

THE PARADOX OF INTERNATIONAL INVESTMENT LAW: TRIVIALIZING THE DEVELOPMENT OBJECTIVE UNDERLYING INTERNATIONAL INVESTMENT AGREEMENTS IN INVESTOR-STATE DISPUTE SETTLEMENT

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Abstract

International investment agreements (IIAs) are justified on the presupposition that they attract foreign investment which is sine qua non for development. In spite of the fact that the texts of IIAs reveal states enter into them to attract foreign investment for development which thereby embeds and centralises development as an expected outcome of the obligation to protect foreign investment, investment tribunals are divided as to whether an investment's contribution to development is an element in the definition of the concept of investment. While some tribunals have held that such contribution is an essential element of an investment, others have held the contrary view that contribution is not a criterion and that an investment does not need to make any specific contribution to the development of the host to be entitled to protection under an IIA. I argue that where contribution to development is a stated objective of an IIA, it is not necessary to establish whether contribution is an essential element of an investment but the IIA must be interpreted in light of that objective. The rule that a treaty must be interpreted in good faith, in context (which includes preambles and annexes) and in light of its object and purpose is well settled. Thus, I argue that where the development objective is an inherently embedded foundation of IIA, the obligation to protect foreign investment must interpretively be linked to the contribution such investment will make to the development of the host state. If no development benefit derives from the investment, it should not be entitled to protection under an IIA.

I. INTRODUCTION

The *paradox* of international investment law is the contradiction very much real and alive in international investment treaty law and arbitration. International investment agreements (IIAs) and arbitration are justified in terms of their supposed role in promoting the development of the host states through foreign investment attraction. Nevertheless, investor-state arbitration defines the concept of investment and adopts an approach to the settlement of investment disputes in terms which take out or trivialize the development objective underlying the IIA regime. In other words, the *paradox* of international investment law is about its opposite and contradictory features. This is revealed in particular in investment treaty arbitration, namely the fact that the very development reason that is used to justify the investment treaty regime is

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treated peripherally, in fact, as irrelevant in defining the concept of investment and in deciding the issue whether an investment should enjoy protection under an IIA if it does not make contribution to the development of the host state. This is the paradox with which this article is concerned.¹ Should contribution to development be treated as relevant in the definition of the concept of investment in investor-state dispute settlement? Should an investor lose the rights of protection under an IIA if its covered investment does not make a contribution to the development of the host state? I argue that in theory and in practice states enter into investment treaties to promote their development and not just to protect investment as an end in itself. Thus, there is the need for a *sustainable investment dispute settlement*; that is resolving investment disputes in manner that guarantee investors the enjoyment of rights under the applicable IIAs without compromising states' development interest in entering into the IIA. The continued existence and relevance of the IIA regime depends on its ability to balance and sustain the protection of the competing interests that underlie its construction. The IIA regime cannot be sustainable if the protection of one its competing interests becomes the primary occupation of investor-state arbitration to the neglect of other equally embedded interests.

The IIAs are premised on at least two disputed² related rationales. The first conventional supposition is that foreign investment leads to development and that IIAs are necessary to protect and thereby attract foreign investment.³ Based on this premise and other reasons, most countries have liberalised or strengthened their legal regimes for the promotion and protection of foreign investment and international law on foreign investment has been preoccupied with the treatment to be accorded to foreign investment and associated private property rights.⁴ The strengthening of the legal regime for foreign investment at the international level is reflected in the growth of IIAs which reached 3,304 by the end of 2015.⁵

The stated premise of the first IIA, reached between Germany and Pakistan in 1959, was the states' conviction that it was likely to promote investment, encourage private industrial and financial enterprise and *increase the prosperity of both states*.⁶ The Convention on the Settlement of Investment Disputes between States and Nationals of Other States of the International Centre for the Settlement of Investment Disputes (ICSID Convention)⁷ expresses the idea that there was a need for international cooperation and private international investment *for the attainment of economic development*. The IIAs, it is claimed, can attract foreign investment by establishing standards of investment protection such as fair and equitable

¹ My thinking here was influenced by Hans Morgenthau, "What Is the National Interest of the United States?" (1952) 282 *The Annals of the American Academy of Political and Social Science* 1; and Martin Loughlin and Neil Walker (eds), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford University Press, 2007).

² M Sornarajah, *Resistance and Change in the International Law on Foreign Investment* (Cambridge University Press, 2015) at 81-86.

³ For the rationales of the IIA regime see: Sornarajah, *Resistance and Change* *ibid* p 81, 107-108; M Sornarajah, *The International Law on Foreign Investment* (3edn Cambridge University Press, 2010) 82-88; Andrew T Guzman, 'Why LDCs Sign Treaties that Hurt Them: Explaining the Popularity of Bilateral Investment Treaties' (1997) 38 *Virginia Journal of International Law* 639; Jeswald W Salacuse, *The Law of Investment Treaties* (Oxford University Press, 2010); Kenneth J Vandeveld, *Bilateral Investment Treaties: History, Policy, and Interpretation* (Oxford University Press, 2010); Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (Oxford University Press, 2008) and Reinisch August (ed), *Standards of Investment Protection* (Oxford University Press, 2008).

⁴ Dominic N Dagbanja, "The Investment Treaty Regime and Development Policy in Ghana: Analysis in Constitutionalism and General International Law" in Andrea K Bjorklund (ed), *Yearbook on International Investment Law and Policy 2014-2015* (Oxford University Press 2016) 405

⁵ UNCTAD, *World Investment Report 2016: Investor Nationality: Policy Challenges* (United Nations Publication, 2016) xii and 104.

⁶ *Pakistan and Federal Republic of Germany Treaty for the Promotion and Protection of Investments*, signed at Bonn, on 25 November 1959.

⁷ *Convention on the Settlement of Investment Disputes between States and Nationals of Other States* entry into force on 14 October 1966.

treatment, full protection and security, national treatment, most-favoured-nation treatment, repatriation of investment returns and prohibition against direct and indirect expropriation.⁸

A second argument is that host states' judicial systems cannot provide adequate protection for foreign investors. Therefore, to ensure that these standards of investment protection are 'effectively' enforced, IIAs make provision for investment arbitration to settle investment disputes between states and foreign investors.⁹ By the end of 2015, the number of investor-state dispute settlement claims reached 696 with 107 states as respondents.¹⁰

In spite of the fact that developing states enter into IIAs to attract foreign investment for development¹¹, investment tribunals are divided as to whether an investment's contribution to development is an element in the definition of the concept of investment. They are consequently not agreed on whether an investment should be entitled to protection under an IIA if it does not make any contribution to the development of the host state. As Dr Diane Desierto stated¹²:

[T]he concept of development figures in two highly polemical questions that have become a staple in contemporary investment arbitral disputes. The first question asks whether development should be treated as an essential element or criterion (rather than simply a descriptive feature) to establish the existence of an "investment" to which the international investment agreement (IIA) would apply ... The second question inquires if the state's regulatory prerogative to pursue development objectives form part of subject matter that can be deemed excluded from the applicability of an IIA ... [T]hese questions speak to a much broader *problématique* about the extent of applicability of an IIA to an investor-state dispute when the host state has to contend with challenging adverse development situations arising during the life of an investment.

