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# Economic development at the core of the international investment law regime

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## **Economic Development at the Core of the International Investment Law Regime**

By

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### **I – Introduction.**

States exist to provide for the welfare or development of their subjects. In the pursuit of that development, capital is needed. Different tactics are set up to attract that capital, one of which is enhancing the investment climate of countries through international legal instruments. States agree to grant international protection to foreign investments aspiring to attract capital needed to promote their economic development. Thus, analyze the intention of the States when entering into International Investment Agreements (IIAs) is essential for adjudicating fair solutions to the disputes that might arise between investors and States.

### **II- Intention of States in International Investment Law.**

The regime of international protection of foreign investment is fed by two streams. On one hand foreign investors and foreign investments are granted international protection through instruments of law willfully created by the States: the consensual international law. On the other hand the regime is fed by set of principles of customary international law that have evolved over time. Principles such as State responsibility for injury to aliens, standards of compensation for expropriation, *inter alia*, are considered part of the customary international law and useful to create an international framework of protection for foreign investments.

While the principles of customary international have been accepted universally and States have not expressly manifested their intentions when accepting them, the consensual international law is different. States enter into IIAs with an intention in mind. Moreover, the States are not forced upon the consensual international law. In a pure use of their sovereignty, States enter into the agreements they will to.

When it pertains to international law of foreign investment, States enter into IIAs to grant protection to foreign investments under the assumption that having a sound and internationally bound system of foreign investment protection will enhance the chances of attracting capital. However, the rationale behind foreign investment attraction should

not be underestimated. Countries are not willing to attract any kind of foreign capital. The intention of the countries on devising a set of policies aimed at protecting the interests of foreigners needs to be interpreted rationally and in good faith, taking into consideration all the relevant circumstances.

In that sense, it would not be rational to assume that countries grant international protection to foreign investment, just because countries need capital. To assume that would allow protection to any kinds of foreign investment regardless of their consequences, nature or legitimacy. Countries and for that matter the legal concept by which they are recognized, States, have a goal and that is to provide for the welfare of their subjects.

Consequently, if development --generally understood as the general welfare of a people<sup>1</sup>—is the main goal of the States, then capital is but a means to finance it. Traditionally, the development of the countries had been financed by the revenues obtained by the public treasures, either by direct exploitation of their resources or by collecting duties from those that did business within their boundaries. Overtime the sources of capital have expanded and have comprised credit and also international aid. And more recently, countries have rightly understood that foreign investments could also be a means to finance and promote the welfare of their peoples.

As a way to enhance the attractiveness of countries, international guarantees have been granted to foreign capitals. Under the assumption that international guarantees will diminish the non-commercial risk of doing business in a given countries, many countries have entered into IIAs. But the rationale on doing that has been to attract capital that could finance the development of the country.

In that sense, foreign investments are in the same category of public revenues, credit and aid: they are all means to finance the development of a country.

Thus, the intention of the States when entering into IIAs need to be interpreted. In some cases that interpretation is easy because the agreement itself provides for the intention

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<sup>1</sup> See Amartya Sen, DEVELOPMENT AS FREEDOM, 1999. "Development consists of the removal of various types of unfreedoms that leave people with little choice and little opportunity of exercising their reasoned agency. The removal of substantial unfreedoms, it is argued here, is constitutive of development." Page xii.

and purpose of the parties. But in other cases, that intention is not expressly stated. In the latter cases, the work of the judges or arbitrators should be to look at all the surrounding circumstances, not only the preamble and preparatory work, but also at the *raison d'être* of the States. Only by doing that could a fair decision be reached.

### **III- Economic Development as expressed in IIAs.**

According to the Vienna Convention on the Law of the Treaties the purpose of the treaties as expressed in their body texts, preambles, annexes, and *travaux préparatoires* shall be taken into account in treaty interpretation. Specifically, Article 31 of the Vienna Convention states that, “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.”<sup>2</sup>

Article 32 also states: “Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.”<sup>3</sup>

Both articles have been accepted by the International Court of Justice<sup>4</sup> and by the international community as expressions of customary international law. Consequently, the purpose of IIAs is relevant to their interpretation. An effort should be made to duly understand the intention of the parties when entering into these agreements. However, in not all cases the purpose is properly defined.

A treaty with a stated purpose of promoting foreign investment that does not make reference to State parties' development, may leave the host State powerless against foreign investments that are generally detrimental.<sup>5</sup>

This section will review the given purpose of various IIAs to underline the manner by which slight differences in an agreement's language profoundly impact the protection provided therein.

