

# The OECD/UNCTAD 2nd Symposium on IIA's

2010-12-14, Paris

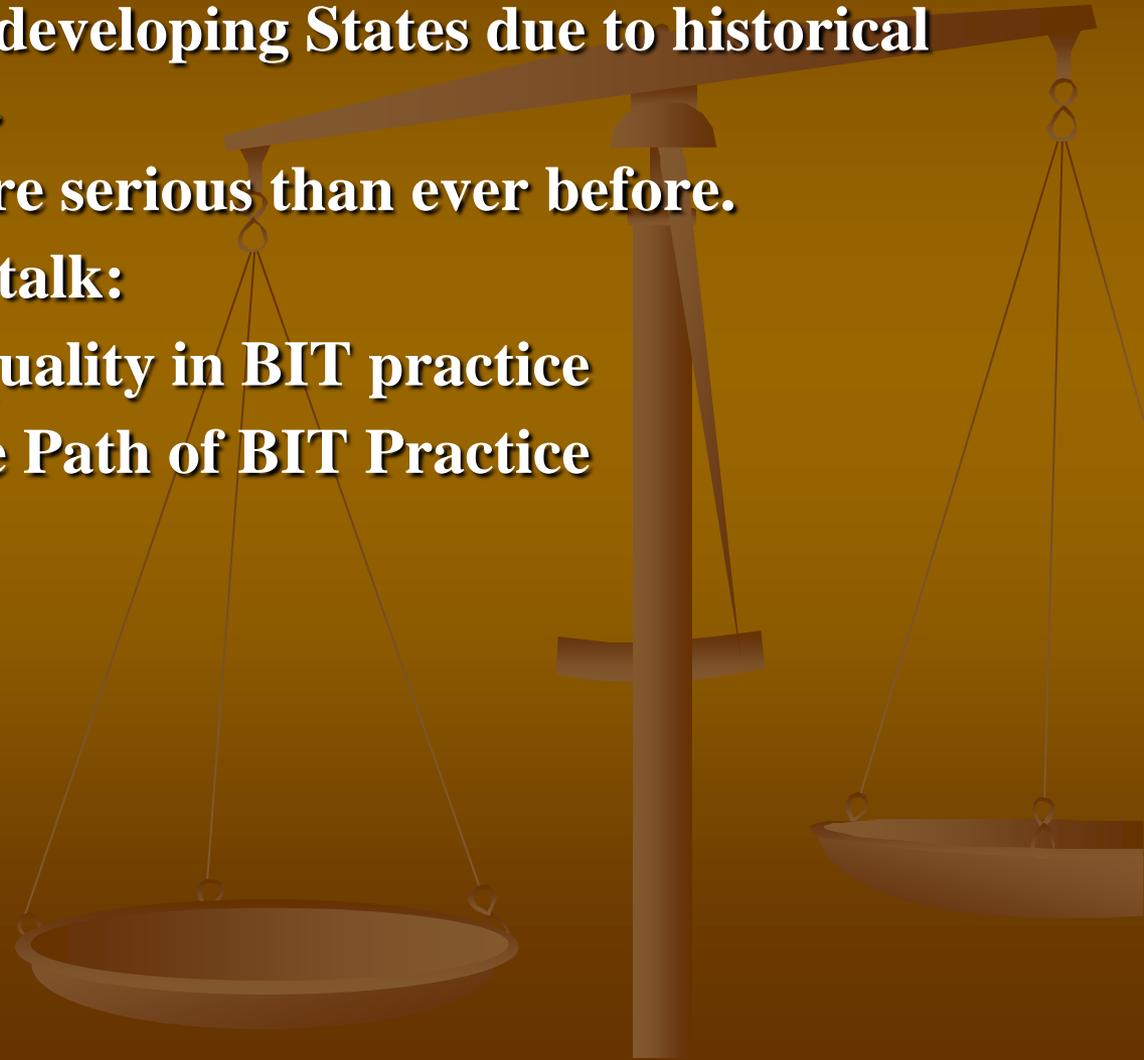
## On Innovative Path for BIT Practice

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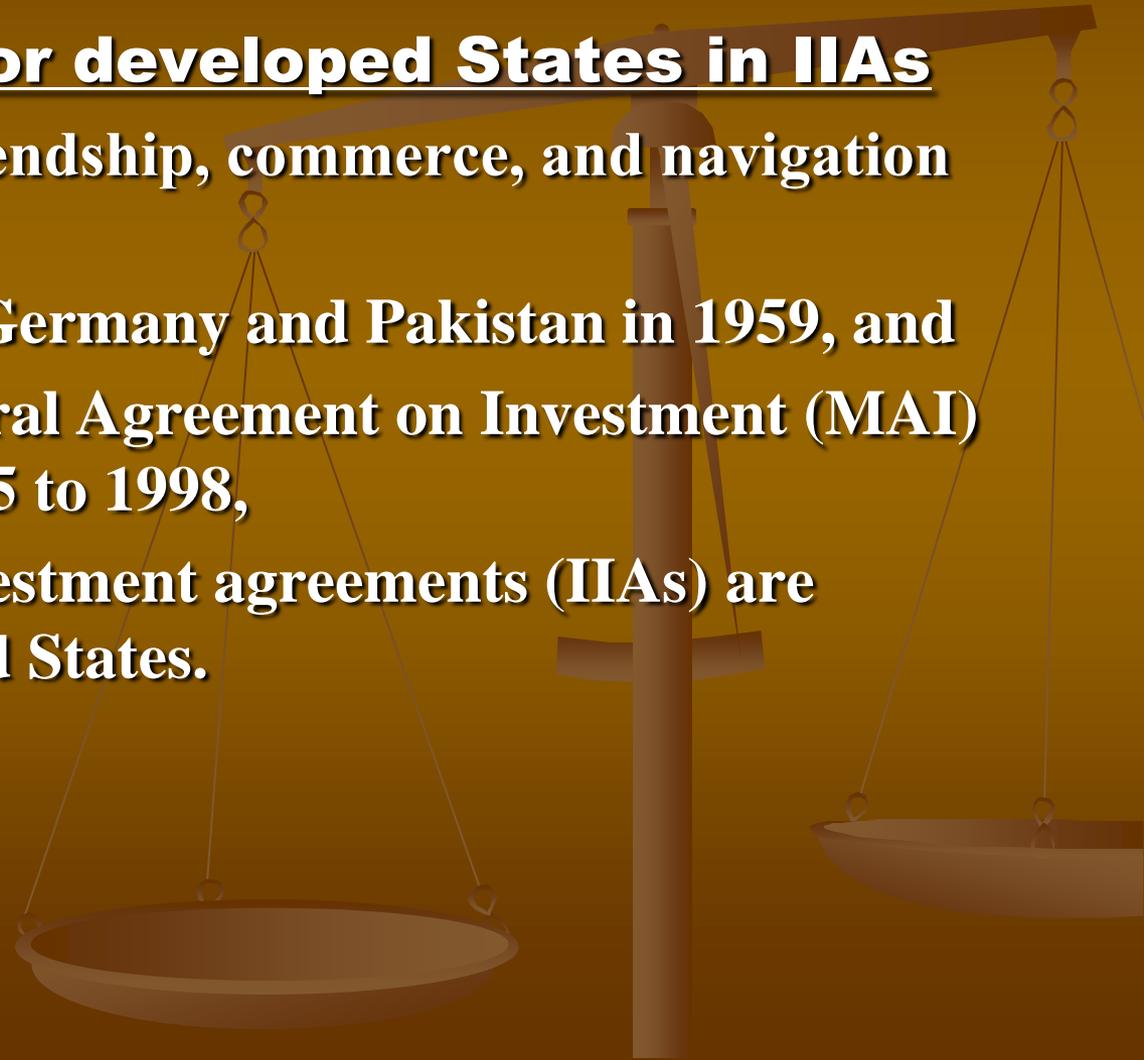


