

## **The Emerging Global Right to Investment: Understanding the reasoning behind foreign investor rights**

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### **Abstract**

The international investment regime is probably the most controversial area of international law today. This article argues that looking at the interpretation of foreign investor rights can help us to better understand this regime and the challenges it poses to states and local actors. Relying on property and contract law theory, this article shows that the arbitral interpretation of foreign investor rights privileges wealth maximization over propriety. This leads arbitrators to draw on particular theories of property and contractual reliance. The analysis of these interpretative moves brings to the front crucial normative and distributive implications of the international investment regime.

### **Introduction**

What do we protect when we protect foreign investment? This may seem a trivial question, but it is not. The literature on the international investment regime has touched on this question in passing when discussing the applicable law or the nature of foreign investor rights (i.e. whether foreign investors own the rights or are only beneficiaries). But it has never explored the object of investment protection in detail. For most of the literature, this does not seem to be an important question. International investment law is based on the premise that investment treaties and arbitration are mechanisms to protect rights that are well defined either in investment contracts or in the domestic legislation. The concern of this field, in other words, is not the indeterminacy of foreign investor rights. The international investment regime is about political risk and *pacta sunt servanda*.<sup>1</sup> Foreign investors acquire control rights over assets such as land and minerals, but these rights remain at the mercy of host states' sovereign powers. The *raison d'être* of investment arbitration is to protect foreign investor rights against the abusive or arbitrary use of these powers. For Wälde, investment

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<sup>1</sup> W Reisman, 'Case Specific Mandates' versus 'Systemic Implications': How Should Investment Tribunals Decide?, 29 *Arbitration International* (2013) 131, 151; J Paulsson, 'The power of states to make meaningful promises to foreigners,' 1:2 *Journal of International Dispute Settlement* (2010) 341; J Salacuse, 'The Emerging Global Regime for Investment,' 51 *Harvard International Law Journal* (2010) 427.

arbitration is at the core of this regime because '[a] right without an effective remedy is a mere declaration.'<sup>2</sup>

But the premise that investment arbitration is only a remedy to protect well-defined foreign investor rights is flawed. Legal orders do not define entitlements in a comprehensive and detailed manner. Property is the result of a 'system of pre-established rights, which are disputable or even disputed.'<sup>3</sup> There is no universal concept of property but rather different conceptions that depend on normative and policy preferences. The interpretation of property 'is informed both by background conceptions about economics, public and private authority, the nature of property and by ideas about what law itself is and how it works, all of which differ from time to time and place to place.'<sup>4</sup> Contracts can mitigate this problem, but only to certain extent. Foreign investors can rely on contracts to clarify the scope of ownership, creating special entitlements in areas like taxation or environmental requirements.<sup>5</sup> But contracts remain incomplete by definition.<sup>6</sup> Contractual entitlements are not always enough to resolve investment disputes, and many investments, in any case, are not the result of detailed investment contracts.

Property and contracts are subject to interpretation, and this interpretation has significant normative and distributional effects.<sup>7</sup> The literature recognizes the limitations that investment protection standards may impose on state regulation. These intrusive effects, however, can be more severe if we accept that investment tribunals participate in the process of defining foreign investor rights. For one, the concepts of property and sovereignty are closely interconnected.<sup>8</sup> Greater foreign investor rights limit states' sovereign power to implement reforms without paying compensation. For another, the definition of property affects all, including those who are not parties to the contracts clarifying the scope of foreign investor rights. Property is relational and regulation is not only about

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<sup>2</sup> T Wälde, 'The Specific Nature of Investment Arbitration,' in P Kahn & T Wälde (eds.) *Les Aspects Nouveaux du Droit des Investissements Internationaux/New Aspects Of International Investment Law* (Nijhoff, 2007) 43, 119.

<sup>3</sup> C Barrère, 'Judicial System and Property Rights,' in E Colombatto (ed.) *The Elgar Companion to the Economics of Property Rights* (Edward Elgar Pub, 2006) 129, 151.

<sup>4</sup> David Kennedy, 'Some Caution About Property Rights as a Recipe for Economic Development,' 1:1 *Accounting, Economics, and Law* (2011) 3, 13.