### ***The International Centre for Settlement of Investment Disputes***

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2 Vienna Convention on Treaties, article 31. The full text of Vienna Convention on the Law of the Treaties can be found on the United Nations' webpage: <http://www.un.org/law/ilc/texts/treaties.htm>

3 Vienna Convention on Treaties, article 32.

4 For example, *Kasikili/Sedudu Island (Botswana/Namibia)*, Judgment, I.C.J. Reports 1999, p. 1059, para. 18.

5 Examples of detrimental foreign investments protected under IIAs are provided in Howard Mann, *Private Rights, Public Problems. A Guide to the NAFTA's Controversial Chapter on Investor Rights*. Winnipeg, MB: IISD, 2001. <http://www.iisd.org/publications/publication.asp?pno=270>.

The International Centre for Settlement of Investment Disputes (ICSID) Convention, which creates one of the primary investment dispute resolution mechanisms has addressed the question of the purpose of IIAs by means of textual reference to economic development in its preamble where it states, “Considering the need for international cooperation for economic development, and the role of private international investment therein.”<sup>6</sup>

While the report from the executive directors states that the primary purpose of the Convention is to stimulate international investment flows, the report underlines the body’s desire to address the interests of both investors and States:

“12. The Executive Directors believe that private capital will continue to flow to countries offering a favorable climate for attractive and sound investments, even if such countries did not become parties to the Convention or, having joined, did not make use of the facilities of the Centre. On the other hand, adherence to the Convention by a country would provide additional inducement and stimulate a larger flow of private international investment into its territories, which is the primary purpose of the Convention.

13. While the broad objective of the Convention is to encourage a larger flow of private international investment, the provisions of the Convention maintain a careful balance between the interests of investors and those of host States.”

In the context of ICSID, the reference to economic development is relevant when it relates to jurisdiction. In that sense, article 25 of the ICSID Convention states that for the Centre to have jurisdiction certain requirements need to be satisfied:

- a) The dispute needs to be of legal nature. Disputes of technical nature although related to an investment are not covered by the Convention nor are within the boundaries of ICSID jurisdiction.
- b) The dispute needs to arise directly out of an investment. Disputes arising out of matters that do not tantamount an investment are excluded, e.g., disputes arising out of immigration.
- c) The non-State party to the dispute needs to be a national of another Contracting State. However, since 1978 ICSID has had a set of additional facility rules that allow disputes in which either the State party to the dispute or the State whose national is party to the dispute are not a Contracting State or disputes that did arise directly out of an investment to be submitted to arbitration.

The Convention provides hints as to who is national of another Contracting State: i) any natural person who had the nationality of a Contracting State other than the State Party to the dispute at the time of the consent and ii) any juridical person which had the nationality of a

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<sup>6</sup> The full text of the ICSID Convention, Regulations and Rules are available on the World Bank website:  
<http://www.worldbank.org/icsid/basicdoc/basicdoc.htm>

Contracting State other than the State Party to the dispute and any juridical person which had the nationality of the Contracting State party to the dispute at the time of the consent and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State.

- d) Consent to submit the dispute to ICSID needs to be granted by both parties in writing.

Thus, disputes before ICSID Tribunals need to be about investments. The fact that the ICSID Convention does not define investments has not hindered the rejection of disputes that *prima facie* are not related to an investment. Accordingly, at some point the Secretary General of ICSID refused to register a request for arbitration in which the dispute arose out of a sale.<sup>7</sup>

Commentators however, have stated that ICSID jurisdiction is typically limited to foreign investments that:

- Are of a certain duration
- Are characterized by a degree of regularity in earnings and returns
- Contain elements of risk
- Have incurred a substantial commitment (by financial or other means) to develop certain activities
- Contribute to the economic development of the host State, as stated in the Convention's preamble<sup>8</sup>

Consequently, a dispute about an investment that does not contribute to economic development could be left out of the scope of the jurisdiction of an ICSID Tribunal if a teleological interpretation of the ICSID Convention is made. Such interpretation would be cognizant of the IIAs' relation to economic development.

Several factors could lead to that conclusion.

For example, on further looking at the preamble of the ICSID Convention one could notice that the fifth preambular paragraph of the ICSID Convention states: "Desiring to establish such facilities under the auspices of the International Bank for Reconstruction and Development."

Consequently, it is presumed that ICSID's purpose could not be divorced from those of IBRD, specifically stated to be, among others, facilitating and encouraging of international investment for: a) productive purposes; b) for the development of the productive resources of countries to increase productivity, standards of living and

7 I.F.I. Shihata and A.R. Parra, The Experience of the International Centre for Settlement of Investment Disputes: ICSID Review, FOREIGN INVESTMENT LAW JOURNAL, vol. 14, n 2, 1999, page 308.

