THE DEVELOPMENT OBJECTIVE AS AN IMPERATIVE IN INTERPRETATION OF INTERNATIONAL INVESTMENT AGREEMENTS

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International investment agreements (IIAs) are entered into on the supposition that they attract investment and that investment leads to development. This reason accounts in part for the entering into force of 3320 IIAs by the end of 2017. Yet investor-state tribunals and scholars are divided on whether an investment's contribution to the development of the host state is an element of the concept of investment. Some hold that such contribution is an essential element of an investment and that a lack of contribution should deny an investment legal protection under IIAs. Others hold that contribution to development is not a criterion and that an investment does not need to make any specific contribution to the development of the host state to enjoy protection under an IIA. The purpose of this article is to show that establishing whether contribution to development is an element of investment as a foundation and precondition for decision whether an investment is entitled to protection is not only circumlocutory, but more fundamentally, besides point. The more crucial issue is not whether contribution to development is a distinct element of investment but whether the attainment of development is a stated objective of an IIA. In light of the imperative to interpret a treaty in context and to advance its purpose, I argue that where attainment of development is a stated object of an IIA it is irrelevant to establish whether contribution is an element of investment but the IIA must nevertheless be interpreted in light of that and any other object. Therefore, I argue similarly that if the attainment of development is a stated object of an IIA, an investment's

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contribution to development becomes an inherent element of investment within the context of the applicable IIA and the obligation to protect foreign investment must accordingly be linked to the contribution such investment would make to the development of the host state.

Keywords: definition of investment, element of investment, development, contribution to development, IIAs, interpret, investment, object and purpose

I INTRODUCTION

There is a contradiction in international investment treaty law and arbitration. On the one hand, international investment agreements (IIAs) and arbitration are justified or promoted in terms of their supposed role in the development of host states through foreign investment attraction, whereas, investor-state tribunals define the concept of investment and adopt an approach to the settlement of investment disputes in terms which take out or trivialize the development objective underlying IIAs. This contradiction is revealed in particular in investment treaty arbitration, where the fact that the very development reason that is used to justify the investment treaty regime is treated peripherally or 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 a contribution to the development of the host state. As Dr Marek Jeżewski stated, "[n]otwithstanding the obvious need to create a legal environment in which development goals … will be pursued, the law, both customary and treaty … seems to focus on investment protection even stronger than before."[1] This is the contradiction with which this article is concerned.[2]

[1] Marek Jeżewski, *There Is No Freedom Without Solidarity : Towards A New Definition of Investment In International Economic Law,* Society of International Economic Law Inaugural

Should contribution to development be treated as an inherent element in the definition of the concept of investment if the attainment of development through investment is a stated objective of an IIA? 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?

In spite of the fact that states enter into IIAs to attract foreign investment for development[3] as shown in Part II below, investment tribunals and scholars 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 stated[4]:

> [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 … 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 forms 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

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Conference, Geneva, July 15-17, 2008 Online Proceedings, Working Paper No. 51/08) <http://www.ssrn.com/link/SIEL-Inaugural-Conference.html>, 27-28.

[2] 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.

[3] M Sornarajah, *Resistance and Change in the International Law on Foreign Investment* (Cambridge University Press, 2015); M Sornarajah, *The International Law on Foreign Investment* (3edn Cambridge University Press, 2010); Jeswald W Salacuse, *The Law of Investment Treaties* (Oxford University Press, 2010); and 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.

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

> 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 in *Resistance and Change in the International Law on Foreign Investment*: [5]

> 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.

This article contributes to a new way of assessing whether an investment's contribution to development should be taken into consideration in interpreting IIAs and whether a lack of such contribution should deny an investment legal protection based on textual interpretation and analysis rather than historical, policy or definitional analysis as the current literature does.[6] The article analyses various international texts and conventions on investment and trade to ascertain the extent to which the attainment of development is a *stated* objective in those treaties and the role that such an objective might play in commercial and investment disputes settlement. The analysis establishes that the attainment of development is a stated objective of the reviewed IIAs.

Based on purposive interpretation and analysis, I argue that the substantive obligation to protect an investment is an economic exchange

[5] Sornarajah, *Resistance and Change*, above n 3, 162.
[6] Jeżewsk, above n 1.

for the contribution an investment will make to development for the host states. Therefore, contribution to development or lack of it must be taken into consideration in deciding whether the investment should be entitled to protection if it is a stated objective of the applicable IIA. I point out the centrality of development as one of the purposes for the making of IIAs and the need for that purpose to be factored into investment dispute settlement. I make a purposive case for 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.

The explanation given to the divergent conclusions whether contribution to development is an element of investment is that "[a]mongst the various possibilities of interpretation, a choice has to be made and the act of choosing sometimes results more from legal policy and politics than from pure law."[7] The limited scholarship that holds the view that an investment should not be entitled to protection if it does not make contribution to the development of the host state do so on the basis that an investment must be *defined* to include contribution to development since states enter into IIAs for the purpose of their development.[8] The issue for this article is the choice of tribunals and scholars to focus on whether contribution to

[7] Nitish Monebhurrun, 'The Political Use of the Economic Development Criterion in Defining Investments in International Investment Arbitration' (2012) 29(5) *Journal of International Arbitration* 567, 573.

[8] Omar E. García-Bolívar, *Defining an ICSID Investment: Why Economic Development Should be the Core Element* (International Institute for Sustainable Development, 13 April 2012) <https://www.iisd.org/itn/2012/04/13/defining-an-icsid-investment-why-economic-development-should-be-the-core-element/> 1; Aniruddha Rajput, 'Definition "Investment" – A Developmental Perspective' (2013) 2(1) *Indian Journal of Arbitration Law* 12; and Prabhas Ranjan, 'Definition of Investment in Bilateral Investment Treaties of South Asian Countries and Regulatory Discretion' 26(2) *Journal of International Arbitration* 217 However see Alex Grabowski 'The Definition of Investment under the ICSID Convention: A Defense of Salini" (2014) 6(1) *Chicago Journal of International Law* 287 for some textual analysis.

development is *an element in the definition of investment*[9] rather than whether *it is an objective of the applicable IIAs* that must be taken into consideration in *interoperating* the IIAs. The thesis of this article is that where the attainment of development is a stated objective of an IIA, contribution to development becomes an inherent and essential element of the concept of an investment in the context of the IIA. In such a case, IIAs must be interpreted in light of that objective as well as any other objective and the extent of the obligations to protect foreign investment must be linked to the contribution the investment will make to the development of the host state. The contribution of this article to the literature lies in its focus on whether textually contribution to the development of the host state *is an objective of an IIA and thereby an inherent element of investment* and must be taken into consideration in IIA interpretation. The current literature on the subject focuses essentially on whether contribution to development *is or is not an element of the concept of investment* and whether its presence or absence in the definition of an investment entitles or denies an investment protection under an IIA. In doing so the existing literature largely focuses on the ordinary meaning of the concept of investment largely without taking its overall context in the IIA into consideration.[10] I argue that to the extent that development is a stated objective of an IIA, it is not necessary to determine whether contribution to development is an element of investment in order to decide whether an investment that does not make such contribution is or is not entitled to protection.