Professor Muthucumaraswamy Sornarajah articulated a similar point:¹³

It is not far-fetched to argue that there is an ideological schism that dominates the debate on the definition of investment. Those who seek to confine the jurisdiction of tribunals would seek to define consent of states as being confined to investments that clearly promote economic development, whereas the expansionists would not like to see jurisdiction limited in this manner. The explanation of the rift between these two views does not turn only on the interpretation of words, but on the imputation of policy objectives.

⁸For the history behind the IIA regime and the justification for this regime see Sornarajah, *Resistance and Change in the International Law on Foreign Investment* at 78-135; Ignaz Seidl-Hohenveldern "The ABS-Shawcross Draft Convention to Protect Private Foreign Investment: Comments on the Round Table" (1961) 10 *Journal of Public Law* 100

⁹Christopher Dugan et al, *Investor-State Arbitration* (Oxford University Press, Oxford, 2008); and Dodge, William S, "Investment Treaties between Developed States: The Dilemma of Dispute Resolution" in Rogers, Catherine A, and Alford, Roger P (eds), *The Future of Investment Arbitration* (Oxford University Press: New York, 2009) 165; M Sornarajah, *Resistance and Change*, See above note 3, 136-190; ; M Sornarajah, "Evolution or Revolution in International Investment Arbitration" in Chester Brown and Kate Miles (eds), *Evolution in Investment Treaty Law and Arbitration* (Cambridge University Press, Cambridge 2011) 631; M Sornarajah, *The Settlement of Foreign Investment Disputes* (Kluwer Law International, 2000)

¹⁰UNCTAD, *World Investment Report 2016*, See note 5 above.

¹¹Sornarajah, *Resistance and Change*, See note 3 above; Sornarajah, *Law on Foreign Investment*, See note 3 above; Salacuse, *Law of Investment Treaties*, See note 3 above; and Guzman, *Why LDCs Sign Treaties*, See note 3 above.

¹²Diane A. Desierto, 'Deciding International Investment Agreement Applicability: The Development Argument in Investment' in Freya Baetjens (ed), *Investment Law within International Law: Integrationist Perspectives* (Cambridge University Press, 2013) 240, 240-241.

¹³Sornarajah, *Resistance and Change*, See note 3 above, p 162.

This article contributes to a new way of assessing whether an investment's contribution to development should be taken into consideration in defining the concept of investment and whether a lack of such contribution should deny an investment legal protection based on textual rather than historical and policy analysis. The article reviews various international texts and conventions on investment and trade to ascertain the extent to which development is an objective in those treaties and the role that such an objective might play in commercial and investment disputes settlement.

Based on purposive interpretation and analysis, I argue that the substantive obligation to protect an investment is an economic exchange or *offer* for the contribution an investment will make to development (*consideration*) for the host states. Therefore, contribution to development or lack of it must be taken into consideration in defining an investment and in deciding whether the investment should be entitled to protection. I point out the centrality of development as one of the purposes for the construction of the IIA regime and the need for that purpose to be factored into investment disputes settlement. I make a purposive case for sustainable investment disputes settlement: an approach to dispute resolution that takes into account the rights of private business and commercial parties to the dispute without compromising any of the purposes of the governing legal text and the autonomy of states to regulate generally to promote development.

II. DEVELOPMENT AS OBJECTIVE OF INTERNATIONAL INVESTMENT AGREEMENTS

A case can only be made for the development objective to be factored into investor-state dispute settlement if it is shown that objective is central and inherent part of the investment treaty regime. This section does that.

Liberal economic theory justifies free trade and investment in terms of development.¹⁴ According to Professor Sornarajah:¹⁵

Independently of the structuring of the theory of internationalization of foreign investment contracts through the inclusion of appropriate clauses that increase external contacts of the contracts, policy grounds have been developed to justify the theory of internationalization. The policy grounds are founded in clearly classical economic views that foreign investment brings unmitigated blessings to a developing country, and that flows of such investment should be promoted through legal protection given through international law ...

The justifications concentrate on the benefits of foreign investment. The benefits brought by foreign investment include technical assistance, transfer of new technology, the building of infrastructure and new employment for local personnel. Such flows would not take place if there was instability in the legal regime that covered the foreign investment. The considerable financial risks involved in making investments in sectors like petroleum required that there should be security for such investments. Security and stability are essential because of the long duration of the contract. Since the laws of the host state were inherently unstable, it was necessary to rectify this situation by

¹⁴Sornarajah, *Resistance and Change*. See note 3 above, 19-31; Jane Kelsey, *The Fire Economy: New Zealand's Reckoning* (Bridget William Books, 2015), 121-149; Jane Kelsey, *Reclaiming the Future: New Zealand the Global Economy* (Bridget Williams Books, 2000), p 200.

¹⁵ *Resistance* at 107-108.

constructing stable rules that promoted contractual stability. These are long-standing justifications for the protection of foreign investment through internationalization.

Global policymakers and many trade and investment scholars share this view that there is a relationship between foreign investment and development. The basic proposition on why there is the need for friendly policies and laws on foreign investment has been summed up by Kofi Annan, former United Nations Secretary-General in the following words: “[w]ith its enormous potential to create jobs, raise productivity, enhance exports and transfer technology, foreign direct investment is a vital factor in the long-term economic development”¹⁶ of developing countries. Annan also stated that outward investment offers additional avenues for developing countries to link up to global markets and production systems. These investments, if managed properly, according to Annan, could help firms to access markets, natural resources, foreign capital, technology or various intangible assets that are essential to their competitiveness that may not be readily available in their home countries.¹⁷

Professor Terutomo Ozawa argues that while an outward-orientation alone is not a sufficient condition for rapid development, it does create a climate favourable for the transfer by transnational corporations, and the absorption by local enterprises of modern managerial, production and marketing technologies which are the *sine qua non* of industrial modernization.¹⁸ In the opinion of Ozawa, any developing country serious about raising living standards “must open its economy so as to avail itself of opportunities to trade, interact with and learn from the already advanced.”¹⁹ This is because the advanced countries are not only “the rich reservoirs of industrial technology, information and experiences which the followers can tap,”²⁰ “[t]hey also provide the promising export markets from which the less developed can earn precious hard currencies.”²¹ Thus, as summed up by Professor Sornarajah, the “premise on which investment treaties are made is that foreign investment leads to economic development and that foreign investment treaties lead to greater flows of foreign investment.”²² However, in theory and practice this is not so.²³ Professor Ozawa’s claim as to technology transfer arising from trade and investment is quite exaggerated to the extent that international agreements (such as Commission Regulation (EU) No 316/2014) restrict or limit technology transfer.²⁴

There are many reasons for the development of IIAs and arbitration.²⁵ However, from an interpretive perspective there cannot be a better source to explain the objectives of IIAs than their texts. The preambles,

¹⁶ Kofi Annan, “Foreword” in UNCTAD, *World Investment Report 2003: FDI Policies for Development: National and International Perspectives* (United Nations, 2003) iii.

¹⁷ *Ibid.*

¹⁸ Terutomo Ozawa, “*Foreign Direct Investment and Economic Development*” (1992) 1 *Transnational Corporations* 27

¹⁹ *Ibid.* 27.

²⁰ *Ibid.*

²¹ *Ibid.*

²² Sornarajah, *Law on Foreign Investment*. See above note 3, p 229.