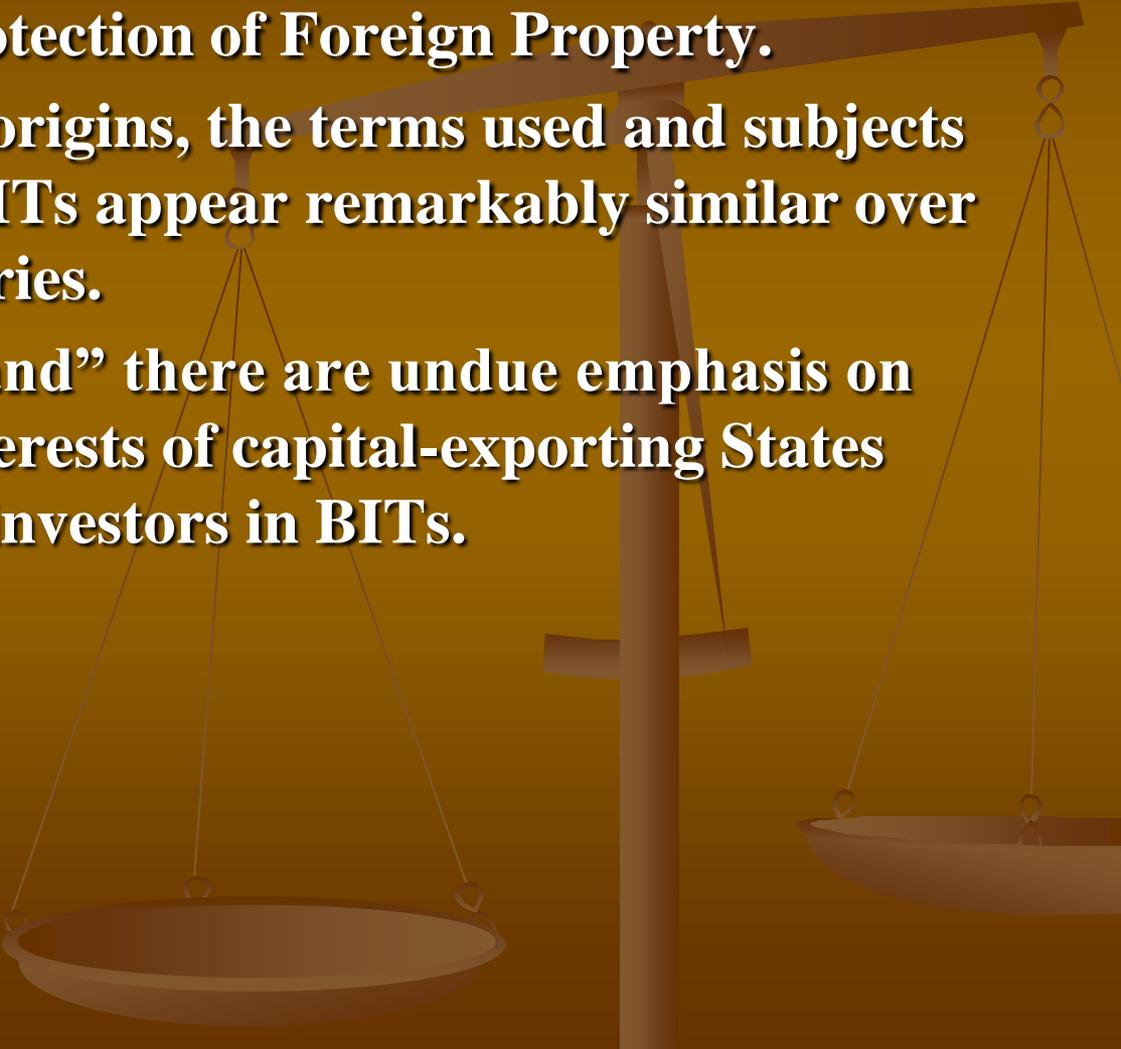
- **In the history of bilateral investment treaty (BIT) practice, there is an issue on imbalance and/or un-equality between developed States and developing States due to historical and practical reasons.**
- **Today the issue is more serious than ever before.**
- **The two points of the talk:**
  - **I. Imbalance or un-equality in BIT practice**
  - **II. Seeking Innovative Path of BIT Practice**



