The teleology of international investment law

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The Role of Purpose in the Interpretation of International Investment Agreements

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1. INTRODUCTION

Foreign investments need an international legal framework, but that necessity is based on different motives depending on who is who in the foreign investment process. For foreign investors, that framework is necessary in order to protect their investments through a stable and fair law. For host countries, it is needed to provide international protection to foreign investments so that they be better positioned to attract investors. However, although the subjects of the international law of foreign investment are investors and States, the former do not negotiate the international investment agreements (IIAs) which are, rather, a creation of the States. Thus, the interests, intentions and purposes of the investors are included in the IIAs by the States of their nationality when they enter into those legal instruments.

For that reason, the States that enter into IIAs might have different purposes among themselves for doing so. Countries that are primarily capital exporting might be interested in protecting their investors, whereas countries that are primarily capital importing might be interested in maximizing the gains they realize from the foreign investment while their sovereignty is protected. As a result of that, the purposes countries state in those IIAs has an impact in terms of how the agreements are interpreted, a factor usually neglected but which becomes important when disputes arise and arbitrators need to analyze the IIAs in order to take decisions.
This article examines the effect that the purpose of IIA's has on their interpretation. By underlining the degree to which an agreement's content pertaining to its objectives, rationale and purpose influence its interpretation, policy makers and negotiators of future agreements can make the stated purposes consistent with the agreement's implicit objectives. While arbitrators are largely limited in the extent to which they are able to look beyond an agreement's text, the following is useful in making the case against strictly formalistic arbitral interpretations and contributes to the case for a more holistic approach to interpreting IIA's.

II. THE EMERGENCE OF INTERNATIONAL LAW FOR FOREIGN INVESTMENT

Foreign investments are by essence a matter of international law. The mere fact that foreign investments relate to the transfer of capital from one country to another has international consequences for which an international legal framework needs to provide. Issues such as nationality of the investor and the investment, the treatment provided to investors by the host State and the extraterritorial application of the home State's law are just some examples of matters of potential relevance for international law.

Historically, the international law of foreign investment has been influenced by the local policies of countries towards foreign investments. When foreign investments have been perceived as a means of dominance and neo-colonialism, the international law of foreign investment has been protective of the interests of countries against foreign investors. For example, during the 1970s, in the United Nations Charter of Economic Rights and Duties of States, every State was recognized to have the right to freely exercise full permanent sovereignty, including possession, use and disposal, over all its wealth, natural resources and economic activities and to take foreign property, in which case appropriate compensation—understood as compensation at a lower level than that provided under the Hull formula—should be paid by the State adopting such measures. Where the question of compensation gave rise to a controversy, it was to be settled under the domestic law of the nationalizing State and by its tribunals. No wonder that, by means of the Charter, some States considered themselves to be protected against foreign investments and the alleged unfairness of the world economic order to be balanced.

Likewise, the Calvo Doctrine, which had been incorporated into the constitutions of many countries and whereby foreign investors were not entitled to take disputes with

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2 According to the Hull formula, named after the U.S. Secretary of State, Cordell Hull, who exchanged notes with the Mexican government during the Mexican expropriations that followed that country's Revolution, compensation should be paid in an "adequate, prompt and effective" manner; see Francesco Francioni, Compensation for Nationalization of Foreign Property: The Borderland between Law and Equity, 24 Int'l & Comp. L. Q. 225, 1975.
4 Named after the Argentine Minister of Foreign Affairs, Carlos Calvo—see Greta Gainer, Nationalization: The Dichotomy between Western and Third World Perspectives in International Law, 26 Howard L. J. 1547, 1983.
host States to the international arena, is also a reflection of a historical attitude against foreign investments. Accordingly, investors were subject to the same treatment that domestic investors received in the host State, not better. Therefore, they could only claim diplomatic protection from their home States in a few restricted cases, and then only after exhausting local legal remedies. In addition, host States were not compelled to indemnify aliens for losses that were not the State’s fault.5

In opposition to the approach of the old international law of foreign investment, which was based on the protection of sovereignty, there is the doctrine of State responsibility for injury to aliens, whereby States are made accountable to other States if investors from one country are injured in any way in another State. In that context, foreign investors need to claim diplomatic protection from the States of their nationality for the host State to be declared responsible.

Although the principle of State responsibility is independent of any attempt to create international law of foreign investment, its basic principles had an impact on foreign investment law because they guaranteed a minimum level of security to foreign investors.6 In the context of foreign investments, State responsibility means that host States owe a duty to each other not to deny the other’s nationals the international minimum standards of treatment. When a wrongful act has occurred, the victim can initiate any local action against the host State, but if there is no such local action or if the one that exists does not meet the international standard, the victim has the right to claim diplomatic protection by the State of its nationality.7

That is what occurred in the Barcelona Traction case,8 in which a company incorporated in Canada, whose shares were owned by Belgian citizens, was expropriated by Spain. The International Court of Justice (ICJ) held that international law recognizes the existence of the corporate entity as a matter of local legislation caused by the economic reality and determined that Belgium could not protect the company in an action before the Court against Spain.