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[9] Laurens JE Timmer, "The Meaning of 'Investment' as a Requirement for Jurisdiction Ratione Materiae of ICSID Centre" (2012) 29(4) *Journal of International Arbitration* 363, 368-372.

[10] Jeżewski, above n 1; Mary E. Hiscock, 'The Emerging Legal Concept of Investment' (2009) 27(3) *Penn State International Law Review* 765; Mavluda Sattorova, 'Defining Investment Under the ICSID Convention and BITs: Of Ordinary Meaning, Telos, and Beyond' 2 *Asian Journal of International Law* 267; Engela C. Schlemmer, 'Investment, Investor, Nationality, and Shareholders' in *Peter Muchlinski, Federico Ortino, and Christoph Schreuer* (ed), *The Oxford Handbook of International Investment Law* (Oxford University Press 2008) 50; and OECD, *International Investment Law: Understanding Concepts and Tracking Innovations* (17 March 2008) Chap 1.

In sum, I show that textually states enter into investment treaties to promote their development and not just to protect investment as an end in itself. This makes development an objective of IIAs. Thus, there is the need to resolve 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 *stated* competing interests that underlie the making of IIAs. The IIA regime cannot be sustainable if the protection of only one of its competing interests becomes the sole preoccupation of investor-state arbitration to the neglect of other equally embedded interests.

Part II establishes the connection between international law and development based on theoretical and textual analysis to show that from the beginning IIAs have always been justified on the basis that they are necessary to attract investment which can lead to the development of host states. Part III reviews and interprets the current literature, particularly arbitral cases, on whether contribution to development is an element of the concept of investment and whether the absence of such contribution means an investment is not entitled to protection under the applicable IIA. This Part is both descriptive and analytical as it seeks to show the nature of the current debate but also involves an engagement with the dominant positions on the subject. This descriptive analysis is crucial because it reveals the nature of existing arguments which this article seeks to engage with in order add a fresh perspective. Part IV is the core of the article. It involves an interpretive analysis of the texts of various IIAs to determine the centrality of contribution to development as an objective of these IIAs based on theories of interpretation. It proposes that investor-state dispute settlement should attend to competing interests underlying

the making of IIAs, which includes states' search for development through foreign investment. Part V develops basic arguments that need to be taken into consideration in interpreting IIAs. It is also normative. The normative position proposes a reform of the content of IIAs through the integration of development concerns in the substantive terms of IIAs and the imposition of positive obligations on foreign investors to ensure that their investments make contribution to the development of their host states. Part VI, which is the conclusion, reiterates the centrality of development an objective in the making of IIAs and the need for that objective to be taken into consideration in the interpretation of IIAs.

In terms of scope, the article is not about the relationship between investment and development or trade and development and whether investment and trade actually lead to development.[11] It is about whether development is a stated objective of IIAs and whether in interpreting IIs tribunals have an obligation to take that development objective into consideration. Also, no attempt is made to define the concept of development in definitive terms. Instead, the article proposes that the meaning of development has to be looked at in context: in making a case that an investment is not entitled to protection for want of contribution to

[11] On trade and development see: UNCTAD, World Investment Report 2013: Global Value Changes: Investment and Trade for Development (United Nations 2013) ; D Irwin, *Against the Tide : An Intellectual History of Free Trade (*Princeton University Press, 1996); Mervyn Martin*, WTO Dispute Settlement Understanding and Development* (Brill, 2013); M Cordonier Segger, M Gehring and A Newcombe (eds.), *Sustainable Development in World Investment Law*, (Kluwer Law International 2011); John H Dunning, Re-evaluating the Benefits of Foreign Direct Investment (1994) 3 *Transnational Corporations* 23; Kojo Yelpaala, Costs and Benefits of Foreign Direct Investment: A Study of Ghana (1980-1981) 2 *New York University Journal of International and Comparative Law* 72; Emily Lydgate, "Sustainable Development in the WTO: From Mutual Supportiveness to Balancing" (2012) 11(4) *World Trade Review* 621; Carlos Pomareda and Carlos Murillo, *The Relationship between Trade and Sustainable Development of Agriculture in Central America* (International Institute for Sustainable Development, 2003), <https://ase.tufts.edu/gdae/Pubs/rp/tkn_trade_sd_agi_sum.pdf>; *World Trade Organisation Harnessing Trade for Sustainable Development and a Green Economy*, https://www.wto.org/english/res_e/publications_e/brochure_rio_20_e.pdf; and *International Trade and Sustainable Development Policy* (International Centre for Trade and Sustainable Development, Brief June 2014)<https://www.google.com.au/?gfe_rd=cr&ei=3gPnWIHLGJHrugT_nInIBg#q=international+trade+and+sustainable+development+pd>

development, the burden must be on the state to define what it means by development in the context of the IIA and the dispute arising from it. The burden must also be on the state to establish what contribution an investment could reasonably and legitimately be expected to have made to the development of the host state in light of the objectives and overall context of the IIA.

II DEVELOPMENT AS AN OBJECTIVE OF INTERNATIONAL INVESTMENT AGREEMENTS

Liberal economic theory justifies free trade and investment in terms of development.[12] According to Professor Sornarajah:[13]

> 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 constructing stable rules that promoted contractual stability. These are long-

[12] Sornarajah, *Resistance and Change*, above n 3, 107-108; 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), 200.
[13] Sornarajah, *Resistance and Change*, above n 3, 107-108.

> standing justifications for the protection of foreign investment through internationalization.

These justifications are seriously problematic because they create the impression that foreign investment comes with assured and automatic benefits. Global policymakers and many trade and investment scholars share this view that there is a relationship between foreign investment and development. Thus, the basic proposition on why there is the need for friendly policies and laws on foreign investment has been summed up by the late 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"[14] 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.[15]

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.[16] In the opinion of Professor Ozawa, any developing

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[14] Kofi Annan, 'Foreword' in UNCTAD, *World Investment Report 2003: FDI Policies for Development: National and International Perspectives* (United Nations, 2003) iii.
[15] Ibid.
[16] Terutomo Ozawa, 'Foreign Direct Investment and Economic Development*' (1992)* 1 *Transnational Corporations* 27

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."[17] This is because the advanced countries are not only "the rich reservoirs of industrial technology, information and experiences which the followers can tap,"[18] "[t]hey also provide the promising export markets from which the less developed can earn precious hard currencies."[19] 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."[20] However, in theory and practice this is not always so.[21] 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.[22] To the extent that investment and trade are not the sole panaceas or sufficient conditions for development, the terms of IIAs to promote and protect investment and trade must make room for the adoption of general policies that equally promote development.