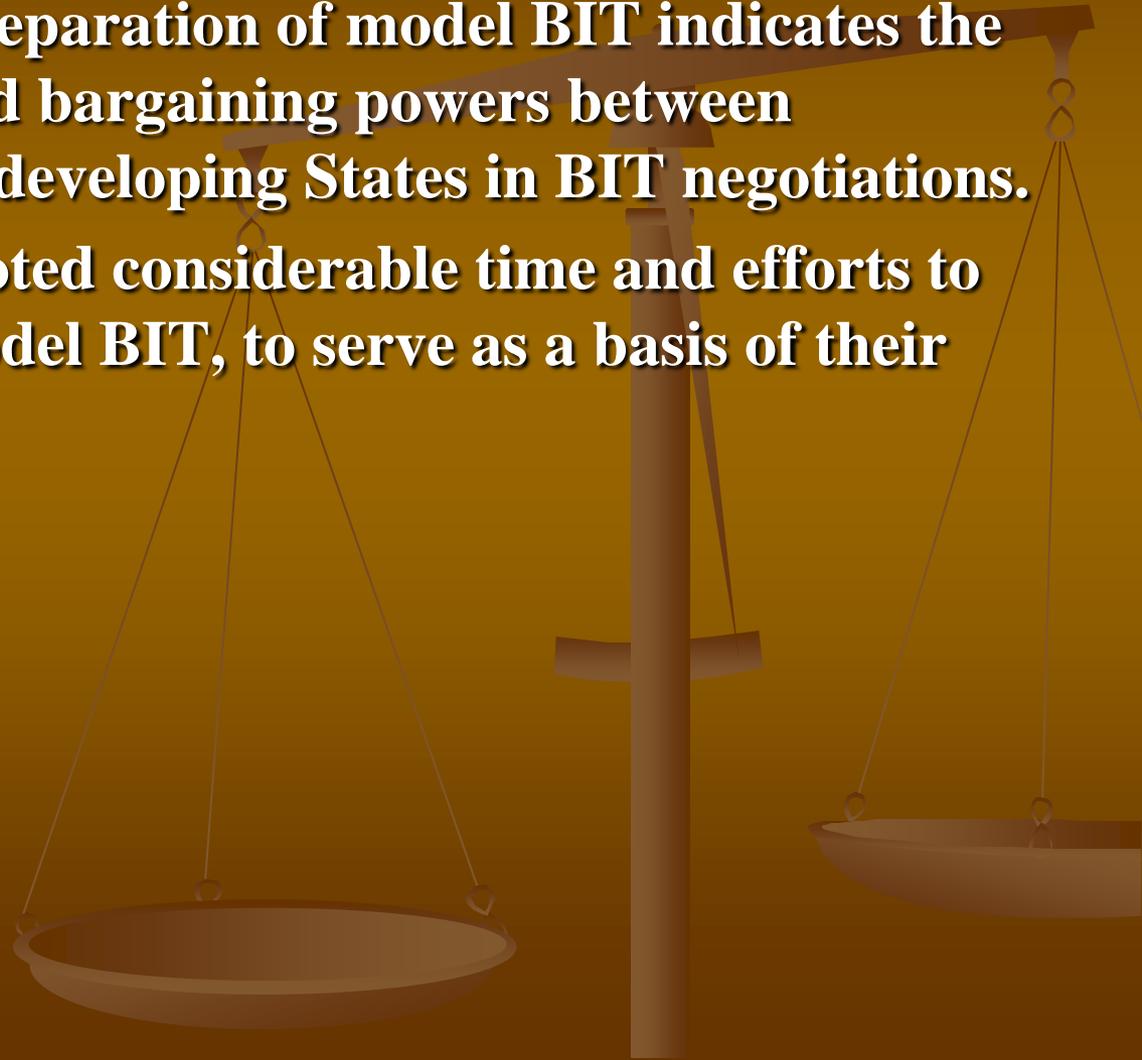
# I. Imbalance or Un-equality in BIT Practice

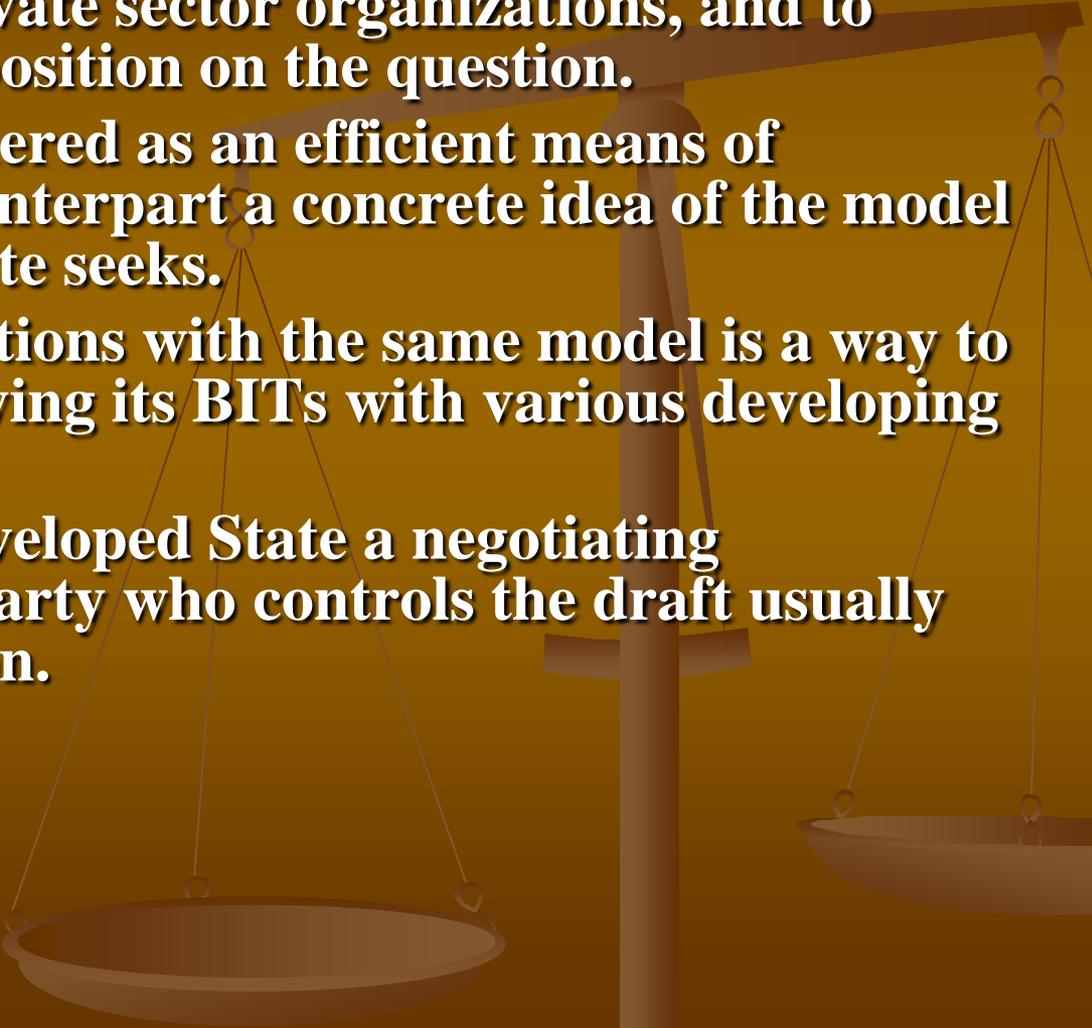
- **1. Innate brand for developed States in IIAs**
- From traditional “friendship, commerce, and navigation treaties” (FCN)
- to first BIT between Germany and Pakistan in 1959, and
- to the draft Multilateral Agreement on Investment (MAI) by OECD during 1995 to 1998,
- The international investment agreements (IIAs) are creations of developed States.