<sup>5</sup> T Anderson & P Hill, 'The Evolution of Property Rights,' in T Anderson & F McChesney (eds.), *Property rights: cooperation, conflict, and law* (Princeton UP, 2003) 118, 122-3.

<sup>6</sup> E Brousseau & J Glachant, 'The Economics of Contracts and The Renewal of Economics' in E Brousseau & J Glachant (eds.) *The Economics of Contracts-Theories and Applications* (Cambridge UP, 2002) 3.

<sup>7</sup> Kennedy, *supra* note 4; H Muir Watt, "Private international law beyond the schism," 2:3 *Transnational legal theory* 2.3 (2011) 347, 352.

<sup>8</sup> M Cohen, 'Property and Sovereignty,' 13 *Cornell Law Quarterly* (1927-1928) 8.

curbing negative externalities but also about protecting neighboring property rights.<sup>9</sup>

The problem of indeterminacy is not new to international investment law. The vagueness and ambiguity of the standards of investment protection, such as indirect expropriation and fair and equitable treatment (FET), has dominated investment law literature since the early 2000s. Most academic and policy work has aimed to deal with this issue in one way or another. Some reform proposals have suggested tackling indeterminacy and inconsistent awards through the creation of an appeal mechanism or, more recently, a permanent investment court.<sup>10</sup> Others have looked at different methods to improve the arbitral interpretation of the relevant treaties. Global administrative law and comparative public law have been very popular in this respect.<sup>11</sup> The masters of the treaties, i.e. the states, have also attempted to reinterpret or renegotiate the treaties.<sup>12</sup>

This article looks at the problem of indeterminacy from a slightly different angle. Focusing on the interpretation of foreign investor rights, I propose to examine the baseline, i.e. the measure of property and contracts, against which arbitrators review state behavior. This is linked to the interpretation of investment treaties even if these treaties –as most constitutional property clauses– provide few insights about the interpretation of property and contractual rights.<sup>13</sup> Investment treaties as constitutional property clauses provide rights and remedies. Concerning remedies, as Cotula observes, investment treaties grant foreign investors with an efficient means to enforce their rights when compared, for instance, with locals who can only rely on domestic law or human rights systems.<sup>14</sup> But investment treaties, as constitutions, provide more than a remedy. As Llewellyn explains, '[n]ot only 'no remedy no right,' but 'precisely as much right as remedy.'<sup>15</sup> Investment arbitrators need to interpret foreign investor rights, and this necessarily entails defining correlative obligations of non-interference on states and other local actors.

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<sup>9</sup> G Alexander & E Peñalver. *An introduction to property theory* (Cambridge UP, 2012) 169.

<sup>10</sup> See United Nations Conference on Trade and Development (UNCTAD), 'Reform of Investor-State Dispute Settlement: In Search of a Roadmap', IIA Issues Note No. 2 (June 2013).

<sup>11</sup> See S Schill, 'The Sixth Path: Reforming Investment Law from Within', 11:1 *TDM* (January 2014).

<sup>12</sup> A Roberts, 'Power and persuasion in investment treaty interpretation: the dual role of states,' 104:2 *American Journal of International Law* (2010) 179.

<sup>13</sup> See F Michelman, 'Property as a Constitutional Right', 38 *Washington and Lee Law Review* (1981) 1097, 1098-9.

<sup>14</sup> L Cotula, *Human rights, natural resource and investment law in a globalised world: shades of grey in the shadow of the law* (Routledge, 2012).

<sup>15</sup> K Llewellyn, *Jurisprudence: Realism in Theory and Practice* (Transaction Publishers 2000) 63; D Levinson, "Rights Essentialism and Remedial Equilibration," 99:4 *Columbia Law Review* (1999) 857, 858.

Against this background, this article has two objectives. The first is to show that international investment arbitration is more than a remedy to foreign investor rights. Investment tribunals not only review host state measures to protect foreign investors from abusive and arbitrary behavior. They also specify the scope of foreign investor rights relying on either domestic or international law. This article focuses on the interpretation of foreign investor rights according to the legitimate expectations doctrine and international law (i.e. investment-as-expectations). The second objective is to examine this interpretation using property and contract theory. My argument is that arbitrators follow a Lockean conception of property where foreign investor rights emerge as the outcome of transactions between foreign investors and host states. The primary, if not the only, purpose of these transactions is the maximization of local wealth through foreign investment.