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[17] Ibid 27.
[18] Ibid.
[19] Ibid.
[20] Sornarajah, *Law on Foreign Investment*, above n 3, 229. For further readings on why states sign investment treaties see: Sornarajah, *Resistance and Change*, above n 3, 78-135 and 136-190; in Chester Brown and Kate Miles (eds) *Evolution in Investment Treaty Law and Arbitration* (Cambridge University Press, Cambridge 2011) 271; 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 Yelpaala "Fundamentalism in public health and safety in bilateral investment treaties [Part I]" (2008) 3(1) *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
[21] M Sornarajah and Leo Trakman, "A Polemic: The Cases for and Against Investment Liberalization" in Leon A Trakman and Nicola W Ranieri (eds) , in Leon A Trakman and Nicola W Ranieri (eds), *Regionalism in International Investment Law* (Oxford University Press, 2013) 499, 504
[22] 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>

The IIA regime, in sum, is premised on at least two disputed[23] 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.[24] 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.[25] The strengthening of the legal regime for foreign investment at the international level is reflected in the growth of IIAs which reached 3320 by the end of 2017.[26]

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*.[27] 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

[23] M Sornarajah, *Resistance and Change*, above n 3, 81-86; Lauge N. Skovgaard Poulsen, *Bounded Rationality and Economic Diplomacy: The Politics of Investment Treaties in Developing Countries* (Cambridge University Press, 2015); Lauge N Skovgaard Poulsen, 'Bounded Rationality and the Diffusion of Modern Investment Treaties' (2014) 58(1) *International Studies Quarterly* 1; and Lauge N Skovgaard Poulsen and Emma Aisbett, 'When the Claim Hits: Bilateral Investment Treaties and Bounded Rational Learning' (2013) 65(2) *World Politics* 273

[24] Sornarajah, *Resistance and Change*, above n 3, 81, 107-108; Sornarajah, *Law on Foreign Investment*, above n 3, 82-88; Guzman, "Why LDCs Sign Treaties that Hurt Them" above n 3; Salacuse, above n 3; Kenneth J Vandevelde, *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).

[25] 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

[26] UNCTAD, *Investment Policy Monitor* (No 19, March 2018) <http://unctad.org/en/PublicationsLibrary/diaepcb2018d1_en.pdf> ; See also UNCTAD, *World Investment Report 2016: Investor Nationality: Policy Challenges* (United Nations Publication, 2016) xii and 104 for 2016 figure.

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

Convention)[28] expresses the idea that there was a need for international cooperation and private international investment *for the attainment of economic development*. The obligations to protect foreign investment in these international conventions were thus linked to role that foreign investment was expected to play in the host countries. The IIAs, it is claimed, can attract foreign investment by establishing standards of investment protection such as fair and equitable treatment, full protection and security, national treatment, most-favoured-nation treatment, repatriation of investment returns and prohibition against direct and indirect expropriation.[29]

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.[30]

III THE RELEVANCE OF CONTRIBUTION OF INVESTMENT TO DEVELOPMENT IN INVESTOR-STATE DISPUTE SETTLEMENT

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

[29] Sornarajah, *Resistance and Change*, above n 3, 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; Salacuse, above n 3, 87-141; Vandevelde, above 24, 19-74; Leon E Trakman and Nicola W Ranieri " Foreign Direct Investment: A Historical Perspective" in Ranieri, *Regionalism in International Investment Law*, above n 21, 14-26; and Andreas F Lowenfeld International Economic Law (2edn, Oxford University Press, 2008) 465-591.

[30] Christopher 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; Sornarajah, Resistance and Change, above n 3, 136-190; M Sornarajah, 'Evolution or Revolution in International Investment Arbitration' in Brown and Miles, *Evolution in Investment Treaty Law*, above n 20, 631; and M Sornarajah, *The Settlement of Foreign Investment Disputes* (Kluwer Law International, 2000).

This Part is primary concerned with finding out the importance that investment treaty arbitration attaches to contribution to development in settling investor-state disputes. The analysis reveals the predominant focus on whether contribution *is an element of investment as a condition* for decision whether the investment is entitled to protection and the consequent neglect of interpreting the applicable IIAs in light of their objects. The point to be made here is that, since states enter into IIAs to promote a number of objectives including development yet development an objective 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*

A large number 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. They do so on the basis that contribution to development is not an essential element of investment, even if development is a stated objective of the applicable IIA.

In *Société Générale v Dominican Republic*[31] the investor argued that the Dominican Republic had expropriated its investments in an electricity distributer because the country failed to allow for electricity rate increases and to control rampant electricity theft. This claim was based on a bilateral

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

investment agreement between the Dominican Republic and France.[32] 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 Arbitration Rules[33] 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 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."[34] In the opinion of the Tribunal, 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.[35] The Tribunal's position denies the development objective of the IIA as revealed in its text, and tilts the interpretation of the IIA to promote the objective of serving the investor's interest. If development is a guiding principle of IIAs as the Tribunal acknowledges but the contribution of an investment to development need not be assessed, then it means an investor does not

[32] *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.
[33] *UNCITRAL Arbitration Rules* as revised in 2010
[34] *Société Générale v. Dominican Republic*, above n 31 [33].
[35] Ibid.

need to ensure that its investment contributes to the development of the host state and the state cannot say an investment is not entitled to protection for want of contribution to its development. If this is the case then the development objective in IIAs serves no purpose having it in IIAs. Such an approach erodes the very foundation of the IIA regime, namely to attract investment for development.

Thus, 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 funs.[36] 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"[37] 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."[38] 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"[39] because the applicable IIA *defined* investment non-exhaustively in the sense that it did not restrict the scope of application of the concept.[40] The position of the Tribunal as to when preambles become necessary is quite inaccurate and misleading. Treaties are to be interpreted to promote

[36] Ibid [34].
[37] Ibid [35].
[38] Ibid [31].
[39] Ibid [31].
[40] Ibid [32].

their objects. Thus to the extent that a treat'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 because the context of a treaty includes its preamble. So preambles will always be necessary to refer to so long as they contain the objects of the applicable treaties. In this case, the Tribunal focused on the *definition of the investment* and not the objects of the IIA in deciding whether the investment was entitled to protection. Yet, the issue whether contribution is an element of the investment could only be appropriately interpreted contextually, that is if the definition of investment were considered in reference to the objects of the IIA.