²³ M Sornarajah and Leo Trakman, “A Polemic: The Cases for and Against Investment Liberalization” in Leon A Trakman and Nicola W Ranieri (eds), *Regionalism in International Investment Law* (Oxford University Press, 2013) 499, p 504

²⁴ Commission Regulation (EU) No 316/2014 of 21 March 2014 < <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014R0316&from=EN>>

²⁵ Sornarajah, resistance 78-135 and 136-190; Chester Brown and Kate Miles (eds), *Evolution in Investment Treaty Law and Arbitration* (Cambridge University Press, 2011); Kate Miles, *The Origins of International Investment Law: Empire, Environment and the Safeguarding of Capital* (Cambridge University Press, 2013); Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press, 2005) 445; Kojo Yelapaala “Fundamentalism in public health and safety in bilateral investment treaties [Part I]” (2008) 3(1)

and to a limited extent, the substantive provisions of investment and trade agreements justify trade and investment regimes in terms of development. This is reflected in treaties entered into not only between developing countries and developed countries, but also within and among developed countries and within and among developing countries themselves. For example, Ghana is a party to a number of investment treaties with United Kingdom, Netherlands, Denmark, China and Malaysia, among others. The preambles to these investment treaties state that they are intended to create favourable conditions for foreign investment because of its role in development. Strengthening cooperation between private enterprises of the contracting parties is also an important objective of Ghana's investment treaty framework..

The objective of the Ghana-United Kingdom investment treaty²⁶ was "to create favourable conditions for greater investments".²⁷ The states parties assumed that the "encouragement and reciprocal protection under international agreement of such investments will be conducive to the stimulation of individual business initiative and will increase prosperity".²⁸ The Ghana-Netherlands investment treaty²⁹ was meant "to strengthen the traditional ties of friendship"³⁰ between the two countries and "to extend and intensify the economic relations between them particularly with respect to investments".³¹ An agreement upon the treatment to be accorded to foreign investments was considered necessary to stimulate the flow of capital and technology for development.

The Ghana-Malaysia investment treaty³² was intended "to expand and strengthen economic and industrial cooperation on a long term basis, and in particular, to create favourable conditions for investments."³³ The parties recognised the need to protect investments "to stimulate the flow of investments and individual business initiative with a view to promoting ... economic prosperity".³⁴ The Ghana-China investment treaty³⁵ expressed the parties' desire "to encourage, protect and create favourable conditions for investment",³⁶ "based on the principles of mutual respect for sovereignty, equality and mutual benefit and for the purpose of the development of economic cooperation between both States."³⁷

The stated objective of all these investment treaties in providing the legal basis for the protection of foreign investment is explicitly linked to development cooperation, economic development, increased prosperity and stimulation of the flow of capital and technology. Therefore, the search for development is an objective of Ghana and its contracting parties' investment treaties as is with other developing countries.

Asian Journal of WTO and International Health Law and Policy 242 at 249; and Dominic N Dagbanja, "The Limitation on Sovereign Regulatory Autonomy and Internationalization of Investment Protection by Treaty: An African Perspective" (2015) 60(1) *Journal of African Law* 1

²⁶ *Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Ghana for the Promotion and Protection of Investments* (signed 22 March 1989, entered into force 25 October 1991 ("Ghana-United Kingdom Investment Treaty").

²⁷ *Ibid.*

²⁸ *Ibid.*

²⁹ *Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Republic of Ghana* (signed 31 March 1989, entered into force 1 July 1991 ("Ghana-Netherlands investment Treaty").

³⁰ *Ibid* preamble.

³¹ *Ibid.*

³² *Agreement between the Government of the Republic of Ghana and the Government of Malaysia for the Promotion and Protection of Investments* (signed on 8 November 1996, entered into force 18 April 1997 ("Ghana-Malaysia Investment Treaty").

³³ *Ibid.* preamble.

³⁴ *Ibid* preamble.

³⁵ *Agreement between the People's Republic of China and the Government of the Republic of Ghana Concerning the Encouragement and Reciprocal Protection of Investments* (signed 12 October 1989, entered into force on 22 November 1991 ("Ghana-China Investment Treaty").

³⁶ *Ibid* preamble.

³⁷ *Ibid.*

The investment treaties never pretend to present the protection of foreign investment as an end in itself. The articulation of development as an objective of foreign investment promotion and protection necessitates the integration of development concerns into the enforcement of investment treaties.³⁸

The parties to the Agreement Establishing the World Trade Organisation³⁹ put development at the centre stage of trade promotion and protection when they stated in the very first paragraph of the preamble to the Agreement that the contracting parties’:

relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world’s resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development.

The WTO Agreement on Trade-Related Investment Measures reflects the members’ desire “to promote the expansion and progressive liberalisation of world trade and to facilitate investment across international frontiers so as to increase the economic growth of all trading partners,” taking into account the particular “trade, development and financial needs” of developing countries.⁴⁰ The Trans-Pacific Partnership Agreement (TPPA) is a comprehensive regional agreement (among Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, United States, and Vietnam) that is aimed at promoting “economic integration to liberalise trade and investment, bring economic growth and social benefits, create new opportunities for workers and businesses, contribute to raising living standards, benefit consumers, reduce poverty and promote sustainable growth.”⁴¹ Very significantly the investment chapter in Article 9.16 recognises the rights of member stated to adopt, maintain or enforce measures to protect the environment and human health.

In relation to the objectives of international trade rules, Peter Van den Bosche and Werner Zdouc argue that “international trade can make a significant contribution to economic development and prosperity in developed as well as developing countries.”⁴² In their opinion, international trade rules “are necessary” because “as a result of the greatly increased levels of trade in goods and services, the *protection and promotion of important social values* such as public health, a sustainable environment, consumer safety, cultural identity and minimum labour standards is no longer a purely national matter.”⁴³ I argue then that where the objective of attaining development is intimately and inherently embedded in these IIAs and trade agreements, a state that is party to them should be able to say a particular investment or commercial activity is not entitled to claim legal protection under the applicable treaty if the investment or commercial

³⁸ Dagbanja, Investment Treaty Regime and Development Policy, See above not 4, 419-429.

³⁹ *Agreement Establishing the World Trade Organisation*, Marrakesh, 15 April 1994, <https://www.wto.org/english/docs_e/legal_e/04-wto.pdf>

⁴⁰ *Agreement on Trade-Related Investment Measures*, https://www.wto.org/english/docs_e/legal_e/18-trims.pdf.

⁴¹ *Trans-Pacific Partnership Agreement* <<http://dfat.gov.au/trade/agreements/tpp/official-documents/Pages/official-documents.aspx>>

⁴² Peter Van den Bosche and Werner Zdouc, *The Law and Policy of World Trade Organization* (3edn, Cambridge University Press, 2013), p 30

⁴³ *Ibid* p 33 (emphasis original).

activity will not contribute to the development of the host state. This is because by these agreements reviewed herein, a business undertaken or transaction should only qualify as investment if it will make contribution to the development of the host. Indeed, by these agreements it is contribution to development from the perspective of the state that has entered into the investment treaties that is one of the primary criteria that constitute investment because that objective is one of the underlying reason states entered into these investment treaties.

