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# International Investment Protection Made in Germany? On the Domestic and Foreign Policy Dynamics behind the First BITs

Ingo Venzke\* and Philipp Günther\*\*

## Abstract

*The investment protection treaty concluded between Germany and Pakistan in 1959 is generally regarded as a milestone in the development of international investment law. It has entered the collective memory as the first bilateral investment treaty (BIT). In this article, we analyse archival sources to investigate why Germany and Pakistan concluded this agreement at that specific time and what makes this treaty the first of its kind. Through historical analysis, we trace the domestic and related foreign policies that led to the BIT and discuss the negotiation process. Our analysis shows that the BIT was so closely linked with the German federal investment guarantee scheme (Bundesgarantien) that it is best understood as an extension of that policy. This also helps us to specify the underlying rationale for the treaties. We further highlight the influence of the financial industry – especially of Hermann Josef Abs – on the genesis of the BIT, which was less decisive than is often suggested. We identify features of the 1959 BIT that do characterize it as a new international legal instrument, but nuance claims about its degree of innovation as well as underlying motivations, and counter considerable retrospective myth making.*

## 1 Introduction

The Treaty between the Federal Republic of Germany and Pakistan for the Promotion and Protection of Investments, concluded in 1959, is generally regarded as a

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milestone in the development of investment protection under international law.<sup>1</sup> By general acclaim, it is the first bilateral investment treaty (BIT). Research has helped to better understand the development of this legal regime,<sup>2</sup> but many gaps remain.<sup>3</sup> One such gap pertains to this first investment treaty. Why did Germany and Pakistan conclude this treaty at the time? Which ideas and actors drove the initiative? Was there any opposition? How does the treaty compare to other mechanisms? What actually made the treaty the first of its kind? We investigate these questions using original archival sources, thereby supplementing and also correcting previous accounts while countering retrospective myth making.<sup>4</sup> We present four important findings. First, our research shows how closely Germany's treaty practice was intertwined with domestic political dynamics.<sup>5</sup> Germany's massive surpluses in trade and the balance of payments of the 1950s was one of the starting points that led to promoting capital exports through federal guarantees, which in turn prompted the question of legal protection for such capital exports.<sup>6</sup> In contrast to the widespread narrative in international economic law, the economic development of the host state was not a

<sup>1</sup> Treaty between the Federal Republic of Germany and Pakistan for the Promotion and Protection of Investments (German-Pakistan BIT) 1959, 457 UNTS 23. Even if the first bilateral investment treaty (BIT) is not explicitly mentioned in decisions by investor-state dispute settlement (ISDS) or other formal judicial bodies, it nonetheless is often received by policy-makers as a 'path-breaking, norm-making achievement'. Pakistani Prime Minister Gilani, 'Welcoming Address 3', 24 *ICSID Review – Foreign Investment Law Journal (ICSIDR)* (2009) 311, at 312. This notion is best exemplified by the fact that, in 2009, an academic conference organized under the patronage of the German Federal Ministry of Economics and Technology was held in Frankfurt to commemorate the 50th birthday of the first BIT. In one of the opening speeches, German politician Hans-Joachim Otto posited that the first BIT marked the 'beginning of a new era of international standards of protection'. H.-J. Otto, 'Welcoming Address 4', 24 *ICSIDR* (2009) 314. This 'milestone' reception and retrospective myth making also influenced scholars and civil society actors that have a rather critical stance on the development of international investment law. See, for instance, Mahardhika, who observes that the first BIT was 'supposedly a template treaty with open-ended language to achieve uniformity that has cemented the first building brick to the establishment of the regime'. Mahardhika, 'An Epilogue to Bilateral Investment Treaties Regime and the Fate of Foreign Investments Protection in Indonesia', 22 *Jurnal Hukum Ius Quia Iustum* (2022) 93, at 95.

<sup>2</sup> For examples, see Ghouri, 'The Evolution of Bilateral Investment Treaties, Investment Treaty Arbitration and International Investment Law', 14 *International Arbitration Law Review* (2011) 189; Johnson and Gimblett, 'From Gunboats to BITs: The Evolution of Modern International Investment Law', in K. Sauvant (ed.), *Yearbook on International Investment Law and Policy 2010–2011* (2012) 649; K. Miles, *The Origins of International Investment Law: Empire, Environment and the Safeguarding of Capital* (2013); N. Perrone, *Investment Treaties and the Legal Imagination: How Foreign Investors Play by Their Own Rules* (2021); T. St. John, *The Rise of Investor-State Arbitration: Politics, Law, and Unintended Consequences* (2018); Trakman and Ranieri, 'Foreign Direct Investment: A Historical Perspective', in L. Trakman and N. Ranieri (eds), *Regionalism in International Investment Law* (2013) 14; Vandeveld, 'A Brief History of International Investment Agreements', 12 *University of California Davis Law Review* (2005) 157.

<sup>3</sup> See also Schill, Tams and Hofmann, 'International Investment Law and History: An Introduction', in S. Schill, C. Tams and R. Hofmann (eds), *International Investment Law and History* (2018) 6.

<sup>4</sup> See note 1 above.

<sup>5</sup> See also Hepburn *et al.*, 'Investment Law before Arbitration', 23 *Journal of International Economic Law (JIEL)* (2020) 929.

<sup>6</sup> According to the Budget Act, 1959 (Gesetz über die Feststellung des Bundeshaushaltsplans für das Rechnungsjahr 1959, BGBl. 1959 II, 793), s. 18; Budget Law, 1960 (Gesetz über die Feststellung des Bundeshaushaltsplans für das Rechnungsjahr 1960, BGBl. 1960 II, 1545) s. 23.

meaningful motive for investment protection and only emerged as a strategic argument during treaty negotiations.<sup>7</sup> Our work here also speaks to the renewed interest in approaches within international relations that examine domestic dynamics to better explain international processes.<sup>8</sup>

Second, all federal guarantees were conditionally based on an adequate level of legal protection in the host country, which, according to the 1959 Budget Act, could be satisfied either through the host country's national legal system or through international agreements.<sup>9</sup> In practice, however, the protection through host countries' domestic laws was effectively cast aside with assertions that bore resemblance to colonial arguments. Germany would only issue federal guarantees and assume the political risks for foreign investments if a BIT with the respective host state was concluded. Our findings thus echo and support accounts of how the law of the host state has been disregarded in the practice of arbitrations based on so-called internationalized treaties or a self-styled transnational law.<sup>10</sup>

Third, the archival materials document the tangible interest and influence of the financial industry on these developments. Consequently, our research helps to specify relationships between private interests and public powers during the critical time leading up to the development of this legal regime.<sup>11</sup> Of particular interest is Hermann Josef Abs – the personification of the Deutsche Bank – who spoke vehemently against the use of federal guarantees for foreign investments, even though the Deutsche Bank stood to gain from the arrangement. According to Abs, the practice of using federal guarantees alongside BITs simply did not offer an adequate level of protection and would, moreover, create counterproductive incentives. He instead campaigned for a multilateral 'Magna Carta' for investment protection, which would notably have provided for collective measures against property violations. Despite his close connections, especially with the minister of economic affairs, Ludwig Erhard, Abs was unable to assert himself. Whereas the international endeavours of Abs, in tandem with those of Lord Shawcross, have been dealt with in the literature, his involvement in German

<sup>7</sup> The narrative according to which investment protection contributes to the economic development of the host state is prevalent in practice and scholarship. See, e.g., ICSID, *Amco Asia Corporation and Others v. Republic of Indonesia – Decision on Jurisdiction*, 25 September 1983, ICSID Case no. ARB/81/1, para 23.2 ('to protect investments is to protect the general interest of development and of developing countries'). From scholarship, consider Weil, 'The State, the Foreign Investor and International Law: The No Longer Stormy Relationship of a Menage à Trois', 15 *ICSIDR* (2000) 401. With further references, see Shalakany, 'Arbitration and the Third World: A Plea for Reassessing Bias under the Specter of Neoliberalism', 41 *Harvard International Law Journal* (2000) 419; A. von Bogdandy and I. Venzke, *In Whose Name? A Public Law Theory of International Adjudication* (2014), at 79–85.

<sup>8</sup> Such an approach is in the tradition of liberal theories and has recently been strengthened again, albeit with a different direction, given the influence of authoritarian governments. See Ginsburg, 'Authoritarian International Law?', 114 *American Journal of International Law* (2020) 221.

<sup>9</sup> Budget Act, 1959, *supra* note 6, s. 18(1).

<sup>10</sup> See Perrone, *supra* note 2.

<sup>11</sup> Compare with Cutler, Haufler and Porter, 'The Contours and Significance of Private Authority in International Affairs', in A.C. Cutler, V. Haufler and T. Porter (eds), *Private Authority and International Affairs* (1999) 333.

politics tends to be neglected.<sup>12</sup> It is crucial, however, because it belies any account that would portray German BITs as an expression of Abs' ideas.<sup>13</sup>

Fourth, what then makes the 1959 treaty the first of its kind? Regarding the idea of federal guarantees, German public officials oriented themselves towards US practice. Since the 1951 Mutual Security Act, the USA already assumed so-called 'political risks' for foreign investments.<sup>14</sup> However, it did not conclude BITs and instead relied on well-established treaties of friendship, commerce and navigation (FCN treaties). The relevant provisions of Germany's BITs largely correspond with US FCN treaties, emulating them rather than adding anything new. However, the USA did not link the assumption of political risks with their FCN treaties, as Germany did with the BITs.<sup>15</sup> More importantly still, the limited scope of BITs, when compared with FCN treaties, changed the dynamics of negotiations along with the power dynamics between the contracting parties.

