) ever in 1959, Germany created a mould for over 2300 BITs signed since then. The total number of BITs signed by Germany is 138, which makes it the country with the largest number of BITs.

German BIT programme's disconnect with development policy

This paper finds that the German BIT programme appears solely focussed on investment protection without reference to linkages between investment and sustainable development, at times without any consideration to the development policy aims that the German Federal Ministry for Economic Cooperation and Development itself espouses. In fact, the German BIT programme has a negative impact upon a developing state's policy space to take measures to achieve its development goals.

Developing states need to be very careful when negotiating BITs as the majority of them contain a unique feature – the right of foreign investors to bring claims directly against the state hosting the investment ("the host state") before an international arbitral tribunal. This powerful dispute settlement mechanism has now spawned over 220 investor-launched arbitrations. Over 2/3 of these have been filed since 2003, the great majority against developing states and states in transition.

Conclusion & Recommendations

The German BIT programme needs to be revised so it strikes a balance between investor protection and the development goals of host states. Examples of how the German Model Treaty can be improved include clarifying the scope of the treaty, structuring the obligations with greater precision to reduce vagueness, expressly allowing national policy space for a host state to take measures required to protect its development goals and introducing a more transparent, legitimate and accountable dispute resolution system.

The Federal Ministry of Economic Cooperation and Development has the noble aim of improving the role of developing states in international regimes. However, rather than renegotiating its BITs "upwards" to be development oriented, Germany through efforts of the Federal Ministry of Economics and Labour is solely concentrated on enhancing investor protection in its BIT programme without reference to the restrictive impact this can have on the host state's ability to regulate in order to protect its development interests. The German Federal Ministry of Economic Cooperation should intervene to ensure that the German BITs are development positive, not development negative. This needs to be accompanied by capacity building to create an understanding of the full implications of BITs both within the government and civil society in developing states.

Mahnaz Malik, August 2006

3. Background

On 29 November 1959, by signing the first bilateral investment treaty (BIT) ever with Pakistan, Germany created the mould for the over 2300 BITs that have been signed by more than 140 states[1] since then[2]. However, the importance of Germany's BIT programme extends beyond the historical. Today, Germany retains this lead with over 130 BITs, making it the country with the largest number of BITs in the world.

With over 130 BITs, Germany is the country with the largest number of BITs in the world.

Countries have traditionally set out their rules on foreign direct investment (FDI) in BITs, which are signed agreements between countries for the reciprocal encouragement, promotion and protection of investments in their territories by nationals and companies based in another country. The substantial German investment abroad[3] is protected through an extensive network of BITs signed by Germany with over 130 states[4].

FDI is a vital factor for long-term economic development for developing countries because of its potential to create jobs, raise productivity, enhance exports and transfer technology. A developing country's main objective in attracting FDI is to reduce poverty and stimulate development. Therefore, as world FDI outflows pick up after a recent downturn[5], the good news for developing states is that FDI inflows for developing states increased by 35% in 2004, the highest since 1997[6]. The bad news is that the present international investment law regime, which primarily governs the flow of FDI into most developing states is not designed to foster the achievement of their sustainable development goals[7]. In fact, as this report discusses, some of the international law obligations agreed by developing states under the German BIT programme can in fact impact negatively on their sustainable development aspirations.

Some of the international law obligations agreed by developing states under the German BIT programme can impact negatively on their sustainable development aspirations.

1 In its recent Research Note UNCTAD calculates that there were 2392 BITs at year-end 2004, UNCTAD reported that 73 of these were concluded in 2004, of which 10 were renewals.
2 For example, the UK Government's extensive BIT programme owes is inspiration to the German BIT programme. See page 3 of UK Bilateral Investment Treaty Programme and Sustainable Development by Luke Eric Peterson, www.riia.org.
3 UNCTAD reported Germany to be one of the leading sources of FDI after the US and along with the United Kingdom and China, World Investment Report 2005.
4 UNCTAD records a total of 132 BITs, whereas the German Federal Ministry of Economics and Labour Overview, dated 2005, records that 138 BITs have been signed.
5 UNCTAD World Investment Report 2005 reported FDI flows of US$ 648 billion in 2004, which was a 2% increase from 2003.
6 Ibid.
7 This report discusses the impact of a selection of international investment agreements signed by Germany on the ability of developing states to take measures to achieve their sustainable development without breaching their international law obligations under these treaties. For a consideration of broader issues relating to the relationship between international investment agreements and sustainable development, see International Investment Agreements and Sustainable Development: Achieving the Millennium Development Goals, by Aaron Cosbey, www.iisd.org.

Germany starts yet another new trend by renegotiating its earlier BITs to "upgrade" protection for its investors, without any consideration to the development policy aims that the German Federal Ministry for Economic Cooperation and Development itself espouses.

The compatibility of Germany's BIT programme with the development goals of developing countries becomes of increased significance as Germany[8] starts yet another new trend by renegotiating its earlier BITs to "upgrade" protection for its investors, without any consideration to the development policy aims that the German Federal Ministry for Economic Cooperation and Development itself espouses[9].

While developing countries may have much to gain from FDI, they also have much to lose from badly written investment rules – a lesson that they have recently been learning the hard way in the form of expensive investor-state claims occasioned by the loosely defined and broad investor rights found in the majority of the BITs in the world today. These include claims by investors that a wide range of government policies, including health, environmental and tax measures, may violate treaty provisions. Although not all BITs are the same, most usually do contain broad commitments to protect investments by investors of one state in the territory of the other state ("the host state"), ranging from assurances of fair, equitable and non-discriminatory treatment to undertakings to observe investment contracts and other investment-related obligations. Most importantly, in the vast majority of cases, these protections are accompanied by a powerful international arbitration mechanism that allows the investors to bring claims directly against the host state alleging violations of these protections under international law.

The right of private individuals and companies to enforce a state's international obligations (and claim damages) give BITs "teeth" which other international instruments normally lack.

The ability of investors to enforce their rights directly against a state without the need of an agreement between the investor and the state or the involvement of their own state is seen as one of the most far reaching innovations of BITs. The right of private individuals and companies to enforce a state's international obligations (and claim damages) give BITs "teeth" which other international instruments normally lack.

The fact that BITs can bite was fully realised when the first arbitration claim by an investor against a state under a BIT was registered at the International Centre for the Settlement of Investment Disputes (ICSID)[10] against Sri Lanka in 1987 pursuant to a UK-Sri Lanka BIT[11]. Since then, there have been 219 known investor-state arbitrations under investment treaties, of which over two thirds (69%) were registered since the beginning of 2002.[12] At least 61 governments – 37 of them in the developing world – have faced investment treaty arbitrations.

8 The renegotiation of these BITs is based on the German Model BIT prepared by the German Federal Ministry of Economics and Labour.
9 www.bmz.de states that the development policy of the Federal Republic of Germany is an independent area of German foreign policy. It is formulated by the Federal Ministry for Economic Cooperation and Development (BMZ) and carried out by the implementing organisations. The aim of German development policy is to reduce poverty worldwide, to build peace and to promote equitable forms of globalisation.
10 The International Centre for Settlement of Investment Disputes (ICSID), an affiliate of the World Bank which administers specialised investment arbitration and conciliation under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, done at Washington in 1965 (commonly known as the ICSID Convention, 1965). ICSID is the most commonly referenced arbitration mechanism in investment treaties.
11 Asian Agricultural Products Limited v. Sri Lanka (AAPL v. Sri Lanka), registered in 1987 under the Sri Lanka–U.K. treaty of February 18, 1990.
12 UNCTAD IIA Monitor No.4 (2005), Latest development in investor-state dispute settlement, UNCTAD (WEB/ITE/IIT/2005/2).

4. Scope of review

This report provides:

(a) An overview of the German BIT programme;

(b) an identification of the critical problems in the German Model Treaty Concerning the Reciprocal Encouragement and Protection of Investment issued by the Federal Ministry of Economics and Labour in 2005 ("the German Model Treaty") (attached as Appendix 1[13, 14]) that can potentially have a negative impact on sustainable development goals through a comparison with the IISD Model Investment Agreement ("the IISD Model")[15], an investment treaty model that starts from the clear relationship between investment and the achievement of sustainable development;

(c) a discussion on the cost and benefits of signing German BITs for developing countries; and

(d) recommendations for changes to the German BIT programme, with reference to the aims of the development policy of the German Federal Ministry of Economic Cooperation and Development (BMZ).[16]

Although the IISD Model is drafted as a multilateral agreement, its principles can be applied to guide bilateral negotiations as well. It has been used by both individual states[17] as a source to develop their own models as well as by regional groupings of states to devise regional investment agreements. [A copy of the IISD Model is attached as Appendix 2[18] to this report]. To avoid translation issues, this study has only considered the German BITs available in English on the UNCTAD database, a list of these are attached as Appendix 3[19].

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13 Appendices to this paper are available on http://www.fes-globalization.org/
14 Sent by the German Federal Ministry of Economics and Labour to Stephanie Muche in January 2006. The role of Stephanie Muche in obtaining data relating to the German BIT programme is acknowledged.
15 2005. The draft is the result of an 18-month process of drafting and consultations, including a high-level experts meeting in January 2005 in The Hague and a launch event hosted by the Commonwealth Secretariat in April 2005. A parallel exercise developing a Southern Agenda on Investment also fed strongly into the process. Available at www.iisg.org.
16 www.bmz.de. German development policy takes its cue from the shared goals of the international community: the Millennium Declaration and the eight Millennium Development Goals (MDGs) derived from it, the Monterrey Consensus and the Johannesburg Plan of Implementation determine the direction.
17 For example, both Pakistan and Azerbaijan have used the IISD Model as a source while preparing their model BITs.
18 Appendices to this paper are available on http://www.fes-globalization.org/
19 Appendices to this paper are available on http://www.fes-globalization.org/

5. Overview of the German BIT programme

The German Federal Ministry for Economics and Labour issued an overview of its BITs (or investment protection treaties as they are termed by Germany) on 07 October 2005, which is attached as Appendix 4[20] to this report. This overview confirms that the total number of BITs signed by Germany is 138, of which 115 are effective, i.e. in force, and 23 have been signed but are not effective. UNCTAD records show that Germany has signed 132 BITs. The diagram below shows BIT signing activity by Germany from 1950 to date as recorded by UNCTAD[21] as this data is available in English. The diagram shows that German BIT signing activity peaked in the 1990's, reflecting the international trend – the number of BITs in the world rose sharply from 385 in 1989 to 2,181 in 2002,[22] as the 1990s saw great activity in signing BITs.

The lack of the investor-state dispute resolution clause in its earlier BITs is probably the main reason why Germany now proposes to upgrade these earlier BITs through renegotiations.

The German BITs reviewed for this report have consistent themes even though they cut across a long time span (1959 to 2005). However, one critical difference is the absence in the earlier German BITs of an investor-state arbitration clause which is present in the later German BITs. The lack of the investor-state dispute resolution clause in its earlier BITs, the implications of which are discussed below, is probably the main reason why Germany now proposes to upgrade these earlier BITs through renegotiations. For example, the Germany-Pakistan BIT (1959) does not include an investor-state dispute resolution clause.

BIT ACTIVITY OF GERMANY FROM 1950 TO 2005, ACCORDING TO UNCTAD AS AT 15 AUGUST 06

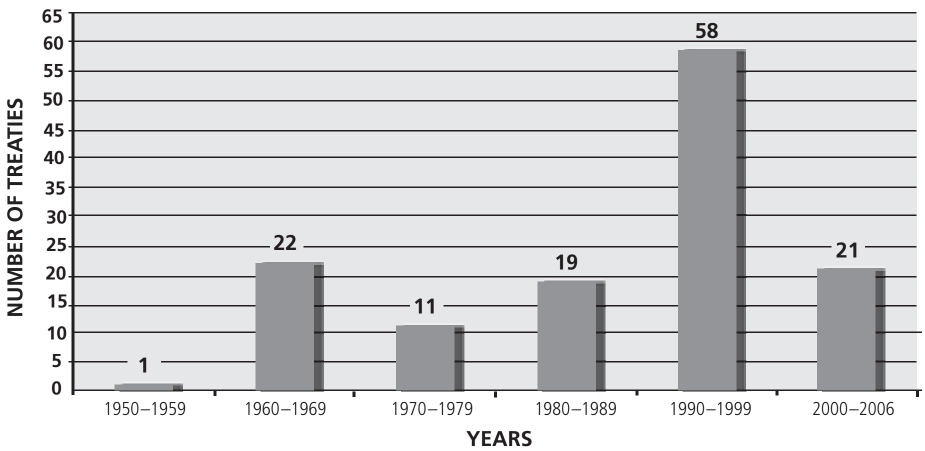

Diagram 1; Prepared by the author

20 Appendices to this paper are available on http://www.fes-globalization.org/
21 Confirmed on UNCTAD treaty database as at 15 August 2006.
22 UNCTAD (2003).