III. THE CONTRIBUTION OF INVESTMENT TO DEVELOPMENT AND INVESTOR-STATE DISPUTES SETTLEMENT

This section is primarily concerned with investigating the importance that investment treaty arbitration attaches to development in settling investor-state disputes. The point made in this section is that, since states enter into investment agreements to promote a number of objectives including development yet development is not central in investment arbitral decision-making, states need to reconsider whether investment treaties and investment arbitration are the appropriate mechanisms to advance their development goals.

A. *Contribution of Investment to Development as a Non-essential Element of Investment*

The majority of known arbitral decisions hold the view that an investment does not need to contribute to the development of a host state before it can enjoy an investment treaty protection and that a state may not invoke an investment's lack of contribution to development as a defence for breach of an IIA.

In *Société Générale v Dominican Republic*⁴⁴ the investor argued that the Dominican Republic had expropriated its investments in an electricity distributor because the country failed to allow for electricity rate increases and to control rampant electricity theft. This claim was based on a bilateral investment agreement between the Dominican Republic and France.⁴⁵ The Dominican Republic objected to the Tribunal's jurisdiction. It argued that Société Générale had not made an investment that could be protected by the investment treaty because there was no contribution to the Republic's development as the preamble to the treaty envisaged. The preamble stated that the promotion and protection of investment between the two countries would stimulate the transfers of capital and technology "in the interest of their economic development."

The Tribunal constituted under the UNCITRAL Rules⁴⁶ held that to the extent that the shares, concessions under contract and claims and rights to any benefit having an economic value were involved in the dispute, they all qualified for protection independently of the manner in which they each contributed

⁴⁴ *Société Générale v. Dominican Republic*, LCIA Case No UN 7927, UNCITRAL Arbitration Rules, Award on Preliminary Objections to Jurisdiction 19 September 2008.

⁴⁵ *Agreement between the Government of the French Republic and the Government of the Dominican Republic on the Reciprocal Promotion and Protection of Investment* signed on 14 January 1999 and entry into force on 23 January 2003.

⁴⁶ *UNCITRAL Arbitration Rules* as revised in 2010

to stimulating the transfer of capital and technology. According to the Tribunal, the transfer of capital and technology was the “overall objective but not a specific requirement for each individual form of investment, which would be in any event most difficult to establish on a case-by-case basis.”⁴⁷ The fact that the preamble set out the general objective of economic relationship between the two countries did not detract from the fact that every form of investment listed in the investment treaty qualified for protection whether it contributed to development or not.⁴⁸ The Tribunal’s position denies the development objective of the IIA as revealed in its text.

In finding that the investor had made an investment, the Tribunal held that the principal objective of the transaction was the potential profitability of the investment in the hope that the electricity sector in the Dominican Republic would become financially viable since the investors were involved financial services and investment funds.⁴⁹ Finally, the Tribunal held that the “issue of specific contribution made to the local economy by a transaction of this kind might not be as easy to identify ... but this of course does not disqualify financial investments from protection”⁵⁰ under the treaty. In relation to the role of a preamble to determining substantive rights, the Tribunal held that a preamble sets out the general purposes and objectives of the Treaty but “cannot add substantive requirements to the provisions of the Treaty.”⁵¹ The Tribunal reasoned that preambles become necessary only “when the ordinary meaning of the text cannot be clearly established by the pertinent provisions themselves, which is not the case here”⁵² because the applicable IIA defined investment non-exhaustively in the sense that it did not restrict the scope of application of the concept.⁵³ The position of the Tribunal as to when preambles become necessary is quite inaccurate and misleading. As I establish below, treaties are to be interpreted to promote their objects. Thus to the extent that a treaty’s object is stated in its preamble the substantive terms of the treaty must be interpreted in reference to the object as contained in the preamble. So preambles always be necessary to refer to so long as they contain the objects of the applicable treaties.

In *Conorzio Groupement LESI-DIPENTA v Algeria*,⁵⁴ the investor won a contract for the construction of a dam to provide drinking water for the city of Algiers. The regulatory institutions claimed they wanted to change the method of construction and suspended the contract. The contract was subsequently terminated a few years later because little progress was being made on the job. The investors alleged breach of the full protection and security provision of the investment treaty between Algeria and Italy⁵⁵ and sought damages flowing from cancellation of the contract. Algeria argued that the contract did not meet the definition of “investment” within the meaning of Article 25 of the ICSID Convention. According to Algeria, the claimant made no capital, material, or industrial contribution for the establishment of the worksite, which investments would have become the property of the state after completion of the contract.

⁴⁷ *Société Générale v. Dominican Republic*, See above note 44, at [33].

⁴⁸ *Ibid.*

⁴⁹ *Ibid* at [34].

⁵⁰ *Ibid* at [35].

⁵¹ *Ibid* at [31].

⁵² *Ibid* at [31].

⁵³ *Ibid* at [32].

⁵⁴ *Conorzio Groupement LESI-DIPENTA v Algeria*, ICSID Case No ARB/03/08, Award (10 January 2005).

⁵⁵ *Agreement on the Promotion and Reciprocal Protection of Investments between Algeria and Italy*, entry into on 26 force November 1993.

The Tribunal held that in deciding whether a contract is an investment within the meaning of Article 25 of the ICSID Convention, “it is not necessary that the investment contribute more specifically to the host country’s economic development, something that is difficult to ascertain”⁵⁶

Other cases hold a similar position as those above as to the relevance of contribution to development in investor-state dispute settlement. *Ceskoslovenska Obchodni Banka AS v Slovak Republic*⁵⁷ holds the view that the concept of investment should be interpreted broadly because the drafters of the ICSID Convention did not impose any restrictions on its meaning. The Preamble to the ICSID Convention declares that the contracting states have taken into consideration the need for international cooperation for ‘economic development, and the role of private international investment therein’. It could be inferred, therefore, that an international transaction which “contributes to cooperation designed to promote the economic development of a Contracting State may be deemed to be an investment as that term is understood in the Convention.”⁵⁸ However, the case also suggests that the parties’ consent to the jurisdiction of ICSID is very important in determining a tribunal’s jurisdiction, irrespective of whether or not a specific investment project made a contribution to a host country’s development.⁵⁹

The *Ceskoslovenska Obchodni Banka* tribunal ultimately decided that a two-fold test was to be applied in determining whether it had the competence to consider the merits of the claim: whether the dispute arose out of an investment within the meaning of the ICSID Convention and, if so, whether the dispute related to an investment as defined in the state parties’ consent to ICSID’s arbitration and in their reference to the bilateral investment agreement⁶⁰ and the pertinent definitions contained in the agreement.⁶¹ In effect, the contribution of the loan, which was the subject matter of the dispute, to Slovak Republic’s development was irrelevant in determining whether the transaction constituted an investment or not.

A couple of other recent cases demonstrates that contribution to development is not central in investment treaty arbitration. In *Electrabel SA v Republic of Hungary*,⁶² the Tribunal while identifying profit and return as necessary and integral elements of an “investment” held that although “the economic development of the host State is one of the objectives of the ICSID Convention and a desirable consequence of the investment ... it is not necessarily an element of an investment.”⁶³ Similarly, the Tribunal stated in *Saba Fakes v Turkey*⁶⁴ that it was not convinced:⁶⁵

... that a contribution to the host State’s economic development constitutes a criterion of an investment within the framework of the ICSID Convention. Those tribunals that have considered this element as a separate requirement for the definition of an investment ... have mainly relied on the preamble to the ICSID Convention to support their

⁵⁶ *Consorzio Groupement LESI-DIPENTA v. Algeria*, supra note 81, at [13](iv)].