We will develop our arguments as follows. In section 2, we will outline Germany's economic position, especially as it was perceived in the Ministry of Economics in the 1950s, as a relevant condition for the emerging idea of using federal guarantees to counteract export and balance of payments surpluses. In order to understand the struggle for and against federal guarantees, it is necessary to not only recall conditions of economic policy but also to consider competing proposals – in particular, the multilateral treaty project that Abs advocated for, which is discussed in section 3. We then turn in section 4 to the domestic and foreign policy dynamics behind the first BITs, first by discussing rifts within the government and focusing on the 1959 Budget Act, which played a fundamental role in later BIT practice. We show in section 5 that German BITs should in fact be understood as an appendix to the Budget Acts. Moving on to foreign policy dynamics and international treaty practice, we discuss Germany's negotiation strategy and the BIT's form and legal structure in section 6. Focusing on the negotiations with Pakistan, we bring together the various viewpoints, the domestic political starting position and international treaty practice at that time. We then take a step back in section 7 to discuss the extent to which the BIT can actually be considered a novel development in international legal practice, even the first of its kind. We conclude in section 8 by circling back to historical precursors, tracing the elements of change and continuity.

Concerning archival sources, we relied on the Political Archive of the Federal Foreign Office Berlin (Politisches Archiv des Auswärtigen Amts) and the German

<sup>12</sup> For the international context, see A. Leiter, 'Making the World Safe for Investment: The Protection of Foreign Property 1922–1959' (2019) (PhD thesis on file at the University of Melbourne); Perrone, *supra* note 2.

<sup>13</sup> However, such an interpretation is often suggested. Cf. Pauwelyn, 'At the Edge of Chaos? Foreign Investment Law as a Complex Adaptive System, How It Emerged and How It Can Be Reformed', 29 *ICSIDR* (2014) 372; C. Schreuer and R. Dolzer, *Principles of International Investment Law* (2012), at 18.

<sup>14</sup> Mutual Security Act, 1951, Pub. L. 82-165.

<sup>15</sup> See an overview of the relationship between investment insurance and investment protection treaties, Poulsen, 'The Importance of BITs for Foreign Direct Investment and Political Risk Insurance: Revisiting the Evidence', in K. Sauvart (ed.), *Yearbook on International Investment Law and Policy 2009–2010* (2010) 539.

Federal Archive (Bundesarchiv) in Koblenz for other ministries. We did not consult Pakistani archival sources, a limitation of which we are conscious. To the extent possible, we relied on secondary sources and expert advice to counteract this limitation and contextualize Pakistan's position.<sup>16</sup>

## 2 Balance Surplus and Capital Export: The Idea of Federal Guarantees

During the so-called German economic miracle of the 1950s, annual production grew by 8 per cent and created a significant surplus in trade, which was subsequently reflected in Germany's balance of payments.<sup>17</sup> This economic development and the domestic political dynamics that it triggered, were decisive for Germany's bilateral investment protection programme. According to an opinion by the Federal Ministry of Economic Affairs (Bundesministerium für Wirtschaft [BMWi]), significant dangers were looming for the economy that could only be averted by increasing capital exports.<sup>18</sup> As Waldemar B. Hasselblatt from the BMWi explained at the time, the trade and payments imbalance should be perceived as an urgent problem because the surplus for Germany implied a deficit for its trading partners, which 'in the long run is bound to lead to difficulties in world trade'.<sup>19</sup> There was also the threat of a private as well as a public investment backlog. This was due to the fact that the opportunities to increase the import of goods were almost exhausted, and private imports were maximally liberalized, whilst tariff levels were already low. The USA's significantly higher capital exports in relation to their respective output were seen with envy in German economic and administrative circles.<sup>20</sup>

<sup>16</sup> We are especially grateful to Jamee Moudoud for his comments and suggestions. A. Zaidi, *Issues in Pakistan's Economy: A Political Economy Perspective* (2015) (which has proven particularly helpful); N.U. Khan, *International Economic Law: Theory and Practice in Pakistan* (2015) (to a lesser extent).

<sup>17</sup> W. Abelhauser, *Deutsche Wirtschaftsgeschichte. Von 1945 bis zur Gegenwart* (2004), at 228; P. Manow, *Social Protection, Capitalist Production: The Bismarckian Welfare State in the German Political Economy, 1880–2015* (2020), at 77–85; Dumke, 'Reassessing the Wirtschaftswunder: Reconstruction and Postwar Growth in West Germany in an International Context', *52 Oxford Bulletin of Economics and Statistics* (1990) 451.

<sup>18</sup> Hasselblatt, 'Probleme der deutschen Außenwirtschaftspolitik: Wege zur Erreichung des wirtschaftspolitischen Zieles der Verminderung des Zahlungsüberschusses', *Bulletin des Presse- und Informationsamtes der Bundesregierung*, vol. 158 (1609), Bonn, 29 August 1958, B102/27059, Bundesarchiv (BA) (German Federal Archives).

<sup>19</sup> *Ibid.*

<sup>20</sup> We here rely on the economic problems as they were perceived within the ministry at the time as a crucial condition for the emphasis on capital export, which then led to the BIT programme. While we did not find explicit traces of those arguments in the archival material, there may have been fears of inflationary consequences in view of capital surplus. The debt relief for Germany in 1953 added to that, and the German Federal Bank (Bundesbank), which was established in 1957, has traditionally been particularly wary of inflation. See M. Jacob, 'London Agreement on German External Debts (1953)', in *Max Planck Encyclopedia of Public International Law* (2013); Abelhauser, *supra* note 17; Manow, *supra* note 17.

Paul Krebs, the director of Deutsche Bank and Abs' right hand, stated in a lecture, which he then sent to the BMWi in January 1959, that the Federal Republic 'is still in the early stages of development, especially in the area of private capital transactions with foreign countries'.<sup>21</sup> The idea to stimulate the export of capital-using guarantees, similar to the export of goods (which have been secured by 'Hermes' loans), slowly matured within the BMWi. Civil servants became increasingly familiar with the practices of the US government.<sup>22</sup> The essence was – and still is – the government's assumption regarding the so-called 'political risks' associated with foreign investments.<sup>23</sup> A memorandum of the BMWi from October 1956 explained that the US government was authorized by section 413 of the Mutual Security Act (in its 1954 updated version) to insure foreign investments against certain risks.<sup>24</sup> Through the bilateral exchange of notes, the USA obliged host states to recognize the USA as the owner of the outstanding claims from investors in the event of damage ('subrogation'). Established US practice thus already provided precedents to use public guarantees for foreign investments as the idea ripened in the BMWi.

Other key actors in the German government were equally familiar with the existing US practice regarding insurance protection for capital investments and used it for orientation. In March 1957, for example, the German embassy in Ankara wrote about a new agreement that the USA had concluded by an exchange of notes with Turkey to insure US investments. On that occasion, the embassy once more summarized the main features of the American guarantee programme adequately.<sup>25</sup> The Federal Ministry for Economic Cooperation (Bundesministerium für wirtschaftliche Entwicklung und Zusammenarbeit [BMZ]) was in contact with the US International Cooperation Administration (ICA) in Washington, DC, which had been issuing guarantees for foreign investments since 1955.<sup>26</sup> In 1957, a report of the BMZ rightly noted how the scope of investment insurance in the USA had been

<sup>21</sup> Krebs, 'Ausmaß, Formen und handelspolitische Bedeutung des deutschen Kapitalextorts und -imports', speech given in front of the Internationales Studiengesellschaft für wirtschaftliche, wissenschaftliche und kulturelle Zusammenarbeit, Wiesbaden, 27 January 1959, B102/27060, BA.

<sup>22</sup> Memorandum, 'Garantieprogramme der Vereinigten Staaten', October 1956, B 102-27058, BA; translation of the Foreign Operations Administration, *Handbook of Investment Insurance: Insuring New American Investments Abroad under the Investment Guarantee Program* (1957); see also letter for the head of Department for Foreign Policy and Development Aid (Department V) to the head of Department for Money and Credit (Department VI), 'Deckung für Kapitalinvestitionen im Ausland', 8 March 1957, B102/27058, BA.

<sup>23</sup> What is considered political remains extremely controversial. The term 'political risk' should be understood as a 'battle concept' in the relationship between business and politics. In addition to that, see Perrone, 'The Emerging Global Right to Investment: Understanding the Reasoning behind Foreign Investor Rights', 8 *Journal of International Dispute Settlement (JIDS)* (2017) 673; Schneiderman, 'Investing in Democracy? Political Process and International Investment Law', 60 *University of Toronto Law Journal* (2010) 909.

<sup>24</sup> See Youngquist, 'United States Commercial Treaties: Their Role in Foreign Economic Policy', 2 *Studies in Law and Economic Development* (1967) 72, at 83.

<sup>25</sup> German Embassy in Ankara to the Foreign Office, 'Insurance of US-American Investments in Turkey', 11 March 1957, B102/27058, BA.

<sup>26</sup> The International Cooperation Administration replaced the short-lived Foreign Operations Administration and was in turn replaced by what is now the Agency for International Development in 1961.

expanded beyond the risk of expropriation, confiscation and transfer to also include the risk of war.<sup>27</sup>

At the BMWi, which would become the key actor in the emergence of the BIT programme, the idea of federal guarantees for capital investments abroad was initially met with a great deal of scepticism. It was only approved by the Department for Foreign Policy and Development Aid (Department V), which was close to the BMZ. At the time, the head of the department, Kurt Daniel, was the driving force behind the initiative. He was the first to suggest insurance protection for German capital investments abroad in July 1956, citing successful examples of US practice. He also relied on the parallel German practice to issue 'Hermes' loans for the export of goods.<sup>28</sup> Daniel, however, was unable to make himself heard amongst the predominantly sceptical voices at the BMWi. In addition, opposition outside the ministry hampered his advocacy for the idea of federal guarantees.