There is little easily accessible information available in English on the German thought that underpinned the signing of the first BIT in 1959. The model was developed in the political context of the 1950s and later adapted in the 1960s – a period characterised by the spread of communism and concern for the impacts of decolonisation on business interests. This conscious or unconscious thought process that may still stand behind the German BIT programme is supported by the focus that it has on a singular aspect of the investment process – the protection of foreign capital and investments (rather than development or other policy goals). The website of the Investment Guarantees of the Federal Republic of Germany[23] provides that the German government is continually improving the legal protection requirements in host states – and consequently the protection and coverage for German investors abroad – by entering into new or updating existing IPTs. The lack of reference to development objectives is not unusual but the norm in the bulk of the BITs[24]. For example, BITs signed by the U.K., Canada and Switzerland typically do not refer to development in any context – either in the preamble to the treaty or in the treaty's substantive provisions[25].

As the initial BITs were developed by capital exporting states like Germany, the Netherlands and Switzerland, the consequences of their singular investor rights' focus on the development goals of the developing state party that usually "hosted" the investment, was perhaps never really considered. While initial BITs were between developed and developing states (North-South BITs), there are now a substantial number of South-South BITs, which follow the same (defective) mould.

The increased use of the arbitration process under the BITs has also shown the flaws of a system developed primarily to protect investments rather than one that strikes a balance between the host state's development interests and investor protection in terms of a failure to meet basic criteria of legitimacy, transparency and accountability. The bulk of the BITs in the world today are based on an outdated European model of some 50 years ago containing obligations that are so vague and broad that they have led to conflicting decisions on key obligations. The defects in the current German Model Treaty and the early BITs signed by Germany are discussed in this report. Unfortunately, the German Model Treaty has not evolved too far from the first treaty Germany signed in 1959. While it would be beyond the scope of this report to analyse the provision of each and every BIT signed by Germany, references at times are made to a selection of BITs signed by Germany in the first decade of its BIT programme.

The increased use of the arbitration process has shown the flaws of a system developed primarily to protect investments rather than one that strikes a balance between the host state's development interests and investor protection. The bulk of the BITs in the world today are based on an outdated European model.

23 http://www.agaportal.de/en/dia/deckungspraxis.htm.l
24 Based on the author's experience of reviewing over 500 BITs.
25 Bilateral Investment Treaties and Development Policy-Making, by Luke Eric Peterson, IISD (2004), www.iisd.org.

6. Critical problems with the German Model Treaty from a development perspective

Germany's official foreign policy is oriented towards the aims of maintaining peace and prosperity, promoting democracy and developing respect for human rights the world over. Germany's foreign policy endeavours include: "the promotion of respect for human rights all over the world" and "the preservation of a habitable world worth living in for future generations." Further "as one of the largest industrial and trading nations, Germany is dependent upon a well-functioning world economic system which remains committed to free trade but does not lose sight of the need for a reconciliation of ecological and social interests."

The German Ministry of Economic Cooperation and Development, which devises Germany's development policy independently of its foreign policy, provides that the aim of German development policy is to reduce poverty worldwide, to build peace and to promote equitable forms of globalisation. At the same time, the German Ministry of Economic Cooperation and Development states that Germany is seeking to bring about changes to international regimes, agreements and institutions that will benefit the developing countries with the aim to create, by means of fair international frameworks, the conditions necessary for successful and sustainable development in all countries. It further specifies that the priority areas of German involvement at this level are reforming international trading, financial and environmental systems.

The German Model Treaty and German BITs have negative implications for host state governments, insofar, as they restrict the ability of developing state governments to take policy measures designed to promote development objectives.

However, the current German Model Treaty is far away from these ideals for development. Not only do the German Model Treaty and the German BITs reviewed in this report lack provisions that explicitly make the link between investment and sustainable development, as the subsequent analysis will show, they have negative implications for host state governments, insofar as they restrict the ability of developing state governments to take policy measures designed to promote development objectives. The risk of claims by investors under BITs against developing countries, which can involve hefty compensation amounts by the latter to the former, further harms the cause by diverting precious resources that could be used to achieve development goals.

The website of the German Ministry for Economic Cooperation and Development does not explicitly assess the German BIT programme in the development context. Although it does profess that Germany is a strong advocate of greater participation by the developing countries in international decision-making processes. This absence of a linkage between development and the German BIT programme could be due to a lack of coordination between the efforts of the German Federal Ministry of Economics and Labour and the German Federal Ministry of Economic Cooperation and Development with respect to investment. While the latter ministry's attitude to economic relationships between states is anchored in the development context, the former ministry's thought process, as illustrated by the German Model Treaty, appears to be frozen in the 1950's and 1960's without consideration of the impact investor protection provisions may have on development goals of the state partner to the treaty.

Capital exporting states like Germany will naturally aim to secure the maximum protection. However, the developing state party as host state needs to be careful in ensuring that the agreement is designed in such a way that, first, it attracts the right quality and quantity of investment that support its development needs and, second, it retains policy space to take measures to meet its sustainable development goals (e.g. eradication of extreme hunger and poverty, environment sustainability) without being in breach of the BIT and therefore held liable to pay pecuniary damages to investors.

The developing state party needs to be careful in ensuring that the agreement is designed to attract the right quality and quantity of investment and to retain its policy space.

For example, Australia sees the Australia–Sri Lanka BIT as an important safeguard for Australian companies investing in Sri Lanka. "It [the BIT] would send a positive message to Australian business about investing in Sri Lanka by offering most favoured nation treatment in regard to the treatment of Australian investments, by providing guarantees about expropriation/nationalisation and by establishing mechanisms for resolving disputes over investment matters. The investor-state dispute resolution procedures included in the Agreement provide an avenue by which Australian investors can redress wrongs without recourse to the local legal system (for example, by recourse to the International Centre for the Settlement of Investment Disputes)." The same paper considers the "costs" of Australia signing the BIT and notes, "No formal dispute resolution procedures have even been invoked against Australia in relation to the nineteen investment protection and promotion agreements (IPAs) currently in force for Australia. …" adding that this is highly unlikely in the current Australian legal and political system.

Based on the current body of research, the jury is still out on the two assumptions most developing states' appear to base their decision to sign a BIT. First, promising investor protection provisions in a BIT is likely to lead to an increase in FDI, and second, if the quantity of FDI does increase, will it help them achieve development goals. A recent study, *International Investment Agreements and Sustainable Development: Achieving the Millennium Development Goals by Aaron Cosbey (2005)*[26] considered these very issues and concluded that the body of research analysed in the study indicated there was limited evidence that FDI can be attracted by BITs, but there was no certainty on the question. Cosbey further noted that FDI received may indeed foster economic growth, but this depended heavily on the presence of other prerequisite factors such as trade openness, macroeconomic stability, an economy of sufficient size and development, among others. Balanced off against these uncertain gains, according to Cosbey, are the specific ways in which BITs can actually frustrate the achievement of Millennium Development Goals, for example the provisions on expropriation may conflict with the legitimate exercise of environmental regulatory authority.

The Cosbey study concluded that there was limited evidence that FDI can be attracted by BITs. FDI received may foster economic growth but this depended heavily on the presence of other prerequisite factors.

The BITs signed by Nepal can be used as an example to illustrate Cosbey's concerns about the ways in which BITs can frustrate the achievement of development goals. Nepal's New Industrial Policy of 1992 identifies foreign investment promotion *"as an important strategy in achieving the objectives of increasing industrial production to meet the basic needs of the people, create maximum employment opportunities and pave the way for the improvement in the balance of payments.*

26 Aaron Cosbey 2005, www.iisd.org.

Foreign investment is expected to supplement domestic private investment through foreign capital flows, transfer of technology." Ironically, the very BITs Nepal has signed in order to achieve this may frustrate these very aims. Looking at the BITs signed by Nepal with United Kingdom, Germany and Mauritius, the author of this report found very limited reservation of policy space to allow Nepal to take measures. For example, only the German BIT allows Nepal a limited exception to the obligation to guarantee free transfer of investment related funds, i.e. the ability to take measures in exceptional balance of payment situations provided that the complete amount of funds is transferred within a 5 year period. Nepal's BITs with the UK and Mauritius do not contain such an exception. Again, while the German BIT allows Nepal to take measures to protect public security, health, security and morals without breaching the most favoured nation and national treatment clauses, Nepal's BITs with the UK and Mauritius allow no such exception. None of these BITs signed by Nepal, including the one with Germany, provide for a general exception which would allow it to protect legitimate public interests, for example to protect the environment, without risking breaching the expropriation clause in these BITs.

Although BITs provide rights for investors of both states party to the treaty, in practice the benefit of these rights are with the investors from the capital exporting (usually more developed) state. Since the state hosting the investment of the investor (usually the developing state) has all the obligations and the rights are with the investor (usually from the developed state), it is the developing state, in its role as host state, that ends up with the obligations. This is simply due to the commercial reality that the majority of investments are made in developing states by investors from developed states (or comparatively more developed states in the case of South-South BITs) who have the capital, whereas it would be an unusual situation to find investors from developing states who have the funds to make investments in developed economies. This trend, however, is changing with the economies of India and China, as investors from these states invest in Europe and America on an increasing level.

This section provides (a) an overview of the critical problems with the German Model Treaty from a development perspective by comparing it with the IISD Model and (b) identifies the costs and benefits of signing the German Model Treaty for a developing state partner by using the example of Germany-Pakistan BIT renegotiations.

A defective mould: Selected provisions that restrict policy space for development

By contrast, the IISD's Model starts from the clear relationship between investment and the achievement of sustainable development.

The impact upon a developing state's policy space to take measures to achieve its development goals, including those related to protecting the environment, are discussed below in the identification of some of the key shortcomings of the German Model Treaty. By contrast, the IISD's Model starts from the clear relationship between investment and the achievement of sustainable development. It recognises that an investment agreement is fundamentally about good governance, and that protection of investor rights and obligations as well as host state rights and obligations are an essential part of that equation. It also establishes a clear purpose for the agreement: to foster international investment that is supportive of development aspirations for developing countries and sustainable development requirements in both North and South.

While existing BITs, including the German BIT programme, focus only on investor rights, IISD develops a clear set of provisions that seek to balance the rights and obligations of investors, host states and home states. Further, it sets out specific proposals to fix what is criticised currently a broken investor-state arbitration system.

This section will focus on the following provisions with respect to the German Model Treaty:

I. Preamble & Objectives
II. Scope and definition of investments
III. Right to establish investments
IV. National treatment, i.e. Host state must not subject foreign investments to treatment less favourable than it accords to its own nationals
V. Most favoured-nation treatment, i.e. Host state must not subject foreign investments to treatment less favourable than it accords to investments of an investor of a third state
VI. Fair and equitable treatment and full protection & security: Host state to give foreign investments fair and equitable treatment and full protection and security under international law Compensation in the event of expropriation and/nationalisation;
VII. Guarantees of free transfers and repatriation of funds: Host state must allow transfer of investments and returns in convertible currencies; and
VIII. Investor-state dispute resolution: Right of investor to bring an arbitration claim against the host state for breach of the BIT before an international tribunal.

6.1. Preamble & objectives

The preamble to an international agreement plays an important role in setting negotiating goals. It is also important and at times crucial in guiding its interpretation by the parties and by others affected by the agreement, including the dispute resolution process. For example, in the last few years several international arbitrations have focussed on preambular or objectives provisions that highlight the goal of protecting investors and investments. They have then relied upon this language to emphasise this single element in interpreting and applying several existing BITs. The Germany-Pakistan BIT of 1959 provides the following in its preamble:

[a] Desiring to intensify economic co-operation between both States;
[b] Intending to create favourable conditions for investments by nationals and companies of either state in the territory of the other State;
[c] Recognising that an understanding reached between the two states is likely to promote investment, encourage private industrial and financial enterprise and increase prosperity of both the States.