⁵⁷ *Ceskoslovenska Obchodni Banka AS v Slovak Republic*, ICSID Case No ARB/97/4, (Decision of the Tribunal on Objections to Jurisdiction, 24 May 1999, at [64].

⁵⁸ *Ibid.*

⁵⁹ *Ibid* at [66].

⁶⁰ *Agreement between the Government of the Slovak Republic and the Government of the Czech Republic Regarding the Promotion and Reciprocal Protection of Investments* signed on 23 November 1992, entered into force on January 1993

⁶¹ *Ceskoslovenska v Slovak Republic*, See note 57 above, at [68].

⁶² *Electrabel SA v Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability (30 November 2012).

⁶³ *Ibid* at [5.43].

⁶⁴ *Saba Fakes v Turkey*, ICSID Case No. ARB/07/20, at 97 (emphasis added).

⁶⁵ *Ibid* at [97].

conclusions. The present Tribunal observes that while the preamble refers to the ‘*need for international cooperation for economic development*,’ it would be excessive to attribute to this reference a meaning and function that is not obviously apparent from its wording. In the Tribunal’s opinion, *while the economic development of a host State is one of the proclaimed objectives of the ICSID Convention, this objective is not in and of itself an independent criterion for the definition of an investment.* The promotion and protection of investments in host States is expected to contribute to their economic development. Such development is an expected consequence, not a separate requirement, of the investment projects carried out by a number of investors in the aggregate. Taken in isolation, certain individual investments might be useful to the State and to the investor itself; certain might not. Certain investments expected to be fruitful may turn out to be economic disasters. They do not fall, for that reason alone, outside the ambit of the concept of investment.

The above thus treat an investment’s contribution to development as an irrelevant contribution in defining investment. Such a position is untenable because investment tribunals have an obligation to interpret a treaty in light of its objectives, which includes the development objective. The substantive terms of IIAs must be interpretive to advance the purposes of treaties in which they are contained. From the point of view of the state, the expected outcome of an investment is the development of the host state because that expected outcome is one of the reasons the states entered into the IIA at the minimum as textually revealed in preambles. Thus, while a business transaction might ordinarily and normally qualify as an investment without the presence of and need for the expected outcome, for purposes of and within the context of an IIA such a business transaction does not qualify as an investment if the expected outcome cannot be realised or is not present. In such a situation, the state’s obligation to protect which was undertaken because of that expected outcome should not be enforceable against the state. Furthermore, even if it does not qualify and is not treated as a constituent element of the concept of investment, an investment should not be entitled to protection to the extent that that contribution to development is clearly stated as an objective of the applicable IIA and it is manifest that the IIA was entered into for that the realisation of that objective besides any others that may be ascertainable from the IIA.

B. Contribution to Development as an Essential Element of Investment

There are other cases that hold the contrary view that the contribution of an investment to the development is an element of the concept of investment and should be taken into consideration in making decision whether such an investment is entitled to legal protection under the applicable treaty. A case in point is *Fedax NV v Republic of Venezuela*⁶⁶ in which Fedax alleged that Venezuela did not pay the principal sum owing under six promissory notes it had purchased as investment, regular interest on five of such promissory notes, and penal interest from the dates of maturity on all six promissory notes. The claim was brought under an investment treaty between the Kingdom of the Netherlands and the Republic of Venezuela which guaranteed investments fair and equitable treatment; no impairment, arbitrary or

⁶⁶ *Fedax NV v Republic of Venezuela*, ICSID Case No ARB/96/3, Decision of the Tribunal on Objection to Jurisdiction (11 July 1997).

discriminatory treatment; full physical protection and treatment; and national treatment.⁶⁷ Venezuela argued there was no investment because there was no contribution to the country's development. The Tribunal stated that for a project undertaken by an investor to qualify as an investment, "it must be for a certain duration, a certain regularity of profit and return, an assumption of risk, a substantial commitment made by the investor and the project must be significant for the host state's development."⁶⁸ The Tribunal held that the transaction was an investment because it met the criteria of investment that required "a significant relationship between the transaction and the development of the host State."⁶⁹ However, the Tribunal did not establish that the promissory notes actually contributed to Venezuela's development. This suggests that Tribunals might just make whimsical or conclusory statements about the *significance* of a business project's contribution to development in defining investment for the purposes of establishing their jurisdiction in the particular case without proving in specific terms how the alleged investment has really contributed to development.

In *Salini Costruttori SpA & Italstrade SpA v. Morocco*,⁷⁰ the Tribunal considered whether a public works contract constituted an investment and thus gave rise to its jurisdiction. The Tribunal held that in light of the preamble to the ICSID Convention, "one may add the contribution to the economic development of the host state to the investment as an additional condition"⁷¹ to the elements required for a transaction to qualify as an investment such as the duration of performance of the contract and participation in the risks of the transaction.⁷² The Tribunal concluded that since the contracts involved an infrastructure project, its contribution to the economic development of the Moroccan State could not be questioned because the highway project was going to serve the public interest and moreover the companies involved were going to provide Morocco with know-how in relation to the work to be accomplished.⁷³ Again, in *Patrick Mitchell v Democratic Republic of the Congo* it was stated that:⁷⁴

the existence of a contribution to the economic development of the host State as an essential – although not sufficient – characteristic or unquestionable criterion of the investment, *does not mean that this contribution must always be sizable or successful*; and, of course, *ICSID tribunals do not have to evaluate the real contribution of the operation in question. It suffices for the operation to contribute in one way or another to the economic development of the host State*, and this concept of economic development is, in any event, extremely broad but also variable depending on the case.

⁶⁷ *Agreement on Encouragement and Reciprocal Protection of Investments between the Kingdom of the Netherlands and the Republic of Venezuela* entered into force 1 November 1993 art 3.

⁶⁸ *Fedax v Venezuela*, See above note 66, at [43].

⁶⁹ *Ibid.*

⁷⁰ *Salini Costruttori SpA & Italstrade SpA v. Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction (23 July 2001).

⁷¹ *Ibid* at [52].

⁷² *Ibid.*

⁷³ *Ibid* at [57].

⁷⁴ *Patrick Mitchell v The Democratic Republic of Congo*, Case No. ARB/99/7, Decision on the Application for Annulment of the Award, 1 November 2006. at [33] (emphasis added). Among the cases *Malaysian Historical Salvors Sdn, BHD v. Malaysia*, ICSID Case No. ARB/05/10, Award on Jurisdiction, 17 May 2007, at [143] seem to have made a bold departure by holding that there was the need for a transaction to make substantial contribution to the host country's development to qualify as an investment. This decision was subsequently annulled *Malaysian Historical Salvors Sdn, BHD v. Malaysia*, ICSID Case No ARB/05/10, Decision on an Application for Annulment paras 61 and 80 (16 April 2009).