8 Christoph Schreuer, The ICSID Convention: a Commentary, Cambridge University Press, Cambridge, U.K., 2001, Article 25, para. 86.

conditions of labor.<sup>9</sup> Hence, investments not devoted to productive purposes, such as those undertaken for speculative purposes and those that do not develop the productive resources of the host State and do not impact positively the productivity or increase the standards of living or labor conditions, could be considered to be beyond the outer limits of ICSID.

In addition, it is publicly known that ICSID is part of the World Bank Group along with IBRD and other multilateral institutions. As portrayed by the World Bank Group in its website, the ICSID complements the overall mission of the group on helping “[p]eople help themselves and their environment by providing resources, sharing knowledge, building capacity and forging partnerships in the public and private sectors.”<sup>10</sup>

The level of cooperation between ICSID and World Bank Group exceeds that of just sharing premises, as article 2 of the ICSID Convention states. There is financial linkage as any excess in the expenditure which the Centre cannot meet shall be borne by the Bank<sup>11</sup> and operational linkage as the President of the Bank is also the Chairman of the Administrative Council of ICSID<sup>12</sup>, and has authority, among other things, to appoint arbitrators in given circumstances.<sup>13</sup>

In the words of the dissenting opinion in the annulment decision of MHS: “An ICSID investment might indeed be made in favour of private entities but not for their own enrichment exclusively: only on the basis that, though made in favour of private entities, such an investment would – not might – promote the economic development of the host State.”<sup>14</sup>

Thus, ICSID is not another arbitration center. It is a very special arbitration center; one with a purpose that exceeds the mere resolution of disputes between investors and States. It has a purpose set up by the parties to the Convention, but it also has a mission that needs to be consistent with the multilateral entities to which it is associated. And that purpose cannot be detached from economic development.

### ***The European Energy Charter***

Occasionally IIAs have been based on an eminent need to promote growth in a volatile or economically distressed country or region. In fact, the first bilateral investment treaty (BIT) was established between Germany and Pakistan in 1959 in an effort to compensate for Germany’s loss of foreign investment during World War II. Similarly, countries entered into the European Energy Charter (ECT) primarily to stimulate growth in Eastern

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9 IDRB Articles of Agreement, Article I.

10 <http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/0,,pagePK:50004410~piPK:36602~theSitePK:29708,00.html> (last visited February 1, 2010)

11 ICSID Convention, Article 17.

12 ICSID Convention, Article 5.

13 ICSID Convention, Article 38.

14 *MHS v. Malaysia*, decision of the application for annulment, case No. ARB/05/10, April 16, 2009, dissenting opinion by Judge Mohamed Shahabuddeen, at § 17.

European and former Soviet States after the Soviet Union's collapse. As the treaty was supported on Europe's desire to enfranchise and stabilize Eastern European and ex-Soviet States, the ECT defines economic development amongst its objectives.

Specifically, the ECT cites that the Charter's measures to liberalize the energy sector are meant to spur economic development likened to economic growth: "Wishing to implement the basic concept of the European Energy Charter initiative which is to catalyse economic growth by means of measures to liberalize investment and trade in energy; Affirming that Contracting Parties attach the utmost importance to the effective implementation of full national treatment and most favoured nation treatment, and that these commitments will be applied to the Making of Investments pursuant to a supplementary treaty."<sup>15</sup>

Article 2 of the ECT reinforces the economic development objective by referring to the Charter's general objectives, stating, "This Treaty establishes a legal framework in order to promote long-term cooperation in the energy field, based on complementarities and mutual benefits, in accordance with the objectives and principles of the Charter."

### ***Other IIAs***

However, the Preamble of the ICSID Convention, the ECT and the Germany-Pakistan BIT are exceptions.<sup>16</sup> The majority of IIAs contain either no reference to economic development or use ambiguous language in defining purpose. In a study of BITs, this void is noted: "—the author's experience of examining more than 150 [bilateral investment] treaties ... suggests that references to development are exceedingly rare in treaties pushed by a number of Western governments with developing countries."<sup>17</sup>

Whereas occasional investment agreements expressly place economic development within the teleology of international investment law, the majority of IIAs limit purpose to the promotion and protection of foreign investment. One of the most contentious legal bodies dealing with international investment, the North America Free Trade Agreement (NAFTA), in which the treatment of investments is covered in Chapter 11, does not mention economic development. As NAFTA's Chapter 11 does not define objectives that are particular to the investment provisions, the agreement's purpose as related to investments is the same as that of the rest of the agreement. Thus, NAFTA is a comprehensive trade agreement with an investment chapter. The objectives of the agreement are expressed in broad political, economic and social goals in the general preamble but Chapter 11 has no such references specific to itself. Because of that it

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15 The Energy Charter Treaty and Related Documents, April 1998.