### 3 The Multilateral Alternative

#### *A Herman Josef Abs and the Protection of Property*

The most committed and influential opponent to federal guarantees for foreign investments outside the government was none other than Hermann Josef Abs, the embodiment of the Deutsche Bank in the post-war years. From 1957, Abs was the spokesman for the bank's board of directors.<sup>29</sup> During the war, he had been responsible, among other things, for the liquidation of Jewish companies. He was also a member of the supervisory board of I.G. Farben, though Abs' role and knowledge in the work involving the concentration camps and the extermination of Jews remains uncertain. After the war, Abs was targeted by US investigators, arrested and considered for indictment in Nuremberg but was subsequently released, apparently due to pragmatic interests surrounding the possibility of a speedy reconstruction.<sup>30</sup> When Konrad Adenauer chose Abs to travel to the USA as delegation leader to negotiate compensation payments for confiscated German property, his US counterparts felt a deep unease towards Abs' past.<sup>31</sup>

Although Abs took an active part in the expropriations during the Third Reich, it was the experience of injustice against foreign as well as German property after World War II that seems to have driven him towards the international legal protection of property.<sup>32</sup> In a speech in 1955, Abs pointed out to a then still small and national audience

<sup>27</sup> Letter from the Federal Minister for Economic Cooperation and others to the Federal Minister for Economic Affairs, 13 February 1957, B102/27058, BA.

<sup>28</sup> *Ibid.*

<sup>29</sup> Hermann Josef Abs, born in Bonn in 1901 and died in 1994, was a board member of Deutsche Bank from 1938 to 1945, spokesman for the board from 1957 to 1967 and chairman of the supervisory board from 1967 to 1976.

<sup>30</sup> St. John, *supra* note 2, at 74–76, with reference to L. Gall, *Der Bankier: Hermann Josef Abs* (2005), at 128.

<sup>31</sup> St. John, *supra* note 2, at 78–79.

<sup>32</sup> *Ibid.*, at 73.



that there have been many examples of the confiscation of foreign property in the recent past and that the Western world is... dangerously close to an impasse of legal confusion and moral decay, especially with regard to the principle of the inviolability of private property.... With an ambiguous stance on the question of property, we discourage and paralyze all the forces and people of goodwill in all parts of the world who still believe in the moral and legal foundations of the Western world.<sup>33</sup>

For Abs, the protection of property was not only an essential institution but also an expression of the rule of law and the 'healthy morality' of every state.<sup>34</sup> Thus, the objective of investment treaties was to export this interpretation of the law to the countries of the Global South. To underline his point, Abs repeatedly painted an exaggerated image of how newly independent states would expropriate the existing property and capital investments of Western states. The expropriation of the US United Fruit Company in Guatemala in 1953–1954 served as an example: 'The case of Guatemala is striking proof that even a very small country will not hesitate to expropriate property belonging to citizens or companies of powerful nations even like the United States. What will other larger states do should the opportunity arise? Some have already shown that they will not let such opportunities idly slip by.'<sup>35</sup> For Abs, these risks needed to be countered collectively and through a comprehensive investment protection regime, not through federal guarantees for foreign investments. Such guarantees, he argued, would mean that the consequences of a breach of property, such as by unlawful expropriation, would be borne by the German taxpayers. Host states would feel even less inhibited from committing such unlawful acts since the damage to the investors would be insured in any case, Abs opined.<sup>36</sup>

As the idea of federal guarantees percolated within the walls of the BMWi's Department on Foreign Policy and Department Aid, Abs immediately wrote to Daniel, advising against this idea.<sup>37</sup> Referring to his attached article on 'The Return to Law in International Affairs', Abs wrote that German capital export must indeed be promoted but not with this instrument.<sup>38</sup> He once again summarized his argument for the 'principle of international law and the inviolability of private property, which represents an expression of our traditional Western views on the well-earned rights of the individual'.<sup>39</sup> He went on to describe federal guarantees as a 'perversion' that, 'in the event of a loss, would almost entirely fall on the expense of the giving country and

<sup>33</sup> H. Abs, *Die Beschlagnahme ausländischen Vermögens im Lichte der Politik des Schutzes internationaler Investitionen* (1955), at 7 (translation by the authors).

<sup>34</sup> *Ibid.*, at 10.

<sup>35</sup> *Ibid.*, at 20 (translation by the authors).

<sup>36</sup> We note, but do not discuss further here, that it was highly controversial at the time when expropriation was illegal or unjust and what constitutes adequate compensation. See in further detail Venzke, 'Possibilities of the Past: Histories of the NIEO and the Travails of Critique', 20 *Journal of the History of International Law* (2018) 263; Wortley, 'Observations on the Public and Private International Law Relating to Expropriation', 5 *American Journal of Comparative Law (AJCL)* (1956) 577.

<sup>37</sup> Letter from Abs to Daniel, 'Garantie von Auslandsinvestitionen', 22 February 1957, B102/27058, BA.

<sup>38</sup> Abs, 'Rückkehr zum Recht im internationalen Verkehr', *Chemische Industrie International*, 1957, at 87, B102/27058, BA.

<sup>39</sup> *Ibid.* (translation by the authors).

its taxpayers instead of the receiving countries'.<sup>40</sup> According to Abs, 'the development of the "backward regions of the world", which are so dear to the West, cannot succeed without first investigating the causes of the disease' – that is, the disregard for private property rights.<sup>41</sup> He believed that this could not be achieved through the use of unilateral guarantees but, instead, through multilateral treaties that not only obliged states to respect the law but also enabled effective collective measures to avert or otherwise punish violations of the law.<sup>42</sup> Thus, the programme of a multilateral protection of foreign investments, as first sketched in the 'Magna Carta', did not develop as an expression or extension of bilateral agreements but, rather, from the outset, as an alternative to them.

### **B The 'Magna Carta' for the Protection of Foreign Investments**

In close collaboration with Sir Hartley Shawcross (known for being the British chief prosecutor in Nuremberg), Abs developed the Abs-Shawcross draft convention.<sup>43</sup> In 1956, he presented his draft at a meeting with the American Society of International Law, and then, in October, he gained widespread attention with his related speech at the International Industrial Development Conference, held in San Francisco. Even more succinctly and energetically than before, Abs denounced the collapse of the international legal order, which he equated with a disregard for property. He called upon all benevolent states to counter such behaviour with all their might and through the use of a multilateral convention. In staccato, Abs cited the nationalization of the Anglo-Iranian Oil Company and, once again, Guatemala's expropriation of the United Fruit Company as evidence for the supposed collapse. Some developing countries, he underscored, believe that they have the right to expropriate without compensation and that the West has an obligation to finance the development of their economies. He also complained that countries such as Argentina were being granted new loans when they only recently had violated property rights.<sup>44</sup> Abs asked rhetorically: 'Doesn't that mean that those who have opposed the law not only do not hold them accountable, but also reward them?' He continued:

I believe, gentlemen, it is high time to come to a shared responsibility in this area, to an effective system of international legal protection. ... [The principle of the inviolability of private property] can only be effectively put into practice if we decide to defend our well-founded interests abroad, which we pursue on the basis of a common political line in favor of other countries, against interferences as collectively as we already do in the military field.<sup>45</sup>

<sup>40</sup> *Ibid.*, at 88.

<sup>41</sup> *Ibid.* (translation by the authors).

<sup>42</sup> *Ibid.*, at 89.

<sup>43</sup> Schwarzenberger, 'The Abs-Shawcross Draft Convention on Investments Abroad: A Critical Commentary', 9 *Journal of Public Law* (1960) 213.

<sup>44</sup> Abs, 'Internationale Probleme und Fragen der Investitionsfinanzierung', remarks by Hermann J. Abs at the International Industrial Development Conference, San Francisco, 15 October 1957, speech manuscript, at 18, B102/27059, BA.

<sup>45</sup> *Ibid.* (translation by the authors).

An international convention should provide the basis for such *collective* protection. He referred to it as the ‘Magna Carta for the Protection of Foreign Rights’ – a formulation and idea that was met with considerable approval, at least on the spot. The weekly magazine *Time* gave the project a boost with a prominent article entitled ‘A Capitalist Magna Carta’.<sup>46</sup>

Next to determining a standard level of protection, effective collective redress was the core feature of the convention, and, for Abs, the main difference in contrast to investment insurance in conjunction with a BIT. An international arbitration tribunal was to take binding decisions on violations of the law for all contracting states and lay down the measures that could collectively be taken against violating states. ‘[A] condemned country would not be granted any new loans or bonds’, Abs emphasized.<sup>47</sup>

Sure enough, Abs’s intervention also attracted criticism within the media and during a roundtable that followed his speech.<sup>48</sup> The roundtable included Miguel Cuaderno, the first director of the Philippine Central Bank and chairman of the Board of Governors to the International Monetary Fund, who became a direct sparring opponent to Abs. Cuaderno warned urgently that the predominance of private foreign investment could lead to the external determination of the economic, if not political, interests of the host state.<sup>49</sup> It was therefore justified that developing countries view foreign investments with scepticism. After all, they had only recently emerged from the colonial conditions of exploitation.<sup>50</sup> The underlying differences in opinion dragged on in various discussions in the years to come, including in debates surrounding the New International Economic Order (NIEO) and the Charter on the Economic Rights and Duties of States, especially regarding the obligation to pay compensation in the event of expropriation.<sup>51</sup>

A softer version of the Abs-Shawcross Convention was later discussed in the Organisation for European Economic Co-operation and then the Organisation for

<sup>46</sup> *Time*, vol. LXX, no. 18, 28 October 1957, B102/27059, BA; see also Q. Slobodian, *Globalists: The End of Empire and the Birth of Neoliberalism* (2018), at 139.

<sup>47</sup> Abs, *supra* note 33, at 20 (translation by the authors).