Patrick Mitchell v The Democratic Republic of Congo,⁷⁵ *Malaysian Historical Salvors SDN BHD v The Government of Malaysia*,⁷⁶ *Alex Genin Eastern Credit Ltd Inc v The Republic of Estonia*,⁷⁷ *Pantechniki S.A. Contractors & Engineers (Greece) v. The Republic of Albania*,⁷⁸ *Amoco Asia Corporation v Republic of Indonesia*⁷⁹ and *Joseph Charles Lemire v Ukraine*⁸⁰ also recognised contribution to the economic development of the host country as a characteristic of investment for the purpose of deciding if an investment is entitled to protection.

In effect, some of foregoing cases are authorities for the legal proposition that contribution to a host country's development is not a mandatory element for the concept of investment and that the legal obligation to protect an investment may subsist even if an investment does not make contribution to development. Therefore, tribunals are not under any obligation to make a finding that a particular investment has to contribute to a host country's development. It is sufficient for the purpose of determining whether a transaction constitutes an investment and is entitled to investment treaty protection if the transaction is important, significant or has the potential to contribute to the host country's development. A finding that a transaction has actually contributed to a country's development is not relevant in determining whether the transaction constitutes an investment. Such an approach raises the question as to what the consideration or *quid pro quo* is for states in return for the legal protections they have to accord foreign investors. This is important to consider given that the legal obligation to protect foreign investment may lead to state liability to pay damages to the investor for breach of the legal protection.

Most, if not all, investment treaties, specify their purposes in their preambles. Yet, *Société Générale*⁸¹ suggests that the goals or purposes of IIAs are of less interpretive importance than the actual terms of the IIAs when it comes to enforcing the rights of the parties to the IIAs. This means that the development objective of IIAs must be subordinated to the interest of the investor to make profits, which is not textually revealed in IIAs. Such an approach delinks the legal obligation to protect an investment from a fundamental *reason* states assume that treaty obligation to protect the investment. It follows, as stated in *Malaysian Historical Salvors v Malaysia*, that "a purely commercial entity, intended only for the enrichment of its owners and not connected with the economic development of the host State, is entitled to bring before ICSID a dispute concerning an investment in the host State."⁸² In effect, some investment tribunals have completely and effectively minimised the relevance of development in international investment law and arbitration. The above cases and others challenging measures adopted by Argentina in

⁷⁵ *Patrick Mitchell v The Democratic Republic of Congo*, Case No. ARB/99/7, Decision on the Application for Annulment of the Award, 1 November 2006, paras [27-41].

⁷⁶ *Malaysian Historical Salvors SDN BHD v The Government of Malaysia*, ICSID Case No. ARB/05/10, Award, 17 May 2007. However, *Malaysian Historical Salvors SDN BHD v The Government of Malaysia*, ICSID Case No. ARB/05/10, Decision on the Application for Annulment, 16 April 2009, paras [56-61] found the same contract to be an investment without reference to the need for contribution to development.

⁷⁷ *Alex Genin Eastern Credit Ltd Inc v The Republic of Estonia*, Case No. ARB/99/2, Award, 25 June 2001, at [348].

⁷⁸ *Pantechniki S.A. Contractors & Engineers (Greece) v. The Republic of Albania*, ICSID Case No ARB/07/21, Award, 30 July 2009, at [81-82].

⁷⁹ *Amoco Asia Corporation v Republic of Indonesia*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 25 September 1983, at [23].

⁸⁰ *Joseph Charles Lemire v Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010 paras [272-273].

⁸¹ *Société Générale v Dominican Republic*. See above note 44.

⁸² *Malaysian Historical Salvors Sdn, BHD v Malaysia*, ICSID Case No ARB/05/10, Decision on an Application for Annulment, 6 April 2009, Dissenting Opinion of Judge Mohamed Shahabuddeen at [21]

response to economic and financial crisis⁸³ suggest that investment protection by treaty may, in some cases, come to stand in the way of development rather than promoting it.

IV. CENTRALISING CONTRIBUTION TO DEVELOPMENT IN INVESTMENT TREATY INTERPRETATION

The objective of development is embedded in the investment treaty regime's preambles thereby making an investment's contribution to development a constituent, and I argue, essential and necessary element of an investment. That development objective must inform the interpretation and enforcement of the substantive terms of investment treaties. From a textual perspective, unless the preamble or provision of an investment treaty shows in clear and unambiguous terms that its primary and sole purpose is the protection of foreign investment as an end, it will be out of context of the treaty to interpret it in disregard of its development implications if the treaty's preamble or provision states that it is aimed at attracting foreign investment for development. The issue here is not whether preambles prevail over substantive provisions in law but whether preambles contain purposes that the substantive terms of investment treaties must be interpreted to advance. This distinction is often not made in the literature.⁸⁴ Such a distinction is important because it allows for the existence of a treaty's objective in its preamble to be recognised and admitted, and the substantive terms interpreted in light of that objective. A failure to make the distinction is partly responsible for dismissive attitude of tribunals towards preambles and the concomitant expansive and unqualified interpretation of the substantives of IIA in order to provide absolute protection for the investor.

The imperative to interpret investment treaties in accordance with the objectives contained in their preambles, and not just in terms of their substantive standards of investment of protection, is consistent with Article 31(1) and (2) of the Vienna Convention of the Law of Treaties, wherein it is stated:

A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

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

In his seminal book, *Bennion on Statutory Interpretation*, Francis Bennion defined purposive construction or interpretation as "one which gives effect to the legislative purpose."⁸⁵ From this purposive and contextual approach to treaty interpretation⁸⁶, the concept of investment has to be interpreted in the context

⁸³ *Continental Casualty Company v. Argentina*, ICSID Case No ARB/03/9, Award, 5 September 2008; *LG & E Energy Corporation v. Argentina*, Decision on Liability, ICSID Case No ARB 02/1, 3 October 2006; *Enron Corporation v. Argentina* ICSID Case No. ARB/01/3, Award, 22 May 2007.

⁸⁴ Dagbanja Investment Treaties and Development Policy, See note 4 above, p 453.

⁸⁵ Francis Bennion, *Bennion on Statutory Interpretation: A Code* (5edn, LexisNexis, 2008) at 944. See also *Fothergill v Monarch Airlines Ltd* [1981] AC 151 at 272; and *Sweet v Parsley* [1970] AC 132 at 165.

⁸⁶ Readings on treaties and their interpretation include: Richard K Gardiner, *Treaty Interpretation* (2edn, Oxford University Press, 2015); Anthony Aust, *Modern Treaty Law and Practice* (Cambridge University Press, 2007); Arnold D. McNair, *The Law of Treaties* (Clarendon, 1986); Ian Sinclair, *The Vienna Convention on the Law of Treaties*. 2edn, Manchester University Press, 1984); Maarten Bos, 'Theory and

in which those terms are used and in light of the object and purpose of that treaty unless the definition of the concept in the IIA expressly excludes certain elements. The context of a treaty includes its preamble and substantive terms. Therefore, so long as textually the attraction of investment *for the attainment of development* is stated as an objective of and reason for bringing the particular investment treaty into being, a business activity or transaction can only constitute an investment if it will make such contribution to the development of the host state, although in a different other context it might constitute an investment without having to make any form of contribution. This appears to be the position taken by the Tribunal in *Saluka Investments v Czech Republic*,⁸⁷ which discerned the purpose of the agreement from its title and preamble⁸⁸ as recognising that an agreement “upon the treatment to be accorded to such investments will stimulate the flow of capital and technology and the economic development of the Contracting Parties and that fair and equitable treatment is desirable” to that effect. In interpreting these provisions, the Tribunal stated that:⁸⁹

This is a more subtle and balanced statement of the Treaty’s aims than is sometimes appreciated. The protection of foreign investments is not the sole aim of the Treaty, but rather a necessary element alongside the overall aim of encouraging foreign investment and extending and intensifying the parties’ economic relations. That in turn calls for a balanced approach to the interpretation of the Treaty’s substantive provisions for the protection of investments, since an interpretation which exaggerates the protection to be accorded to foreign investments may serve to dissuade host States from admitting foreign investments and so undermine the overall aim of extending and intensifying the parties’ mutual economic relations.