In *Consorzio Groupement LESI-DIPENTA v Algeria*,[41] 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 Italy[42] and sought damages flowing from the 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. 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,

[41] *Consorzio Groupement LESI-DIPENTA v Algeria*, ICSID Case No ARB/03/08, Award (10 January 2005).
[42] *Agreement on the Promotion and Reciprocal Protection of Investments between Algeria and Italy*, entry into on 26 force November 1993.

something that is difficult to ascertain"[43] As in the previous case, the object of the IIA was not regarded. The Tribunal focused instead on the *definition of the investment* in the IIA in deciding whether contribution was an element.

Ceskoslovenska Obchodni Banka AS v Slovak Republic[44] 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'. According to the Tribunal, 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."[45] 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.[46] The 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 agreement[47]

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[43] *Consorzio Groupement LESI-DIPENTA v. Algeria*, above n 41 [13)(iv)].
[44] *Ceskoslovenska Obchodni Banka AS v Slovak Republic*, ICSID Case No ARB/97/4, (Decision of the Tribunal on Objections to Jurisdiction, 24 May 1999 [64].
[45] Ibid.
[46] Ibid at [66].
[47] *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

and the pertinent definitions contained in the agreement.[48] 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. In this case too, the interest of the Tribunal to give absolute protection to investment is apparent. The Tribunal while advocating for a broad definition of investment ultimately made a decision that served the investor's interest and the definition adopted was not related to the purpose of the IIA.

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,*[49] 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."[50] Similarly, the Tribunal stated in *Saba Fakes v Turkey*[51] that it was not convinced:[52]

> 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 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*

[48] *Ceskoslovenska v Slovak Republic*, above n 44 [68].
[49] *Electrabel SA v Republic of Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability (30 November 2012).
[50] Ibid [5.43].
[51] *Saba Fakes v Turkey*, ICSID Case No. ARB/07/20 [97] (emphasis added).
[52] Ibid.

> *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 cases thus in effect treat an investment's contribution to development as an irrelevant element in defining investment. In doing so investment tribunals are focusing on the ordinary meaning of the concept of investment in the IIA but without taking the overall context of the concept under the applicable IIA into consideration. There is nothing in IIAs that justify a focus on the definition of investment without referencing the object of the applicable IIA.[53] A focus on the ordinary meaning of the concept out of its overall context places a stronger emphasis on investor protection against states' interests. Such a position is untenable because, as established below, investment tribunals have an obligation to interpret a treaty in light of its context and objectives, which includes the development objective. The substantive terms of IIAs must be interpreted to advance the purposes of treaties in which they are contained. Those purposes include the expected outcome of contribution to the development of the host state. From the point of the 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 states enter into the IIAs, 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 of

[53] Sornarajah, *Resistance and Change*, above n 3, 156.

development, 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 contribution to development 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 and the investment does not make such contribution.

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. The argument is that IIAs are intended to protect investments that promote the economic development of the host state.[54] The cases that adopt this argument follow the same route as those rejecting contribution to development as an essential element of investment analyzed above. They decided whether an investment is entitled to protection by focusing on whether contribution to development *was an element of investment of investment* and not whether *it was an objective* of the applicable IIAs. This article is an alternative to that approach.

[54] Ibid 153

A case in point is *Fedax NV v Republic of Venezuela*[55] 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.[56] 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."[57] 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."[58] 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 stating in specific terms how the alleged investment has really contributed to development. The case nevertheless is important because it departed from previous cases by linking the legal obligations to protect foreign investment to the objects of the IIA.

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[55] *Fedax NV v Republic of Venezuela*, ICSID Case No ARB/96/3, Decision of the Tribunal on Objection to Jurisdiction (11 July 1997).
[56] *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.
[57] *Fedax v Venezuela*, above n 55 [43].
[58] Ibid.

In *Salini Costruttori SpA & Italstrade SpA v. Morocco*,[59] 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"[60] to the elements required for a transaction to qualify as an investment.[61] 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.[62] Similarly, in *Patrick Mitchell* v *Democratic Republic of the Congo* it was stated that:[63]

> 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.

[59] *Salini Costruttori SpA & Italstrade SpA v Morocco*, ICSID Case No ARB/00/4, Decision on Jurisdiction (23 July 2001).
[60] Ibid at [52].
[61] Ibid.
[62] Ibid at [57].
[63] *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, 16 April 2009 [61] and [80].

Patrick Mitchell v The Democratic Republic of Congo,[64] *Malaysian Historical Salvors SDN BHD v The Government of Malaysia,*[65] *Alex Genin Eastern Credit Ltd Inc v The Republic of Estonia*,[66] *Pantechniki S.A. Contractors & Engineers (Greece) v. The Republic of Albania*,[67] *Amoco Asia Corporation v Republic of Indonesia*[68] and *Joseph Charles Lemire v Ukraine*[69] 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 the foregoing cases are authorities for the legal proposition that contribution to a host country's development is an element of the concept of investment and that the legal obligation to protect an investment does not subsist if an investment does not make contribution to development. This later group of cases seeks to balance investors' right of protection under IIAs with states' right to benefit from covered investments. Yet, other tribunals, as stated, are of the view they 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

[64] *Mitchell v Congo*, above n 63 [27-41].
[65] *Malaysian Historical Salvors v Malaysia*, Award on Jurisdiction, above n 63. However, *Malaysian Historical Salvors v Malaysia*, Annulment, above n 63, [56-61] found the same contract to be an investment without reference to the need for contribution to development.
[66] *Alex Genin Eastern Credit Ltd Inc v The Republic of Estonia*, Case No. ARB/99/2, Award, 25 June 2001, [348].
[67] *Pantechniki S.A. Contractors & Engineers (Greece) v The Republic of Albania*, ICSID Case No ARB/07/21, Award, 30 July 2009 [81-82].
[68] *Amoco Asia Corporation v Republic of Indonesia*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability,25 September 1983[23].
[69] *Joseph Charles Lemire v Ukraine*, ICSID Case No. ARB/O6/18, Decision on Jurisdiction and Liability, 14 January 2010 [272-273].

transaction constitutes an investment for these other tribunals. 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. In this regard, Professor Sornarajah argues that "[t]here must be a quid pro quo for the treaty, which involves a surrender of sovereign rights of the state. The protection of all investments does not, by itself, secure the extent of the benefit that justifies the surrender of sovereign rights of control over that investment through the treaty."[70]