<sup>48</sup> In addition to the contribution from *Time*, the archive holdings also include those from the *New York Times*, 16 October 1957 (‘Investment Code for World Urged’) and the *San Francisco Examiner*, 16 October 1957 (‘International Economic Controls Urged by German’), both of which marginalize the criticism. It is different in the case of the ‘Colonialism Dispute: Speakers Argue Role of Investors’, *San Francisco Chronicle*, 16 October 1957, B102/27059, BA (which already differs markedly in the title). For recent reworkings that skip this aspect, see Slobodian, *supra* note 46, at 138–142; Perrone, *supra* note 2. In contrast, see L. Poulsen, *Bounded Rationality and Economic Diplomacy: The Politics of Investment Treaties in Developing Countries* (2015), at 50.

<sup>49</sup> Quoted in ‘Colonialism Dispute: Speakers Argue Role of Investors’, *San Francisco Chronicle*, 16 October 1957, B102/27059, BA (‘Cuaderno ... described the wide-spread fear in underdeveloped nations that predominance of private investment from abroad might result in foreign domination of the economic, if not the political, affairs of their countries’).

<sup>50</sup> Quoted in *ibid.* (‘[d]eveloping countries “view foreign investments with suspicion” because they only recently emerged from colonial exploitation ... and because even now they frequently suffer at the hands of investors’).

<sup>51</sup> GA Res. 3281 (XXIX), 12 December 1974. See Anghie, ‘Legal Aspects of the New International Economic Order’, 6 *Humanity* (2015) 145; Venzke, *supra* note 36.

Economic Co-operation and Development. It was never opened for signature, particularly due to a lack of support from the USA. These attempts failed in confirmation of Abs' concerns: the USA did not want to bind its investment decisions to any international regime. It granted loans to Indonesia, for example, even though that country had only recently unilaterally terminated its obligations towards the Netherlands and refused to grant outstanding claims.<sup>52</sup>

## 4 Conflict in the Federal Government

Abs tried hard to prevent the use of federal guarantees for German foreign investments. However, at the Federal Ministry of Economic Affairs, the department headed by Daniel remained unimpressed by Abs' interventions. Daniel was convinced that the guarantees would promote German capital exports and, in his solitary view, the economic development of the host state.<sup>53</sup> In the following section, we trace divisions between the ministerial departments of the BMWi to discern respective reasons and motives underlying the genesis of German BIT practice.

At first, other departments in the BMWi reacted cautiously and even dismissively towards Daniel and his department's take on guarantees for capital exports. The Department for Money and Credit (Department VI) initially replied tersely and soberly that, contrary to Daniel's belief, the legal basis for insuring goods for export (through 'Hermes' loans) was insufficient for capital exports.<sup>54</sup> The Policy Department (Department I), which was headed by none other than the architect of the social market economy, Alfred Müller-Armack, was also dismissive of the idea for similar reasons to those put forward by Abs and Krebs. In addition to reservations relating to economic policy, he also feared that the scheme could burden the federal budget and German taxpayers.<sup>55</sup>

Whereas Department VI warmed to the idea of federal guarantees,<sup>56</sup> Department I continued to harbour 'grave concerns' and referred to a new opinion from the ministry's Scientific Advisory Board.<sup>57</sup> The report argued against the 'selective and artificial support for private capital exports through state measures (i.e., public guarantees,

<sup>52</sup> See the explanations of the German executive director at the World Bank, Otto Donner, in his letter to the Bundesministerium für Wirtschaft (BMWi), 'International Guarantee Institute for the Covering of Political Risks for Investments in Developing Countries', 18 January 1961, B102/47640, BA.

<sup>53</sup> Letter from Kurt Daniel to Hermann Abs, 'Garantierung von Auslandsinvestitionen', 25 April 1957, B102/27058, BA.

<sup>54</sup> See Minutes of the in-house meeting, 'Federal Security and Grants for Capital Investments Abroad; Meeting on 26 October 1956', 8 November 1956, B102/27058, BA.

<sup>55</sup> Minutes, 'Security Deposits and Grants by the Federal Government for Capital Investments Abroad; Meeting on 26 October 1956', 8 November 1956, B102/27058, BA.

<sup>56</sup> Staffing seems to have been key here. From around the beginning of 1957, department head Herbert Fischer-Menshausen was represented by Hans Henckel, which probably enabled sub-department leader Georg-Wilhelm Schreiber to stand out more strongly. The head of Department VI, on the other hand, took a back seat. See communication in B102/27058, BA.

<sup>57</sup> Letter on 'Security Payments and Guarantees from the Federal Government for Equity Investments Abroad', 15 May 1957, B102/27058, BA.

state participation in the coverage of political risks and interest subsidies).<sup>58</sup> Still, Georg-Wilhelm Schreiber of Department VI, in particular, proved to be an important advocate for federal guarantees. Like others, Schreiber orientated himself towards US practice. Emigré Wolfgang Friedman of Columbia Law School was even asked for an expert opinion on the matter.<sup>59</sup> A note from a department meeting in April 1957 stated that 'department VI, after re-examination, will support the introduction of federal guarantees'.<sup>60</sup> As reasons, it stated:

- Reconstruction of German assets abroad,
- Promoting the integration of the Federal Republic into international trade relations with the long-term aim of consolidating sales markets and expanding the sources of supply, especially overseas,
- Initiation of international capital movement.<sup>61</sup>

The economic development of the host states as a possible reason was conspicuously absent on the department note. Schreiber was primarily motivated to balance Germany's payments by supplying capital to the host states.

While there was initially some opposition to the idea of linking foreign investments with federal guarantees, the overall mood inside the BMWi started to change. Even Minister Ludwig Erhard began to support the federal guarantee scheme. When the Federal Ministry of Finance (Bundesministerium der Finanzen [BMF]) expressed its continued concerns,<sup>62</sup> Erhard asked for these to be reviewed and set aside.<sup>63</sup> Abs' repeated interventions were ultimately in vain. Erhard was close to Abs and shared his enthusiasm for the protection of property. Both were members of the Mont Pèlerin Society founded by Friedrich Hayek. In 1956, Erhard had spoken at the opening ceremony of the Society for the Promotion of the Protection of Foreign Investments, which had been established by Abs.<sup>64</sup> Still, Abs could not count on Erhard as an ally in his resistance against federal guarantees or his advocacy for a multilateral alternative. After a short period of time, the BME, the Federal Foreign Office (Auswärtiges Amt [AA]) and the Ministry of Economic Affairs all supported the idea of federal guarantees.<sup>65</sup>

The fact that the general opinion changed in favour of the federal guarantees may also be attributed to the influence of the German export industry since it shifted the argumentative burden from why to why not. The archival material contains briefs from

<sup>58</sup> *Ibid.*

<sup>59</sup> See letter from Georg-Wilhelm Schreiber to the director of Hermes Kreditversicherungs-AG, 12 February 1957, B102/27058, BA.

<sup>60</sup> Note from the Meeting with Georg-Wilhelm Schreiber on 4 April 1957, 6 April 1957, B102/27058, BA.

<sup>61</sup> *Ibid.* See also the letter from Georg-Wilhelm Schreiber to the Foreign Office, 13 December 1957, B102/27059, BA (translation by the authors) (in which he speaks out in favour of federal guarantees).

<sup>62</sup> Letter from the Federal Minister of Finance to the Federal Minister of Economics, 12 April 1958, B102/27059, BA.

<sup>63</sup> *Ibid.*

<sup>64</sup> See reporting in *Die Zeit*, no. 14, 5 April 1956; cf. St. John, *supra* note 2, at 77.

<sup>65</sup> Letter from the Federal Minister of Finance to the Federal Minister of Economics, 12 April 1958, B102/27059, BA; Letter from the Federal Minister of Economics to the Federal Minister of Finance, 8 September 1958, B102/27059, BA.

prominent export companies and several umbrella organizations who lobbied civil servants, especially those at the BMWi.<sup>66</sup> Examples include companies like the Vereinigte Aluminum-Werke AG, which wanted to secure its undertakings in French Guiana.<sup>67</sup> The German Erdöl-AG also emphasized the importance of the introduction of guarantees.<sup>68</sup> Importantly, and circling back to the original motive for federal guarantees, the relevant economic actors were not only concerned with investment opportunities but also with how importers of German goods could pay exporters through local company investments and other financial contributions. These interventions show once more the practical problems associated with the balance surpluses that we highlighted earlier and of which civil servants in the BMWi were well aware. Mechanisms of this kind – that is, promoting the export of goods through foreign company holdings and other financial contributions – piqued the interest of the BMWi, which in turn helped shift sentiments towards the use of federal guarantees.

To illustrate, India served as an example at the time and may do so again here: the Indian government suggested that, in view of the shortages of capital and of foreign currency, its importers of (German) goods should offer their foreign suppliers local company shares, thus settling outstanding payments.<sup>69</sup> German companies were inclined to agree with this because they would otherwise lose out on the Indian market. Federal guarantees gained in importance as a result of these corporate holding schemes and their associated risks.

## 5 BITs as Appendices to the Federal Guarantees in the Budget Act

In April 1958, the BMWi sent its first official draft law regarding federal guarantees to the AA, the BMF and the Federal Ministry of Justice (Bundesministerium der Justiz). According to the cover letter, the purpose of the law was to facilitate the balance of payments in other countries as well as to increase German interest in improving trade relations and the protection of raw materials, along with the interdependence of economies.<sup>70</sup> Once more, the economic development of the host states was not mentioned as a reason explicitly or implicitly. It was not a concern. According to the draft law, the guarantees, like their American counterpart, extended to the political risks of expropriation (Article 2), transfer and conversion (Article 3) and risks of war (Article 4).

<sup>66</sup> *Ibid.* [Letter from the Federal Minister of Finance to the Federal Minister of Economics, 12 April 1958, B102/27059, BA; Letter from the Federal Minister of Economics to the Federal Minister of Finance, 8 September 1958, B102/27059, BA].