<http://www.encharter.org/upload/9/120520674515751158192049714743532131935190860213f2543v3.pdf>

16 The Peru-Venezuela, Germany-Venezuela and U.S.-Lithuania BITs also include economic development amongst their purposes.

17 Peterson, Luke Eric, *Bilateral Investment Treaties and Development Policy-Making*. Winnipeg, MB: International Institute for Sustainable Development (IISD), 2004, p. 4:

could be interpreted that the purpose and objective of NAFTA as a whole should be applicable to the investment chapter.

The Preamble of NAFTA states that the treaty seeks to, “CONTRIBUTE to the harmonious development and expansion of world trade and provide a catalyst to broader international cooperation; and ENSURE a predictable commercial framework for business planning and investment.”

From this reading it seems that the reference to development made in the preamble relates to world trade development, presumably a synonym of trade growth. Thus, as NAFTA does not mention economic development in its trade-related sections or Preamble, investments need not contribute to economic development in order to receive that treaty protection. But a more holistic interpretation might indicate that the reference to harmonious development not only refers to economic development but also to the general development of the country, possibly including social, human and environmental aspects. After all, promote progress in those fields is the desideratum of States.

In general, the IIAs to which the United States is party extend investor protection further than agreements made by other States. The U.S. typically requires that IIAs grant party investors the right to invest. That is, these agreements extend protection beyond the treatment and grant investors the right of entry for future foreign investments to be made into party States. U.S. agreements also generally forbid the imposition of performance requirements such as the use of local content, export requirements, employment, and technology transfer on foreign investors, which have been used to ensure that investments render economic benefit to the host State.<sup>18</sup>

Noticeably, the 2004 U.S. model BIT seems much more balanced than previous model agreements. It affirms the desire to promote “greater economic cooperation between” signatories “with respect to investment by nationals and enterprises of one Party in the territory of the other Party”.<sup>19</sup> The model treaty also recognizes that “agreement on the treatment to be accorded such investment will stimulate the flow of private capital and the economic development of the parties” and states that signatories agree that “a stable framework for investment will maximize effective utilization of economic resources and improve living standards”.<sup>20</sup>

From the wording stated in the preamble of the model BIT, it seems that the purpose of the parties is also to encourage economic development through foreign investment protection. The way the link between treatment and economic development has been

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18 OECD (2004a) Relationship Between International Investment Agreements. Paris: Organisation of Economic Co-operation and Economic Development

19 U.S. BIT Model (2004). Treaty Between the Government of The United States Of America And The Government Of [Country] Concerning The Encouragement And Reciprocal Protection Of Investment, 2004  
[http://www.ustr.gov/assets/Trade\\_Sectors/Investment/Model\\_BIT/asset\\_upload\\_file847\\_6897.pdf](http://www.ustr.gov/assets/Trade_Sectors/Investment/Model_BIT/asset_upload_file847_6897.pdf)

20 Id

made seems confusing and could give rise to different interpretations. However, the fact that the preamble of the model BIT makes reference somehow to economic development can very well be interpreted as an indication that the purpose of the parties to the agreement was to protect foreign investments in order to attract capital and foster economic development of the parties involved. Taken from there, an argument could be made to deny protection to investments that are not beneficial for the economic development of the recipient country.

The BIT between Cuba and the United Kingdom illustrates the manner in which the assumption that foreign investment promotes economic growth is often found in IIAs. The Treaty highlights the desire of the parties to create favorable conditions for foreign investment while recognizing that the agreement will “contribute to the stimulation of business initiative and will increase prosperity in both States”.<sup>21</sup>

Similarly, the Netherlands-Venezuela BIT recognizes that the protection provided to investments “will stimulate the flow of capital and technology and the economic development of the Contracting Parties.”<sup>22</sup> The Preamble of the UK- Venezuela BIT describes its purpose as to, “create favourable conditions for greater investment,” which, in turn, will “be conducive to the stimulation of individual business initiative and will increase prosperity in both States.”<sup>23</sup>

The BIT between Germany and Israel also mentions the effect that investor protection will have on mutual prosperity, but again, the language is ambiguous and fails to make a strong case on behalf of economic development as the purpose for protecting foreign investments.<sup>24</sup>

Agreement expressions such as that which is witnessed above leaves room for interpretation that does not include economic development amongst an agreement’s objectives and thus could give grounds to a narrow interpretation of the intention of the parties to the agreement and consequently limit the protection bestowed on States. But that is one possibility, judges and arbitrators could also make a broad interpretation, not necessarily entering into judicial or arbitral activism, and consider the rationale of States to enter into IIAs that limit their sovereignty and public policy authority.