The issue with both schools of thought is their over-emphasis on the definitions of investment and using those definitions as bases for deciding whether contribution to development is an element of investment and rather than focusing on whether the attainment of development is an object of those IIAs in order to decide whether the investments involved were entitled to protection. The issue arises particularly in relation to those tribunals that in making those decisions either failed to make reference to the objects of the IIAs or made reference but disregarded the preambles and their objects without showing that they conflicted with the substantive terms of the IIAs. If, on one hand, the school of thought dispensing with the element of contribution to development is to be followed at all the times, investment tribunals will always have jurisdiction and the exercise of their jurisdiction will inevitably work in the interests of investors as contribution to development as an object will always be disregarded. If, on the other the hand, contribution to development is recognised as an object of an IIA and as an inherent element of investment thereof, then there could be cases where tribunals will not have jurisdiction for want of such

[70] Sornarajah, *Resistance and Change*, above n 3, 159.

contribution or if they assume jurisdiction, the investor will not enjoy protection if its investment does not make contribution to the development of the host state. So the adoption of either position could lead to unpleasant consequences for the state or investors and investment tribunals. This is dilemma Professor Sornarajah meant when he stated that the "division of opinion strikes at the very root of foreign investment arbitration."[71] However, as established below, treaties are to be interpreted to advance their purposes and investment tribunals must uphold this rule even if it means they will not be able to exercise their jurisdiction or the investor or state might not have remedy.

Investment treaties specify their purposes in their preambles. Yet, *Société Générale*[72] 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 as may be contained in preambles of IIAs must be subordinated to the interest of the investor to make profits, which itself is textually not 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."[73] In effect, some investment tribunals have completely and effectively minimised the relevance of development in international investment law and arbitration.

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[71] Ibid 162.
[72] *Société Générale v Dominican Republic*, above n 31.
[73] *Malaysian Historical Salvors Sv Malaysia*, Annulment, above n 63, Dissenting Opinion of Judge Mohamed Shahabuddeen [21]

The above cases and others challenging measures adopted by Argentina in response to economic and financial crisis[74] suggest that investment protection by treaty may, in some cases, come to stand in the way of development rather than promoting it. This article shows that preambles are of primary, not secondary, importance in investment treaty interpretation to the extent that they contain the objectives of IIAs. This article emphasises the need to give primary consideration to the objects of IIAs in interpreting their substantive terms.

IV CENTRALISING CONTRIBUTION TO DEVELOPMENT IN INVESTMENT TREATY INTERPRETATION

A *Contribution to Development as Objective of IIAs: Textual Analysis*

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

From a legal and interpretive perspective, there cannot be a better source to explain the objectives of IIAs than their texts. The preambles, and to a limited extent, the substantive provisions of investment and trade agreements justify trade and investment regimes in terms of development. As rightly argued by Professor Jeswald Salacuse, governments "are concerned with achieving prosperity, economic development, and security, and improving the general welfare of their people"[75] through international economic cooperation. Thus the purpose of such cooperation "is not just

[74] *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.
[75] Salacuse, above n 3, 45.

to assure legal rights to investors but to achieve broader societal goals."[76] Investment treaties are used to concretise this economic cooperation between states that "advances their individual economic development and prosperity"[77] and these goals are made clear in preambles to IIAs. 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 the 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 treaty[78] is "to create favourable conditions for greater investments".[79] 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".[80] The Ghana-Netherlands investment treaty[81] is meant "to strengthen the traditional ties of friendship"[82] between the two countries and "to extend and intensify the economic relations between them particularly with respect to investments".[83] An agreement upon the treatment to be

[76] Ibid 45
[77] Ibid.
[78] *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 March1989, entered into force 25 October 1991 ("Ghana-United Kingdom Investment Treat").
[79] Ibid.
[80] Ibid.
[81] *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").
[82] Ibid preamble.
[83] Ibid.

accorded to foreign investments was considered necessary to stimulate the flow of capital and technology for development.

The Ghana-Malaysia investment treaty[84] is intended "to expand and strengthen economic and industrial cooperation on a long term basis, and in particular, to create favourable conditions for investments."[85] 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".[86] The Ghana-China investment treaty[87] expresses the parties' desire "to encourage, protect and create favourable conditions for investment",[88] "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."[89]

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 these investment treaties. 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 in the interpretation and enforcement of investment treaties.[90]

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[84] *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 force18 April 1997 ("Ghana-Malaysia Investment Treaty").
[85] Ibid. preamble.
[86] Ibid preamble.
[87] *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).
[88] Ibid preamble.
[89] Ibid.
[90] Dagbanja, Treaty Regime and Development Policy, above 25, 419-429.

In the area of international trade, the parties to the Agreement Establishing the World Trade Organisation[91] 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.

In interpreting this preamble, former Director-General of the World Trade Organisation, Pascal Lamy said sustainable development was "at the heart of the WTO" and that in accordance with its preamble "the organization must work towards the objective of sustainable development. In being one of the youngest international organizations, the WTO's membership agreed right at the outset that international trade would only truly enhance human welfare if put to the service of sustainable development goals."[92] Dr Juan He similarly stated in relation to the same preamble:[93]

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[91] *Agreement Establishing the World Trade Organisation*, Marrakesh, 15 April 1994, https://www.wto.org/english/docs_e/legal_e/04-wto.pdf. See also Mervyn. Martin, *WTO Dispute Settlement Understanding and Development* (Brill, 2013), 19.

[92] Pascal Lamy, *The WTO Path to Sustainable Development and the Green Economy* (Speech at the Rio+20 Earth Summit on 20 June 2012), https://www.wto.org/english/news_e/sppl_e/sppl237_e.htm. A useful reading on the various in which development might be defined within the WTO system is

> In specific terms, the objective pursued by the international trade organization encompasses three highly related aspects: (1) promoting world economic development and social welfare; (2) working towards sustainable development, including environmental protection; and (3) reducing poverty and enhancing the livelihood of developing and least-developed countries. Also informed by the paramount declaration are the recommended ways to best achieve these goals, which are: (1) reciprocity; (2) enhanced market access through the lowering of tariff and non-tariff barriers; and (3) non-discrimination. The three basic legal principles constitute the predominant means to attain the overarching institutional objectives.
>
> It is clear from the preamble that the WTO places first priority on advancing economic growth, preferable through a sustainable and equitable manner in each participating economy. International trade, especially freer trade, is perceived to play a most beneficial role in enhancing national productivity and increasing an economy's exposure to advanced technology. The ultimate goal of development, at any time, must be carefully distinguished from the means of maximizing trade.