The Decision was based in that, under customary international law, a company can claim the protection of the State in which it is registered but not the protection of the State of which the shareholders are nationals. However, in Barcelona Traction, Canada refused to grant diplomatic protection because it required not only a Canadian registration but also that the company had generated a substantial economic benefit domestically or that the company would have had some kind of domestic economic interest of substantial character.

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6 Weston, supra, footnote 3.
Analyzing the facts, the Court found that the shareholders and the company were different entities with different judicial personalities and different rights. Therefore, a company could have property rights over the assets it owned and the right to diplomatic protection from the State in which it was constituted. The shareholders would have the right of property over the stocks and the right to diplomatic protection from the State of which they were nationals. Those two States could be different.9

As the means to finance the economic development of countries have become scarce, however, the legal policies towards foreign investments have changed. Moreover, the combination of economic policies recommended by international organizations as a recipe for progress and poverty alleviation has comprised friendly policies towards foreign investments. Thus, countries have become interested in attracting foreign investments because these have been perceived as a means to finance economic development.

Where that has happened, the local laws have turned favorable to foreign investments. As local laws are easily changeable at the will of the host States, moved by the desire to be more appealing to foreign investors, however, States have sought to attract foreign investments through IIAs. To ease investor concerns regarding the reliability, transparency and sophistication of domestic legal systems, governments of developing countries seek, through participation as signatories of IIAs, to provide potential investors with explicit treatment standards and internationally binding alternatives to domestic courts.10

In that context, countries have bound themselves to IIAs to protect foreign investments and foreign investors. In many cases, however, the real reason why countries have entered into those international instruments has been forgotten, and many IIAs have been unbalanced, reflecting only the purpose of protection of foreign investment without reflecting the ultimate goal of countries when interested in attracting foreign investments: economic development.

In general, foreign investment should be understood as a means by which development is pursued rather than an end in itself. IIAs that define their purpose solely in terms of encouragement of foreign investment thus fail to place this objective within its greater context. Countries grant international protection to foreign investment because of the positive externalities they bring.

Interestingly, whether or not IIAs are able to directly increase foreign investment flows is unclear. A 2003 study conducted by the World Bank concludes that, while the

9 See E.R. Hardy Irvin, Dictionary of Company Law, 2nd edition, Butterworths, London, 1985, p. 42 (indicating that a company’s judicial personality and nationality have nothing to do with the stockholder’s judicial personality).

10 This movement of allowing international arbitration to settle investment disputes represented a shift from the Calvo Doctrine, which placed the settlement of disputes in regard to foreign investments within the domain of local courts. However, recently there has been a resurgence of the Calvo Doctrine in some Latin American countries; see Bernardo M. Cremades, Disputes Arising out of Foreign Direct Investment in Latin America: A New Look at the Calvo Doctrine and other Jurisdictional Issues, Dispute Resolution Journal, May/July 2004, p. 90.
agreements are not effective substitutes for sound institutions or strong property rights. IIAs might play a complementary role in investment attraction in States that are already pursuing broader measures to improve their business climates.11 Regardless of their efficacy in investment attraction, IIAs have become a common means by which developing countries seek to attract foreign investment.

Presently, there are more than 2,200 IIAs in force. Many of them have common patterns regarding the protection of the investment and the investor. For example, in general, IIAs provide protection to all kinds of foreign investment—including foreign direct investment and portfolio investments12—grant protection against unfair treatment, provide protection against direct or indirect taking of property and provide investors with a mechanism for international investment dispute settlement against host States.

Importantly, the parties to IIAs are States but the beneficiaries are the investors. Because the IIAs have not been negotiated with the investors directly, the latter cannot assume legal obligations based on them. Thus, there is scant reference to investor obligations in most IIAs. For example, in most IIAs, a subsidiary of a company from the home State registered in the host State can be considered an entity with the nationality of the home State, given certain conditions. That solution tries to accommodate the legal reality with the economic reality when the foreign investment has been conducted by means of a locally registered company wholly owned by the foreign investor. However, for purposes of liability of the foreign parent company for wrongdoings of the wholly owned local subsidiary, the solution is not the same, and the two entities remain as two separate and different legal persons.

Efforts to increase and formalize investor obligations have, for the most part, been thwarted. The formation of the United Nations Center on Transnational Corporations (UNCFC), an organization seeking to increase foreign investors' obligations to their hosts, was met with harsh criticism by multinational corporations and dismantled.13 Similarly, the new United Nations Norms of Responsibility of Transnational Corporations and other Commercial Entities in relation with Human Rights14 is a non-binding initiative whose results are yet to be seen.