Almost half a century later the preamble remains nearly identical in the German Model Treaty (2005), which provides for:

[a] Desiring to intensify economic co-operation between both States,
[b] Intending to create favourable conditions for investments by investors of either State in the territory of the other State;
[c] Recognizing that *the encouragement and contractual protection of such investments are apt to stimulate private business initiative and to increase the prosperity of both nations.* (Emphasis added)

While [c] in the German Model Treaty may differ slightly from [c] in the German-Pakistan BIT, it is almost identical to the German-Malaya BIT signed on 22.12.1960, which provides for "recognising that a *contractual protection* of such investments is likely to promote private business initiative and to increase the prosperity of both nations." (Emphasis added). Therefore, it would appear that the German BIT programme is essentially based on an assumption developed back in 1959/1960 that contractual protection of investments is likely to lead to or is "apt to stimulate private business initiative and to increase the prosperity of both nations" The following year, the Germany-Liberia BIT even uses the words "apt to."

There are three major shortcomings in the German approach to the preamble. First, it assumes that there is a strong link between the signing of a BIT and FDI, whereas the jury is still out on whether this is the case. Second, it assumes that all FDI leads to increased sustainable development and thus increased prosperity for the developing state. There is no focus on the need to attract quality FDI to support sustainable development in the host state. Third, the status of the state parties' development levels is not mentioned.

The IISD Model approach proposes that the preamble to an investment agreement should clearly set out the broader goals that are encompassed, where development, sustainability and investment protection are all relevant. The preamble in the IISD Model starts out by setting out that the parties are "seeking to promote sustainable development at the national, regional and global levels," while recognising "the development of protections for foreign investors in international law to date."

It further emphasises that the parties are "seeking an overall balance of rights and obligations in international investment between investors, host countries and home countries."

This is bolstered by an objectives clause in the IISD Model, which is used to provide a single statement of the reason for the agreement. The IISD Model provides that "the objective of this agreement is to promote foreign investment that supports sustainable development, in particular in developing and least developed states." The proposed article also helps in setting an interpretational context that is clearly different from the current "investor rights" context used in many arbitrations to date.

The German Model Treaty can be improved by including provisions in the preamble and the body of the treaty that specify that the agreement seeks to promote FDI that contributes to the sustainable development needs of the developing state partner.

The German Model Treaty can be improved by including provisions that specify that the agreement seeks to promote FDI that contributes to the sustainable development needs of the developing state partner.

6.2 Scope of the German Model Treaty

The scope of coverage of a treaty that is critical to understand. The scope of a BIT's application is determined by three main elements:

- Definition of the investment covered by the BIT;
- Definition of the investor covered by the BIT;
- Application in time, that is whether investments made prior to the BIT's entry into force are covered.

This section focuses on the definition of investment and investor in the German BIT programme.

6.2.1 Definition of investment under the German Model Treaty

All of the German BITs[27] reviewed in this report define the term "investment." The definition of investment in BITs is important as the term "investment" is not defined in the ICSID Convention. In fact, a number of BIT arbitrations have turned on the issue of whether a particular project is an investment covered under the BIT. The answer to this question then determines whether the tribunal has the jurisdiction to hear the "investment dispute." For example, in *Mihaly v. Sri Lanka,* the tribunal held that it did not have jurisdiction to hear the claim because expenditure by the claimant in Sri Lanka did not fall under the definition of investment in the US-Sri Lanka BIT.

However, investment has been given a broad interpretation by ICSID tribunals, ranging from physical infrastructure and facilities to the provision of loans, to the issuance of promissory notes to construction and distribution ventures.

Article 1 of the German Model Treaty defines investment broadly by providing that "investment shall comprise every kind of asset, in particular

(I) Movable and immovable property as well as any other rights in rem, such as mortgages, liens and pledges;
(II) Shares of companies and other kinds of interest in companies;
(III) Claims to money which has been used to create an economic value or claims to any performance having an economic value;
(IV) Intellectual property rights, in particular copyrights, patents, utility-model patents, industrial designs, trade-marks, trade-names, trade and business secrets, technical processes, know-how, and good will;
(V) Business concessions under public law, including concessions to search for, extract and exploit natural resources."

27 This paper only considers the BITs attached in appendix 3, which are available in English on the UNCTAD website.

The definition of investment in the German Model Treaty is virtually identical to the one in the German-Malaysia BIT (1960),[28] which provides that investment shall comprise every kind of asset, with a similar list of examples[29] of the form such an investment may take. The German-Pakistan BIT (1959) is worded slightly differently, which indicates that it was a year later in the German-Malaysia BIT (1960) that the clauses were refined to create the mould that would lead to the German Model Treaty[30].

In view of the importance of the definition of investment, each of the different categories of investment covered by German BIT is briefly discussed. However, the definition in the German Model Treaty is not exhaustive and includes "every kind of asset," with the categories only serving as illustrations of the forms such assets may commonly take on. The precise language might vary but the above categories are covered in the bulk of the over 500 BITs the author has reviewed, the majority of which provide a non-exhaustive definition of investment, with similar categories serving as illustrations.

- *Movable and immovable property and any other property rights such as mortgages, liens or pledges*

  Both movable and immovable properties are covered. Property rights are broadly defined without restriction to any particular type of property right as the references to mortgages, liens or pledges are given as examples of the type of property rights that may be covered.

- *Shares of a company and any other form of interest in a company*

  Not only shares in companies are termed as an investment, but a broader variety of interests and rights in companies are also included. This can be interpreted to cover a wide variety of modern commercial interests in companies. The German Model Treaty provides that "shares of companies and other kinds of interest in companies" will be termed investments. The reference to "other interests in companies" is wide and could be interpreted to extend beyond proprietary or participatory interests in companies, in particular, for example, debentures and other debt type instruments. Moreover, it would also include portfolio investment.
- *Claims to money or to any performance having an economic value*

  While the earlier German BITs refer to "title to money," for example Germany's BITs with Malaysia (1960), Liberia (1961)[31] and the Sudan (1964),[32] the German Model Treaty reflects the trend in later German BITs as it provides for "claims

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28 Signed on 22.12.1960.
29 The Malaysia-Germany BIT provides that examples of investment are: "(a) Movable and immovable property as well as any other rights in rem such as mortgages, lien, pledge, usufruct and similar rights;
(b) Shares or other kinds of interest in companies;
(c) Title to money or to any performance having an economic value;
(d) Copyright, industrial property rights, technical processes, trade names and goodwill; and
(e) Such business concessions under public law including concessions regarding the protection of , or the extraction or winning of natural resources as give to their holder a legal protection of some duration".
30 The German-Pakistan BIT states that investment shall comprise capital brought into the host state in various forms in the shape of assets such as foreign exchange, goods, property rights, patents and technical knowledge. Further, that any partnerships, companies or assets of similar kind created by the utilisation of the abovementioned assets shall be regarded as investment.
31 Signed on 12.12.61.
32 Signed on 7.2..64.

to money which has been used to create an economic value or claims to any performance having an economic value." The reference to claims to money or to any performance having an economic value could potentially cover a variety of commercial contracts and transactions, including even those for the sales of goods transactions and sovereign loan agreements, which are not commonly associated with FDI.

The inclusion of sovereign debt could be of particular concern to developing states with heavy external debt. There are no provisions in the German BITs specifically providing that investment does not cover claims to money derived from the sale of goods or services contracts or sovereign loans, which are often found in North American BITs following the NAFTA approach.

- *Intellectual property rights, in particular copyrights, patents, utility-model patents, industrial designs, trade-marks, trade-names, trade and business secrets, technical processes, know-how, and good will*

  The German Model Treaty covers intellectual property rights per se, without any requirement that these intellectual property rights be connected to an investment operating in the host state. The availability of BIT protections for intellectual property rights has come under increasing criticism as they are seen as imposing a WTO TRIPs-Plus standard.[33] There has not been an arbitration under a BIT as yet in which an investor has sued a host state for loss caused to an intellectual property right (IPR) asset. However, there is a view that it will be a matter of time before IPR issues find their way into BIT arbitration claims[34]. This may be of particular concern to those host states where IPR protection is weak[35]. German BITs also cover a range of other intangible rights such as good will and know-how.[36]

- *Business concessions under public law, including concessions to search for, extract and exploit natural resources*

  The German Model Treaty's definition of investment covers business concessions conferred by public law, including concessions to search for, extract or exploit natural resources in the host state. Therefore, a concession, for example to search for gas, in itself would be an investment even if the investor has not yet laid out any funds or resources for actual exploration.

Overall, the definition of investment in the German Model Treaty is broad, reflecting the approach in the majority of the German as well as of other EU and North American BITs. Investment in the German Model Treaty includes a range of tangible and intangible property and contractual rights beyond the classic forms of direct investment, i.e. "the laying out of money or property in business ventures so that it may produce a revenue or income." Returns on the investment are also offered varying degrees of protection.

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33 Bilateral investment agreement: Agents of new global standards for the protection of intellectual property rights? By Carlos M. Corra, August 2004, www.grain.org.
34 NGOs warn on spread of IPRs in investment pacts but disputes slow to arise, by Luke Eric Peterson
35 "Intellectual Property in Investment Agreements: The TRIPS-Plus Implications for Developing Countries", South Centre, Analytical Note, May 2005, available on-line at: http://www.southcentre.org.
36 The German Model Treaty defines investment to include "intellectual property rights, in particular copyrights, patents, utility-model patents, industrial designs, trade-marks, trade-names, trade and business secrets, technical processes, know-how, and good will."

Perhaps one of the most surprising features of the German Model Treaty is how little the German investment regime has changed over the last fifty years.

The GMT can be improved by introducing a narrower and exhaustive definition of investment. The goal of the German BIT programme should be to protect investment that is physically present and operating in the host state, not just a shell company.

The German Model Treaty can be improved by introducing a narrower and exhaustive definition of investment and in particular by removing references to sovereign debt, portfolio investment; sales of goods and services contracts and IPR per se (i.e. those that are not connected with any investment in the host state) from the definition. The goal of the German BIT programme should be to protect investment that is physically present and operating in the host state, not just a shell company. The IISD Model's approach to investment discussed below can be used to add further detail.

The IISD Model clarifies what constitutes an investment. Its objective is to define an investment as either a direct subsidiary or owned company, or shares or other forms of ownership instruments in such a company, or in relation to other significant rights relating to its actual operation or undertaking in the host state. The definition is broad on this count, reflecting different commercial and legal practices, but it is narrowed down on other counts.

The limits flow from arbitrations that have identified market share or very minimal investment, like a sales office, as sufficient to qualify as an investment. The IISD Model suggests that such levels of investment should not qualify for purposes of the protections of the treaty. In other words, the goal appears to be to extend coverage to investments that are physically present and operating in the host state, not just empty shells of one form or another or minimal levels of investment for the purpose, for example, of generating foreign-based sales of goods or services. For greater certainty, the IISD definition provides that "an investment does not include: market share, whether or not it is based on foreign-origin trade; claims to money deriving solely from commercial contracts for the sale goods and services to or from the territory of a Party to the territory of another country, or a loan to a Party or to a State enterprise; a bank letter of credit; or the extension of credit in connection with a commercial transaction, such as trade financing."

The IISD Model also excludes portfolio investment from coverage. IISD bases the exclusion on the premise that the absence of a direct management role and interest, a key element of portfolio investment, as well as the impractical nature of potentially millions of portfolio investors to follow the other obligations of a covered investor or the notice requirement set out, make it impracticable for the relatively small benefits that would accrue.

The IISD Model also excludes intellectual IPRs per se as an investment. This does not mean that an investment that has IPRs among its assets would not have these protected by the agreement in appropriate cases. What it does mean is that simply holding an IPR in a foreign country does not trigger the rights or obligations of the treaty. This is in keeping with the precept that investments should have a significant operational presence in the host state, not just a market share of some form or another.

6.2.2 Definition of an investor

BITs refer to investors as “companies” or “nationals” who are entitled to the benefits accorded by the agreement. The investors in the German BITs, as is the case with nearly all BITs, comprise both natural persons, defined as “nationals”, and juridical persons or other legal entities, defined as “companies”.

Determination of nationality is left to each state’s domestic law. However, the Protocol to the German Model Treaty provides that the possession of a passport issued by the competent authorities shall be deemed evidence of nationality.

The German Model Treaty defines investors as: (I) Germans within the meaning of the Basic Law of the Federal Republic of Germany and (II) any juridical person as well as any commercial or other company or association with or without legal personality having its seat in the territory of the Federal Republic of Germany, irrespective of whether or not its activities are directed at profit.