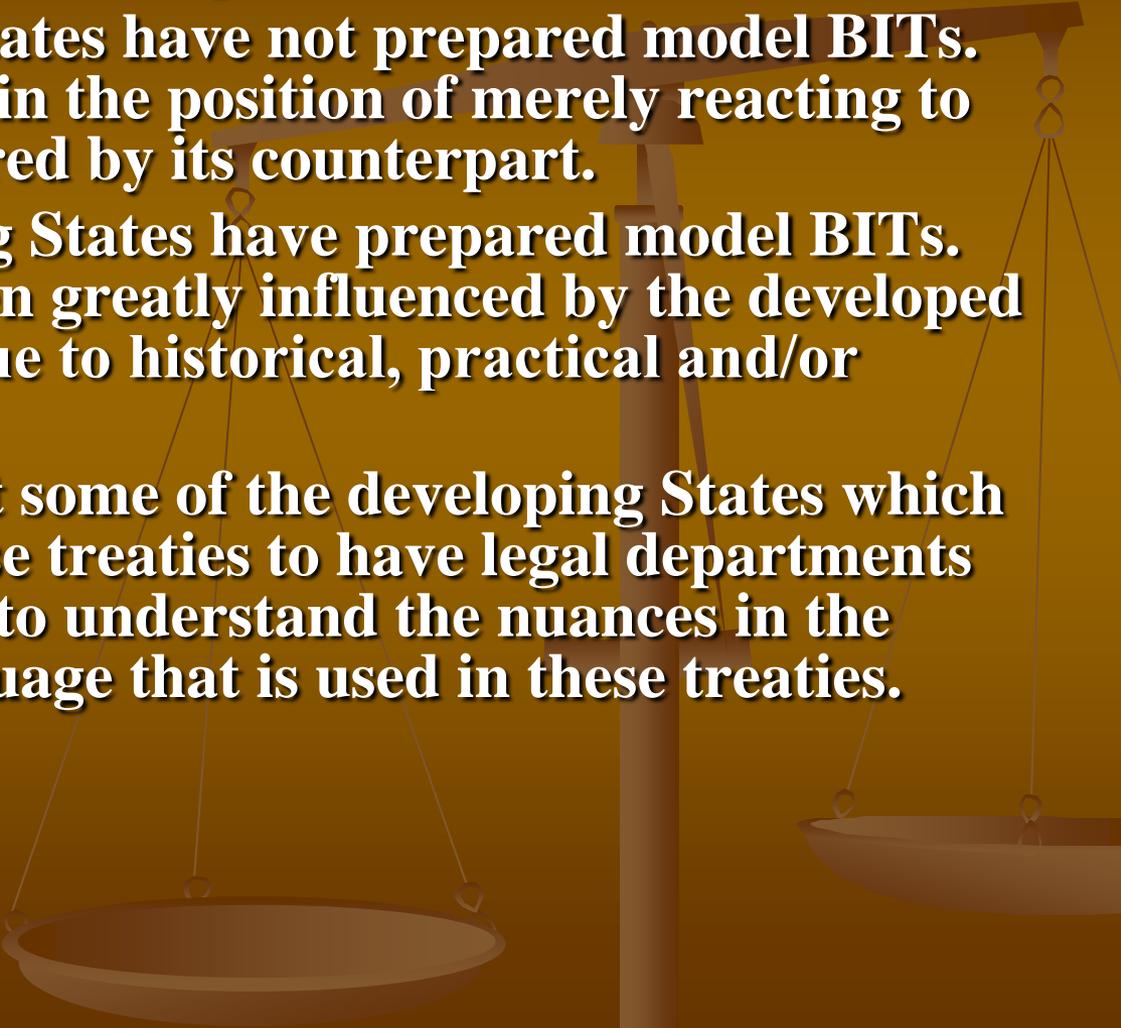


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- **Most BITs mimic, at least in broad strokes, the Draft International Convention on Investments Abroad (the Abs-Shawcross Convention) and OECD 1967 Draft Convention on the Protection of Foreign Property.**
  - **Due to their common origins, the terms used and subjects covered in different BITs appear remarkably similar over time and across countries.**
  - **Due to the “innate brand” there are undue emphasis on powers, rights and interests of capital-exporting States and/or their overseas investors in BITs.**