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.[94] The Trans-Pacific Partnership Agreement (TPPA), a comprehensive regional agreement (among Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Vietnam), is aimed at promoting "economic

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Seema Sapra, "Development: Its Place, Treatment, and Meaning at the WTO" (29 March – 1 April 2006) 100 *Proceedings of the Annual Meeting (American Society of International Law)* 223-226

[93] Juan He, *The WTO and Infant Industry Promotion in Developing Countries: Perspectives on the Chines Large Civil Aircraft Industry* (Routledge, 2015) 49-50.

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

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*."[95] Very significantly the investment chapter in Article 9.16 recognises the rights of member states to adopt, maintain or enforce measures to protect the environment and human health.

Clearly then the search for development is imperative in the making of IIAs. In this regard, 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."[96] 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."[97]

An analysis of the preamble to the WTO and other IIAs thus points to the centrality of development their objective. The substantive terms of IIAs designed to promote trade and investment including fair and equitable treatment, national treatment, most-favour national treatment, expropriation and rules on tariffs and non-tariff barriers are agreed to not just to protect trade and investment as ends in and of themselves or just for the sake of traders and investors alone but ultimately to advance the development of states parties to these agreements.[98] It means that dispute settlement mechanisms under both trade and investment legal

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[95] *Trans-Pacific Partnership Agreement* <http://dfat.gov.au/trade/agreements/tpp/official-documents/Pages/official-documents.aspx> (emphasis added)
[96] Peter Van den Bosche and Werner Zdouc, *The Law and Policy of World Trade Organization* (3edn, Cambridge University Press, 2013) 30.
[97] Ibid 33 (emphasis original).
[98] García-Bolívar, *Defining an ICSID Investment*, above n 8.

regimes need to factor the development objective in resolving disputes. Where the objective of attaining development is intimately and inherently embedded in IIAs, 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 activity will not contribute to the development of the host state. This is because by the agreements considered 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 is one of the primary criteria that constitute investment because that objective is one of the underlying reason states entered into these IIAs. The context of these agreements and the objectives underlying them require that contribution to development should be treated as an inherent element of investment and, more important, as an objective to be taken into consideration in interpreting these IIAs.

B *Interpreting IIAs in Context and Purposively*

The objective of development is embedded in the investment treaty regime's preambles as revealed in the preceding analysis 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. Preambles introduce and are in a sense

prefatory or explanatory note in regards to the substantive provisions that follow them and serve as a guide to legislative intention,[99] and in the domestic context judges have frequently relied on them to determine the objects of statutes.[100] As the United Kingdom Privy Council stated in *Mathew v State of Trinidad and Tobago* "the preamble to a statute cannot override the clear provisions of the statute. But it is legitimate to have regard to it when seeking to interpret those provisions … and any interpretation which conflicts with the preamble must be suspect."[101] 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.[102] 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 the 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 (VCLT), wherein it is stated:[103]

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[99] Francis Bennion, *Bennion on Statutory Interpretation: A Code* (5edn, LexisNexis, 2008) 944 and 732.

[100] *Imperial Tobacco Ltd v Attorney-General* [1979] QB 555, 575; *Olivier v Buttigieg* [1967] AC 115, 128; and *Hollinrake v Truswell* (1894) 3 ChD 420, 427.

[101] *Mathew v State of Trinidad and Tobago* [2005] UKPC 33, [2005] 1 AC 433 [46]. Bennion, above n 99, 732.

[102] Dagbanja, Treaties and Development Policy, above n 25, 453.

[103] Campbell McLachlan, "Investment Treaties and General International Law" (2008) 57 *International and Comparative Law Quarterly* 361*;* and Campbell McLachlan, "The Principle of Systematic Integration and Article 31(3)(c) of the Vienna Convention" (2005) 54 *International and Comparative Law Quarterly* 279

> 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.

According to this provision, a treaty must be interpreted in good faith and the terms and words must be given their ordinary meanings taking into consideration the context and purpose[104] of the treaty. According to the Appellate Body of the WTO, Article 31 of the VCLT as a "general rule of interpretation has attained the status of a rule of customary or general international law. As such, it forms part of the 'customary rules of interpretation of public international law'."[105] This provision requires a holistic approach to treaty interpretation: the text, the context and purpose of the treaty must be taken into consideration in interpreting the treaty. This suggests that the context and purpose of the treaty must determine ordinary meaning of the terms and words are to apply. If the ordinary will lead to the purpose of the treaty being defeated, some other meaning that will effectuate the purpose of the treaty must be adopted. Professor Jeswald Salacuse made a similar point that "an examination of the context of the terms and the object and purpose of a treaty itself may assist in the interpretation of a treaty term when its ordinary meaning is elusive."[106] Similar positions were reached in arbitral cases such as *LG & E Energy*

[104] A purposive approach is reflected in the Appellate Body of the WTO decisions: *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc. WT/DS58/AB/R (adopted Oct. 12, 1998) [12]; *United States - Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R (Adopted 29 April 1996) 15, 17-20 and 25; and *Canada - Measures Affecting Exports of Unprocessed Herring and Salmon*, BISD 35S/98 (adopted on 22 March 1988) [4.6].

[105] *United States - Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, (Adopted 29 April 1996) 17. Being customary rules of interpretation, "[b]oth panels and the Appellate Body must be guided by the rules of treaty interpretation set out in the *Vienna Convention*," *India - Patent Protection for Pharmaceutical and Agricultural Chemical Products* WT/DS50/AB/R (adopted 19 December 1997) [46]

[106] Salacuse, above n 3, 163.

Corp v Argentina and *Saluka v Czech Republic*.[107] The prominence of preambles in treaty interpretation is reflected in the importance attached to *the text* in Article 31 of the VCLT.[108] The text contains both substantive terms and preambles. Thus being part of the text, preambles have interpretive significance, particularly in terms of being a reference point for ascertaining the purpose or object of an IIA.[109] The International Court of Justice has frequently relied on preambles in ascertaining the purposes of applicable treaties in order to properly interpret the scope and effect of THE treaties' substantive terms.[110]

The VCLT Article 32 requires recourse to supplementary means of interpretation such as preparatory work of the treaty and the circumstances of its conclusion in order to confirm the meaning of a term arrived at when Article 31 is applied. Such recourse is also required when the interpretation according to Article 31 leaves the meaning of a term, word or phrase ambiguous or obscure or when the result of applying the meaning in accordance with Article 31 is manifestly absurd or unreasonable. Article 33 of the VCLT deals with interpretation of treaties authenticated in two or more languages.