In sum, the rise of IIAs can be explained by a shift in the attitude of countries towards foreign investment. Countries have done so because they need foreign investment. In turn, countries need foreign investment because they need capital to provide for their economic development and the well-being of their people.

The growth of IIAs that only favor the interests of foreign investors might be dangerously unbalanced, which could generate unexpected results, such as protecting unwanted foreign investment, not generating economic development and exposing the country to international litigation over unpopular investments. A reaction to that could be local laws restrictive of foreign investments, proposals for changes in the international law of foreign investment or reluctance to comply with the provisions or outcome of the international law of foreign investment. In that sense, the resurgence of the Calvo Doctrine in Latin America can be evidence of a change in the attitude towards foreign investments which could be reflected somehow in international law.  

For that reason, and because foreign investors need international protection and countries will need foreign investment for their economic development, the international law of foreign investment needs to maintain an equilibrium. Foreign investors need to be made accountable for their actions regardless of the legal forms that might protect them. Likewise, the purposes States have when interested in attracting foreign investments need to be expressly mentioned in the IIAs.

III. THE PURPOSE OF INTERNATIONAL INVESTMENT LAW

According to the Vienna Convention on the Law of the Treaties, the purpose of treaties as expressed in their body texts, preambles, annexes and travaux préparatoires shall be taken into account in treaty interpretation. Specifically, Article 31.1 of the Vienna Convention states: "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.”

Article 32 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."

As the purpose of an IIA is relevant to its interpretation, it is important to note a distinction between two common, and at times equivocated, purposes provided in these agreements. Signatories of IIAs from developing countries seek to increase inward foreign investment flows. On occasion, this desire for foreign investment is explicitly defined within the context of the larger purpose of promoting economic development. However, promotion of investment and promotion of economic development provide varying degrees of protection to party States. A treaty with a stated purpose of

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15 See supra, footnote 10.
promoting foreign investment that does not make reference to State parties’ economic well-being or economic development may leave the host State powerless against foreign investments that are economically detrimental.17

It is useful to review the given purpose of various IIA’s to underline the manner by which slight differences in an agreement’s language profoundly impact the protection provided therein.

A. The International Centre for Settlement of Investment Disputes

The International Convention for the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention), which created one of the primary investment dispute resolution mechanisms—the International Centre for Settlement of Investment Disputes (ICSID)—has addressed the question of the purpose of IIA’s 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 ...”18

While the Report from the ICSID Executive Directors states that the primary purpose of the Convention is to stimulate international investment flows, it 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.”19

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:

(i) The dispute needs to be of a legal nature. Disputes of a technical nature, although related to an investment, are not covered by the Convention nor are they within the boundaries of ICSID jurisdiction.

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(ii) The dispute needs to arise directly out of an investment. Disputes arising out of matters that do not comprise an investment are excluded, such as disputes arising out of immigration.

(iii) 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 is 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 a national of another Contracting State: 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 any juridical person which had the nationality of a Contracting State other than the State party to the dispute, as well as 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.

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

Thus, disputes before ICSID Tribunals need to be, inter alia, 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 one point, the Secretary-General of ICSID refused to register a request for arbitration in which the dispute arose out of a sale.20

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; and
- contribute to the economic development of the host State, as stated in the Convention’s preamble.21

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 ITAs’ relationship to economic development.

B. The European Energy Charter

Occasionally, ITAs 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 Energy Charter (ECT) primarily to stimulate growth in Eastern European and former Soviet States after the Soviet Union’s collapse. As the Treaty was supported by Europe’s desire to enfranchise and stabilize Eastern European and ex-Soviet States, the ECT defines economic development amongst its objectives.

Specifically, the ECT states that the Charter’s measures to liberalize the energy sector are meant to spur economic development:

“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...”

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.”

C. Other ITAs

However, the Preamble of the ICSID Convention, the ECT and the Germany-Pakistan BIT are exceptions. The majority of ITAs contain either no reference to economic development or use ambiguous language in defining purpose. In a study of BITs, Peterson notes this void:

“...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.”

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23 The Peru-Venezuela, Germany-Venezuela and United States-Latamania BITs also include economic development amongst their purposes.

Whereas a few investment agreements 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 controversial legal bodies dealing with international investment, the North America Free Trade Agreement (NAFTA), in which the treatment of investments is covered in Chapter Eleven, does not mention economic development. As NAFTA’s Chapter Eleven 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. The Preamble of the 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;

... Ensure a predictable commercial framework for business planning and investment ...”

From this reading, it seems that the reference to development made in the NAFTA Preamble relates to development of world trade, presumably a synonym of trade growth. Thus, as NAFTA does not mention economic development in its trade-related sections or Preamble, investments are not required to contribute to economic development in order to receive treaty protection.