<sup>67</sup> *Ibid.*

<sup>68</sup> See the letters from the Wirtschaftsvereinigung Eisen- und Stahlindustrie (iron and steel trade association) to the BMWi, and from the Deutsche Erdöl-Aktiengesellschaft (German oil company) to the BMWi, 29 July 1958 and 27 January 1959, both at B102/27059, BA.

<sup>69</sup> See the note titled 'Assumption of Security and Guarantees for Investments by German Companies Abroad', 14 February 1957, B102/27058, BA.

<sup>70</sup> Letter on the Draft of a Law on the Assumption of Guarantees for Capital Investments Abroad, 16 April 1958, B102/27059, BA.

According to Article 5 – central to our present contribution – guarantees could only be given if the host state consented to the investment and certain prerequisites were met. These prerequisites were not particularly onerous in the first draft. First, the transfer of claims to the federal government had to be recognized. Second, the host country had to agree to discuss the satisfaction of potential claims. Third, the amount of the compensation had to be negotiated, and, lastly, foreigners could not be put in a worse-off position than nationals.<sup>71</sup> Subsequent drafts expanded and tightened these conditions, determining how their fulfilment would be ensured – namely, either through the legal system of the host state or, preferably, through a bilateral treaty with the host state – that is, a BIT. The 1959 Budget Act then authorized the BMF, for the first time, to take on guarantees and other warranties in order to underwrite political risks in the case of capital investments abroad.<sup>72</sup>

The memorandum of the AA relating to the treaty with Pakistan illustrates the close connection between BIT practice and the granting of federal guarantees.<sup>73</sup> It explains that ‘the current treaty has the consequence that the condition of sufficient protection for granting of a guarantee ... will no longer have to be examined through the legal order of Pakistan or otherwise’.<sup>74</sup> The condition of an investment’s sufficient legal protection in the Budget Act thus determined the form and content of the German model investment treaty. This model treaty was drawn up in the BMWi as an extension to the Budget Act and the federal guarantee programme.<sup>75</sup> The draft model treaty was therefore titled the ‘Draft Agreement for German Capital Investments Abroad according to § 17 of the Federal Budget Act 1959’.<sup>76</sup>

## 6 Foreign Policy

### A Strategy and Symbolism

While a sufficient level of protection for the assumption of guarantees could in principle be based on either the national law of the host state or an international treaty, the BMWi averred that the latter should be avoided and that a treaty was always necessary.<sup>77</sup> The practical hurdles for using the national law of the host states would have been low, as this was already standard practice for the guarantee schemes that

<sup>71</sup> *Ibid.*

<sup>72</sup> Budget Act, 1959, *supra* note 6, s. 17(1); *cf.* Memorandum to the Treaty, 15 February 1961, B56, vol. 283, Politisches Archiv des Auswärtigen Amtes (PAAA) (Political Archive of the Federal Foreign Office).

<sup>73</sup> See Karl, ‘The Promotion and Protection of German Foreign Investment Abroad’, 11 *ICSIDR* (1996) 1, at 26.

<sup>74</sup> Memorandum to the Treaty, 15 February 1961, at 2, B56, vol. 283, PAAA (translation by the authors).

<sup>75</sup> ‘Behandlung von Kapitalanlagen in ausländischen Staaten, insbesondere bilaterale Vereinbarungen’, B102/27082, BA.

<sup>76</sup> In German: ‘Entwurf einer Vereinbarung über deutsche Kapitalanlagen im Ausland gemäß § 17 des Bundeshaushaltsgesetzes 1959’.

<sup>77</sup> In German: ‘[Entwicklungsländer bedürfen] in der Regel eines längeren Reifeprozesses und einer kontinuierlichen Bearbeitung’. Note from the Departmental Meeting of 19 September 1960, 7 October 1960, B102/27060, BA.

were in place for goods ('Hermes' loans). However, this was not done with regard to the protection of foreign investments because it risked lowering the pressure on host countries to sign investment treaties. Accepting national law in some cases would make it more difficult not to do so in other instances. Such pressure was necessary because, according to the BMWi, some developing countries would otherwise need more time and 'supervision' before they would finally conclude a treaty. The favourable conditions needed to 'ripen' in order for them to realize that signing a treaty is what they ought to do.<sup>78</sup> National law was also more generally deemed to be unreliable. These lines of argumentation echoed the reasoning that some private arbitration courts used in order to push aside the supposedly 'primitive' laws of the host state.

In addition, decisions to grant a guarantee would consider whether a host state had previously disregarded property rights. Germany did not want to tie its hands entirely in that regard (that is, to necessarily sanction such host countries, as Abs had proposed), but it still weighed earlier experiences as part of the decision-making process. For example, India would have to reimburse outstanding claims first, as Pakistan had recently done, before the German government would vouch for new capital investments abroad.<sup>79</sup> It was made clear to the Indian government, 'as well as to the government of all developing countries, that it should be in their best interest to use all means ... to restore the confidence of foreign investors in the stability of their legal relationship'.<sup>80</sup>

All actors on the side of the German government agreed that under no circumstances should the model treaty fall into the hands of future contracting parties. The aim was to conclude a treaty that conformed to the model, but the appearance of openness had to be preserved for strategic reasons. Instead, Department V was tasked with formulating more points of departure for the treaty negotiations to be handed over to the negotiating partners and other relevant stakeholders (for example, the chamber of commerce and influential business representatives). Naturally, these starting points stressed the objectives of the treaty – namely, economic development – which were aligned with the interests of the host state and left out German motives. It was moreover agreed that all treaties should be negotiated in the host states, mainly because their negotiators were dependent on the cooperation of their ministries.<sup>81</sup>

To further emphasize the interests of the host state, it was decided to refer to future agreements as 'Agreements for the Promotion of Capital' ('Kapitalförderungsabkommen'), foregoing any emphasis on investment protection, at least in the title.<sup>82</sup> This shift in language contributed to the narrative, according to which the legal regime has the primary function of serving the host state's economic

<sup>78</sup> *Ibid.*

<sup>79</sup> Note from Department VI, BMWi, 12 June 1959, B102/27082, BA.

<sup>80</sup> *Ibid.* (translation by the authors).

<sup>81</sup> Recordings of the house meeting, initiation of negotiations on investment protection treaties, 14 August 1959, B102/27082, BA.

<sup>82</sup> See also the report in the *Frankfurter Allgemeine Zeitung*, 'Weitere Kapitalförderungsverträge in Sicht. Einschränkende Sondervereinbarungen bleiben noch umstritten', 17 April 1961, B102/27082, BA. Concerning the earlier symbolic shift from property to investment protection, see Leiter, *supra* note 12, at 6, 10.



development and that such protection is thus in the host states' enlightened self-interest.<sup>83</sup> It is therefore all the more important to elucidate the underlying, decidedly strategic considerations on the basis of historical sources.

## B Why Pakistan?

The reasons that the first treaty was concluded with Pakistan were related in part to strategic considerations by both governments, but it was ultimately also influenced by chance. In consultation with the AA, the BMWi kept lists of all the countries with which a treaty could be concluded.<sup>84</sup> A list from August 1959 summarizes the situation with regard to 26 countries – countries with which negotiations had already commenced (only Greece), those that had themselves expressed interest and those that had been indicated by German industry.<sup>85</sup> One strategic consideration for Germany was to first negotiate with those countries that could be expected to accept the model treaty one to one.<sup>86</sup> Amongst those who appeared particularly promising were Ghana, Liberia and Greece. In addition to these countries, Pakistan also appeared to be a particularly suitable negotiating partner because it could set a good precedent, from the perspective of the BMWi.<sup>87</sup> Quinn Slobodian notes that Erhard had already travelled to Pakistan in 1958 to consult with General Mohammad Ayub Khan, who came into power that same year. Erhard tried to convince Khan that Pakistan should stop its industrial efforts and instead focus on agricultural production, thus maintaining the global division of labour of supposedly mutual benefit.<sup>88</sup>

Under Khan's leadership and starting in the late 1950s, however, Pakistan underwent a thorough economic transformation from an agricultural to an industrialized economy. In 1947, Pakistan still exported almost exclusively primary commodities (99.2 per cent).<sup>89</sup> But it had no intention of keeping it like that. With objective credibility, Ayub Khan dubbed the years of 1958–1968 the 'Decade of Development'.<sup>90</sup> Pakistan employed a series of development policies, including classic import substitution industrialization, and shifted attention from agriculture to the then rapidly

<sup>83</sup> See note 7 with further references.

<sup>84</sup> For instance, the list of 7 January 1959 counts 38 countries, with Greece in first place and Honduras in last place. Pakistan is listed as 13th. Chile and Venezuela were added by hand. 'Vorschlag einer aktuellen Länderliste für die Aufnahme von Verhandlungen über Investitionsschutzverträge', 7 January 1959, B102/27082, BA.

<sup>85</sup> 'Vorschlag einer aktuellen Länderliste für die Aufnahme von Verhandlungen über Investitionsschutzverträge', 7 August 1959, B102/27082, BA.

<sup>86</sup> Note from the house meeting on the question of capital protection, 14 August 1959, at 1, B102/27082, BA. For diplomatic considerations in treaty negotiations, see also Poulsen and Aisbett, 'Diplomats Want Treaties: Diplomatic Agendas and Perks in the Investment Regime', 7 *JIDS* (2016) 72.

<sup>87</sup> Note from the house meeting on the question of capital protection, 14 August 1959, at 1, B102/27082, BA.

<sup>88</sup> Slobodian, *supra* note 46, at 140.

<sup>89</sup> Zaidi, *supra* note 16, at 3.