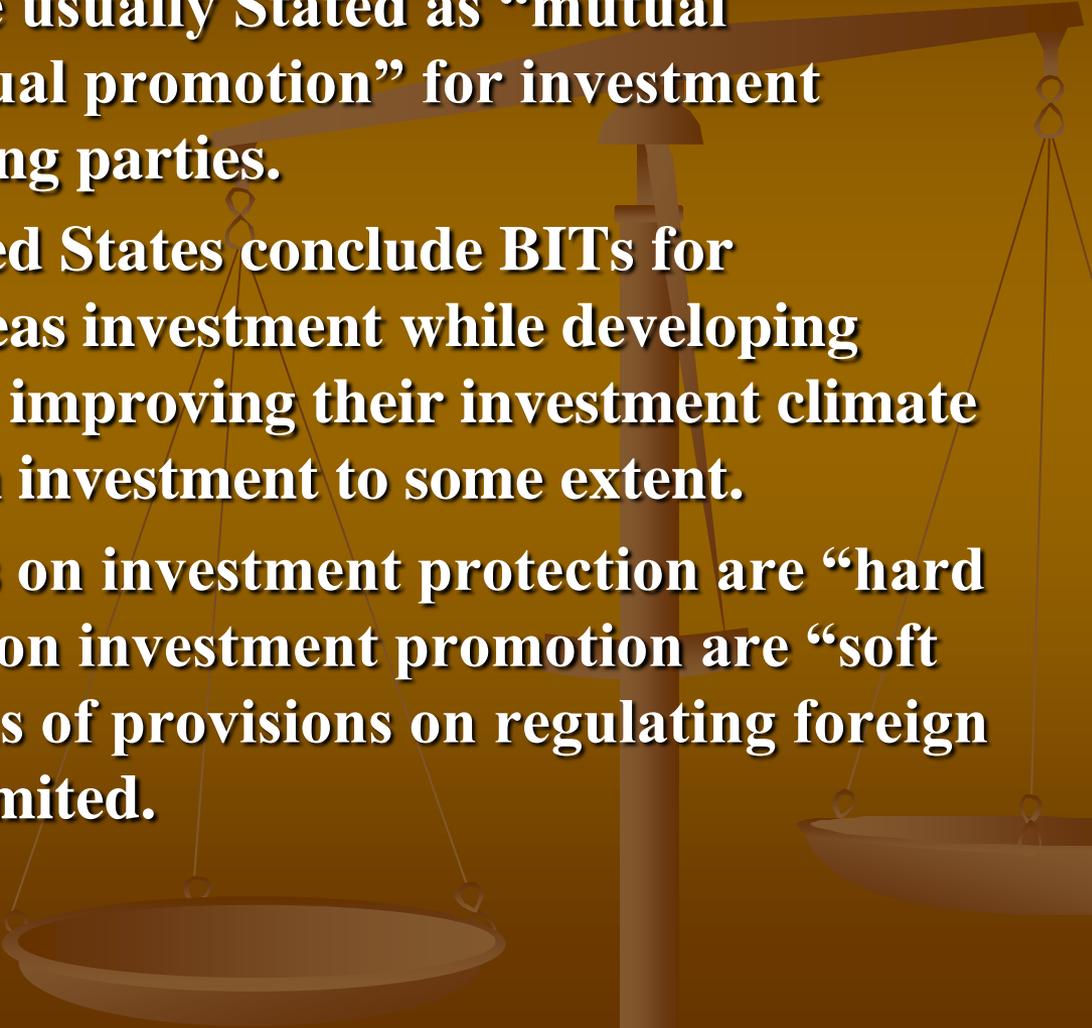
- **2. Un-equality of bargaining powers in BIT negotiation**
- To some extent the preparation of model BIT indicates the un-equal positions and bargaining powers between developed States and developing States in BIT negotiations.
- Developed States devoted considerable time and efforts to the preparation of model BIT, to serve as a basis of their BIT negotiations.