The challenge is how to define what contribution to the development of the host state. It might be argued that the concept of ‘development’ is amorphous and very broad since it can contain many elements. This situation can make it difficult for investment tribunals to define and measure development and the contribution of an investment to the development of the host state. *Salini Costruttori SpA & Italstrade SpA v. Morocco*⁹⁰ said so. However, investment promotion and protection by treaty is premised on the conventional wisdom that it creates jobs, raises productivity and enhances exports and leads to transfer technology.⁹¹ According to those who support investment protection by treaty, inward investment offers an additional avenue for developing countries to link up to global markets and production systems. These investments could help firms to access markets, natural resources, foreign capital, technology, or various intangible assets that are essential to their competitiveness that may not be readily available in their home countries.⁹² In summary, these include the stated benefits of the legal commitment to protect foreign investment. These stated benefits can form the starting point for a tribunal with the aid of counsel to determine whether the investment at stake has made or can make contribution to the host state’s development. If a state alleges that an investment has made no contribution to its development or could not

Practice of Treaty Interpretation” (1980a) 27(1) *Netherlands International Law Review* 3; and Maarten Bos, “Theory and Practice of Treaty Interpretation” (1980b) 27(1) *Netherlands International Law Review* 135.

⁸⁷ *Saluka Investments BV (The Netherlands) v Czech Republic*, Partial Award, 17 March 2006.

⁸⁸ *Ibid* [299].

⁸⁹ *Ibid* [300].

⁹⁰ *Salini Costruttori SpA & Italstrade SpA v. Morocco*, See note 70 above.

⁹¹ Annan. See note 16 above.

⁹² *ibid*.

have been expected to have made any contribution to its development at the time of the admission of the investment and not entitled to protection, the burden is on the state to prove its case.⁹³ That the concept of development is difficult to define is no excuse for a tribunal to refuse to make a determination whether an investment has made a contribution to the development of the host state. For as state in Article 42(2) of the ICSID Convention a tribunal “may not bring in a finding of *non liquet* on the ground of silence or obscurity of the law” (whether IIA or other source of law).

Thus, in making an assessment of an investment’s contribution to the development of the host state, account should be taken of what foreign investment is said to be capable of bringing to the host state, namely, transfer technology or know-how to the host state, employment, enhancement of the Gross Domestic Product of the host country, and the overall impact of the investment on the host state’s development.⁹⁴ I adopt the perspective advanced by Dr Omar García-Bolívar, that:⁹⁵

If an investment is contrary to the public interest, has not generated any knowledge transfer to the host State, has not enhanced the economy or its productivity, has not increased the standards of living of the host country or the labour conditions, it almost certainly has not made a contribution to the economic development of that country[... [T]hat investment should be denied protection.

In particular, the ICISD arbitral system which was established to resolve investment disputes must resolve those disputes taking into consideration the overall objectives of its applicable convention, which objectives are not limited to promoting profiting making alone.⁹⁶ For the contracting parties to ICSID Convention, international cooperation was seen as needed for economic development. Development cooperation is enhanced by private international investment. The substantive obligations states assume to promote and protect foreign investment are aimed at attaining that development. So it would be hard to convincingly argue that this Convention is aimed at investment protection as an end itself and that development is completely irrelevant in its scheme of things.

Furthermore, where a treaty incorporates sustainable development and public interests objectives into its terms, tribunals must respect and uphold those objectives just as they would do in the case of those aimed at protecting private property interests. For example, an investment and trade agreement such as the TPPA substantively recognises and guarantees the right of states parties to regulate in the public interest such protecting the environment and health which must be taken into consideration in interpreting it. Article 9.16 of the investment chapter states:

Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment

⁹³ Rahim Moloo, ‘Evidentiary Issues Arising in an Investment Arbitration’ in Chiara Giorgetti (ed), *Litigating International Investment Disputes: A Practitioner’s Guide* (Brill Nijhoff 2014) 287.

⁹⁴ Omar E García-Bolívar, ‘Economic development at the core of the International Investment Regime’ in Chester Brown and Kate Miles (eds), *Evolution in Investment Treaty Law and Arbitration* (Cambridge University Press 2011) 586, p 603.

⁹⁵ *Ibid* p 595.

⁹⁶ See Christoph H. Schreuer, *The ICSID Convention: A Commentary* (2edn, Cambridge University Press, 2009).

activity in its territory is undertaken in a manner sensitive to environmental, health or other regulatory objectives.

Apart from textual considerations, it can also be argued from a contract law perspective, that legal obligation to protect an investment is an *offer*⁹⁷ in return for the benefit that the state expects to receive from the investment made by the investor. If an investor knowing very well that investment treaty was intended to attract the investment to enhance the development of the host country proceeds to make the investment, then it expressly or impliedly and necessarily agrees that the investment it will make will contribute to the development of the host state. In such case the investor can only enjoy legal protection under the investment treaty if its investment will contribute to the development of the host state. The benefit or expected outcome of the investment to the host state, not the investment itself, is the *consideration* for the *offer* to protect made by the state.⁹⁸ Thus, investment treaty law and arbitration cannot be sustained in such a case if its practical implementation is lopsided, where it focuses solely on the *offer* by imposing damages or penalties on the state for failing to fulfill the legal obligation to protect without considering whether the investor has fulfilled its part of the bargain by making an investment that brings benefits to the host state.⁹⁹

The benefits, consideration, could be in the form of technology and know-how, employment of local people, provision of goods and services that serve the national interest and other benefits. The benefits of an investment could also be assessed in terms of the impact of the investment on the environment and natural resources (including quality of water) and labour rights of the local people.¹⁰⁰ If an investment impacts negatively on the environment and natural resources in a manner that neutralizes any other benefits it brings, the rights available for the investor should correspondingly be reassessed and reevaluated. These matters are important and should be regarded in investor-state disputes settlement. There is the need for *sustainable investment disputes settlement*. *Sustainable investment disputes settlement* arises where the interests of both the investor and the state under the applicable investment treaty are treated as mutually supportive of the continued existence and relevance of the very treaty regime that establishes the respective rights and interests and its disputes settlement mechanisms.¹⁰¹

In summary, the following premises underlie this article:

1. One of the reasons states (at least developing countries) enter into IIAs is to attract investment that will contribute to their development and not necessarily to attract and protect foreign investment as ends in and of themselves.