The enhancement of economic cooperation is also an objective common to many IIAs. While economic cooperation among nations is likely to contribute to mutual economic growth, such terminology lacks the precision to include economic development within an agreement’s objectives. Furthermore, the notion of economic cooperation refers primarily to activities on a State rather than a firm level. That is, the intention to increase economic

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21 Cuba- United Kingdom BIT [http://www.unctad.org/sections/dite/iaa/docs/bits/cuba\\_uk.pdf](http://www.unctad.org/sections/dite/iaa/docs/bits/cuba_uk.pdf)

22 Netherlands- Venezuela BIT [http://www.unctad.org/sections/dite/iaa/docs/bits/netherlands\\_venezuela.pdf](http://www.unctad.org/sections/dite/iaa/docs/bits/netherlands_venezuela.pdf)

23 UK- Venezuela BIT [http://www.unctad.org/sections/dite/iaa/docs/bits/uk\\_venezuela.pdf](http://www.unctad.org/sections/dite/iaa/docs/bits/uk_venezuela.pdf)

24 Germany- Israel BIT [http://www.unctad.org/sections/dite/iaa/docs/bits/germany\\_israel.pdf](http://www.unctad.org/sections/dite/iaa/docs/bits/germany_israel.pdf)

cooperation has little, if any, impact on the protection an agreement provides in a State-investor context.

For instance, the stated purpose of the Sweden-Venezuela BIT is the intensification of the economic cooperation for the mutual benefit of both countries and for the creation of conditions conducive to investment.<sup>25</sup>

The Preamble of the Cuba-Spain BIT uses the notion of economic cooperation in defining its purpose, stating that through the agreement the parties desire to intensify the economic cooperation and to create favorable conditions for foreign investment.<sup>26</sup> The Spain-China BIT also highlights the desire of the parties to develop the economic cooperation.<sup>27</sup>

The importance of negotiating power on the content of IIAs witnessed in the United States' ability to negotiate favorable terms for American transnational corporations is also evident in developing countries. In China, for example, the attractive combination of a rapidly growing consumer market, cheap labor and a strong export infrastructure have given the country greater influence in determining the terms of IIAs to which it is party.

For example, in the IIAs to which China is party, negotiators have succeeded in limiting the instances where dispute settlement mechanism can be used. While China has been a strong proponent for increasing investor obligations in IIAs, the agreements to which it is party rarely mention economic development. In the BIT between Germany and the People's Republic of China, the parties express a desire to develop bilateral "economic cooperation" and "to create favorable conditions for investment" between signatories.<sup>28</sup> The China and Argentina BIT also includes economic cooperation and the creation of favorable investment conditions amongst its objectives and goes on to state that, "recognizing that the promotion and protection of such investments through an agreement stimulates business initiatives in this field."<sup>29</sup>

In the 2005 International Institute for Sustainable Development (IISD) draft model agreement on international investment,<sup>30</sup> it defined its purpose as the promotion of long-term investment that supports sustainable development. The model also refers to a necessary balance between the rights and obligations between and among investors and host countries.

As the evidence of the preceding examples shows, the manner in which IIAs define purpose leaves significant room for interpretation contrary to the interests or unstated

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25 Sweden- Venezuela BIT [http://www.unctad.org/sections/dite/ia/docs/bits/sweden\\_venezuela\\_sp\\_eng.pdf](http://www.unctad.org/sections/dite/ia/docs/bits/sweden_venezuela_sp_eng.pdf)

26 Cuba- Spain BIT [http://www.unctad.org/sections/dite/ia/docs/bits/spain\\_cuba.pdf](http://www.unctad.org/sections/dite/ia/docs/bits/spain_cuba.pdf)

27 Spain- China BIT (in Spanish) [http://www.unctad.org/sections/dite/ia/docs/bits/spain\\_china\\_sp.pdf](http://www.unctad.org/sections/dite/ia/docs/bits/spain_china_sp.pdf)

28 China- Germany BIT [http://www.unctad.org/sections/dite/ia/docs/bits/china\\_germany.pdf](http://www.unctad.org/sections/dite/ia/docs/bits/china_germany.pdf)

29 China- Argentina BIT [http://www.unctad.org/sections/dite/ia/docs/bits/argentina\\_china.pdf](http://www.unctad.org/sections/dite/ia/docs/bits/argentina_china.pdf)

30 The IISD Model International Agreement on Investment for Sustainable Development is available at the IISD website:

<http://www.iisd.org/publications/pub.aspx?id=685>

objectives of party States when protecting foreign investments. Whether by omitting reference to economic development entirely or by using imprecise language in defining an agreement's objective, it appears that a significant gap exists between purpose as intended and as written.

#### **IV- Economic Development as dealt by cases.**

Most cases on the relevance of economic development in the context of international investment law have dealt with it in the context of an ICSID protected investment.