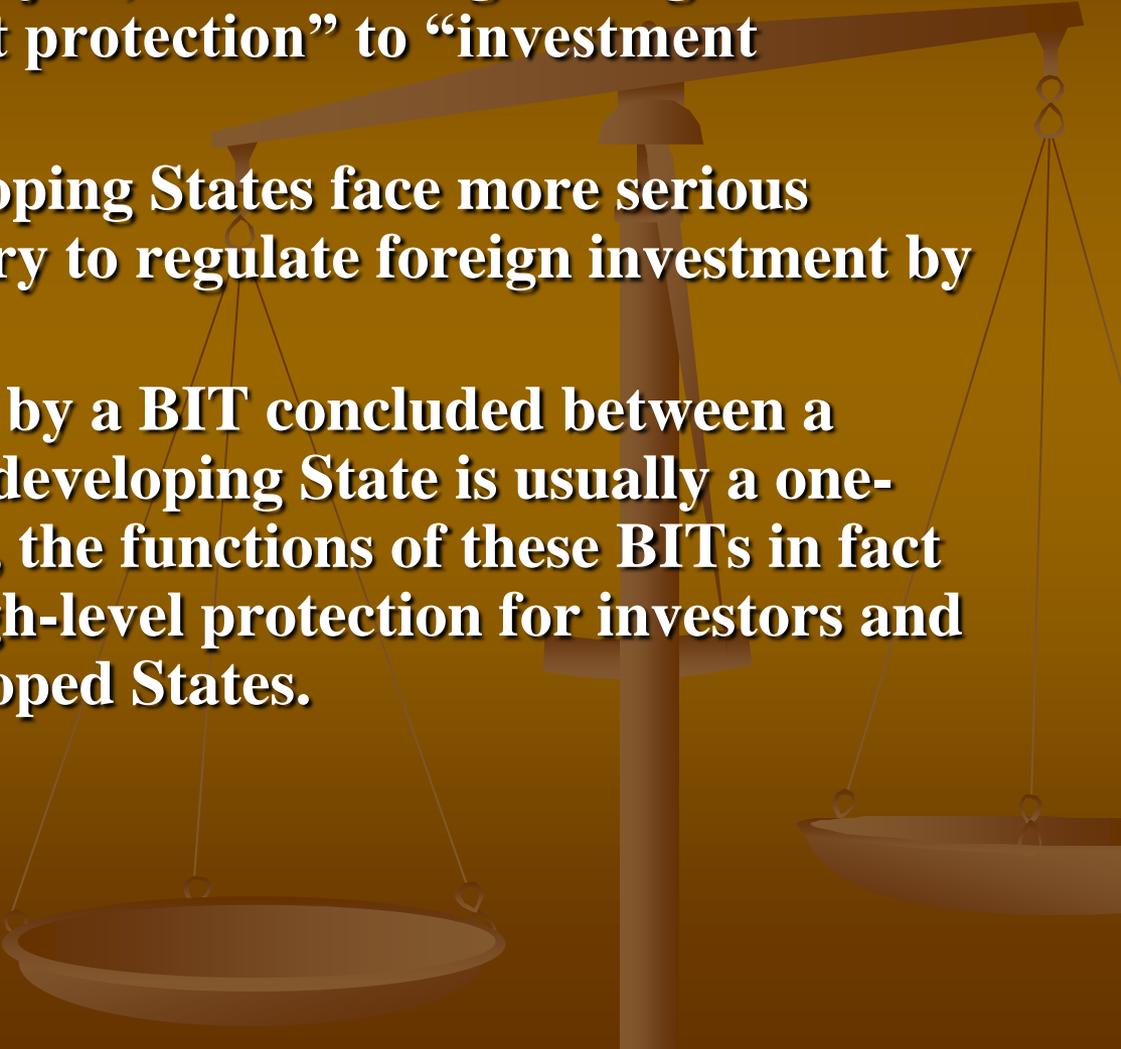


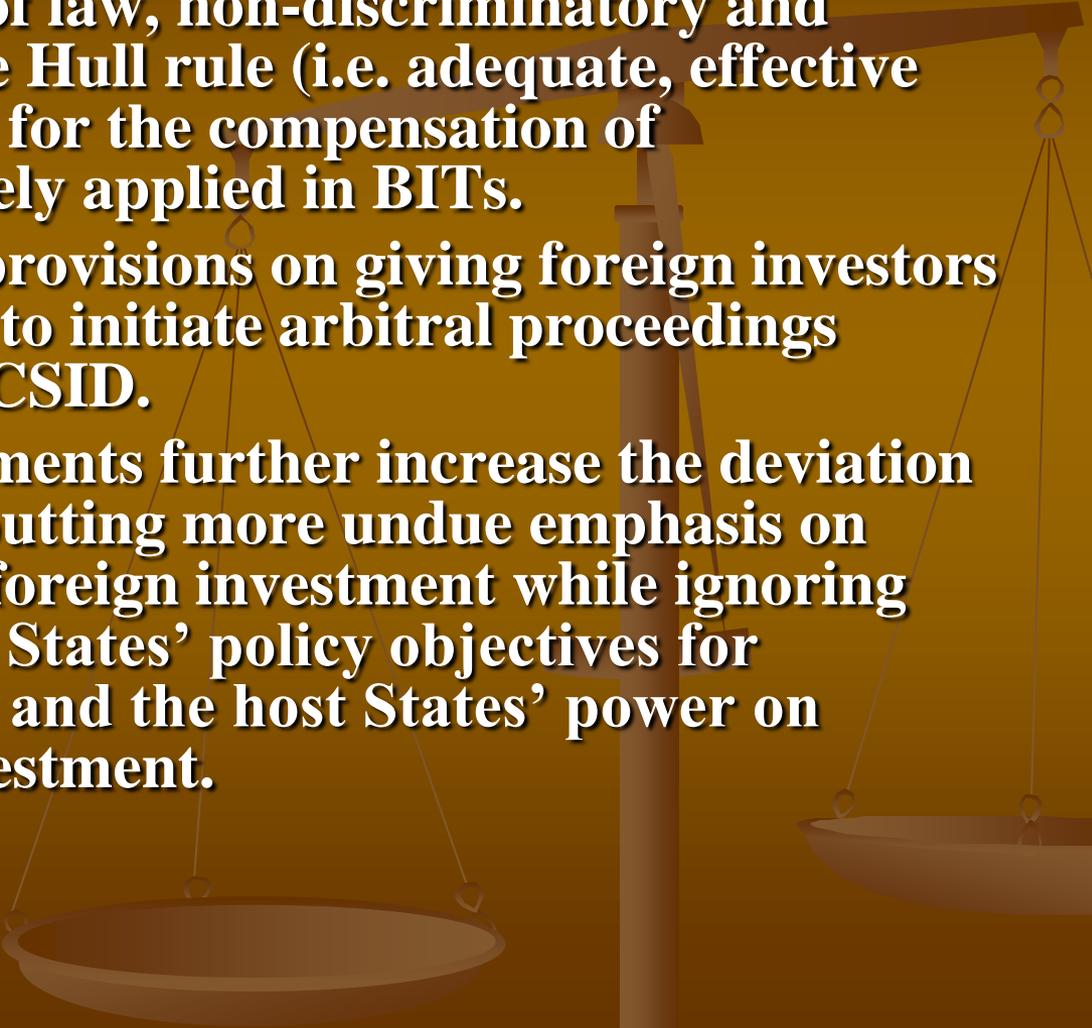
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- In general model BIT serves several purposes:
  - (1) its preparation is an occasion to study the entire issues of investment protection, to consult with interested governmental and private sector organizations, and to formulate a national position on the question.
  - (2) the model is considered as an efficient means of communicating to counterpart a concrete idea of the model that the developed State seeks.
  - (3) starting all negotiations with the same model is a way to attain the goal of unifying its BITs with various developing States.
  - (4) the model gives developed State a negotiating advantage, since the party who controls the draft usually controls the negotiation.

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- **By preparing a model that becomes the basis of discussion, developed State has determined the agenda of negotiation and has established the conceptual framework of BIT.**
  - **Most of developing States have not prepared model BITs. Accordingly they are in the position of merely reacting to the model BIT prepared by its counterpart.**
  - **Only a few developing States have prepared model BITs. These models are often greatly influenced by the developed States' model BITs due to historical, practical and/or technical elements.**
  - **It is difficult to expect some of the developing States which are signatories to these treaties to have legal departments sophisticated enough to understand the nuances in the variations in the language that is used in these treaties.**

### ■ 3. Deviation of objectives and functions in BITs

- Objectives of BITs are usually Stated as “mutual protection” and “mutual promotion” for investment between two contracting parties.
  - Traditionally developed States conclude BITs for protecting their overseas investment while developing States accept BITs for improving their investment climate and regulating foreign investment to some extent.
  - In practice, provisions on investment protection are “hard law” while provisions on investment promotion are “soft law”, and the functions of provisions on regulating foreign investment are very limited.
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- **Currently developed States, taking advantages from the economic globalization and liberalization, promote positively their BIT project, for attaining their goals of BITs from “investment protection” to “investment liberalization”.**
  - **In this situation, developing States face more serious challenges when they try to regulate foreign investment by BIT.**
  - **As investment covered by a BIT concluded between a developed State and a developing State is usually a one-way capital movement, the functions of these BITs in fact serve the unilateral high-level protection for investors and investment from developed States.**

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- **The host States' power on foreign investment admission is transformed gradually to investors' "establishment rights".**
  - **The four requirements for expropriation (i.e. for a public purpose, due process of law, non-discriminatory and compensation) and the Hull rule (i.e. adequate, effective and prompt payment) for the compensation of expropriation are widely applied in BITs.**
  - **There are increasing provisions on giving foreign investors unilateral direct right to initiate arbitral proceedings against host State in ICSID.**
  - **All these new developments further increase the deviation of functions of BITs, putting more undue emphasis on foreign investors and foreign investment while ignoring and crippling the host States' policy objectives for investment promotion and the host States' power on regulating foreign investment.**