<sup>90</sup> Zaidi, *supra* note 16, at 6–7, 110; Khan, *supra* note 16, at 46. See also the assessment of Gustav Papanek, a developmental economist who advised the Pakistan Planning Commission between 1954 and 1960. G. Papanek, *Pakistan's Development: Social Goals and Private Incentives* (1967), at 1–2.

growing manufacturing sector.<sup>91</sup> But, for Pakistan, falling export prices and the limitation of imports meant a significant balance of payments deficit, which placed it in need of foreign capital.<sup>92</sup>

In 1955, Pakistan had already concluded an investment guarantee agreement and, in 1959, a FCN treaty – in both instances, with the USA.<sup>93</sup> The Pakistani secretary of the treasury, S.A. Hasnie, was a driving force behind these agreements. He likewise advocated for an agreement with Germany, which was already one of Pakistan's main trading partners.<sup>94</sup> Pakistan was in dire need of capital imports and considered a treaty with Germany to be a suitable means in that regard, not the least because investments from Germany could then come with federal guarantees.<sup>95</sup> In short, from the German perspective, Pakistan was only one among several countries with which it sought to negotiate a BIT. The reason why Pakistan was the first to conclude a BIT with Germany was as much happenstance as it was Pakistan's own interest in this matter, seeking to attract capital.

### ***C Short Negotiations and a Lasting Model***

Germany and Pakistan first negotiated in Karachi and completed the final step in Bonn. The negotiation process stalled at first as Hasnie encountered resistance within the Pakistani government, particularly from Finance Minister Muhammad Shoaib. Shoaib had close ties to the World Bank and adopted the bank's dismissive posture towards German advances. The representative of the World Bank at the time, John De Wilde, stated that Pakistan would have to hold back on new loans.<sup>96</sup> The German government thus approached De Wilde at an upcoming meeting of the World Bank in Washington, DC, to change his views, which indeed seemed to rest on a mistaken belief about Germany's proposals. Whilst De Wilde was persuaded in favour of the investment treaty,<sup>97</sup> Finance Minister Shoaib remained hesitant, but he ultimately decided not to hinder the negotiation process further.<sup>98</sup>

<sup>91</sup> Zaidi, *supra* note 16, at 110–112; S. Lewis, *Economic Policy and Industrial Growth in Pakistan* (1969), at 157.

<sup>92</sup> Zaidi, *supra* note 16, at 113–114.

<sup>93</sup> According to the German embassy, the exchange of notes is dated 26 May 1955. Report from the Karachi Embassy to the Auswärtiges Amt (AA), 26 August 1959, B56, vol. 283, PAAA; Agreement of Co-operation between the United States of America and Pakistan (USA-Pakistan FCN Treaty) 1959, 327 UNTS 285.

<sup>94</sup> In the files, this was also partially mentioned as 'Hashny', referring to the same person. See, e.g., 'Difficulties in Conducting Negotiations on an Investment Safeguard Agreement with Pakistan', 24 September 1959, B102/27082, BA. On Pakistan's trade patterns over time, see Zaidi, *supra* note 16, at 199–209.

<sup>95</sup> For example, in a Pakistani newspaper article: 'Mr. Hasnie said that under a recently passed law, the West German Government would underwrite 80 per cent of the investment made abroad by its nationals against political risk. It was, therefore, necessary for the West German Government to conclude investment treaties with the countries which could absorb German capital.' 'German Industrials Seem Keen to Invest in Pakistan', *Pakistan Times*, 5 December 1959, B56, vol. 283, PAAA.

<sup>96</sup> Report from the Karachi Embassy to the AA, Karachi, 17 September 1959, at 3, B56, vol. 283, PAAA.

<sup>97</sup> Telex from the AA to the Washington Embassy, Bonn, 24 September 1959, B56, vol. 283, PAAA.

<sup>98</sup> Telex from Washington Embassy to AA, Washington, 30 September 1959, B56, vol. 283, PAAA.

The draft treaty was identical to the underlying model that had been drawn up in the appendix to the Budget Act.<sup>99</sup> The draft was adopted on 25 November 1959, exactly as the German negotiators had proposed it, signed by Hasnie for Pakistan and by Foreign Minister Heinrich von Brentano for Germany.<sup>100</sup> When Hasnie returned from Germany to Pakistan, he expressed pride in the fact that Pakistan was the first country to have concluded an investment agreement with Germany, telling the local media that it would give Pakistan an edge in attracting capital: 'Pakistan should cash in on the lead and try to press home the advantage.'<sup>101</sup> The BMWi's strategy of first concluding the model treaty with Pakistan and then using the precedent-setting effect in relation to the conclusion of other BITs paid off. The AA noticed an increase in interest from other countries. German embassies around the world requested copies of the treaty.<sup>102</sup> A copy of the agreement was still not published so as not to disturb ongoing negotiations with other countries.<sup>103</sup> The AA also sent copies to relevant companies, such as Friedrich Krupp AG, Klöckner u. Co GmbH and Schering AG, which were considering investing in Pakistan.<sup>104</sup> Schering AG had also expressed great interest in an agreement with Afghanistan, Bolivia and Malaysia.<sup>105</sup>

## 7 What Is New?

We already explained that the German idea of providing federal guarantees for foreign investments closely followed US practice.<sup>106</sup> Unlike the USA, as we also mentioned, Germany conditioned such guarantees on the existence of a BIT – the German model BIT is thus best understood as an appendix to the Budget Act authorizing the guarantees.<sup>107</sup> The German-Pakistan BIT was a 'general legal protection treaty, which, unlike the American system, was to be closely tied with domestic guarantees'.<sup>108</sup> In the USA, due to historical path dependency, there was no link between FCN treaties and

<sup>99</sup> Express letter from the Federal Minister of Economics to the AA, Bonn, 31 August 1959, B56, vol. 283, PAAA.

<sup>100</sup> This is borne out by the comparison of the letter from the Federal Minister of Economics to the Foreign Office, Bonn, 31 August 1959 with the final text of the treaty.

<sup>101</sup> 'German Industrials Seem Keen', *supra* note 95.

<sup>102</sup> See Letter for the head of Department IV, Ref. VLR I, v. Heller, AA, and German Embassy in Thailand, Bonn, 7 January 1960, B56, vol. 283, PAAA (sending the agreement with Pakistan). The German Embassy in Manila requested a copy of the agreement, 5 January 1960: 'As can be seen from the Diplomatic Courier, a treaty for the protection of capital investments was signed in Bonn on November 25, 1959 between the Federal Republic of Germany and Pakistan. In connection with discussions here on the same subject, the Embassy would be grateful for the provision of 5 copies of the treaty text (including the English version)'.

<sup>103</sup> Letter from the AA to the embassy of the FRG in Washington DC, 20 June 1960, B56, vol. 283, PAAA.

<sup>104</sup> Thank you letter from Friedrich Krupp an v. Heller, AA, Bonn, 17 March 1960, B56, vol. 283, PAAA; see also letter from Klöckner u. Co., 2 May 1960 and from Schering AG, 27 July 1960, B56, vol. 283, PAAA.

<sup>105</sup> Letter from Schering AG to the legal department of the AA, 23 March 1960, B56, vol. 283, PAAA.

<sup>106</sup> See section 2 of this article.

<sup>107</sup> See section 5 of this article.

<sup>108</sup> M. Banz, *Völkerrechtlicher Eigentumsschutz durch Investitionsschutzabkommen* (1988), at 25 (translated by the authors).

the Investment Guaranty Program.<sup>109</sup> The Randall Commission on Foreign Economic Policy, established under US President Dwight D. Eisenhower, explicitly argued against the conclusion of special investment protection treaties and continued to adhere to the comprehensive FCN model.<sup>110</sup> The investment guarantee agreements concluded as part of the Investment Guarantee Program were negotiated independently of FCN treaties and initially only comprised provisions relating to subrogation.<sup>111</sup> Beyond those differences in the set-up of investment protection, a comparison between BITs and FCN treaties is still warranted but so far missing from our analysis.

### A *Parallels to FCN Agreements*

According to the memorandum of the AA, the BIT followed the US tradition of FCN treaties, merely supplementing them with several provisions concerning investment policy.<sup>112</sup> But not even that seems to be the case. A substantive comparison of individual provisions from the two treaty types demonstrates that they are almost identical in the area of investment protection. A comparison of the German-Pakistan BIT and the FCN Treaty between the USA and Pakistan (USA-Pakistan FCN Treaty), also concluded in 1959, yields just a few very specific differences.<sup>113</sup> Both treaties contain provisions that guarantee the principle of national treatment for investors and the principle of most-favoured nation treatment.<sup>114</sup> Both treaties also guarantee protection against expropriation.<sup>115</sup> Furthermore, both regulate investor compensation in the event of expropriation with similar clauses,<sup>116</sup> and they both ensure a free transfer of capital – in each case, without exceptions regarding balance-of-payment crises.<sup>117</sup>

The only notable substantive legal difference between the German-Pakistan BIT and the USA-Pakistan FCN Treaty is that the BIT's prohibition of discrimination itself does not extend to the investor's initial access to the market.<sup>118</sup> This issue was relegated to a protocol, stipulating that the treaty's prohibition of discrimination only covers the following measures: a restriction of the purchase of raw materials and resources of any

<sup>109</sup> Walker, 'Treaties for the Encouragement and Protection of Foreign Investment: Present United States Practice', 5 *AJCL* (1956) 229, at 245. For the general link, see Poulsen, *supra* note 15.

<sup>110</sup> R. Wilson, *United States Commercial Treaties and International Law* (1960), at 21.

<sup>111</sup> See Ocran, 'International Investment Guarantee Agreements and Related Administrative Schemes', 10 *University of Pennsylvania Journal of International Law* (1988) 341, at 342.

<sup>112</sup> Memorandum to the Treaty, 15 February 1961, at 2, B56, vol. 283, PAAA.