In general, the Iias to which the United States is party extend investor protection further than agreements made by other States. The United States 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 on foreign investors of performance requirements which have been used to ensure that investments render economic benefit to the host State, such as the use of local content, export requirements, employment and technology transfer.25

Noticeably, the 2004 U.S. Model BIT seems much more balanced than were 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”.26 The Model BIT 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”.27


27 Ibid.
From the wording in the Preamble of the U.S. 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 made seems confusing and could give rise to different interpretations. However, the fact that the Preamble of the Model BIT makes some reference 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 the 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”.28

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”.29 The Preamble of the United Kingdom-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”.30 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.31

Agreement expressions such as those which have been quoted above leave room for interpretation that does not include economic development amongst an agreement’s objectives and thus limits the protection bestowed on States.

There are also a large number of IIAs that come close to defining economic development as a purpose but describe their objectives in words sufficiently ambiguous as to leave room for interpretations that may contradict the agreement’s underlying intent. The free trade agreement between Mexico, Colombia and Venezuela (G3), in which investments are covered in Chapter 17, is an example of this. The Agreement’s Preamble states that Signatories have decided to enter into an agreement to “contribute to the harmonic development”.32

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28 Cuba-United Kingdom BIT; available at: www.unctad.org/sections/dite/iai/docs/bits/cuba_uk.pdf.
31 Germany-Israel BIT; available at: www.unctad.org/sections/dite/iai/docs/bits/germany_israel.pdf.
32 See Tratado de Libre Comercio entre los Estados Unidos Mexicanos, la República de Colombia y la República de Venezuela, Colombia Decree 2901, 31 December 1994; Mexico Decree of 31 December 1994; Venezuela Law, 29 December 1994.
The enhancement of economic co-operation is also an objective common to many IIAIs. While economic co-operation 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 co-operation refers primarily to activities on a State rather than a firm level. That is, the intention to increase economic co-operation 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 economic co-operation for the mutual benefit of both countries and for the creation of conditions conducive to investment. The Preamble of the Cuba–Spain BIT uses the notion of economic co-operation in defining its purpose, stating that through the Agreement the Parties desire to intensify economic co-operation and to create favorable conditions for foreign investment. The Spain–China BIT also highlights the desire of the parties to develop economic co-operation.

The importance of negotiating power on the content of IIAs, witnessed in the United States' ability to negotiate favorable terms for U.S. 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 mechanisms can be used. While China has been a strong proponent of 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. The China and Argentina BIT also includes economic co-operation and the creation of favorable investment conditions amongst its objectives and goes on to "recognize that the promotion and protection of such investments through an agreement stimulates business initiatives in this field".

Recently, the International Institute for Sustainable Development (IISD) produced a draft model agreement on international investment that was specifically directed at addressing the concerns of host States as they relate to sustainable economic development. The model agreement defines its purpose as the promotion of long-term investment that supports sustainable development. The model also refers to a

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35 Spain–China BIT; available (in Spanish) at: www.unctad.org/sections/dite/iia/docs/bits/spain_china_sp.pdf.
necessary balance between the rights and obligations between and among investors and host countries.

As has been demonstrated in the preceding examples, the manner in which IIA's define purpose leaves significant room for interpretation contrary to the interests or unstated 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. INTERPRETATION OF PURPOSE IN IIA’S: A REVIEW OF CASES

Examination of cases of investment dispute settlement demonstrates the relevance of an IIA’s purpose to its interpretation. In some instances, arbitral tribunals have considered an agreement’s purpose in deciding issues of arbitral jurisdiction or in deciding the cases on the merits.

In *Salini v. Morocco*, 39 two Italian companies claimed compensation for damages from the Kingdom of Morocco under the Treaty between Morocco and Italy for the reciprocal promotion and protection of investments due to a dispute that arose out of a construction contract related to a section of highway joining Rabat to Fès. Morocco objected to the Tribunal’s jurisdiction based on different grounds, one of which was 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 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. 40

The Tribunal found that the construction contract fulfilled the criteria of an investment. Even in the risk aspect, the Tribunal indicated that a construction project that lasts several years and 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 to the work. 41

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40 Ibid., at para. 52.
41 Ibid., at para. 57.
The Tribunal also mentioned that all the elements to be taken into account to define when there is an investment in the context of the ICSID 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 be taken into account in order to determine the existence of an investment according to the ICSID Convention, it looked at the purpose of that Treaty as mentioned in its Preamble.

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

In *Siemens*, the German firm initiated ICSID arbitration against Argentina based on alleged violation of the Germany–Argentina BIT after a contract to establish a migration control and personal identification system was suspended and then terminated. Argentina objected to ICSID jurisdiction based on eight arguments, each of which was ultimately rejected by the Tribunal.