Articles 31-33, require then that treaties be treated *as a whole*, meaning individual terms of the treaty are to be interpreted in relation to other terms, the context and purpose of the treaty and relevant preparatory and

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[107] *LG&E Energy Corp v The Argentine Republic*, ICSID Case No ARB/02/1, Decision on Liability, 3 October 2006, [124]; and *Saluka Investments BV (The Netherlands) v Czech Republic*, Partial Award, 17 March 2006, [298]

[108] *European Communities - EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, (adopted 16 January 1998) [181]; and *India - Patent Protection for Pharmaceutical and Agricultural Chemical Products,* WT/DS50/AB/R (19 December 1997) [45].

[109] A detailed account of the role of preambles in treaty interpretation is Max H Hulme, 'Preambles in Treaty Interpretation' (2016) *University of Pennsylvania Law Review* 1281.

[110] For example: *Rights of Nationals of the United States of America in Morocco* (Fr. v. U.S.), Judgment, 1952 ICJ Rep. 176, 196-98 (Aug. 27); *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Judgment, ICJ Reports 2012, 624 [126]; and *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonessia v. Malaysia),* Judgment, 2002 ICJ 625 [51]

supplementary materials. According to Isabelle Van Damme, Articles 31 to 33 of the VCLT dealing with treaty interpretation "are widely recognized as reflecting customary international law on treaty interpretation".[111] She argues that "the objective of interpretation is to arrive at a contextual meaning of the treaty language" and that Article 31(1) "does not purport to say that interpretation should be a matter of strict grammatical or textual analysis in isolation from other considerations. Article 31(1) confirms that there can be no starting point other than the actual terms of the text."[112] Thus if the text of a treaty states its purpose, the treaty must be interpreted in light of that purpose. In practice this means in interpreting the meaning of the term investment in a treaty in order to determine whether the term encompasses contribution to development, the overall context of the treaty, including its preamble, and not just the particular provision defining the term investment, must be taken into consideration.

Adopting a holistic approach to interpretation the Appellate Body of the WTO stated *in United States-Continued Existence and Application of Zeroing Methodology*:[113]

> The principles of interpretation that are set out in Articles 31 and 32 are to be followed in a holistic fashion. The interpretative exercise is engaged so as to yield an interpretation that is harmonious and coherent and fits comfortably in the treaty as a whole so as to render the treaty provision legally effective. A word or term may have more than one meaning or shade of meaning, but the identification of such meanings in isolation only commences the process of interpretation, it does not conclude it. Nor do multiple meanings of a word or term automatically constitute 'permissible' interpretations within the meaning of

[111] Isabelle Van Damme, 'Treaty Interpretation by the WTO Appellate Body' *(2010) 21(3) The European Journal of International Law* 605, 619.
[112] Ibid 619-620. See also *Hormones*, above n 108 and *Pharmaceutical and Agricultural Chemical Products*, above n 108.
[113] *United States-Continued Existence and Application of Zeroing Methodology*, WT/DS350/AB/R
(adopted 4 February 2009) [268]

> Article 17.6(ii). Instead, a treaty interpreter is required to have recourse to context and object and purpose to elucidate the relevant meaning of the word or term. This logical progression provides a framework for proper interpretative analysis. At the same time, it should be kept in mind that treaty interpretation is an integrated operation, where interpretative rules or principles must be understood and applied as connected and mutually reinforcing components of a holistic exercise.

In his seminal book, *Bennion on Statutory Interpretation*, Francis Bennion defined purposive construction or interpretation as "one which gives effect to the legislative purpose."[114] From this purposive and contextual approach to treaty interpretation,[115] the concept of investment has to be interpreted in the context 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 the particular IIA, a business activity or transaction should 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,* which discerned the purpose of

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[114] Bennion, above n 99, 944. See also *Fothergill v Monarch Airlines Ltd* [1981] AC 151, 272; and *Sweet v Parsley* [1970] AC 132, 165.

[115] 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 Practice of Treaty Interpretation" (1980a) 27(1) *Netherlands International Law Review* 3; Maarten Bos, 'Theory and Practice of Treaty Interpretation" (1980b) 27(1) *Netherlands International Law Review* 135; Donald McRae, 'Treaty Interpretation and the Development of International Trade Law by the WTO Appellate Body' in Sacerdoti, Yanovich and Bohanes (eds) *The WTO at 10: The Contribution of the Dispute Settlement System* Cambridge University Press, 2006) 360; and Donald McRae, 'Approaches to the Interpretation of Treaties: The European Court of Human Rights and the WTO Appellate Body' in Stephan Breitenmoser et al (eds), *Human Rights, Democracy and the Rule of Law: Liber amicorum Luzius Wildhaber* (2007) 1407.

the agreement from its title and preamble[116] 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:[117]

> 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 and quantify 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*[118] said so, and it has been argued that that there is no shared understanding of the concept of (economic) development so contribution to the development of the host state as an element of investment "is vulnerable to various interpretations."[119] Moreover, it would be difficult to

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[116] *Saluka v Czech Republic*, above n 107 [299].
[117] Ibid [300].
[118] *Salini*, above n 59.
[119] A R Sureda, "Development Considerations in Defining Investment" in M Cordonier Segger, M Gehring and A Newcombe (eds.), *Sustainable Development in World Investment Law*, (Kluwer Law International 2011) 211, 229.

quantify the extent of contribution to development necessary to meet the standard of contribution to development.[120]

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 technology transfer.[121] 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.[122] 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 to determine whether the investment at stake has made or can make contribution to the host state's development. Development and the contribution of an investment to development have to be looked at on a case-by-case basis in terms of what the state expected to benefit in admitting the particular investment. Thus if a state alleges that an investment has made no contribution to its development or could not 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 define what it means by development in this context and prove its case.[123] That the concept of development is difficult to define should be no excuse for a tribunal to make a determination whether an investment has made a contribution to the development of the host state. For as stated in Article 42(2) of the ICSID Convention, a

[120] Ibid.
[121] Annan, above n 14.
[122] Ibid.
[123] 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.

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).

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.[124] I adopt the perspective advanced by Dr Omar García-Bolívar, that: [125]

> 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 must resolve those disputes taking into consideration the overall objectives of its applicable convention, which objectives are not limited to promoting profiting making alone.[126] 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

[124] Omar E García-Bolívar, 'Economic development at the core of the International Investment Regime' in Brown and Miles, *Evolution in Investment Treaty* Law, above n 20, 603.
[125] Ibid 595.

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

as an end itself and that contribution to development is completely irrelevant among its objectives.