The definition of an investor is wider than what is often understood by the term in ordinary use as it also extends to unincorporated entities and non-profit operations.

The vast majority of German BITs do not contain any restriction that the companies have to be controlled by citizens of the home state.[37] The requirement of control by citizens limits the BIT’s protection to those that have a link with the contracting state rather than simply the fact of having their “seat” in Germany. This is designed to prevent “treaty shopping,” where citizens of a third state can effectively benefit from the BIT’s protection by simply incorporating a company in the state party to the BIT, even though their commercial activities have no real connection to that state beyond the bare minimum required to have them recognised as a company duly constituted as having its seat in Germany under German law.

On the other hand, the IISD Model includes conditions at the end of the definition of investor designed to ensure that a real operational investment is covered, one with the capacity to contribute to development opportunities. Further, the IISD Model sets out a process for the selection of the home state in the definition of the home state section. In most BITs, including the German Model BIT, this has gone largely undefined, opening up the process to abuse through what can be described as “home state forum shopping.” This process involves investors finding locations from where they may have minimal obligations under the laws of the state in question, but maximum benefits under a BIT, irrespective of their actual business connection to the home state. On occasion, investors from the host state have successfully established shell companies in the home state as a vehicle for gaining the protections of a BIT. The IISD Model requires an express choice to be made by the investor, and requires that choice to be based on the location of actual control over the investment, and where liability can be effectively imposed if needed. It also subjects that choice to potential review by the host state. The proposed provision

37 However, the German-Antigua & Barbuda BIT is an example of one that does.

seeks to balance the need for fast decisions and certainly on the part of all parties, while preventing forum shopping for home states. The last paragraph of that process ensures that a home state is deemed to be determined if an investor does not choose one or a final decision is not agreed under the terms of that paragraph.

The definition of "investor" in the German BITs needs to be narrowed to ensure that only those investors that have an actual commercial connection to the home state are protected.

The definition of "investor" in the German BITs needs to be narrowed to ensure that only those investors that have an actual commercial connection to the home state are protected by the BIT, for example, not merely a shell company incorporated to benefit from the protections in the BITs. The IISD Model can be used as a guide as it goes further by requiring the investor to make an express choice of home state. This is particularly important as under the IISD Model the home state also has obligations (not present in the German BITs).

6.3 Right to establish investments

None of the German BITs provide for any pre-establishment rights for investment, as seen, for example, in the modern US BITs. The German BITs provide only post-establishment rights, that is, the protections in the BITs only apply once the investment has been made in the host state in accordance with its laws.[38] Although the German BITs provide that the host state shall encourage or promote investment, it does admit that such capital is to be subject to the host state's right to exercise powers under its laws. This is in line with the majority of the BITs in the world today, which create only post-establishment rights.

Paragraph 3(E) of the IISD Model addresses an absolutely critical issue, whether or how an agreement should extend to create a right of establishment for foreign investors in a host state. While the German Model Treaty only covers post-establishment issues, several other current model agreements and negotiating demands seek to do just this. IISD takes the view that creating a right of entry for foreign investors is inappropriate and unnecessary from a developing country perspective. Further, it creates significant risks to the ability of states to ensure the sustainable development of resources and national development benefits from them. The alternative suggested by the IISD Model is what might be called an "advertisement" of investment opportunities under each state's domestic law. It allows the states to indicate which sectors are more open for foreign investment than others, and the associated conditions. But it also allows each state to amend its list unilaterally, as long as this does not impact any investor rights or obligations for investment already made or in progress under the pre-amended list.

It is recommended that the German Model Treaty should not seek pre-establishment rights.

It is recommended that the German Model Treaty should not seek pre-establishment rights; however, it may look towards the approach the IISD Model takes with respect to advertising opportunities for investment.

38 Article 2 of the German Model BIT provides that the host state "shall in its territory promote as far as possible investments by investors of the other Contracting State and admit such investments in accordance with its legislation."

6.4 Protection of investments

The German Model Treaty provides protection to investments of "investors" by imposing obligations on the state party in which the investment is made (i.e. the host state).

The main types of protections available to investments of investors in the German Model Treaty are discussed below. These obligations will need to be interpreted by reference to the applicable law of the BIT, i.e. the law that governs the BIT.

When a BIT does not state the law to be applied to disputes between investors and host states, and provides for ICSID arbitration, Article 42 of the ICSID Convention provides that in the absence of agreement between the parties the tribunal shall decide a dispute in accordance with the law of the relevant state party (i.e. the host state) and such rules of international law as may be applicable.

ICSID tribunals have generally concluded in investment cases that the BIT is the primary source of the law. Because a state's treaty obligations are determined by international law, this prevails even when tribunals also refer to the host state's law, because to be consistent with its treaty obligations a state's action has to comply with the requirements of international law as well as local law. Further, it is an established principle of international law that a state cannot rely upon its domestic law as an excuse for breaching international treaties. Rather, its domestic law must be brought into line with its treaty obligations.[39]

Thus, the trend in ICSID jurisprudence is that international law will usually trump over a state's domestic law in BIT disputes. However, unfortunately the precise scope of international law provisions is uncertain. International law is not a defined body of rules like national law but includes international conventions, international custom, general principles of law, judicial decisions and academic writing. There are, therefore, many sources on which an arbitral tribunal can draw in deciding whether a host state has complied with its treaty obligations. The present uncertainly found in the interpretation of key BIT standards will be apparent from the discussion below. However, substantive BIT case law is rapidly emerging, although at times with inconsistent decisions. The IISD Model contains a clear articulation of the governing law to be applied to the agreement, however, some of the uncertainty due to the evolution of customary international law remains even in this approach.

6.4.1 Fair and equitable treatment in the territory of the host state

In a study considering 19 awards against host states, the host state was sanctioned for unfair or inequitable treatment or for a failure to provide full protection and security in 13 cases; for a failure to provide compensation for expropriation or other deprivation of property in 7 cases; for discriminatory treatment in 5 cases; and for failure to observe contractual or other obligations in 2 cases[40].

39 See Article 27 of the Vienna Convention on the Law of Treaties.
40 A return to the Gay Nineties? The Political Economy of Investment Arbitration, Gus Van Harten, Law Department, LSE, April 2006.

Article 2 of the German Model Treaty states that the host state shall provide investments by investors "fair and equitable treatment." The majority of German BITs also provide that investments of foreign investors shall enjoy "fair and equitable treatment" in the territory of the host state.

The fair and equitable standard is the second most important (and common) feature of BITs after the expropriation clause. Therefore, it is essential to understand the meaning of the term "fair and equitable." Unfortunately, the precise scope of the fair and equitable treatment under international law is presently uncertain.

The classic interpretation of the breach of the fair and equitable standard is behaviour or conduct that would clearly shock the impartial observer.[41] However, international law evolves over time, and today the fair and equitable standard can be interpreted to include due diligence and non-arbitrariness. Examples of the conduct of public authorities found to be incompatible with the fair and equitable standard in previous arbitrations include discrimination in favour of domestic entities, requiring the investor to incur unnecessary expenses and disruption, breach of a commitment by a government official to the investor and failure to ensure transparency of public authorities. Article 5(2) of the US Model BIT explains that the obligation to provide fair and equitable treatment includes the obligation not to deny justice in criminal or civil or administrative proceedings in accordance with the principle of due process embodied in the principle legal systems of the world. Thus, a tribunal would have considerable scope to decide the 'fairness' and equity' of a state's actions under the German Model Treaty by considering the evolution of international law, including customary international law.

Overall, the fair and equitable standard requires states to maintain stable and predictable investment environments consistent with reasonable investor protection. For example, in the ICSID case of *Maffezini v. Spain,* the tribunal held that the government's failure to ensure transparency in the workings of public authorities in relation to the management of the investor's money constituted a breach of the fair and equitable standard in the Argentina-Spain BIT. The tribunal in the *CME v. Czech Republic* case found that the Czech Republic had breached the fair and equitable standard by failing to provide a predictable framework for investment, contrary to the investor's legitimate expectations and his reliance on the state's earlier commitments.[42]

One critical issue for developing states is whether their environments meet the international standards of fair and equitable treatment, particularly in terms of transparency and predictability. While these may be standards to aspire to, taking on an obligation, the breach of which can result in claims worth several million dollars, as has been the case in a few BIT arbitrations, can be risky business.

The IISD Model in Article 7 clearly provides that the host state shall accord to investors or their investments treatment in accordance with customary inter-

41 The Neer case (1927) standard of "shocking, wilful neglect of duty".
42 CME Czech Republic B.V. (the Netherlands) v. The Czech Republic (13 September 2001). This case is highly controversial, as a second case, on the exact same facts, found there was no breach of this standard. Still, the decision stood up to further judicial review despite this obviously disquieting situation.

national law, including fair and equitable treatment. It clarifies that the concepts of fair and equitable standards are those prescribed by minimum customary international law standard and do not create any additional substantive rights. Further the article specifies that the obligation of the host state to provide fair and equitable treatment should be consistent with the obligation of host states, in particular under Article 19. Article 19 (D) recognises that different levels of development mean that states may not achieve the same standards and qualities for their administrative and judicial processes, and the article does not establish a single international standard in this context. At the same time, states are encouraged to improve their transparency and accountability.

The IISD fair and equitable provision sets a minimum threshold of conduct that would clearly shock the impartial observer, whereas the lack of reference to the minimum international law standard in the German Model Treaty with respect to fair and equitable treatment may leave room for uncertainty. However, the reference to customary international law also means that the standard does evolve over time, and today it would include, in the eyes of many, some basic elements of transparency and non-arbitrariness. These are brought in by reference to Article 19, which sets out what might be termed a minimum level of good governance obligation on host states. Article 19 also makes it clear that not all states have achieved the same standards of governance, and therefore investors cannot expect one level of standard from all host states, the cross-reference also makes it clear that this is not intended to be a standard determined by reference to OECD standards of good governance when non-OECD governments are involved.

The "fair and equitable" standard in the German Model Treaty can be improved by an explicit reference to the minimum customary international law standard and by including a provision that takes account of the state's particular stage of development.

The "fair and equitable" standard in the GMT can be improved by an explicit reference to the minimum customary international law standard and by including a provision that takes account of the state's particular stage of development.

6.4.2 Full protection and security in the territory of the host state

Nearly all of the German BITs reviewed for the purposes of this study provide for "full protection and security" for investments by foreign investors in the territory of the host state. This provision is also included in the German Model Treaty[43].

As considered in the discussion on fair and equitable treatment, the obligation to provide "full protection and security" needs to be interpreted under international law, and the exact meaning of "full protection and security" is uncertain. Although this standard has found application in situations of physical protection of real and tangible property, its coverage may extend to other situations. For example, in the *Goetz v. Burundi* case, the ICSID tribunal held that the withdrawal of a government authorization vital to the operation of the project may breach the standard. Again, there is no reference in the German Model Treaty that this standard should be in accordance with the minimum international law standard, as it is found in recent US BITs. The current US Model BIT provides that "full protection and security" requires each party to provide the level of police protection required under customary international law.

43 Article 4 of the German Model Treaty provides that investments by investors of one state party shall enjoy full protection and security in the territory of the other state party

The precise extent of the full protection and security standard under the German Model Treaty is uncertain because first, there is no express reference to the minimum international law standard and second, the minimum international law standard itself evolves over time. Therefore, a tribunal would have considerable discretion in interpreting the full protection and security standard.

Although the decisions of other tribunals on this standard are not binding, tribunals are likely to be influenced by these interpretations. ICSID tribunals have found breaches of the full protection and security obligation in situations where the host state failed to take reasonably expected protective measures to prevent the physical destruction of the investor's property, in particular measures that fell within the normal exercise of governmental functions. For example, in *AAPL v. Sri Lanka,* Sri Lankan security forces destroyed the investor's shrimp farm and killed more than 20 of its employees in seeking to curb the Tamil insurrection. On the basis of the full protection and security clause in the UK-Sri Lanka BIT, the tribunal found that the Sri Lankan government would be held to a standard of due diligence. On the basis of this standard, the tribunal held that Sri Lanka had violated its obligation of full protection and security by not taking all possible measures to prevent the killings and destruction of investment.

The GMT's standard of "full protection and security" can be improved by providing an explicit reference to the minimum standard of customary international law and a provision which takes into account of the developing state's level of development.