The Claimant argued that by virtue of the most-favored-nation (MFN) clause of the Germany–Argentina BIT, it was entitled to certain procedural benefits of the Argentina–Chile BIT. Argentina objected to this claim, but 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.”

During the case, Argentina argued that if the Argentina–Chile BIT was applicable by virtue of the MFN clause, unfavorable provisions contained therein should also apply. The Tribunal responded that under the MFN clause only favorable provisions were applicable. In view of the inapplicability of unfavorable provisions and the purpose of the BIT, the Tribunal rejected Argentina’s objection to jurisdiction stating:

“... an MFN clause ... as its own name indicates ... relates only to more favorable treatment. There is also no correlation between the generality of the application of a particular clause and the generality of benefits and disadvantages that the treaty concerned may include. Even if the MFN clause is of a general nature, its application will be related only to the benefits that the treaty of reference may grant and to the extent that benefits are perceived to be such.”

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44. *Ibid.*, at para. 120.
Likewise, 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,\textsuperscript{45} a Malaysian company made an investment in Chile to build a planned community in an urban section of Santiago. The company obtained a permit to invest in the form of a contract with Chile’s Foreign Investment Commission. Subsequently, the investor learned of zoning regulations contained in Chile’s urban development and environmental policies which designated the land on which the community was to be built as reserved for agricultural purposes. The investor initiated ICSID arbitration alleging indirect expropriation and unfair and inequitable treatment in violation of the MFN clause of the Malaysia-Chile BIT and the fair and equitable treatment provisions of the Denmark-Chile and Croatia-Chile BITs, which were applicable, as witnessed in the Siemens case, due to the general nature of MFN interpretation. The investor alleged that the Chilean government’s approval of the investment in spite of knowing of its impossibility violated the government’s obligation to provide fair and equitable treatment.

The Tribunal ruled that States are not limited in their authority under national laws or policies except to the extent that exercising that authority would contravene BIT obligations. As the purpose of the Malaysia-Chile BIT was to foster and promote foreign investment, the fair and equitable treatment provisions of other BITs were applicable to Malaysian investors by means of the MFN provision. The Tribunal’s Decision made reference to the Treaty’s purpose, stating that “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”.\textsuperscript{46}

While the Tribunal ruled that the State’s approval of an investment that was inconsistent with its urban planning regulations constituted a violation of fair and equitable treatment provisions, the panel also found MTD partially responsible. The Tribunal stressed that “BITs are not an insurance against business risk”\textsuperscript{47} and pointed out that under international law a State cannot be compelled to change a policy or pass a law. That is, the investor did not have the right to amendment of a land use policy. The investor was not denied a permit but rather denied amendment of a regulation. Thus, while the failure to amend public policy was not considered expropriation, unfair treatment did occur, as the investor was admitted to invest under circumstances known by the State to make the investment inoperable. The Tribunal reached a decision whereby only a portion of the compensation claimed by the Malaysian firm was awarded because “the claimant failed to protect themselves from business risks inherent to their investment in Chile”.

\textsuperscript{45} MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile (MTD), ICSID Case No. ARB/01/7, 25 May 2004; available at: www.asil.org/lib/MTDvChile.pdf.
\textsuperscript{46} Ibid., at para. 113.
\textsuperscript{47} Ibid., at para. 178.
In two controversial decisions, the ICSID tribunals reached different levels of control of the investors while fulfilling the purpose of Article 25(2)(b) of the Convention. In **Amco**, PT Amco was a locally incorporated company but controlled by the foreign parent company Amco Asia. The arbitration clause mentioned PT Amco as a potential party in the proceedings before ICSID. Indonesia objected to ICSID jurisdiction, arguing that it had not agreed to treat PT Amco as a foreign company. The Tribunal had to consider Indonesia’s objection according to which PT Amco was not controlled by Amco Asia, a company belonging to a national of the United States, because Amco Asia was controlled by a Hong Kong company which itself was owned by a Dutchman. The Tribunal rejected the search for indirect control beyond the first level of control and found that the search was to be restricted to the immediate control of the parent company over the local company.

By contrast, in **SOABI**, the ICSID Tribunal considered a treaty’s purpose in determining jurisdiction, which, in turn, provided arbitrators with the support necessary to go beyond the analysis of a firm’s direct control. SOABI, a Senegalese-incorporated company, was controlled by a Panamanian company which was controlled by Belgian citizens. When the consent to arbitration was given, Panama was not a Contracting State of the ICSID Convention but Belgium was. Senegal objected to ICSID jurisdiction, arguing that Panama was not part of the ICSID system and thus, while SOABI could be considered a local company under foreign control, the foreigners who controlled the company were not nationals of a Contracting State of the Convention and therefore outside of ICSID’s domain. However, the Tribunal found that the purpose of the Convention’s Article 25(2)(b) was to facilitate foreign investments through locally incorporated companies so that they might qualify before ICSID. As a consequence of this interpretation, the Tribunal went beyond SOABI’s direct Panamanian control, finding that Belgian nationals, in effect, controlled the company, and rejected Senegal’s objection to jurisdiction on this basis.