<sup>113</sup> Yackee, 'Conceptual Difficulties in the Empirical Study of Bilateral Investment Treaties', 33 *Brooklyn Journal of International Law* (2008) 405, at 437; USA-Pakistan FCN Treaty, *supra* note 93.

<sup>114</sup> German-Pakistan BIT, *supra* note 1, Arts. 2, 3; USA-Pakistan FCN Treaty, *supra* note 93.

<sup>115</sup> German-Pakistan BIT, *supra* note 1, Art. 3; USA-Pakistan FCN Treaty, *supra* note 93, *supra* note 93, Art. 6.

<sup>116</sup> German-Pakistan BIT, *supra* note 1, Art. 3; USA-Pakistan FCN Treaty, *supra* note 93, Art. 6.

<sup>117</sup> German-Pakistan BIT, *supra* note 1, Arts 4, 6; USA-Pakistan FCN Treaty, *supra* note 93, Art. 12.

<sup>118</sup> See Protocol to the German-Pakistan BIT, 'Protokoll zu dem Vertrag vom 25. November 1959 zwischen der Bundesrepublik Deutschland und Pakistan', 29 June 1961, BGBl. 1961 II, 799, s. 2; K. Vandeveld, *The First Bilateral Investment Treaties: US Postwar Friendship, Commerce, and Navigation Treaties* (2017), at 540.

Protocol of the German-Pakistan BIT, *supra* note 118, at 2.

kind, the hindrance of sales and any other provisions that are not equally applied to nationals.<sup>119</sup> The protection of investors thus only applies when investments have already been made.<sup>120</sup> Also with regard to procedural provisions, the German-Pakistan BIT differed only marginally from the USA-Pakistan FCN Treaty. In both cases, only states involved in the treaty were allowed to institute proceedings disputes, not the investors themselves (yet).<sup>121</sup> Apart from inter-state arbitration, disputes could be referred to the International Court of Justice (ICJ).<sup>122</sup>

Considering the many overlaps in substantive and procedural law, it is hardly surprising that explicit distinctions between the German-Pakistan BIT and USA-Pakistan FCN Treaty were initially not made within the literature.<sup>123</sup> As a matter of fact, the agreement between Germany and Pakistan was hardly discussed for almost a decade. This only changed towards the end of the 1960s when German-speaking authors declared the German-Pakistan BIT to be the first of its kind, highlighting its arguably unique features. The Swiss lawyer Roy Preiswerk, for example, described the treaty in 1967 as a new category of agreement, supposedly differing both conceptually and substantively from its FCN predecessors. 'The Federal Republic of Germany', Preiswerk wrote, 'introduced this new type of treaty in 1959 and ever since has negotiated it with relentless energy'.<sup>124</sup> He did not substantiate his claim, however, that the treaty was different or even a new type. What then, if anything, could justify the BITs' status as a novel instrument in international law?

## B Contextual Restrictions to Investment Protection

The most apparent difference between the German-Pakistan BIT and the USA-Pakistan FCN Treaty is the fact that the BIT is significantly shorter and focused exclusively on the area of investment protection.<sup>125</sup> The German-Pakistan BIT contains fewer than 40 provisions, the USA-Pakistan FCN Treaty contains over 120. Moreover, from the 1950s onwards, the provisions of US FCN agreements regarding the protection of property were tightened and supplemented by further regulations.<sup>126</sup> Provisions regarding investment protection made up more than half of the entire text of those

<sup>119</sup> *Ibid.*

<sup>120</sup> See also Menkes, 'Screening of Foreign Investments: Promises and Perils of Technological Sovereignty', in C. Nagy (ed.), *World Trade and Local Public Interest: Trade Liberalization and National Regulatory Sovereignty* (2020) 253.

<sup>121</sup> German-Pakistan BIT, *supra* note 1, Art. 11; USA-Pakistan FCN Treaty, *supra* note 93, Art. 23. For the development of dispute resolution, see Hepburn *et al.*, *supra* note 5.

<sup>122</sup> German-Pakistan BIT, *supra* note 1, Art. 11; USA-Pakistan FCN Treaty, *supra* note 93, Art. 23.

<sup>123</sup> See Lauterpacht, 'The Drafting of Treaties for the Protection of Investment', *International and Comparative Law Quarterly* (1962) 18, at 23.

<sup>124</sup> Preiswerk, 'New Developments in Bilateral Investment Protection', 3 *Revue Belge de Droit International* (1967) 173, at 179 (emphasis added; translation by the authors).

<sup>125</sup> Cf. Vandevelde, 'The Bilateral Investment Treaty Program of the United States', 21 *Cornell International Law Journal* (1988) 201, at 208.

<sup>126</sup> H. Frick, *Bilateraler Investitionsschutz in Entwicklungsländern* (1975), at 80.

FCN agreements.<sup>127</sup> This contradicts the popular belief among scholars that the USA avoided entering into BITs until the mid-1970s because they could rely primarily on standards of customary international law.<sup>128</sup>

Although the FCN agreements sometimes offered a higher level of protection for foreign investments, the German-Pakistan BIT stood out precisely because of its compactness. The fact that the BIT limited itself exclusively to the subject of investment protection ensured that the negotiations were more likely to be successful with potential partners states, which were mainly in the Global South.<sup>129</sup> Germany and other states (which soon began to conclude their own BITs) realized that negotiating far-reaching FCN treaties would become more difficult. This also became evident in the lengthy negotiations over the US-Colombian FCN Agreement in the 1950s.<sup>130</sup> Issues that were outside the scope of investment protection, such as the regulation of double taxation of nationals, often delayed the negotiation process.<sup>131</sup>

The German government realized as early as the mid-1950s that FCN agreements would decline in relevance in international relations in the long run. When negotiating a new FCN agreement with the USA, which was concluded in 1954, German diplomat Walther Becker told the US State Department that only a few states would be ready or able to conclude a treaty of the same scope.<sup>132</sup> Although Germany and Pakistan did not reinvent the wheel when they concluded the first BIT, they did manage to introduce a compact and uniform treaty that, in the time span of only a few years, was adopted by many other countries.

### C *Asymmetry between the Contracting Parties*

While the first BIT, like others after it, contained rights and obligations that formally applied to both treaty parties equally, the actual socio-economic circumstances at the time made clear that, in practice, they would not do so. Germany only exported capital to Pakistan, and Pakistan only imported it. Rights were practically on Germany's side, and obligations were on the side of Pakistan. The primary purpose of the BIT was,

<sup>127</sup> Alschner, 'Americanization of the BIT Universe: The Influence of Friendship, Commerce and Navigation (FCN) Treaties on Modern Investment Treaty Law', 5 *Goettingen Journal of International Law* (2013) 455, at 462; Walker, *supra* note 109, at 234.

<sup>128</sup> See, for instance, Vandeveld, who argues that one of the main drivers behind the inception of the US BIT programme was 'to counter the claim made during the 1970s by many developing countries that customary international law no longer required that expropriation be accompanied by prompt, adequate, and effective compensation'. Vandeveld, 'U.S. Bilateral Investment Treaties: The Second Wave', 14 *Michigan Journal of International Law* (1993) 621, at 625. Early proponents of the BITs were thus under pressure to adopt a new framework, especially after the United Nations General Assembly adopted the 1974 Charter of Economic Rights and Duties of States, *supra* note 51, which specified that compensation for expropriation is determined by the laws of the expropriating state.

<sup>129</sup> Banz, *supra* note 108, at 24; Frick, *supra* note 126, at 53, 80.

<sup>130</sup> See Vandeveld, *supra* note 118, at 298–305.

<sup>131</sup> *Ibid.*

<sup>132</sup> Dispatch (15 April 1954), US High Commissioner in Bonn, Department of State File no. 611.62A4/4-1554, Record Group 59, National Archives and Records Administration, quoted in Vandeveld, *supra* note 118, at 301.

after all, to protect German foreign investments.<sup>133</sup> The asymmetry in the practical operation of rights and obligations is paralleled by an asymmetry in bargaining power. As we argued above, it would belittle, if not belie, Pakistan's interests and agency to understand the 1959 BIT as a unilateral imposition. Pakistan chose to negotiate, sign, and ratify the treaty out of an interest in attracting foreign capital and in line with its developmentalist policy under Ayub Khan.<sup>134</sup> There are several factors, however, that tilted the negotiations to Pakistan's and other capital-importing states' disadvantage. One reason was that capital-importing states saw themselves in competition with one another.<sup>135</sup> As Hasnie told the press after signing the treaty, Pakistan now had an edge in comparison to other countries in need of capital, and it should now 'press home the advantage'.<sup>136</sup> It is not by accident that, in 1959, Germany partnered with a state such as Pakistan, which was well aware of this competitive situation and therefore more willing to make concessions.<sup>137</sup>

The asymmetry of socio-economic conditions and bargaining power between treaty parties questions the room for manoeuvre that capital-importing states, almost exclusively in the Global South, have had. The fact often stressed in legal scholarship that states were free to choose – and some notably did not enter into BITs – does certainly not settle this question of asymmetry. Capital-importing states in the Global South were often unable to escape economic dependencies.<sup>138</sup> They saw themselves in dire need of foreign capital, frequently exacerbated by the consequences of import-substituting

<sup>133</sup> Salacuse, 'BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries', 24 *The International Lawyer* (1990) 655, at 663; M. Sornarajah, *The International Law on Foreign Investment* (4th edn, 2017), at 177.