Article 7 of the IISD Model as discussed above helps resolve this issue by clarifying that the host state's obligation to provide full protection and security is in accordance with the minimum standards of customary international law. However, a degree of uncertainty still remains due to the evolutionary nature of international law itself. Further, as discussed above in the fair and equitable section, this standard is to be interpreted in conjunction with Article 19, which recognises that states will be at different levels of development.

The German Model Treaty's standard of full protection and security can be improved by providing an explicit reference to the minimum standard of customary international law and a provision which takes into account of the developing state's level of development.

6.4.3 "Umbrella clause"

Under an "umbrella clause" breaches of a commitment or contract between the host state and an investor can be elevated to a breach of the relevant BIT. Article 8(2) of the German Model Treaty is such an "umbrella clause"; it provides that the host state shall "observe any other obligation it may have entered into with regard to investments in its territory by investors of the other contracting state."

There is uncertainty surrounding the situations in which under an "umbrella clause" contract breaches would automatically become breaches of the BIT, given the handful of publicly available awards on this particular point which appear to contradict each other (for example, *SGSv. Pakistan and SGSv. Philippines*). Indeed, the first international arbitration tribunal to rule on the legal effect of such a clause in a jurisdiction context was in SGS v. Pakistan in 2003. The answer appears to depend on the formulation of the umbrella clause in each BIT and the attitude of the arbitral tribunal hearing the case, particularly its inclination to restrict or expand the scope of the BIT.

A recent ICSID award, *Noble Ventures Incv. Romania,* dated 12 October 2005, interpreted a similar clause in the US-Romania BIT. Article II(2)(c) of the US-Romania BIT stated that „[e]ach Party shall observe any obligation it may have entered into with regard to investments.“ The investor claimed that this provision was a so-called “umbrella clause” which operated in such a way as to bring contractual obligations under the treaty umbrella. The tribunal agreed with the investor’s reading of the clause, noting that any other interpretation would deprive the particular treaty provision of its obvious meaning. The tribunal distinguished the awards in *SGS v. Pakistan, SGS v. Philippines, and Salini v. Jordan* by concluding that the clause was different and required a different interpretation based on the Vienna Convention on the Law of Treaties. The tribunal considered that the clause used the term „shall,“ which undoubtedly „was intended to create obligations, and obviously obligations beyond those specified in other provisions of the BIT itself.“

The existence of an umbrella clause broadens the scope of the treaty, particularly as it can subject individually negotiated private commercial contracts between investors and the host states governments to the BIT. This can lead to an international arbitral tribunal taking jurisdiction over contract disputes, even when they specifically designate a domestic court as the forum of choice.

The IISD Model tackles this issue in the investor-state disputes clause in Article 44. IISD believes that the focus should be on the underlying facts. IISD believes that stating a breach of contract case as a breach of treaty will not alter the fact that the breach of contract is the key issue, and that this can be resolved at least notionally at a domestic level. The dispute resolution provision provided in the IISD Model compels the contract claim to be brought to domestic dispute settlement before it can be taken to an investor-state claim as a breach of the treaty.

It is recommended that the “umbrella clause” in the German Model Treaty should be revised to ensure that it does not allow investors to use the BIT dispute resolution mechanism in the place of a negotiated dispute resolution mechanism in a commercial contract between the investor and the host state.

The “umbrella clause” in the GMT should be revised to ensure that it does not allow investors to use the BIT dispute resolution mechanism in the place of a negotiated dispute resolution mechanism in a commercial contract between the investor and the host state.

6.4.4 National Treatment and most favoured nation treatment provisions

The obligation to provide investment national treatment and most favoured nation treatment is seen as the hallmark of BITs, and it is a feature in the German Model Treaty.

Article 3(1) of the German Model Treaty provides protection to both investments owned or controlled by investors from treatment less favourable than that accorded by the host state to its own investors or to investments of investors of any third state.

Article 3(2) prevents the host state from subjecting investors, as regards their activity in connection with investments in its territory, to treatment less favourable than it accords to its own investors or to investors of any third state.

The Protocol to the German Model Treaty provides a non-exhaustive definition of the “activity” of investors and of “treatment less favourable.” It states that the management, maintenance, use, enjoyment and disposal of an investment will be deemed “activity” within the meaning of Article 3. Further, that the following shall, in particular, be deemed “treatment less favourable” within the meaning of Article 3: unequal treatment in the case of restrictions on the purchase of raw or auxiliary materials, of energy or fuel or of means of production or operation of any kind, unequal treatment in the case of impeding the marketing of products inside or outside the country, as well as any other measures having similar effects. These restrict the ability for the host state to take measures aimed at enhancing local production or enterprise for fear of breaching this standard.

However, the Protocol also contains an important exception to the measures which may constitute treatment less favourable. It provides that measures that have to be taken for reasons of public security and order, public health or morality shall not be deemed “treatment less favourable” within the meaning of Article 3. Having said that, there is no exception to allow a host to take measures designed to encourage domestic enterprise.

The Protocol also provides that privileges granted to investors of third states due to a double taxation convention or other agreements regarding matters of taxation shall be excluded from the most favoured nation treatment obligations in Article 3. Further, Germany’s EU commitments are reflected in the exclusion referring to a custom or economic union. The existence of these limited exceptions in the German Model Treaty is important. Even though these exceptions are not adequate to allow a host state full discretion to take measures to achieve development goals, they do recognise that there is a need in certain circumstances to allow exceptions to the obligations the BITs impose. Similarly, there is scope for the host state to take measures for public security, health or morality without breaching the national treatment and most favoured nation treatment standard. However, the scope of the exception is limited to the less favourable treatment standard and does not apply to other obligations, such as expropriation. Further, no exception is allowed with respect to the national treatment standard in situations where the host state may need to encourage a local industry, for example a gender oriented local economic empowerment programme.

In Article 5, the IISD Model provides for national treatment. Some arguments have been made that there is some form of general or customary international law right to national treatment for foreign investors. IISD disagrees with this and believes that the national treatment rights are those that are set out in investment agreements. It is, therefore, important to get them right, so that they are meaningful for investors while maintaining the appropriate ability of governments to regulate and to participate in the management of their economies.

The IISD provisions on national treatment are a fairly standard articulation of the national treatment rule. Paragraph (A) addresses treatment of the foreign investor, and Paragraph (B) treatment of the investment itself. Both cover the post-establishment phase, but only to the extent it is granted under domestic law.

Paragraph (C) sets out a specific exclusion that ensures the government can use government procurement measures to promote domestic businesses or domestic content requirements.

The IISD National Treatment article is also drafted keeping in mind that in assessing national treatment standards, more than a simple comparison of foreign and domestic investors is required. Rather, IISD believes that they must be foreign and domestic investors "in like circumstances." The German Model Treaty does not use the detail of "in like circumstances" adopted in the IISD Model.

While some arbitral panels have ruled that only very general tests must be met here, such as: Are they both exporters?; or, Are they in the same production sector? IISD believes this approach is wrong and has led to inappropriate results. Therefore, Paragraph (E) sets out a more comprehensive test that interpreters of the agreement will be bound to apply. It requires all potentially relevant factors to be included, and precludes a simple reliance on one factor, such as being an exporter.

The list also expressly requires consideration of the aims of the measure that is of concern, ensuring that not just the effects of the measure are part of the test.

The express approach to the like circumstances issues is a response, in part, to some of the arbitrations and some writings that have followed a historical but no longer applicable view of how trade law approaches the "like products" test used to assess its national treatment tests. The reliance under trade law on the competitive products test as the sole measure has been reversed in recent trade cases. Expressly ensuring that the aims of a measure are considered here, along with all the other factors listed, will prevent any further efforts to eliminate the purpose of a measure from due consideration under investment agreements, or to focus only on the most general of comparisons as determinative.

Article 6 of the IISD Model provides for most favoured nation treatment. The most favoured-nation (MFN) rule has long been associated with BITs but has recently become very controversial. Some arbitral tribunals have allowed investors to essentially "cherry-pick" from any and all international investment rules or domestic laws available to any foreign investor. The result has been growing uncertainty for host states as to what their obligations are under an agreement, and growing opportunities for an expansive reading of existing agreements by arbitrators at the behest of investors.

Article 6 limits the use of MFN principles to future agreements only, while maintaining a broad sweep for national measures to be covered. This is important because any backwards use of the MFN provision would not just maintain the cherry-picking opportunity but allow previous BITs to prevail over the new one to the extent that they are not rendered inapplicable by virtue of either the home or host states not being a party to this agreement. This issue is dealt with in Article 34 of the IISD Model (Relationship to Other Agreements).

The use of the word “ substantive” and its accompanying footnote ensure that only the substantive provisions of any future agreement will be subject to the MFN rule, not dispute settlement provisions or procedures that might be specifically established in a bilateral or regional context.

The “National Treatment” standard in the GMT should have an exclusion that ensures government can use procurement measures to promote domestic businesses or domestic content requirements.

The National Treatment standard in the German Model Treaty should have an exclusion that ensures that government can use government procurement measures to promote domestic businesses or domestic content requirements. The MFN standard in the German Model Treaty should be clarified to provide that it applies only to substantive provisions of any future agreements.

6.4.5 No expropriation without compensation

The obligation of a host state to compensate investors in the event of an expropriation is perhaps the most critical protection offered by BITs to investors, and it is frequently relied upon by investors in BIT arbitrations. Article 4 of the German Model Treaty provides that the host state shall not indirectly or directly expropriate, nationalise or subject to any other measure the effects of which would be tantamount to expropriation or nationalization the investments by investors in its territory, except for the public benefit and against compensation.

The notion of expropriation has recently been interpreted quite broadly in some arbitrations. It is a well-accepted principle of public international law that expropriation may result from either (a) a direct and deliberate formal act of taking, such as an outright nationalisation, or (b) from an indirect taking that substantially deprives the investor of the use or enjoyment of his investment, including deprivation of the whole or a significant part of the economic benefit of the property, even if the legal and beneficial title of the asset remains with the investor. An expropriation may also be “creeping” or “constructive”: it need not be immediate but may unfold through a series of acts the cumulative effect of which is the substantial deprivation of the use or value of an investment.[44] Government measures such as tax increases, environmental regulations or the revocation of a license may, in certain circumstances, amount to an expropriation.

The provision setting out the rules for expropriation vary from BIT to BIT. This has an important impact on the scope a tribunal will give in any given case to all of the above noted possibilities. This in turn impacts the space left for governmental measures to impact a foreign investor and the rights of an investor to seek compensation for such measures. The critical issue of whether a regulation can be an expropriation under the German Model Treaty is discussed below.

The obligation not to expropriate

The German Model Treaty states that “expropriation” and “measures tantamount to expropriation” may only take place for public benefit and against compensation. As discussed above, “expropriation” is interpreted to include both direct and indirect takings. The critical issue is the scope to be given to phrases such as “measures tantamount to expropriation” or “measures equivalent to expropriation,”

44 Guide to ICSID Arbitration, by Lucy Reed, Jan Paulsson and Nigel Blackaby (Kluwer Law International 2004).

or concepts such as indirect expropriation. This category of measures has been interpreted broadly by some tribunals to include situations where legislation or regulatory measures by a host state have an impact on the value of the investment. In stark contrast, the recent decision in the *Methanex v. United States* decision under NAFTA focused on the purpose of the regulatory measure involved in that case – an environmental protection measure – as a basis for excluding it form the scope of what could be considered as an expropriation.

This reflects the current uncertainty of exactly what would constitute a measure equivalent to expropriation or an indirect expropriation and therefore attract compensation, even if it is taken for the public good. For absence of further clarity in the actual text of the BITs, therefore, the matter is left very much to the skills of the lawyers arguing any given case and the aptitudes of the arbitrators involved. This lack of clarity presents a number of risks for host governments in adopting new measures. The German Model Treaty does not include language that specifically addresses this issue.

What would constitute a measure equivalent to expropriation or an indirect expropriation and therefore attract compensation? This lack of clarity presents a number of risks for host governments.

Compensation for expropriation

Article 4 of the German Model Treaty also provides for the valuation of the compensation payable upon expropriation. It states that "such compensation shall be equivalent to the value of the expropriated investment immediately before the date on which the actual or threatened expropriation, nationalization or comparable measure has become publicly known. The compensation shall be paid without delay and shall carry the usual bank interest until the time of payment; it shall be effectively realizable and freely transferable. Provision shall have been made in an appropriate manner at or prior to the time of expropriation, nationalization or comparable measure for the determination and payment of such compensation. The legality of any such expropriation, nationalization or comparable measure and the amount of compensation shall be subject to review by due process of law."