⁹⁷ See Richard Craswell, "Offer, Acceptance and Efficient Reliance" (1996) 48 *Stanford Law Review* 481

⁹⁸ See J. Cumberbatch, "Of Bargains, Gifts and Extortion: An Essay on the Function of Consideration in the Law of Contract" (1990) 19(3) *Anglo-American Law Review* 239; K O Shatwell, "The Doctrine of Consideration in the Modern Law" (1953-4) 1 *Sydney Law Review* 789; John Swan, "Consideration and the Reasons for Enforcing contracts" (1976) 15 *University of Western Ontario Law Review* 83.

⁹⁹ Stephan W. Schill, *Reforming Investor-State Dispute Settlement (ISDS): Conceptual Framework and Options for the Way Forward* (International Centre for Trade and Sustainable Development, July 2015), <<http://e15initiative.org/wp-content/uploads/2015/07/E15-Investment-Schill-FINAL.pdf>> at 4 and 6

¹⁰⁰ Sornarah, Resistance and Change, See above note 3, p 163.

¹⁰¹ See *Report of the World Commission on Environment and Development: Our Common Future* (1987) available at <<http://www.un-documents.net/wced-ocf.htm>>

2. Treaties, including IIAs, are to be interpreted in context and in light of their object and purpose.
3. Unless expressly excluded as not being a constituent element of the concept of investment in IIA, contribution to development should be treated as essential element of investment to the extent that an IIA stipulates it as an objective for the making and coming into being of the IIA.
4. Given that IIAs are to be interpreted in light of their object and purpose, even if not capable of being treated as an essential element of investment the resolution of the issue whether or not an investment should be entitled to protection for want of contribution to the development of the host state should be dependent on whether such contribution can manifestly be said to be an objective of the IIA.
5. If an investment's contribution to development is an essential element of the concept of investment or is an objective of an IIA, the investment should not be entitled to protection under the IIA if it does not make such contribution.
6. Where an IIA has competing objectives, investment tribunals must resolve investment disputes *sustainably*. They must not be predisposed to make decisions in favour of one of the disputing parties or one of the competing interests. Investment tribunals must objectively take all the competing interests into consideration and make decisions in light of the facts and evidence. In this regard, as risk is an inherent part of investment, tribunals must not seek to protect investment against each and every risk, including risks *inherent* in justified regulation. The legitimate rights of investors must be protected without compromising the rights of states to regulate now or in future in to promote development.

V. MODERNISING INTERNATIONAL INVESTMENT AGREEMENTS TO PROMOTE DEVELOPMENT

The reason investment tribunals hold that an investment's contribution to development is not a constituent or essential element of an investment is substantive imbalance in the terms of IIAs. Whereas investment treaties impose substantive standards of investment protection on states, similar obligations are not imposed on investors. The reason for such lack of corresponding obligations appears to be the orthodox view that foreign investment leads to development and everything must be done to secure protection for the investor.

In this regard, there is the need to modernise the IIA regime in at least four aspects. First of all, there is the need to be explicit in the substantive terms of IIAs about the role that investment activity must play to the development of the host state if such investment is to enjoy legal protection under the applicable IIA. While recent IIAs (such as TPPA Articles 9.8 and 9.16) tend to make exceptions for public interest regulation such as environmental protection, labour rights and limiting the scope of expropriation standard, those exceptions are commonly qualified in terms that limit their potency to practically give states the scope they need to regulate in the public interest. Thus, the contribution of an investment to development

must be stated as a positive obligation that investors must observe. Investors must have an express obligation to ensure that their investment operations contribute to the development of the host state.

Secondly, the concept of investment must be defined in IIAs in terms that expressly include contribution to development as a constituent element. This will remove doubt as to the status of this criterion in identifying the elements of an investment.

Thirdly, there is the need for specific indices of what constitutes contribution of an investment to development to be contained in schedules to IIAs or to be developed as separate guidelines. Those indices will serve as a reference point for a tribunal that is faced with an argument that an investment is not entitled to protection for want of contribution to development.

Fourthly, the objectives of IIAs need to be stated in clearer and precise terms. The IIAs cannot replace rules of international law on international and diplomatic relations and cooperation. So they must just deal with the business and the specific state interests they seek to promote and nothing more. Thus if their objectives are to secure legal protection for investments to guarantee investor profits and returns in return for the contribution the investments will make to the development of the host state that must be precisely and unambiguously stated as their objectives. The terms of the IIA must mandate tribunals to interpret the IIAs to advance these objectives.

VI. CONCLUSION

In theory and in practice states enter into investment treaties to promote their investment and not just to protect investment as an end in itself. This is very well settled and is empirically reflected in the preambles to investment treaties, and most recently in their substantive terms as contained in chapter 9 of TPPA. In light of the fact that states conclude investment treaties to protect foreign investment in order *to promote their development* by ensuring that foreign investors are protected from non-commercial risks associated with regulation in particular:¹⁰²

[I]t becomes important that to consider in the interpretation of IIAs the intention of the States when entering into those agreements. In some cases, that interpretation is relatively straightforward as the IIA itself identifies the intentions of the State Parties, and sets out the object and purpose of the agreement. But in other instances, the States' intentions are not expressly stated. Where this is the case, it is suggested that the approach adopted by the arbitrators should be one of looking at all the surrounding circumstances, not only at the preamble and preparatory work, but also at the *raison d'être* of the States themselves as well as the reasons for entering into the agreement – in other words the promotion of the welfare and development of communities within the host State.

The development objective can no longer be treated as peripheral in investor-state dispute settlement: it is a central part of the investment treaty regime and must be treated as such. The investment treaty regime as reflected in recent backlash against the regime¹⁰³ cannot be sustained unless competing objectives under

¹⁰² García-Bolivar, See above note 94, 588 and 589-590.

¹⁰³ Michael Waibel et al (eds), *The Backlash against Investment Arbitration: Perceptions and Reality* (Kluwer Law

the regime are all adequately respected and upheld. This means there is the need for a *sustainable investment disputes settlement* approach to handling investment disputes: development is and must be treated as necessary for the attainment of the objective to provide a secure environment investment under the applicable investment treaty. The objective to provide a secure legal environment for investment to flourish and gain profits must be pursued in a manner that does not compromise the overall development objective for which a state has undertaken the obligation to protect the investment. The development objective should prevail over the need to guarantee an investment secure protection and vice versa depending on the facts and circumstances of the case. It cannot be that the investor's interests must always have its way and at all cost as has been the case. The statement of development an objective of investment treaties should also condition the nature and scope of the investors' responsibility in terms of ensuring that their investments contribute to the development of the host state. This is the only way a balance of rights and corresponding obligations between investors and their host states can be attained.¹⁰⁴

International, 2010); Suzanne A Spears, "Making Way for the Public Interest in International Investment Agreements" in Chester Brown and Kate Miles (eds) *Evolution in Investment Treaty Law and Arbitration* (Cambridge University Press, Cambridge 2011) 271 Suzanne A Spears, "The Quest for Policy Space in a New Generation of International Investment Agreements" (2005) 13(4), *Journal of International Economic Law* 1037; and Asha Kaushal, "Revisiting History: How the Past Matters for the Present Backlash against the Foreign Investment Regime" (2009) 50 *Harvard International Law Journal* 491.

¹⁰⁴ *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania*, ICSID CASE NO. ARB/05/22, Award. 24 July 2008, at [380].