The tribunals’ different approaches concerning the application of direct control are reconciled by the interpretation of the purpose of Article 25(2)(b) of the Convention. As Article 25(2)(b) seeks to promote investment through the extension of jurisdiction to locally incorporated companies controlled by foreign nationals, the two arbitral decisions, while extending the analysis of direct control to different levels, were consistent with the Article’s intention to grant jurisdiction to locally incorporated firms controlled by foreign nationals.

In **Banro**, the Tribunal held that the ICSID Convention was not intended to provide the Claimant with diplomatic protection and arbitration simultaneously. The parent company, a national of Canada, had used the mechanism of diplomatic
protection while a U.S. subsidiary submitted the dispute to ICSID. The Tribunal stressed that:

"... once ICSID arbitration is available for settling a dispute related to a foreign private investment, diplomatic protection is excluded; the investor no longer has the right to seek diplomatic protection, and the investor's home State no longer has the right to grant the investor diplomatic protection."\textsuperscript{31}

Furthermore, it was pointed out that it would be against the purpose and aim of the ICSID Convention to expose the host State at the same time to both diplomatic intervention and arbitration. On ruling in that direction, the Tribunal stated that a group of companies cannot avail itself of both diplomatic protection through its parent company and arbitration through a subsidiary.

The Tribunal also analyzed the subject of nationality of the company from a different perspective—the company with the nationality of the other Contracting State and the company giving the consent and in connection with whom the host State gave consent to arbitrate disputes involving them were not the same. The Tribunal held that a company could transfer to a subsidiary the consent it had granted to submit a dispute to ICSID as per the terms of the agreement where consent was originally granted. However, for the consent to be transferable, it had to have been previously granted. In the case in point, the consent could not have been granted or transferred because the parent company did not have the nationality of a Contracting State. Thus, if a claimant lacked the nationality of a Contracting State, ICSID could not have jurisdiction. The Tribunal also considered the possibility of the claimant having the nationality of a Contracting State but not having granted consent and the possibility of the host State granting consent but not including disputes involving the claimant. In both such cases, the Tribunal stated that it lacked jurisdiction.

On reaching its conclusion, the Tribunal established differences with two previous cases: one where a request to submit a dispute to ICSID was submitted by a member company of a group of companies while the consent was expressed by another company of the group; and the other where, following a transfer of shares, the request to submit the dispute to ICSID came from the transferee company while the consent had been given by the company making the transfer. The Tribunal stressed that, in general, it tends to be less formalistic and that ICSID is more willing to work its way from the subsidiary to the parent company than the other way around. "Consent expressed by a subsidiary is considered to have been given by the parent company, the actual investor, whose subsidiary is merely an 'instrumentality'," it said.\textsuperscript{32}

As noted in Salini, Tribunals have used the Preamble of the ICSID Convention to require that contribution to a host's economic development is an element necessary to the definition of investments falling under ICSID's arbitral jurisdiction. In Tokios Tokelés,\textsuperscript{33} the Tribunal again referred to the purpose of the ICSID Convention, but did so from a decidedly different perspective.

\textsuperscript{31} Ibid., at para. 15.
\textsuperscript{32} Ibid., at para. 12.
\textsuperscript{33} Tokios Tokelés v. Ukraine, ICSID Case No. ARB/02/18, Decision on Jurisdiction of 29 April 2004; available at: www.worldbank.org/icsid.
In *Tokios Tokelės*, a firm incorporated in Lithuania but of which the majority of shares were owned by Ukrainian nationals initiated arbitration against Ukraine, alleging that the Ukrainian government breached the Ukraine–Lithuania BIT. Ukraine objected to the Tribunal’s jurisdiction, arguing, *inter alia*, that the Claimant was not a foreign investor and hence the dispute was between a State and its own subjects and not a matter for ICSID arbitration.

The Ukraine–Lithuania BIT defined foreign investors as those entities incorporated in the other State party. Based on that, the majority of the Tribunal stated that the parties to a BIT were free to determine the criteria to determine nationality and to set the definition of investor and foreign control of a local entity for purposes of Article 25(2)(b) of the ICSID Convention. It was not up to the Tribunal to question the criteria used therein. It stated:

“... Contracting Parties are free to define their consent to jurisdiction in terms that are broad or narrow; they may employ a control-test or reserve the right to deny treaty protection to claimants who otherwise would have recourse under the BIT. Once that consent is defined, however, tribunals should give effect to it, unless doing so would allow the Convention to be used for purposes for which it clearly was not intended.”