Finally, it is worth noting that, some arbitral tribunals may rule that once an expropriation is found to have occurred, the nature of the public good motivating the measure does not impact the level of compensation. This is not stated in any BITs, but it was seen in the recent ICSID arbitration decision of *Santa Elena v. Costa Rica,* in which the tribunal held that an expropriation undertaken for environmental reasons does not affect the level of compensation to be paid for the expropriation.[45] This approach could be followed by another tribunals.[45]

The IISD Model tackles expropriation in Article 8. The inclusion of a provision prohibiting expropriation without compensation is standard fare. It must be noted that while expropriation is not prohibited, it does require specific conditions to be fulfilled, including being non-discriminatory, and requiring compensation to be paid. This is seen in Paragraph (A) of Article 8 of the IISD Model. Paragraph B sets out the rule on the evaluation of expropriated property for compensation purposes. It follows the general principle of fair market value, but adds that investor conduct contributing to damages or to non-mitigation of damages may be

45 Santa Elena v. Costa Rica (Award), as referred to in the Guide to ICSID Arbitration, by Lucy Reed, Jan Paulsson and Nigel Blackaby (Kluwer Law International 2004).

considered. Subsequent Paragraphs (C)-(F) ensure that compensation is made in a manner that is prompt and effective for the investor being paid.

Paragraphs (G) and (H) set out common understandings of governmental acts that are not considered as expropriations, including the issuance of compulsory licences granted in relation to IPR. These are specific carve-outs from the content of the Article.

Paragraph (I) deals with a central issue of concern. Where there is a full taking of property, expropriation provisions are generally not problematic today, although some governments and analysts maintain that the expropriation of foreign-owned property may, in some cases, not be compensable. This position is not adopted in the IISD Model, given the evolution of international law in the last several years. Three harder issues arise where there is something less than a complete taking of title to property. One is called measures tantamount to expropriation, i.e., measures that have the same effect but accomplish this through a less direct manner. Where the effect is the same, most analysts have agreed that the fact that it is not a direct legal taking is not determinative. This is reflected here. The second issue is creeping expropriation, where a series of measures are used instead of one measure to accomplish the same thing. Again, where the effect is the same, namely that several measures are used to create a full taking of all rights to property, analysts generally support the view that this is an expropriation.

The main issue is where regulations are claimed to create an expropriation because they have a significant economic impact on the investor.

The main issue is where regulations are claimed to create an expropriation because they have a significant economic impact on the investor. This has arisen as an issue in several arbitrations, some of which are pending.

The IISD formulation in Paragraph (I) takes a very clear line: a measure taken to protect or enhance basic public welfare interests shall not be considered as an expropriation. This is stronger language than in the U.S. model BIT, which states that this shall normally be the case, and is closer to the new Canadian model agreement.

The rule here is absolute, subject to the test of the regulatory measure being *"bona fide,"* which can be assessed by an arbitral tribunal. *Bona fide* is defined in the Oxford English Dictionary as "freedom from intent to deceive." Black's Law Dictionary (5th edition) defines *bona fide* as "in or with good faith, honestly, openly and sincerely; without deceit or fraud; truly, actually without simulation or pretence"; and other similar formulations. The essence in the IISD Model is the good faith behind the measure, that it not be for deceitful or for ulterior motives.

The IISD Model, Paragraph 8(I), provides that consistent with the rights of states to regulate and the customary international law principles on police powers, bona fide, non-discriminatory regulatory measures taken by a state that are designed and applied to protect or enhance legitimate public welfare objectives, such as public health, safety and the environment, do not constitute an indirect expropriation under Article 8.

Some formulations, such as "would not normally be," have been applied to this issue instead of the absolute test set out here. IISD believes that this issue must also be seen in the light of other remedies available under the agreements for illicit regulatory measures, under the expropriation heading. The language makes it clear, however, that it is indirect expropriation, not direct expropriation that is covered by this carve-out.

Finally, the IISD text creates what in legal terms is known as a carve-out from the rules on expropriation: by definition such a regulatory measure is not an expropriation. An investor would have to show that the measure is not *bona fide,* for example that it has a disguised purpose; that it is irrelevant for the stated purposes; that it is adopted through corruption; etc. This is very different from the idea of a regulatory "exception" which would have regulations defined as expropriations unless the host state could show they fit into an exception category. A carve-out keeps the burden of proof on the investors, where it should be in such a case.

The GMT needs to create a carve out to indirect expropriation by introducing a provision which allows a state to take bona fide, non-discriminatory regulatory measures that are designed and applied to protect or enhance legitimate public welfare objectives.

The German Model Treaty does not provide any exceptions to the obligation to expropriate, which means that a regulatory measure designed to protect development interests, for example to protect environment or public health, which has an economic impact on the investment could be an expropriation and the state then potentially liable to pay compensation. The German Model Treaty needs to create a carve-out to indirect expropriation by introducing a provision which allows a state to take bona fide, non-discriminatory regulatory measures that are designed and applied to protect or enhance legitimate public welfare objectives, such as public health, safety and the environment.

6.4.6 Repatriation of investment and returns

Most BITs provide that the host state must permit all transfers related to investment to be made freely and without delay into and out of its territory. Investors are entitled to compensation if they are affected by currency control regulations or other acts of the host state, like freezing investor funds.

Article 5 of the German Model Treaty also obliges the host state to guarantee to the foreign investor free transfer of payments in connection with an investment, in particular: (a) the principal and additional amount to maintain or increase the investment; (b) the returns; (c) the repayment of loans; (d) the proceeds from the liquidation or sale of the whole or part of the investment; and (e) compensation for losses suffered due to conflict or for expropriation as provided under the BIT.

Article 6 further provides that transfers shall be made without delay and at the market rate of exchange applicable on the day of the transfer. The protocol to the German Model Treaty defines "delay" as a period which should not exceed a two month period of time commencing from the day the request has been submitted.

The German Model Treaty does not provide for any exception to this obligation in a difficult balance of payment situation. The same provision can be found in several other German BITs. For example, the German-Saint Lucia BIT allows the host state, in the event of exceptional balance of payments difficulties, to restrict the transfer of the proceeds from liquidation to annual instalments of at least 20 percent, so that the transfer should be completed within 5 years from the date of liquidation.

Overall, the free transfer of funds provisions are broad in scope, and cover a range of amounts derived from and associated with an investment. Even where certain types of investment or returns are specified, these include the most common type of investment related payments. Host states are not allowed to restrict transfer, even in situations of economic collapse or balance of payments difficulties. The inability to control foreign currency inflows and outflows may leave smaller African states vulnerable to swings in their foreign exchange reserves. Therefore, this article does not allow the host country to take adequate measures to safeguard its economic stability without being liable to pay compensation for effected investment of investors.

Article 10 of the IISD Model provides that the host state shall permit all transfers relating to an investment to be made freely and without delay. The article assures investors of their ability to move their assets from the place of the investment to the home state. Examples of common types of transfer, such as those of profits, proceeds from the sale or payments arising from a dispute settlement, are provided in the clause. However, the article allows a state to prevent a transfer through equitable, non-discriminatory and good faith application of its laws relating to matters such as bankruptcy, criminal or penal offences. The provision is buttressed by a balance of payments exception in Article 51 that allows governments to manage all currency flows in the event of such a crisis without being in breach of the agreement. Some form of such an exception is essential today, given the likelihood of more currency and balance of payment crises in the future

The GMT needs to have exceptions to allow a state to prevent transfers through equitable, non-discriminatory and good faith application of its laws. Further, a general exception to allow governments to manage all currency flows in a balance of payments crisis.

The German Model Treaty needs to have exceptions to allow a state to prevent transfers through equitable, non-discriminatory and good faith application of its laws relating to matters such as bankruptcy, criminal or penal offences. Further, as in the IISD Model, a general exception to allow governments to manage all currency flows in the event of such a balance of payments crisis without being in breach of the agreement. This is particularly important for least developed countries.

6.5. Dispute settlement

There are two types of dispute settlement provisions in BITs. A clear distinction must be made between the dispute resolution provisions between (a) the states that are party to the BIT; and (b) the foreign investor and the host state. The latter type is commonly known as “investor-state dispute resolution,” which involves disputes between private investors against states rather than disputes between the states themselves.

The importance of BITs arises from the fact that the vast majority of these offer international arbitration to investors even if the disputing parties have no prior arbitration agreement.

The importance of BITs arises from the fact that the vast majority of these offer international arbitration to investors even if the disputing parties – the investor and the host state – have no prior arbitration agreement. This means that an investor can take the host state to international arbitration for breach of a term of a BIT, for example expropriation of investment, even if there is no contractual relationship between the state and investor because signing the BIT is deemed consent by the state to international arbitration. The investor consents by filing his request for arbitration pursuant to the investor-state dispute resolution clause.

While some of the protections in BITs, for example 'no expropriation without compensation', are not new, as they already exist under international law, what is novel in BITs is the opportunity for investors themselves to proceed directly, without espousal of their claims by their governments against the expropriating state for compensation.

Article 11 of the German Model Treaty contains two types of investor-state dispute resolution clauses, one between two ICSID member states and the second version providing for the situation where only one state party is an ICSID member. Not all German BITs contain investor-state dispute resolution clauses. In fact, the earlier German BITs, for example the German BITs with Pakistan, Liberia, Malaysia, the Sudan, Dominica, Saint Vincent & the Grenadines and Haiti, do not contain an investor-state dispute resolution clause. This reflects the trend in some early German BITs, which do not contain such clauses.

The German Model Treaty provides that "divergences concerning investments" between an investor and a host state shall as far as possible be settled amicably between the parties. If such a dispute is not settled within six months of the date when it has first been raised, the investor has the right to submit it to arbitration. If both states are parties to the ICSID Convention then, unless the host state and the investor agree otherwise, the dispute shall be submitted for arbitration under the ICSID Convention. If only one state is party to the ICSID Convention, then the divergence shall be submitted to ad hoc arbitration following (unless agreed otherwise) the procedure set out for state-state arbitration in Article 10.

The German Model Treaty also restrains the host state from raising the objection that the investor has received compensation under an insurance contract in respect of all or part of the damage. Such provisions further clarify the rules a tribunal must apply in a scenario where the investor has insurance. They also clearly exclude the grounds on which the host state can raise objections to jurisdiction. It is worth noting that the German Model Treaty's use of the word "divergence" could be used to extend the scope of the types of matters that an investor can bring to arbitration.

Although Germany was the first state to sign a BIT effectively starting a trend followed by over 140 states, a review of the German Model Treaty reveals that there has been little evolution or innovation in Germany's BIT Programme. By contrast, in the US Model BIT, innovations for greater transparency and other improvements to the investor-state dispute resolution mechanism can be found, including consolidation of claims.

IISD believes that the current investor-state dispute resolution system is in disorder and without a proper institutional structure to contain it. The IISD Model approach is to take a more holistic and institutional approach in relation to investor-state dispute resolution. Thus, the IISD model provides for a dispute settlement body, a technical assistance centre (for developing state parties) and a legal aid assistance centre.

The IISD model provides for a dispute settlement body, a technical assistance centre and a legal aid assistance centre.

Part 9 of the IISD Model deals with dispute prevention and settlement. The major innovation the IISD Model introduces to BITs is the concept of investor rights and their linkage to the investor-state dispute resolution mechanism. Investor obligations include a pre-establishment impact assessment, compliance with local laws, an anti-corruption obligation, environmental management/international environmental obligations, human rights protection, adherence to core labour standards, provision and publication of information, and corporate social responsibility. There is also a procedure in Article 44 on the abrogation of investor rights in certain circumstances. This provision responds to the goal stated by many observers that rights of investors should be conditioned on compliance with the obligations. Article 18 provides that if an investor has breached his anti-corruption obligation (Article 13), then neither the investor nor the investment shall be entitled to the dispute resolution process. A host state or home state can raise this as an objection to jurisdiction in any dispute under the agreement.

This provision responds to the goal of many observers that rights of the investors should be conditioned on compliance with the obligations.

Further, the IISD Model also allows the arbitral tribunal to take account of the investor's breach of compliance with its obligation relating to pre-establishment impact assessment, if proved and found to be materially relevant to the issue, to see what mitigating or off-setting effects this may have on the merits of a claim or any damages awarded in the event of such award (Article 18).

The IISD Model also allows a host state to initiate proceedings under Part 9 before a tribunal to have the rights of the investor or investment abrogated if the home state or host state believes that an investor or his investment has breached the anti-corruption article (13) or has persistently failed to comply with its obligations under Articles 14 (post establishment obligations such as human rights protection and core labour standards) and 15 (corporate governance requirements).