As the ICSID Convention does not define the term investment, commentators and tribunals have considered whether there are some criteria to determine when an investment is subject to be considered by an ICSID tribunal; an issue that in principle seems to be important for jurisdictional reasons.

The most emblematic case has been *Salini*, which has given origin to what is now known as the “*Salini* test”

In *Salini Costruttori SpA and Italstrade SpA (Salini) v. Kingdom of Morocco (Morocco)*,<sup>31</sup> two Italian companies claimed compensation for damages from the Kingdom of Morocco under the Treaty between the Government of the Kingdom of Morocco and the Government of the Republic of Italy for the reciprocal promotion and protection of investments due to a dispute that arose out of the construction contract related to a section of a highway joining Rabat to Fés. Morocco objected the tribunal jurisdiction based on different grounds, one of which referred to the argument that construction contracts did not qualify as investments under the ICSID Convention. On considering that objection the Tribunal pointed out that the ICSID Convention does not define the term investment. It then considered the criteria generally identified by the Convention's commentators, indicating that those were: existence of contribution, certain duration and risk participation. It also added that the operation should contribute to the development of the host State, as provided by the Convention's preamble.<sup>32</sup> The Tribunal found that the construction contract fulfilled the criteria. Even in the risk aspect, the Tribunal indicated that a construction project that lasts several years, for which total costs cannot be established with certainty in advance, created a risk for the contractor. Thus, a construction operation could be qualified as an investment, and the disputes that arose directly out of it were susceptible to be heard by ICSID. In connection with the economic development requirement the Tribunal mentioned that in most countries construction of infrastructure falls under the tasks to be carried out by the State or by other public authorities. It then mentioned that the highway in question served the public interest and that the claimant companies were also able to provide the host State with know-how in relation with the work.<sup>33</sup>

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31 *Salini Costruttori SpA and Italstrade SpA v. Kingdom of Morocco*, Decision on Jurisdiction, 23 July 2001, 42 ILM 609 (2003).

32 *Id* at § 52.

33 *Id* at § 57

The Tribunal also mentioned that all the elements to be taken into account for defining when there is an investment in the context of the Washington Convention may be interdependent. Thus, had the investment failed the test of any of the elements, for example, the one on economic development, the Tribunal would have had to reject the claim and declare that it did not have jurisdiction.

Noticeably, for the Tribunal to reach the conclusion that economic development was one of the elements to take into account in order to determine the existence of an investment according to the Washington Convention, it looked at the purpose of that treaty as mentioned in its preamble.

Based on the Claimants' fulfillment of each of the criteria, the Tribunal found that the construction contract constituted an activity within ICSID jurisdiction and that disputes arising directly out of the contract would be heard before the Tribunal.

Although not duly noticed by commentators, *Salini* defined at least two of the criteria needed for an investment to contribute to the economic development of the host State: a) beneficial to public interest and b) know-how transfer. Specifically the Tribunal said: "It cannot be seriously contested that the highway shall serve the public interest. Finally, the Italian companies were also able to provide the host State of the investment with know-how..."<sup>34</sup>

The *Salini* test has been followed by many Tribunals, some in whole, some in part and some with subtle changes.<sup>35</sup> Others have taken a different approach in connection with the fourth criterion.

In the *Malaysian Historical Salvors*, subsequently annulled by the ad-hoc committee, the sole arbitrator found that a positive and significant contribution to the economic development of the host country was a requirement for the investment to be ICSID protected. Significantly, the Tribunal pointed out to enhancing the Gross Domestic Product of an economy as the factor that determined the criterion of economic development. The Tribunal then qualified that factor and interpreted that the enhancement of Gross Domestic Product could not be by a small amount for the investment to be ICSID protected.

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<sup>34</sup> Id.

<sup>35</sup> See *Joy Mining Machinery Limited v. The Arab Republic of Egypt*, ICSID Case No. ARB/03/11, Decision on Jurisdiction, July 23, 2001, § 53; *Jan de Nul N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Decision on Jurisdiction, June 16, 2006, § 91; *Helnan International Hotels A/S v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Decision on Objection to Jurisdiction, October 17, 2006, § 77; *Malaysian Historical Salvors SDN, BHD v. The Government of Malaysia*, ICSID Case No. ARB/05/10, Award on Jurisdiction, May 17, 2007, §§ 73-74.