The majority thus concluded that Tokios Tokelės was a foreign investor under the terms of the BIT and rejected Ukraine’s objection to jurisdiction, stating:

“In our view, however, neither the text of the definition of ‘investment’, nor the context in which the term is defined, nor the object and purpose of the Treaty allow such an origin-of-capital requirement to be implied. The requirement is plainly absent from the text... the origin-of-capital requirement is inconsistent with the object and purpose of the Treaty, which... is to provide broad protection to investors and their investment on the territory of the other party.”

The majority then held that “the ICSID Convention contains no inchoate requirement that the investment be in a dispute have an international character in which the origin of the capital is decisive”. Regarding the Convention’s purpose, the majority considered that the Decision had not allowed “the Convention to be used for purposes for which it clearly was not intended”.

The dissenting arbitrator stressed that the purpose of the ICSID Convention was to govern international investments—that is, investments characterized by a trans-border movement of capital—rather than investment disputes between a country and its citizens. In the Dissenting Opinion, the minority arbitrator explains this distinction, stating:

“... when it comes to ascertaining the international character of an investment, the origin of the capital is relevant, and even decisive. True, the Convention does not provide a precise

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54 Ibid., at para. 24.
55 Ibid., at para. 39.
56 Ibid., at para. 77.
57 Ibid., at para. 82.
58 Ibid., at para. 39.
and clear-cut definition of the concept of international investment—no more than it provides a precise and clear-cut definition of the concept investment—and it is therefore for each ICSID tribunal to determine whether the specific facts of the case warrant the conclusion that it is before an international investment.\textsuperscript{60}

The dissenting arbitrator also objected to the right of Contracting Parties to extend the Convention's jurisdiction, explaining:

"...it is within the limits determined by the basic ICSID Convention that the BITs may determine the jurisdiction and powers of the ICSID tribunal, and it is not for the Contracting Parties in their BITs to extend the jurisdiction of the ICSID tribunal beyond the limits determined by the basic ICSID Convention."\textsuperscript{61}

The doctrine of company law is based on assumptions regarding the costs and benefits provided by limited liability. In general, it is understood that limiting shareholders' liability is socially beneficial as it allows a greater number of people to establish or own portions of a corporation and allows for greater specialization of a firm's functions and the externalization of business risks beyond its owners to creditors, who may be better suited to bear risk.\textsuperscript{62} However, should the negative externalities produced by limited liability exceed those deemed acceptable, the legal personality of the company can be disregarded.

Thus, the abuse of legal personality that was apparent in \textit{Tokios Tokelės} offered arbitrators the means by which the formal definition of nationality could have been weighed against its social costs. In this case, the use of a Lithuanian company owned by Ukrainian nationals to obtain international protection against Ukraine not only constitutes an abuse of the legal personality of the Lithuanian company but also puts at risk the whole international investment arbitration system, for the result is that investment disputes between States and their citizens—albeit disguised as foreigners—could be settled internationally.

The majority's decision to take a formalistic rather than an instrumentalist approach in interpretation was contrary to the primary purpose of the ICSID Convention: to protect foreign investments. A teleological approach might have sought to disregard the legal personality of Tokio Tokelės, based on the Ukrainian owners' abuse of it by pursuing international protection on behalf of a purely domestic investment.

In \textit{Champion},\textsuperscript{63} the Tribunal took a similar approach to that taken in \textit{Tokios Tokelės}. In \textit{Champion}, the Claimants, all of which were shareholders of an Egyptian cotton trading company, alleged that the Government of Egypt violated the terms of the United States–Egypt BIT and filed a claim through ICSID arbitration. Egypt objected to ICSID

\textsuperscript{60} Ibid., at para. 20.
\textsuperscript{61} Ibid., at para. 13.
jurisdiction based on the argument that some of the individual Claimants had Egyptian nationality. The Claimants alleged that their real and effective nationality was U.S.

In looking at the issue of real and effective nationality, the Tribunal analyzed the Nottebohm ICJ Decision\(^4\) and the A/18 Decision from the Iran–United States Claims Tribunal.\(^5\) The Champion Tribunal quoted the A/18 Decision and noted that "real and effective nationality was indeed relevant 'unless an exception is clearly established'". The Tribunal found that such an exception existed in Article 25(2)(a) of the ICSID Convention, which expressly provides that a national of another Contracting State does not include any person who, on either the date of the consent or on the date when the request was registered, had the nationality of a Contracting State party to the dispute. The Tribunal found that the individual Claimants had mentioned their Egyptian nationality in the documents establishing the investment vehicle without any reference to their U.S. nationality. It declared that it did not have jurisdiction in the dispute as presented by the individual Claimants. However, while the individual Claimants were forbidden from bringing a claim against Egypt due to their Egyptian nationality, the Claimants were also U.S. nationals and shareholders of the corporate Claimants, both of which were U.S. companies. The Tribunal held that the corporate Claimants were considered foreign investors for purposes of the arbitration and rejected the Respondent's objection to jurisdiction for the corporate Claimants.