The IISD Model also makes it mandatory for the investor to exhaust domestic remedies. However, in the event that such domestic remedies are unavailable due to the subject of the dispute or a demonstrable lack of independence or timeliness on the part of the judicial or administrative process, then the investor may plead this in an application before a panel as a preliminary matter.

The IISD Model (Article 46) also envisages transparency in the proceedings making it clear that all documents relating to a notice of intention to arbitrate, the settlement of any dispute, the initiation of a panel or appeal or the pleadings, evidence and decision in them shall be made available to the public via an Internet side. Further, procedural and substantive hearings are to be made open to the public. However, the tribunal has the power to take steps to protect confidential business information. The IISD Model also sets out a procedure for the tribunal to be open to *amicus curiae* submissions.

The recent amendments to the ICSID arbitration rules have now also introduced (limited) transparency and an amicus curiae procedure, which shows the importance of these developments. However, transparency outside of ICSID in the international arbitration institutions is non-existent, as even the registration of a claim is not made public in view of the strong importance attached to the confidentiality of the parties to the dispute. There is concern that nearly 40% of BIT arbitrations may take place outside of ICSID, which means that even their existence is not publicly disclosed. This is important because states may be paying out damages, and (in some cases) even settling claims without any public scrutiny.

The investor-state dispute resolution provisions in the German Model Treaty need to be reviewed to include transparency and amicus curiae submissions so there can be public scrutiny, participation and accountability of matters that affect public interest. The German Model Treaty could also introduce obligations on investors following the IISD and link the right of an investor to bring a claim to compliance with its obligations under the BIT.

The investor-state dispute resolution provisions in the GMT need to be reviewed to include transparency and amicus curiae submissions so there can be public scrutiny, participation and accountability of matters that affect public interest.

6.6 Duration and termination

The typical duration of most BITs is 10 years, with the term automatically extending thereafter until and unless one party terminates the BIT by giving notice. All German BITs contain a duration and termination clause. This means that states have the unilateral option to terminate these BITs upon expiry by following the procedure set out in them. This is particularly important if the BITs are having a negative impact upon their development goals. On the other hand, if states decide to continue their bilateral relationship, upon termination of the BIT they can enter into a new BIT that strikes a balance between investor protection and their sustainable development needs.

States can also amend BITs by agreement; however, this would require the consent of both states. The recent vintage of most BITs, especially those signed in the 1990s, means there is little experience with the termination of BITs. However, the recent increase in BIT arbitration and the growing criticism of their negative implications for development may lead states to terminate existing BITs and enter into upgraded or renegotiated BITs. There is an emerging trend among developed states like Germany and Japan to renegotiate their older BITs to enhance investor protection standards as these BITs expire. UNCTAD reported that during 2004, 10 BITs of a total of 73 BITs concluded in that year were BITs that replaced earlier BITs.[46]

Article 14 of the German Model Treaty provides that it shall remain in force for a period of ten years and shall be extended thereafter for an unlimited period unless denounced in writing through diplomatic channels by either state twelve months before its expiration. After the expiry of the period of ten years this Treaty may be denounced at any time by either state giving twelve months' notice.

In respect of investments made prior to termination, the provisions shall continue to be effective for a further period of 20 years from the date of termination. The extension of the existing protection for 20 years further limits the state's rights to regulate even if the BIT is terminated or renegotiated.

46 UNCTAD Research Note, dated: 30 August 2005.

7. The costs and benefits of BITs

Despite the shortcomings in the present mould of German BITs, their popularity – as well as those of other developed states – is high, given the number of BITs signed by these states. For example, the UK, which has a BIT similar to the German Model Treaty, has signed over a one hundred. This report uses the German-Pakistani context as an example of Germany's investment relationship with a developing state and examines the costs and benefits of signing one from the perspective of the latter.

Nearly 50 years later, Germany is seeking to "renegotiate" a treaty with its first BIT partner, Pakistan.[47] The German Consulate in Karachi, Pakistan[48] confirmed that while the German government was interested in re-negotiating a BIT with Pakistan, negotiations were currently "on hold" in view of the ongoing talks between Pakistan and the United States on a BIT. The German Consulate also confirmed that negotiations would be based on the draft treaty text provided by the German Ministry of Economics and Labour[49].

Almost half a century later, Germany's BITs have not moved on from a solely investor protection focus towards striking a balance between investor protection and the sustainable development goals of developing states.

As this report shows, almost half a century later, Germany's BITs have not moved on from a solely investor protection focus towards striking a balance between investor protection and the sustainable development goals of developing states like Pakistan.

Developing countries need to exercise caution with respect to signing the German Model Treaty, which reflects provisions found in the bulk of the BITs existing today.

First, the rising surge of BIT claims by investors against states and the uncertainty surrounding key treaty provisions have lead even UNCTAD to advise developing states to be very careful when negotiating BITs.[50] As the rise in BIT claims is a recent phenomenon, the law in this area is still developing, and conflicting decisions can be found. Therefore, there is uncertainty surrounding

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47 Germany and Pakistan have a tradition of good and amicable relations. Germany reaffirmed its interest in Pakistan with the visits to Islamabad by Federal Foreign Minister Fischer in July and Chancellor Schröder in October 2004. Bilateral trade is worth approx. EUR 1.2 billion. Pakistan's principal exports to Germany are clothing, leather goods and textiles. Pakistan's main imports from Germany are chemical products, machinery, electrical goods, vehicles and hardware. Bilateral agreements in force between Pakistan and Germany include air transport, investment promotion, double taxation, Technical Cooperation (as amended by annual arrangements on Financial and Technical Cooperation. The total amount provided by Germany for development cooperation purposes since 1961 is approx. EUR 2.6 billion. In response to the nuclear tests conducted in May 1998, no new pledges were made in 1999. Development cooperation was resumed in September 2000. (Source German Embassy Islamabad)

48 Email correspondence dated 28 February 2006 between M.Malik and D. Kuester at the German Consulate, Karachi.

49 It has been assumed that this is the German Model Treaty as the German Consulate in Karachi did not have the text of the draft in hand at the time of writing this paper.

50 UNCTAD Note "International investment disputes on the rise", dated 29 November 2004. Well over half (92) of the 160 known BIT claims were filed within the last 3 years. Of the claims against 50 states, at least 31 were against developing countries.

key BIT provisions in the German BITs, which makes it difficult for states to be sure that measures taken by them will not breach the obligations contained in them.

Second, the existing legal and political systems may not comply with the higher standards found in the German BITs, thus making the states susceptible to breaching these BIT obligations and attracting investor-state disputes.

Third, the German BITs are based on a defective mould drafted with a singular focus on investor protection rather than one that strikes a balance between the sustainable development interests of a developing state and investor protection. This means that states may not have the regulatory space they require to achieve their development goals as their measures, even if taken in the public interest, may breach their respective BIT obligations.

These *international* agreements have the potential to reach behind the border, and to impact upon *domestic* policy.

Fourth, the weak capacity of most developing states in understanding the full legal implications of signing BITs and defending BIT arbitration claims. The expertise for the latter in particular rests in private commercial law firms in European and North American arbitration centres. Most developed states like Germany have model BITs which they use and in the vast majority of cases, and the BITs actually signed by these states do not vary from the terms set out in their models, implying a lack of negotiation on the part of the developing state party. This is reflected in the majority of the German BITs reviewed for the purposes of this report. Usually negotiations are based on model draft treaty texts proposed by the developed country, which usually has access to international investment law expertise. The use of a model text also provides a negotiating advantage to the country that has drafted it since such a text sets out the agenda and indicates the ideal outcome for the drafting country on every issue addressed by the treaty. While a country is free to contest any provision with which it disagrees, if it does not question a given provision, the country proposing the draft obtains by default its preferred language on the issues addressed by that provision.

The above analysis reveals the risks attached to BITs, and hence the costs they can translate into for developing states. States, however, continue to sign these BITs. The main argued potential benefits of a BIT for developing countries are: (a) the possibility of an increase in FDI leading to development; (b) the possibility of an FTA leading to increased exports and trade following a BIT or with a BIT included in a FTA; and (c) pressure on the legal system to meet the international best standards set out in the BIT, thereby improving the investment climate for local investors as well. As the analysis shows, the benefits from BITs are uncertain compared to the more certain costs.

7.1 The benefits

7.1.1 Increase in FDI? No guarantee

As competition for FDI becomes more severe, with more economies opening up, countries have to fight harder for their share of global FDI, and they are therefore keen to sign more BITs, as evidenced by the rising numbers of BITs.

There is no guarantee that FDI will increase as a result of a state entering into a BIT.

BITs are aimed at attracting much-coveted FDI. They are primarily used to make the regulatory framework for FDI stable, transparent, predictable and secure. However, creating this on paper is not necessarily the same as developing it in practice. Nor is it sufficient in itself to gain the confidence of investors in order to influence their decision to invest. It is therefore important to emphasise that there is no guarantee that FDI will increase as a result of a state entering into a BIT. The basic assumption is that a BIT with clear, simple and enforceable rules to protect foreign investors increases investor confidence, by reducing political risks that the investor would otherwise face, and above all encourages investment. However, FDI flows are determined by a variety of economic, institutional and political factors, including the size and growth rate of the host country market, the availability of raw materials or labour, the nature of the physical or legal infrastructure and political and economic stability[51]. It would therefore be unreasonable to expect that any individual factor, let alone a BIT, can be isolated and credited with a decisive impact on FDI flows[52].

The link between FDI and BITs has been the subject of some discussion and research, particularly as the number of BITs crossed the 2300 mark. A recent study, *International Investment Agreements and Sustainable Development: Achieving the Millennium Development Goals, by Aaron Cosbey (2005),*[53] considered these very issues and concluded that the body of research analysed in that study indicated there was limited evidence that FDI can be attracted by BITs, but that there was no certainty on the question.

Jalacuse and Sullivan, in their article in the Harvard International Law Journal (2005), reviewed several well-known studies about the impact of BITs, as well as offering their own econometric analysis. However, their own econometric analysis focuses solely on US BITs and covers the period 1991-2000 (thereby also being affected by the Asian financial crisis). They conclude on a positive note that a U. S. BIT is more likely than not to exert a strong and positive role in promoting both U.S. and overall investment. They also note that a U.S. BIT is likely to exert more of an impact than other OECD BITs in promoting overall investment. They state that "after reviewing both the literature, which makes note of the potential impact of BITs with strong investor protections, and our own econometric study on the promotional effects of a U.S. BIT, we find strong evidence that BITs have, to a significant extent, attained their stated goal of promoting investment." Having said that, it should be noted that the US BITs contain pre-establishment provisions, so with these liberalisation provisions it can be expected that they may have more of an impact than BITs limited post establishment rights.

In May 2005 Susan Rose-Ackerman and Jennifer Tobin at Yale University published the latest research study on the issue.[54]) The period covered is 1984-2000 (and thus encompasses the Asian financial crisis as well). The Rose Ackerman/Tobin results differ from Salacuse/Sullivan and conclude that there was a weak rela-

51 UNCTAD 1998.
52 UNCTAD, Bilateral Investment Treaties in the mid 1990s.
53 Aaron Cosbey 2005, www.iisd.org.
54 Available at http://www.law.yale.edu/outside/html/faculty/sroseack/profile.htm.

tionship between BITs and FDI, although the effect for riskier countries was greater. They also found that there was a weak relationship between BITs and improvement in the domestic investment environment.

Tobin and Rose-Ackerman's article also analysed the effect of BITs on US FDI flows and concluded that signing a BIT with the US did not correspond to increased FDI inflows - although if a country was relatively risky, BITs could assist it to attract a greater amount of FDI. They state, "overall, we conclude that the relationship between BITs and FDI is weak. In general, BITs, by themselves, appear to have little impact on FDI. There does appear to be a complex interaction between the level of political risk, BITs, and FDI, but the results leave one uncertain about the exact mechanism involved. The mechanism is apparently different in different countries, but our analysis seems to show that a country must have some minimum level of political stability before BITs have a positive effect on their ability to attract FDI. Similarly, in our analysis of US investment we find little relationship between the existence of a BIT with the United States and the level of US FDI. Again, we find that for high-risk countries where there is a relationship, it is weakly negative."

The recent study by Cosbey (2005) discussed above takes into account the above studies among others, and concludes that there is no certainty that BITs increase FDI.