## II. Seeking Innovative Path of BIT Practice

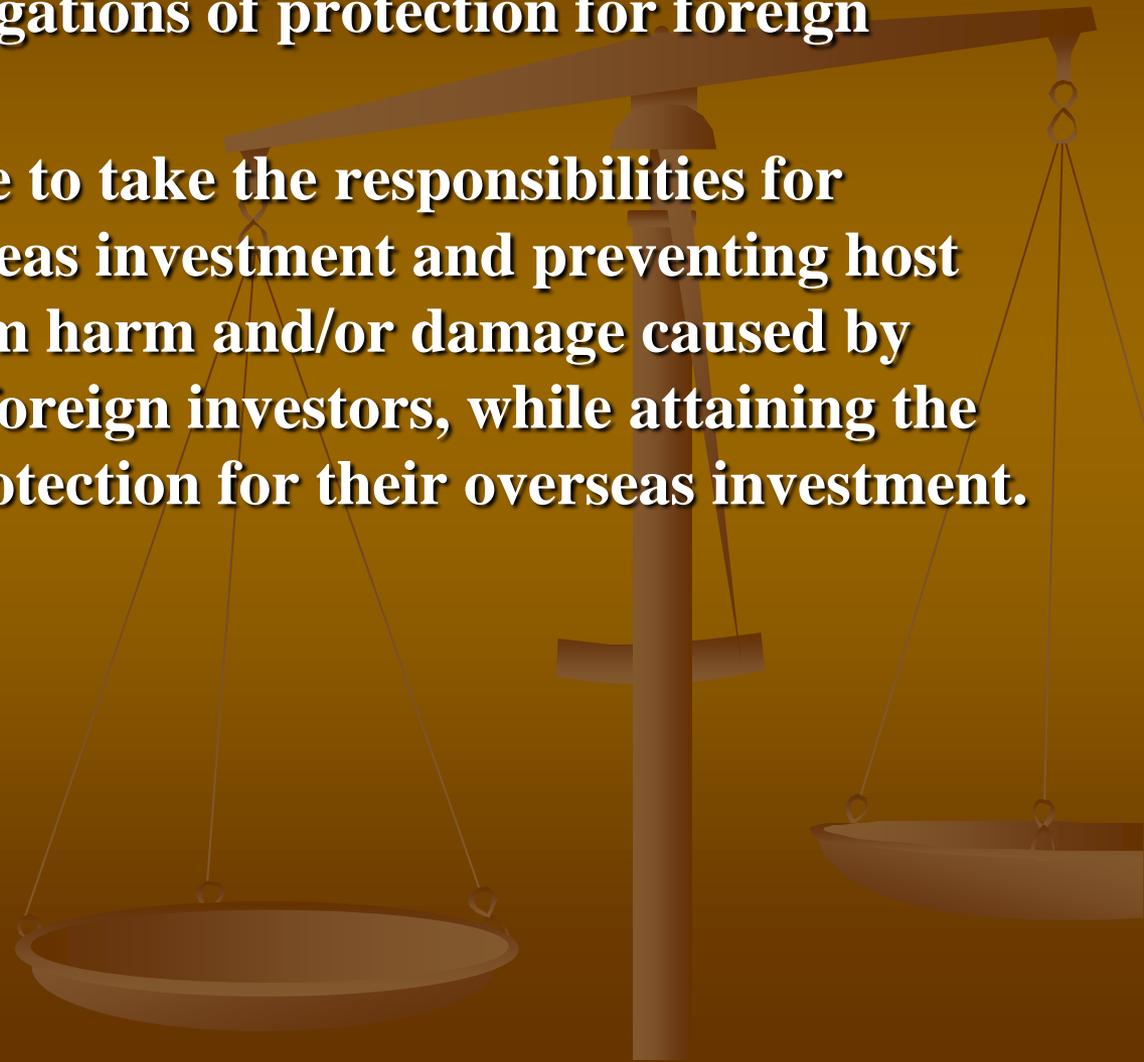
- For correcting the imbalance and un-equality of BIT practice, international society have to seek innovative path of BIT practice.
- **1. Reaching consensus by principles of “equity” and “sustainable development”**
- to pay attention to the South-North contradiction in the development of BIT practice;
- to recognize the negative impact of unilateral protection for capital-exporting States and transnational investors;
- to identify the imbalance elements of BIT practice; and
- to explore the innovative path for future BITs practice based on the principles of “equity” and “sustainable development”.

## ■ 2. Drafting new BIT model by international organizations

- It is evident that world-wide international organizations, especially UNCTAD, are more neutral and independent than individual State in preparing a model BIT with equal and balanced consideration for capital-exporting States and capital-importing States.
- The new model should be designed to serve for protection, promotion, and regulation of international investment, so as to realize the balanced powers, rights and interests between capital-exporting States and capital-importing States, and between host States and foreign investors.