<sup>134</sup> See notes 90–91 above. We leave aside the question of whether, for Pakistan or other states, BITs have in fact contributed to attracting foreign investments or, in turn, to the economic development of the host country. The empirical evidence is too ambivalent to answer that question in a general fashion and demands more nuance. In support of a positive contribution, see Neumayer and Spess, 'Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing Countries?', 33 *World Development* (2005) 1567, at 1582; Busse, Königer and Nunnenkamp, 'FDI Promotion through Bilateral Investment Treaties: More Than a BIT?', 146 *Review of World Economics* 146 (2010) 147, at 171; Falvey and Foster-McGregor, 'North-South Foreign Direct Investment and Bilateral Investment Treaties', 41 *World Economy* (2018) 2, at 22. Not finding a positive contribution, see Tobin and Rose-Ackerman, 'When BITs Have Some Bite: The Political-Economic Environment for Bilateral Investment Treaties', 6 *Review of International Organizations* (2011) 1, at 28; Bauerle Danzman, 'Contracting with Whom? The Differential Effects of Investment Treaties on FDI', 42 *International Interactions* (2016) 452; Lee and Johnston, 'Improving Reputation BIT by BIT: Bilateral Investment Treaties and Foreign Accountability', 42 *International Interactions* (2016) 429. For emphasis on conditioning factors, see Colen, Persyn and Guariso, 'Bilateral Investment Treaties and FDI: Does the Sector Matter?', 83 *World Development* (2016) 193; Echandi and Newson, 'The Influence of International Investment Patterns in International Economic Law Rulemaking: A Preliminary Sketch', 17 *JIEL* (2014) 847, at 858.

<sup>135</sup> Concerning competition as a decisive factor, see Elkins, Guzman and Simmons, 'Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960–2000', 60 *International Organization* (2006) 811. The feeling of the competitive situation is also evident in the context of the 'New International Economic Order'. See Venzke, *supra* note 36, at 286.

<sup>136</sup> 'German Industrials Seem Keen', *supra* note 95.

<sup>137</sup> See notes 85–86 above.

<sup>138</sup> For details on this, see Guzman, 'Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties', 38 *Virginia Journal of International Law* (1998) 639, at 660.

industrialization.<sup>139</sup> And, still more fundamentally, what actors in the Global South thought to be good policy did also not stand independent of policy advice and knowledge production dominated by the Global North.<sup>140</sup>

It is clear that asymmetries in bargaining power also existed between the parties to many FCN agreements, such as the 1959 agreement between Pakistan and the USA. However, FCN agreements were based on a diverse combination of rights and obligations that was not evident in the same way by German BITs.<sup>141</sup> The State Department responsible for negotiating the US FCN agreements was also aware of this fact. Herman Walker, the architect of the USA's FCN programme after World War II, noted in 1956 that:

[a]n FCN treaty in its fully realized form is a house of many mansions, concerned with all citizens and their interests, great and small, and whether or not of an economic nature; it is implicitly concerned also, in a major way, with the intangibles of goodwill between nations in their everyday relations. ... [W]hile conclusion of a treaty means perforce that both sides concur on the mutual desirability of investment protections, in the case of a country having little or no capital to export the legal rights vouchsafed investors can appear on their face to constitute a lopsided bargain unless balanced by rights utilizable in actual practice by that country's own citizens.<sup>142</sup>

Due to the broad substantive range of an FCN treaty, economically weaker parties were sometimes able to link issues and, to a degree, compensate for their bargaining disadvantage.<sup>143</sup> The restriction of the BITs thus had an important implication: not only was the practical distribution of formally equal rights and obligations asymmetric, but BITs also weakened the bargaining power of the capital-importing countries of the Global South.

## 8 Conclusions

The German-Pakistan BIT of 1959 paved the way for the expansion of BITs to become the predominant instruments in investment protection in international law.<sup>144</sup> After the first BIT was concluded, several capital-exporting countries quickly followed suit by implementing their respective BIT programmes, such as Switzerland in 1961,<sup>145</sup>

<sup>139</sup> Zaidi, *supra* note 16, at 114; Lewis, *supra* note 91, at 38–39.

<sup>140</sup> Poulsen, *supra* note 48, at 47. From among the related, seminal critiques of development discourse, see A. Escobar, *Encountering Development: The Making and Unmaking of the Third World* (1995). And in the law and development scholarship, in particular, with reference to Escobar, see S. Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (2011).

<sup>141</sup> Poulsen, *supra* note 48, at 47.

<sup>142</sup> Walker, *supra* note 109, at 243.

<sup>143</sup> On this strategy and the response by powerful states of pushing for increased issue-specific fragmentation, see Benvenisti and Downs, 'The Empire's New Clothes: Political Economy and the Fragmentation of International Law', 60 *Stanford Law Review* (2007) 595.

<sup>144</sup> Cf. A.P. Newcombe and L. Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (2009), at 42–43; Salacuse, *supra* note 133, at 657.

<sup>145</sup> Treaty between the Swiss Confederation and the Tunisian Republic on the Protection and Encouragement of Capital Investments 1961, available at <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bit/2997/switzerland---tunisia-bit-1961>.



the Netherlands in 1963<sup>146</sup> and Italy in 1964.<sup>147</sup> One decade after the inception of the first BIT, 65 similar treaties had entered into force.<sup>148</sup> With the BIT's restriction in scope, a new kind of international legal instrument ultimately emerged. With their spread, BITs then contributed to creating a transnational, global legal ordering, which was largely influenced by the capital-exporting countries in the Global North to serve their interests.<sup>149</sup> They were not the first legal instrument to do so. Instead, they performed functions like those of consular jurisdiction and protectorate law, which used to determine that all legal disputes affecting citizens of the home state were to be dealt with under a separate legal regime, independent of the laws of the host state.

For Germany, which lost its colonies with the Treaty of Versailles, those earlier instruments of legal protection were no longer available, and they generally became unavailable in the context of decolonization.<sup>150</sup> BITs' functional similarity was recognized as such. German lawyer Justus Alenfeld, for instance, noted in his 1971 monograph on Germany's BITs that 'our treaties [are] part of the frequently observed efforts of Western industrialized countries to export ... their "appropriate" economic values through bilateral treaties and to make them a compulsory element for economic relations with developing countries'.<sup>151</sup> In contrast to the now common practice of ISDS, investors could not themselves initiate proceedings against the host states under the first BITs.<sup>152</sup> Hermann Josef Abs had already advocated for that possibility in the 1950s, but German civil servants in fact saw this to be incompatible with international law. Disputes concerning the interpretation or application of the treaty were to be submitted, with the consent of the parties, to the ICJ or otherwise to an arbitral tribunal.<sup>153</sup> The German-Pakistani BIT thus established compulsory international arbitration but did not contain an ISDS mechanism. The Dutch-Indonesia

<sup>146</sup> Convention between the Government of the Kingdom of the Netherlands and the Government of the Republic of Tunisia Concerning the Encouragement of Investment Capital and Protection of Goods 1963, 523 UNTS 237.

<sup>147</sup> Agreement between the Italian Republic and the Republic of Guinea to Promote Capital Investments 1964, available at <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/1836/guinea---italy-bit-1964>.

<sup>148</sup> Parra, 'CSID and the Rise of Bilateral Investment Treaties: Will ICSID Be the Leading Arbitration Institution in the Early 21st Century?', 94 *American Society of International Law Proceedings* (2000) 41. To date, around 2,800 BITs have been concluded (with about 2,200 treaties still in force). 'International Investment Agreements', UNCTAD, available at <https://investmentpolicy.unctad.org/international-investment-agreements>.

<sup>149</sup> Sornarajah, 'Mutations of Neo-Liberalism in International Investment Law', 3 *Trade, Law and Development* (2011) 203; Miles, *supra* note 2, at 386.

<sup>150</sup> Versailles Peace Treaty 1919, 225 Parry 188.

<sup>151</sup> J. Alenfeld, *Die Investitionsförderungsverträge der Bundesrepublik Deutschland* (1971), at 21 (noting that 'unsere Verträge ein Glied in dem vielfach zu beobachtenden Bemühen westlicher Industriestaaten [sind], durch zwischenstaatliche Verträge die ihnen gemäße ... Wirtschaftsverfassungen zu exportieren und sie für ihre Wirtschaftsbeziehungen zu Entwicklungsländern verbindlich zu machen').

<sup>152</sup> See Hepburn *et al.*, *supra* note 5.

<sup>153</sup> Version of the first draft contract, Article 11, B102/27082, BA.

BIT of 1968<sup>154</sup> was the first to include an arbitration clause enabling private investors to themselves initiate proceedings.<sup>155</sup>

Lastly, drawing out the close links between Germany's BIT programme and domestic policy dynamics has helped us to highlight Germany's motives. Concerns over the high surpluses in the balance of payments were the main reason for the federal guarantees and for the BITs as their extension. Pakistan and other developing countries' developmentalist policies placed them in need of foreign capital, which created favourable conditions for BITs to be concluded.<sup>156</sup> The motive for economic development in the host country, however, played a subordinate role and was only foregrounded in the treaty negotiations as a strategic argument. Regardless, the economic development of the host state quickly became the prevailing narrative to legitimize the legal regime.<sup>157</sup>

<sup>154</sup> Agreement on Economic Cooperation between the Government of the Kingdom of the Netherlands and the Government of the Republic of Indonesia, 1155 UNTS 243.

<sup>155</sup> Germany's first BIT with an ISDS mechanism was concluded in 1979 with Bulgaria, UNCTAD, available at <https://investmentpolicy.unctad.org/international-investment-agreements>.

<sup>156</sup> The World Bank, reluctant at first (see note 96 above), later turned to advocate foreign direct investment as a development strategy. For Pakistan, see Zaidi, *supra* note 16. Pakistan has concluded 53 BITs to date. 'International Investment Agreements', *supra* note 148. Cf. Soofi, 'Pakistan', in S. Chesterman, H. Owada and B. Saul (eds), *The Oxford Handbook of International Law in Asia and the Pacific* (2019) 576, at 598.

<sup>157</sup> See note 7 above, with further references; Leiter, *supra* note 12.