The importance of other FDI determinants as compared with BITs can also be viewed from the perspective of the many examples of countries that have concluded BITs and received modest inflows of investment[55].

7.1.2 Free Trade Agreements (FTAs)

Some developed countries offer FTAs as a "reward for signing a BIT." Countries usually seek an FTA to increase exports; however, there is no guarantee that a FTA will follow a BIT even when the countries offering the BIT have a practice of signing FTAs. For example, the US does not have an FTA with every country with which it has a BIT. At the same time, the US has signed FTAs with Israel and Australia without signing BITs with them. However, even if an FTA does follow the BIT or incorporates the BIT, states will need to consider whether exposure to the risk of potential claims by investors worth several hundred million under the BIT is beaten by the benefits from a FTA, if any, in due course.

Even if a FTA does follow the BIT, states will need to consider whether the exposure to the risk of potential claims by investors are beaten by the benefits from a FTA, if any, in due course.

In the case of EU states, while investment is dealt with through BITs on a bilateral level, FTAs are under EU competence rather than in the ambit of an individual EU state. Therefore, an FTA cannot be offered by a EU state for signing a BIT, as the US can and often does.

55 For example, Laos has 10 BITs and Cambodia has 14 BITs.

7.1.3 Pressure to improve the domestic legal environment

Rose-Ackerman's study did not find any link between BITs and the improvement in the enforcement of contractual and property rights for the domestic investor.

Rose-Ackerman's Yale study on US BITs did not find any link between BITs and improvement in the enforcement of contractual and property rights for the domestic investor. Again, there are a number of examples of states that have signed a large number of BITs but have poor standards of protection for domestic investors; for example, Zimbabwe has 29 BITs[56].

Even if there is an improvement in the domestic legal system, would this improvement come at too high a price, i.e. compensation to foreign investors for breaching the BIT, until the state attains those high international standards? The other issue to consider is whether improvement in the domestic environment should be driven externally under pressure of an international obligation rather than being an internal organic process appropriate to the pace of the state concerned.

7.2 The costs of BITs

The "costs" of signing BITs have become significant in the form of expensive investor state arbitrations against developing states.

The "costs" of signing BITs have become significant in the form of expensive investor state arbitrations against developing states. The risk of BIT claims against developing states is presently high due to

(I) the general trend of rising BIT claims as investors are encouraged by large payouts against states at ICSID. For example, in 2003 the Czech Republic was ordered to pay some US$ 270 million plus substantial interest to a Dutch firm following a breach of the Czech-Netherlands BIT;
(II) the uncertainty surrounding the key terms in BITs; and
(III) the fact that the existing legal, political and economic environment in most developing countries may not meet the high standards of investor protection set out in the German BITs.

Over two thirds (69%) of the 219 know claims have been filed since 2003. The majority of these arbitrations were brought against developing states[57]. Facing an arbitration claim means the use of scarce resources by the developing state to defend the against claim before an international tribunal, which can be expensive. The payouts under these claims can be prohibitive for a developing state. For example, Pakistan, which has a total of 47 BITs, has been the recipient of 5 claims at ICSID worth nearly US$ 1 billion[58]. The Attorney General of Pakistan estimated that the costs of defending Pakistan in the SGS case would be

56 UNCTAD updated until 01 July 2005.
57 UNCTAD Monitor 2 of 2005, November 2005.
58 (i) Impregilo S.p.A-v-Islamic Republic of Pakistan (Case no. ARB /03/3) registered on 3 March 2004 for US$ 450 million in connection with the Ghazi Barotha hydropower project under the Pakistan-Italy BIT. This was settled on 26 September 2005; (ii) Bayindir Insaat Turizm Ticaret Ve Sanayl A.S.-v-Islamic Republic of Pakistan (Case No. ARB 03/29) registered on 01 December 2003 in connection with a motorway project for US$ 400 million under the Pakistan-Turkey BIT. This is still pending; (iii) Societe Generale Surveillance S.A. (SGS)-v-Islamic Republic of Pakistan registered on 03 July 2002 for US$ 120 million under Pakistan-Swiss BIT. (This was settled favourably, with SGS dropping claims, apologising and paying Pakistan's legal costs, a highly unusual case due to the corruption allegations involved); and (iv) Occidental of Pakistan, Inc. v. Islamic Republic of Pakistan (Case No. ARB/87/4) registered on 7 October 1987 in connection with a petroleum concession. Settled on 27 January 1989.

over US$ 5 million[59]. Usually, costs average around US$ 2 million in a ICSID case, as the expertise for handling these cases is largely concentrated in commercial law firms based out of London, Paris or New York.

Even if a state is successful in defending against the claim, it may still be liable to pay the costs of the proceedings. For example, the tribunal in Mihaly *International Corporation v. Democratic Socialist Republic of Sri Lanka* (ICSID CASE NO. ARB/00/2),[60] while dismissing the case for lack of jurisdiction, ordered that the parties pay their own costs of the arbitration.

Only the investor has a right under BITs to bring a claim against the host state and not the other way around. This is because the investor does not have any obligations under the BIT, only the state does, creating what is referred to by commentators like Muchlinski an unbalanced approach where investors do not have any obligations, for example corporate responsibility or ethical standards, increasingly required by national laws[61].

The investor does not have any obligations under the BIT, only the state does, creating an unbalanced approach.

However, more recently investors appear to be looking towards arbitration bodies, other than ICSID, that offer different options for review of arbitral decisions and generally more confidentiality in the process.[62] Recent UNCTAD (2005) studies suggest that up to one third of arbitrations are not at ICSID. This is important because, while ICSID makes public the registration of a claim, other arbitration institutions keep this confidential, therefore, the actual amount of BIT arbitrations are much higher than those presently known. This lack of transparency in the process is one of the problems discussed below under the comparison with the IISD Model.

Then, there is also the case where the investor threatens a claim under a BIT, which is not officially lodged, but could lead to the state using public funds to settle this before proceedings are even commenced. Very little is known about these claims; however, these are increasing as investor awareness of this avenue rises[63].

There have been at least 19 known arbitration awards against states for damages averaging at about US$ 90 million[64]. These include the US$ 598,000 award against Sri Lanka in the *AAPL case*. However, the costs are not limited to awards; even if the state is successful in having the claim dismissed for lack of jurisdiction, it could remain liable for costs, as in the case of *Mihalyv. Sri Lanka*. However, more far reaching are the settlement amounts states might end up paying foreign investors to settle arbitration claims.

More far reaching are the settlement amounts states might end up paying foreign investors to settle arbitration claims.

59 Quoted by Daily Times in Pakistan, dated 18 May 2002, www.dailytimes.com.pk.
60 www.worldbank.org/icsid.
61 Peter T Muchlinski A development perspective of bilateral investment treaties, www.uspakistanlaw.com.
62 Some arbitrators have noted in an anecdotal fashion that even the recognition that an arbitration has been commenced, which appears on the ICSID web site, is enough to generate publicity and public pressure that some foreign investors are adverse to.
63 Based on the professional experience of the author at an international law firm in London dealing with investor-state dispute resolution.
64 A return to the Gay Nineties? The Political Economy of Investment Arbitration, Gus Van Harten, Law Department, LSE, April 2006.

Although, states do not always lose and pay up under BIT claims at ICSID, there is a perception[65] that ICSID tribunals are largely made up of the "arbitration mafia" from European and North American jurisdictions, with little representation from arbitrators from the developing states. Since the law under BITs is still developing and the obligations are broad, the approach of the arbitrators is highly significant. Not having an arbitrator who understands challenges faced by developing states, with direct experience of working in their systems, could be seen as a disadvantage in an arbitration. The selection of an arbitrator is an important part of the strategy towards a successful arbitration.

65 A review of the list of arbitrators on the ICSID website shows that representation from the developing states is very scant. www.worldbank.org/icsid.

8. Uninformed negotiations

One of the main problems with present BIT regimes is the weak capacity of developing states in understanding the full legal implications of signing BITs and making public disclosure of the potential costs and benefits that flow from these agreements. Lack of informed negotiations could mean that government measures may not consider their impact on the international legal obligations the state has signed up to in the German BITs. This is particularly important when states are slow in implementing their international treaty obligations into domestic law, as is the case of Pakistan, meaning that precious public funds then have to be used to defend and/or pay out claims by investors[66].

One of the main problems with present BIT regimes is the weak capacity of developing states in understanding the full legal implications of signing BITs.

There is also informal evidence to suggest that some BITs signed by developing states[67] may have been signed as "photo opportunities" without realising that these BITs actually create legal rights enforceable by private investors. BITs are ultimately legal pacts between states that can have far reaching consequences given the broad rights they give to a potentially large group of investors. As is the case of any contract, parties should seek advice in order to understand the costs and benefits of that agreement. The lack of open, informed and transparent deliberation taking into account stakeholder views with respect to BITs is missing in most developing states. By contrast, in the US, the US Trade Advisory Committee on Trade Policy and Negotiations under Trade Act 2002 contains over 750 members from a variety of interest groups like business, academics, labour and environment, and they provide confirmation that the FTAs the US is negotiating meet the objectives in the Trade Act and are in "the best economic interests of the United States."

66 SGS v. Pakistan, the Supreme Court of Pakistan held that the Swiss-Pakistan BIT was not implemented in domestic legislation and was therefore of no effect.
67 Author's personal experience in interacting with government negotiators from Pakistan and India.

9. Conclusion & recommendations

As awareness of the flaws in the present model grows, this is an opportune time to usher the German BIT programme in a new direction that is consistent with the goals and requirements of sustainable development and the global economy of the 21st century.

The rationale at the time behind the model developed for BITs nearly 50 years ago may be the subject of debate. However, what is clear is that it no longer meets the needs of a global economy in the 21st century. Therefore, states following older models of BITs need to "modernise" their approach. Unfortunately, in the case of Germany the old model is being upgraded to enhance investor protection further rather than to strike a balance between investor protection and the development goals of host states. As awareness of the flaws in the present model grows, this is an opportune time to usher the German BIT programme in a new direction that is consistent with the goals and requirements of sustainable development and the global economy of the 21st century. Indeed, these are values that Germany promotes in its development policy, although they do not appear to be reflected in its recent BITs, in particular the German Model Treaty. The German BITs have a detrimental impact on development as their broad and uncertain definitions increase the risk of states being in breach of the BITs and thus attracting hefty compensation claims, which they cannot afford. The majority of the German BITs also restricts the ability of host states to take measures that may be needed to achieve development goals like protecting the environment or eradication of poverty without breaching the BIT, because there are no carve-outs in these BITs to reflect this. Further, the fact that a state may be liable to pay compensation even if a measure is taken to pursue its development goals could make it an impossible price for most developing states to shoulder.

The IISD Model is a multilateral agreement, but one that can be used as a guide for Germany's Model Treaty in order to improve its compatibility with sustainable development goals. Examples of how the German Model Treaty can use the IISD Model include clarifying the scope of the treaty, structuring the obligations with greater precision to reduce vagueness, expressly allowing for national policy space for a host state to take measures required to protect its development goals and introducing a more transparent, legitimate and accountable dispute resolution system.

The Federal Ministry of Economic Cooperation and Development has a noble aim of improving the role of developing states in international regimes. However, rather than renegotiating its BITs "upwards" to be development oriented, Germany, through efforts of the Federal Ministry of Economics and Labour, is enhancing investor protection in way that leave less space for the host state to regulate to protect its development interests. Clearly, one way would be start at home, with the German Federal Ministry of Economic Cooperation, first, reviewing the development impact of the German BIT programme and, second, joining the German Federal Ministry of Economics and Labour in its BIT renegotiation drive so as to ensure that the new and revised German BITs are development positive not development negative.

At the same time, these efforts need to be accompanied by capacity building to create an understanding of the full implications of BITs within both the government and civil society in developing states. One of the ways to start is to ensure that accurate records are kept of the BITs signed by each state and disputes arising from them so that all government departments are aware of the obligations they stand to breach when taking a particular measure. Germany can start capacity building with its own BIT partners, which now include over 130 states.

Appendices

Appendices to this paper are available on
http://www.fes-globalization.org/

Appendix 1: German Model Treaty

Appendix 2: IISD Model International Agreement on Investment for Sustainable Development

Appendix 3: List of German Bilateral Investment Treaties – Based on the UNCTAD Database

Appendix 4: List of German Bilateral Investment Treaties – Official Version of the German Ministry for Economics and Labour (in German)

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