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

Contractual analysis supports the textual position taken by this article. Contractually, it can be argued that the legal obligation to protect an investment is an *offer*[127] in return for the benefit that the state expects to receive from the investment made by the investor. Thus even if an IIA does not in its substantive terms impose a positive requirement of contribution to the development of the host state but states it an objective of an IIA, an investor that knows very well that IIA was intended to attract the investment to enhance the development of the host country and proceeds to make such investment, expressly or impliedly agrees that its investment will contribute to the development of the host state. In such a

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

case, the investor should 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.[128] 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 to an investment that brings benefits to the host state.[129]

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.[130] 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. In other words, an investment's contribution to the development of the host state should be looked at not only in positive terms but also in negative terms.[131] These matters are important and should be regarded in investor-state disputes

[128] See J. Cumberbatch, "Of Bargains, Gifts and Extortion: An Essay on the Function of Consideration in the Law of Contract" (1990) 19(3) 19 *Anglo-American Law Review* 239; K O Shatwell, *"The Doctrine of Consideration in the Modem 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.

[129] 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

[130] Sornarah, Resistance and Change, above n 3, 163.

[131] A R Sureda, "Development Considerations in Defining Investment" in M Cordonier Segger, M Gehring and A Newcombe (eds.), *Sustainable Development in World Investment Law*, (Kluwer Law International 2011) 211, 235 and Jeżewski, above n 1, 31

settlement. In this regard, 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.[132]

There is no doubt the profit motive is central in the decision of investors to invest abroad. In fact, investors do not invest abroad for purposes of charity, simply to develop the host state. They do so to make profits and nothing more. The motivations for foreign investment are explained by various theories such as the capital arbitrage theory,[133] portfolio diversification theory,[134] market imperfection hypothesis,[135] intangible assets hypothesis,[136] industrial organization theory,[137] and internalization theory.[138] Corporate or business motives behind foreign investment can also be appreciated by looking at the various types of international investment. These are: natural resource seeking, market seeking, efficiency seeking, and strategic assets seeking investment.[139] Natural resource seeking international investment is based on locational factors where the investors invest in the particular region or country depending on the natural resource endowments of the place concerned. Market seeking investment aims at supplying a significant foreign market through local

[132] See *Report of the World Commission on Environment and Development: Our Common Future* (1987) available at <http://www.un-documents.net/wced-ocf.htm>
[133] See Kojo Yelpaala 'The Efficacy of Tax Incentives within the Framework of the Neoclassical Theory of Foreign Direct Investment: A Legislative Policy Analysis' (1984) 19 *Texas International Law Journal* 365, 372.
[134] See Kojo Yelpaala 'In Search for Effective Policies for Foreign Direct Investment: Alternatives to Tax Incentive Policies' (1985) 7 *Northwestern Journal of International Law and Business* 208, 377.
[135] Ibid 221-22
[136] Ibid 220-221
[137] Ibid 224-225.
[138] Ibid 255.
[139] Peter Muchlinski *Multinational Enterprises and the Law* (2edn, Oxford University Press, Oxford, 2007).

production or service provision that replaces importation. Efficiency seeking investment is concerned with enhancing the firm's competitiveness by allowing for a more cost-effective cross-border integration of production. This may be low wages or knowledge driven. Finally, strategic assets seeking investment seeks to enhance competitiveness by accessing knowledge based assets of the investment location. The factor is to tap into the local innovation system and thereby enhance the foreign investor's technological efficiency and may be achieved through acquisition of or alliance with, local firms.[140]

These theories in essence show that the decision to invest abroad is driven by the desire of foreign investors to advance their interests. So that motive is important and has been the predominant objective in investment treaty interpretation. As Isabelle Van Damme argues, the reference to the object and purpose and the context in Article 31 of the VCLT "confirms that interpretation is not well served if it does not consider other elements besides the text of the treaty."[141] So it is not out of context to interpret an investment treaty to advance the profit motive of the investor because profit making is the reason the investor makes the investment but the profit motive must not treated as the sole objective of IIAs.

V MODERNISING INTERNATIONAL INVESTMENT AGREEMENTS TO PROMOTE DEVELOPMENT

A *Basic Arguments for Considerations in Interpreting IIAs*

In summary, the following arguments underlie these article which need to be taken into consideration in the interpretation of existing and future IIAs by tribunals:

[140] Ibid 32.
[141] Damme, above n 111, 620.

1. One of the reasons states 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. Therefore, the obligation to protect foreign is an *offer* in return for the *consideration*, that is, contribution the investment will make to the development of the host state.
2. Treaties, including IIAs, are to be interpreted in context and in light of their object and purposes.
3. Unless expressly excluded as not being a constituent element of the concept of investment in IIA, contribution to development is an essential element of investment to the extent that an IIA stipulates of attainment of development as an objective for the making and coming into being of the IIA.
4. Where contribution to development is a stated objective of an IIA, an investor that makes an investment and seeks protection under the IIA undertakes an obligation to ensure its investment makes such contribution to development in return for the legal protections available to it under an IIA.
5. Given that IIAs are to be interpreted in light of their context and object, even if contribution to development is not capable of being treated as an essential element of investment, the resolution of the issue whether 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 in light of the preparatory materials of the IIA.
6. If an investment's contribution to development is an objective of an IIA it is an element of investment and the investment should not be entitled to protection under the IIA if it does not make such contribution unless there is another overriding stated objective.

7. Where an IIA has competing objectives, investment tribunals must resolve investment disputes objectively and impartially. 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 to promote development.

B *Proposals for Reforming IIAs*

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 an investment 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 specific 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 terms of IIAs or in the 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. The International Centre for the Settlement of Investment Disputes and the United Nations Conference on Trade and Development could work towards the realisation of this objective.

Fourthly, the objectives of IIAs need to be stated in clearer and precise terms. The IIAs cannot replace rules of international law in other areas of 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 since 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. Rather than being presented in aspirational terms, preambles

must incorporate specific contributions investments must make to the development of host states. The terms of the IIA must mandate tribunals to interpret the IIAs to advance these objectives. In relation to this fourth point, states must reserve their authority on pre-establishment of investment. Entry to invest must be subject to domestic law and states must pre-screen investments in terms of their strategic contribution to national development. Investments that will not contribute to the development of the host state may still admitted but must not be entitled to investment treaty protection to the extent that investment treaties are intended to attract investment that would contribute to development.

VI CONCLUSION

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, it is important, as Dr Garćia-Bolívar argues:[142]

> 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

[142] Garćia-Bolívar, above n 124, 588 and 589-590.

> as the reasons for entering into the agreement – in order 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 regime[143] cannot be sustained unless competing objectives under 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 bring 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. The statement of development an objective of investment treaties must 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 will

[143] Michael Waibel et al (eds), *The Backlash against Investment Arbitration: Perceptions and Reality* (Kluwer Law International, 2010); Suzanne A Spears, "Making Way for the Public Interest in International Investment Agreements" in Chester Brown and Miles, *Evolution in Investment Treaty Law*, p 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.

ensure a balance of rights and corresponding obligations between investors and their host states.[144]

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