Although the Champion Decision, which was taken before that in Tokios Tokélés, seems to have reached the same conclusion that was reached later on in the latter case, there are some differences. First, in Champion, the shareholders of the corporate claimants had Egyptian and U.S. nationality, a factor that was not present in Tokios Tokélés.

Secondly, had the possibility of disregarding the legal personality of the corporate Claimants in Champion been considered, the references the Tribunal made to the Nottebohm and A/18 decisions in terms of real and effective nationality would have been useful to dismiss the argument that they were Egyptian investors because the real and effective nationality of the individual shareholders was U.S.

Thirdly, the reference to Article 25(2)(a) of the Convention, which excludes dual nationals from invoking the protection of the Convention against the host country of the investment and of which they are also nationals, only applies to individuals, not to companies of the other Contracting State when individuals with dual nationality are shareholders.

Fourthly, the Tribunal in Champion made a specific reference to Article 32 of the Vienna Convention, which states that supplementary means of interpretation, including


the preparatory work of the treaty and the circumstances of its conclusion, can be used for interpretation in cases of ambiguity or unreasonable results. That provision could have allowed the hypothetical tribunal to look at supplementary means of interpretation of the ICSID Convention to disregard the applicability of Article 25(2)(a) if it led to an absurd or unreasonable result, such as the confirmation of ICSID jurisdiction to settle disputes between a State and a domestic investor.

Thus, it is likely that if it had been faced with the same issue addressed in Tokio Takelès—a national investor disguised as a foreigner—the Champion Tribunal would have used the argument of unreasonable result and would have explored the purpose of the ICSID Convention in depth to declare that it did not have jurisdiction over a dispute between a national and its State.

In sum, the evidence shows how important the purposes of IIs have been in interpretation of the international law of foreign investment when deciding investment arbitration disputes.

V. Conclusion

Historically, the international law of foreign investment has been motivated by different reasons. At one point, it was driven by a desire to protect the sovereignty of the recipient countries, and that desire originated a kind of international law that was defensive of the interests of countries against the interests of foreign investors. With changes in the world’s economy, and with the acceptance of economic policies generally thought of as favorable to economic development, countries have in general become friendlier to foreign investments. It has been assumed that foreign investments are good for economic development; they enhance the local economy, create jobs, transfer know-how and promote competitiveness. Because of that, countries need to attract them. Foreign investments are probably placed in the same category as multilateral or international banks’ loans in terms of means to finance economic development. Thus, the better laws that countries have, the better suited they will be to attract international capital; more so if they are of international nature.

As the evidence shows, the continuum of foreign investments has not been peaceful, and disputes have constantly arisen between investors and States. When that has happened, judges and arbitrators have had to interpret the international law of foreign investment as expressed in the IIs. In many cases, the interpretation of the IIs has extended to the purpose of the agreements, as is mandated by the Vienna Convention.

However, most IIs fail to show the real purposes of the contracting parties when entering into those agreements. Usually, reference is made to a plain “foreign investment protection” purpose or to vague statements that rarely express the intention of economic development that lies behind the international protection of foreign investments.
Investment arbitrators constantly look at the purpose of the IIA's in order to make a complete interpretation of the law and apply it to the facts of a case. That is a practice that needs to be encouraged. An interpretation that takes into account the purpose of the parties to IIA's is not only bound to produce reasonable results; it is also likely to be fair.

In that sense, investments that are detrimental to the economy of a country could be denied the protection of international law if the expressed purpose of the relevant IIA were betterment of the local economy. Likewise, investment disputes between local investors and their States could be denied access to ICSID arbitration, because ICSID has been intended only to handle disputes between foreigners and host States Party to the ICSID Convention.

However, arbitrators and judges cannot go beyond the purpose as mentioned in the text of the agreements, their preambles and the travaux préparatoires; that is, to the point where negotiators have left the IIA's. Hence, negotiators of IIA's need to be more diligent and understand how important it is to expressly state the real purposes their countries have when they enter into IIA's. An expressed purpose that neglects to indicate that foreign investments are protected because they are a means to economic development will only allow arbitrators to see IIA's as a means to protect foreign investments. On the contrary, IIA's that express that their purpose is to protect foreign investments as a means for economic development will broaden the scope of interpretation of the treaties on behalf of the arbitrators by also including the interests of the recipient countries. That might be beneficial to deny protection to foreign investments that are not in tune with the economic development of the host State. In turn, it would make investment arbitration decisions more balanced.