The Tribunal said: “[t]he weight of the authorities cited above swings in favour of requiring a significant contribution to be made to the host State’s economy. Were there not the requirement of significance, any contract which enhances the Gross Domestic Product of an economy by any amount, however small, would qualify as an “investment.”<sup>36</sup>

In *CSOB*, it was concluded that the investment had to have a positive impact on the host State’s development. The tribunal considered that the phrase found in the Preamble to the ICSID Convention “*permits an inference 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.*”<sup>37</sup>

Somehow, this had been previously recognized by the Tribunal in *Amco v. Indonesia* when it concluded: “[t]he Convention is aimed to protect, to the same extent and with the same vigour the investor and the host State, not forgetting that to protect investments is to protect the general interest of development and of developing countries.”<sup>38</sup>

Thus, combining the criteria for determining a contribution to economic development used by *Salini, MHS and CSOB*, points out to the need that the investment: a) be made for public interest, b) transfer know-how, c) enhance the Gross Domestic Product of the host country; d) make a positive impact on the host State’s development.

Other tribunals have taken a different approach regarding the criterion of contribution to economic development. Noticeably, most of these cases have been similar in one thing: they have rejected the criterion of economic development due to difficulty or impossibility to ascertain it.

The *ah-hoc* Committee of *Mitchell* said: “[t]he 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

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<sup>36</sup> *Malaysian Historical Salvors SDN, BHD v. The Government of Malaysia*, ICSID Case No. ARB/05/10, Award on Jurisdiction, May 17, 2007, § 123.

<sup>37</sup> *Ceskoslovenska obchodni banka, a.s. v Slovak Republic* (Case No. ARB/97/4), Decision of the Tribunal on Objections to Jurisdiction, 24 May 1999, § 64.

<sup>38</sup> *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on Jurisdiction, 25 September 1983 (“*Amco v. Indonesia*”). See also *id.*, Award, 20 November 1984.

State, and this concept of economic development is, in any event, extremely broad and also variable depending on the case.”<sup>39</sup>

In *L.E.S.I. S.p.A. et ASTALDI S.p.A. v. Algeria* the Tribunals considered that it did not seem necessary that the investment contributed to the economic development of the country, a condition that it considered difficult to establish and that was implicitly covered by the previous three elements.<sup>40</sup>

In *Phoenix*, the Tribunal did not deny that contribution to economic development was a criterion to define an ICSID protected investment; rather the Tribunal rejected its applicability for other reasons. It stated: “ It is the Tribunal’s view that the contribution of an international investment to the *development* of the host State is impossible to ascertain – the more so as there are highly diverging views on what constitutes “development”.”<sup>41</sup>

But subsequently the Tribunal stated: “The Tribunal wishes to recall that the object of the Washington Convention is to encourage and protect *international investment made for the purpose of contributing to the economy of the host State*... This has to be read in light of the first words of the Preamble of the ICSID Convention, referring to “ ... the need for *international cooperation for economic development*, and the role of private international investment therein.”<sup>42</sup>

Thus, the Tribunal did agree that the purpose of the ICSID Convention was to encourage foreign investment for economic development. Being so, it would have followed that for investments to be protected under the ICSID system they would have needed to contribute to the economic development of the host country. However, the Tribunal refused to do that analysis.

Other Tribunals have looked at the purpose of other IIAS, not so much for digging into the definition of economic development but to consider the goal of protecting the interests of the investors. In *Metalclad*, for example the Tribunal looked into the objective of NAFTA and stated the three objectives it believed were relevant to interpreting the provisions of Chapter 11:

- To increase transparency in government regulations and activity;
- To substantially increase investment opportunities; and
- To ensure a predictable commercial framework for

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39 *Patrick Mitchell v. The Democratic Republic of Congo*, ICSID Case No. ARB/99/7, Decision on the Application for the Annulment of the Award, November 1, 2006, § 33.

40 *L.E.S.I. S.p.A. et ASTALDI S.p.A. v. Algeria*, ICSID Case No. ARB/05/3 (Italy/Algeria BIT), Decision, July 12, 2006 (French), § 73(iv)

41 *Phoenix Action, Ltd v. The Czech Republic*, Case No. ARB/06/5, Decision of April 15, 2009, § 85.

42 Id at § 87, notes omitted.

investors.<sup>43</sup>

In *Siemens, A.G. v. The Argentine Republic*,<sup>44</sup> the Tribunal analyzed the purpose of the Germany-Argentina BIT to find that the agreement was meant to promote investment and create conditions favorable to investors. The Tribunal ruled that interpretation of the BIT should account for such context, stating, “The Tribunal shall be guided by the purpose of the Treaty as expressed in its title and preamble. It is a treaty ‘to protect’ and ‘to promote’ investments...The intention of the parties is clear. It is to create favorable conditions for investments and to stimulate private initiative.”<sup>45</sup> Argentina’s contention that had it intended to define the procedural terms of the MFN clause of the Germany-Argentina BIT, it would have done so explicitly in the Treaty was negated by the teleological reading of the treaty: to encourage and protect foreign investment. In this case, the Treaty’s purpose of promoting investment extended the Treaty’s protection beyond its text.