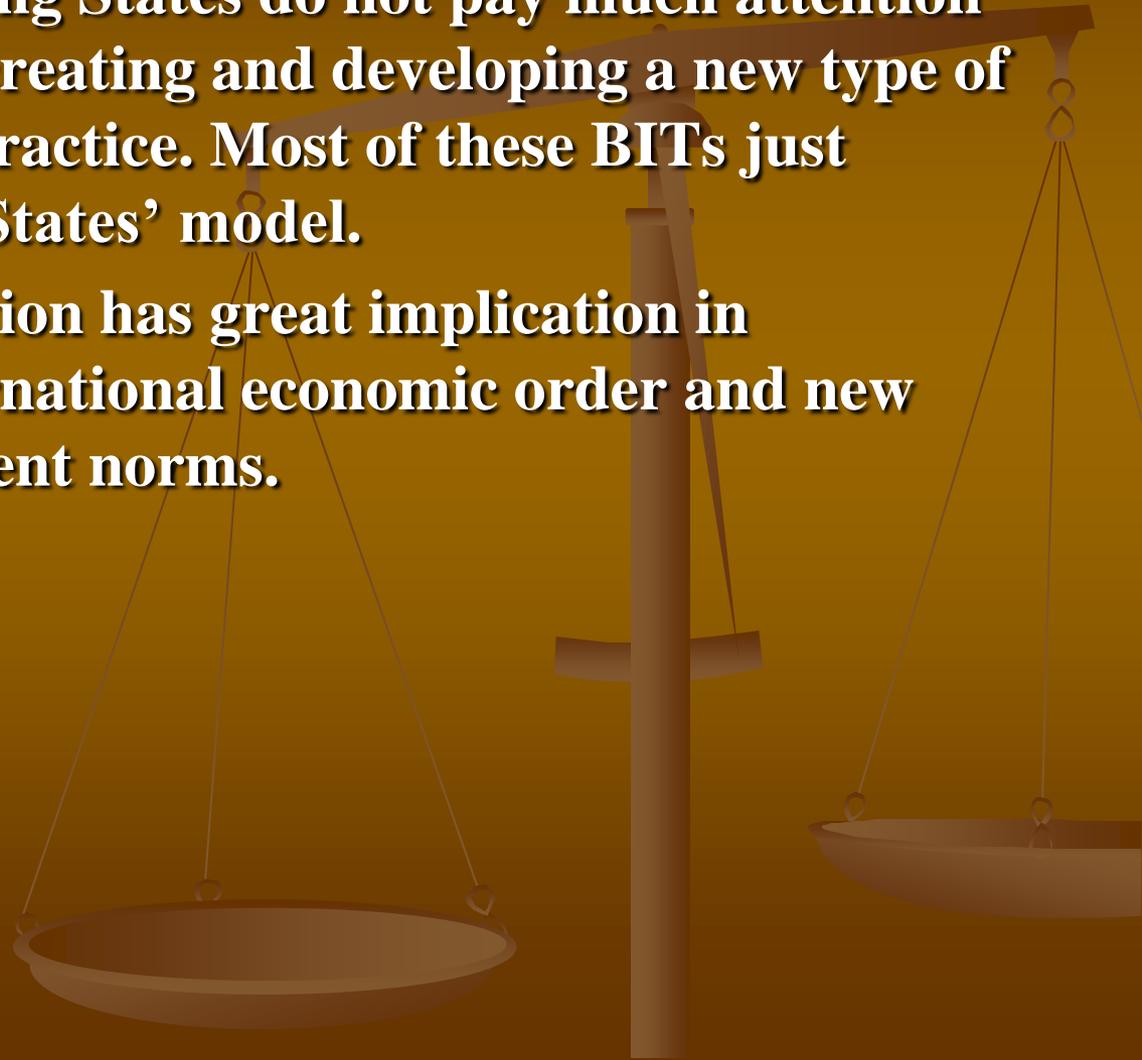


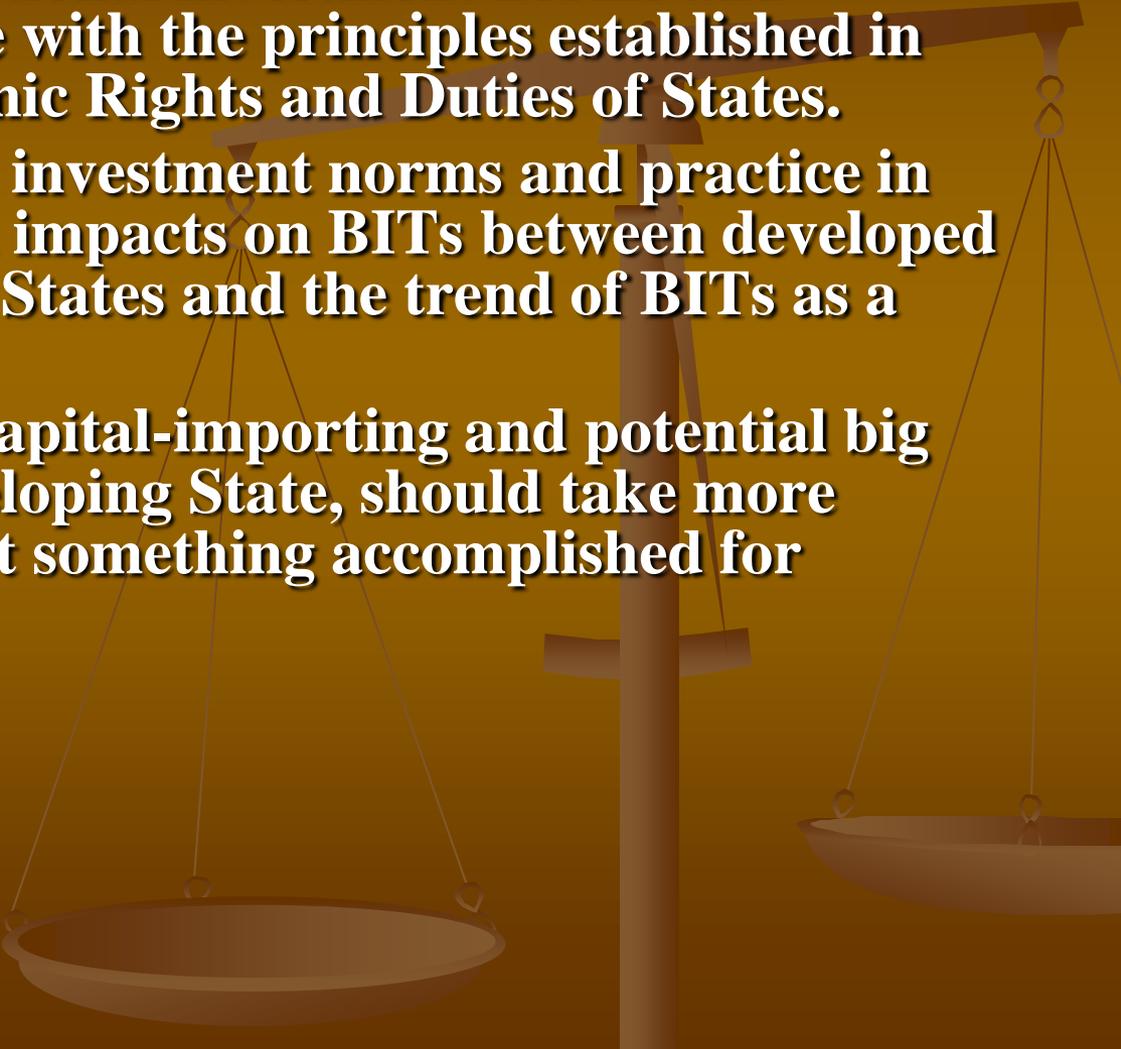
- **To these aims, developing States should enjoy absolute power on investment admission, performance requirement, etc., and bear the obligations of protection for foreign investment.**
- **Developed States have to take the responsibilities for regulating their overseas investment and preventing host developing States from harm and/or damage caused by negative conducts of foreign investors, while attaining the international legal protection for their overseas investment.**



### ■ 3. Conducting new BIT practice between developing States

- It seems that developing States do not pay much attention to the importance of creating and developing a new type of BIT from their own practice. Most of these BITs just follow the developed States' model.
- South-South cooperation has great implication in establishing new international economic order and new international investment norms.



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- **In the negotiation of BITs between developing States, as equal partners with common historical mission and objectives, both contracting parties may set up and constitute new international investment norms and practice in accordance with the principles established in the Charter of Economic Rights and Duties of States.**
  - **The new international investment norms and practice in turn may have certain impacts on BITs between developed States and developing States and the trend of BITs as a whole.**
  - **China, as the largest capital-importing and potential big capital-exporting developing State, should take more responsibilities and get something accomplished for innovation of BITs.**