In *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*,<sup>46</sup> the Tribunal made reference to the Treaty’s purpose, stating, “...in terms of the BIT, fair and equitable treatment should be understood to be treatment in an even-handed and just manner, conducive to fostering the promotion of foreign investment.”<sup>47</sup>

Thus, most debates on economic development have been centered to a large extent around the ICSID Convention. However, since many other IIAs also contain references to economic development as the *leit motiv* of States to enter into them, it is foreseeable that tribunals could be exposed to circumstances where interpretation of the intention of the States would have to be considered. In those cases, it would inevitable turn into an analysis of the economic development criterion of the investment. Of course, in the absence of any reference to economic development in the IIAs the task of the tribunals will be harder.

In cases to be tried in fora different than ICSID, the so called economic development defense to object jurisdiction will probably not be possible. Only if the relevant IIAs has made references to economic development as the reason for the parties to grant international protection to foreign investments could that argument be submitted. But in that hypothetical the tribunals would most likely consider the defense on the merits. For now, it seems that cases under ICSID will dominate the discussion on the analysis of economic development as an outer limit of a protected investment.

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43 *METALCLAD CORPORATION v. United States OF MEXICO*. AUG, 30, 2000, § 70-75

44 *Siemens, A.G. v. The Argentine Republic*, Decision on Jurisdiction, Case No. ARB 02/8 (August 3, 2004)

45 *Id* at § 81.

46 *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile* (Case No. ARB/01/7) (May 25, 2004)

47 *Id* at § 113.

## **V- Economic development: a measurable concept.**

The search for prosperity has been the main drive behind the emergence of the consensual international law of foreign investment. That intention is portrayed clearly in some IIAs and not so much in others. As it is, it seems that we are short of a consensus that contribution to economic development is a relevant criterion to determine whether an investment is entitled to protection under certain IIAs or not. The divergence seems to be on how to define and measure economic development.

Economic development is certainly a concept that can be very broad and encompass many aspects. However, through the review of relevant documents and cases, several factors signal some non exclusive criteria to determine when an investment has made a contribution to the economic development of the host country.

As pointed out above, case law points out to:

- a) investment that benefits public interest, b) transfer of know-how from investor to the host State, c) the investment enhancing the Gross Domestic Product of the host country; d) the investment having a positive impact on the host State's development.

A hermeneutic analysis of the ICSID and IBRD points out to the need that investment be made for:

- a) productive purposes as opposed to speculative purposes; b) for the development of the productive resources of countries to increase productivity, standards of living and conditions of labor.

Similarly, as ICSID is part of the World Bank Group, the wording of World Bank 's documents should be relevant. One of those documents is the 1992 Guidelines for Treatment of Foreign Investors. Although, not a binding document, but a set of recommendations intended to be incorporated by countries into their laws, it states in its preamble that it is recognized that: [a] greater flow of foreign direct investment brings substantial benefits to ...the economies of developing countries ... through greater competition, transfer of capital, technology and managerial skills and enhancement of market access and in terms of the expansion of international trade”<sup>48</sup>.

Thus, it can be said that there are ways to ascertain the contribution to economic development of a foreign investment. In some cases, it would be up to the tribunal to determine when that contribution has not been made and decide in consequence. Although the litigating party could not be asked to prove the negative, the tribunal could look at all the facts and find that there has not been a contribution to the economic

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<sup>48</sup> Guidelines on Treatment of Foreign Investments, World Bank, 1992. [http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/1999/11/10/000094946\\_99090805303082/Rendered/PDF/multi\\_page.pdf](http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/1999/11/10/000094946_99090805303082/Rendered/PDF/multi_page.pdf) (last visited Feb 1, 2010)

development of the country when, for example the investor has not complied with the local law, or has violated human rights, or has damaged the environment or has been based on corruption. Tribunals in many cases have already reached decisions where protection has been denied to foreign investments based on any of the failures above mentioned. Those decisions have been taken on the merits, not on jurisdiction. But all those factors can also be part of a holistic analysis to determine the contribution to economic development of a given investment.

Be it as it may, tribunals have the needed tools to ponder whether the investment exceeds the outer limits for protection. If an investment is contrary to public interest, has not left any knowledge to the host country, has not enhanced the economy or its productivity, has not increased the standards of living of the host country or the labor conditions, it has probably made no contribution to the economic development of that country. Given specific references in the relevant IIAs, that investment should be denied protection either at a preliminary jurisdictional stage or at a final merits stage. In some cases, factors other than those mentioned here should be taken into account, and in most cases all these factors should not be considered concurrently, but the rationale of countries on granting international protection to foreign investment should be taken into account for adjudicating a sustainable outcome.