This conception of foreign investor rights falls under the label of investment rights. As opposed to other types of property, Veblen describes investment rights as a form of absent or passive ownership with the aim to maximize wealth.<sup>16</sup> In this respect, Veblen's conception is different from other utilitarian conceptions of property because in his view the owner is, in some way, detached from the relational consequences brought about by the investments. Foreign investors have a similar relationship with host resources and societies because, as opposed to migrants, they never fully integrate into these societies. They remain, in many respects, absent. This could lead, following the work of Waldron, to an interpretation of foreign investor rights that reproduces 'the perspective of an outsider interested only [...] in what can be extracted from a given society.'<sup>17</sup>

The first section of this article shows that investment tribunals play a major role in specifying the scope of foreign investor rights. Arbitrators need to interpret these rights in order to resolve investment disputes. In so doing, they can apply either domestic or international law. The second section examines the normative theory behind the interpretation of foreign investor rights according to international law. It relies on the work of Rose, Alexander, and Waldron to argue that the purpose of these rights is the maximization of wealth. The third section suggests that the interpretation of foreign investor rights is the result of this purpose and a transactional view of foreign investment relations. According to this conception, what matters most are the views of the promisees, i.e. foreign investors, and not those of the promisors, i.e. host states and local actors. The fourth section relies on this claim to argue that this interpretation of foreign investor rights

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<sup>16</sup> T Veblen, 'The Natural Right of Investment', in C B Macpherson (ed.), *Property, Mainstream and Critical Positions* (University of Toronto Press, 1978) 121.

<sup>17</sup> J Waldron, *The Rule of Law and the Measure of Property* (Cambridge UP, 2012) 105-6.

overlooks crucial normative and distributional effects. This article concludes by suggesting that a more pluralist interpretation of foreign investor rights is possible, one that could accommodate competing expectations for local resources.

## **1. Investment tribunals and foreign investor rights**

For many years, the literature on international investment law has discussed the private or public law nature of this international regime.<sup>18</sup> A public law approach focuses on judicial review, global administrative law, and is sometimes perceived as a more progressive understanding of the international investment regime. This approach focuses on the indeterminate nature of the standards of protection, proposing for instance the use of proportionality as an interpretative method that could help safeguard states' regulatory space.<sup>19</sup> A private law approach to the international investment regime, on the other hand, is often described in rather doctrinal terms. It draws on principles such as *pacta sunt servanda* and is regarded as less progressive. Those who highlight the private dimension of this regime, like Douglas or Alvarez, prefer to describe international investment law as a hybrid regime.<sup>20</sup>

According to property law theory, this hybrid view is theoretically sound because property is an artifact of public and private law.<sup>21</sup> But what follows from this, even if often overlooked, is that the interpretation of foreign investor rights should be at the center of any private law discussion of the international investment regime. Most economic and political economy analyses of foreign investment confirm this central role of property and contract rights. These analyses show that foreign investors have a strong interest in creating, strengthening, and protecting their ownership advantages.<sup>22</sup> And one could argue that international law has not been indifferent to this interest. The promotion of a minimum standard of treatment for foreign property goes to the core of international law,<sup>23</sup> and

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<sup>18</sup> J Alvarez, 'Is Investor-State Arbitration 'Public'?', 7:3 *Journal of International Dispute Settlement* (2016) 534. A fundamental contribution in this debate is G Van Harten, *Investment Treaty Arbitration And Public Law* (Oxford UP, 2007).

<sup>19</sup> See S Schill (ed.), *International investment law and comparative public law* (Oxford UP, 2010).

<sup>20</sup> J Alvarez, *supra* note 20; Z Douglas, 'The Hybrid Foundations of Investment Treaty Arbitration,' 74 *British Yearbook of International Law* (2003) 151.

<sup>21</sup> J Waldron, *supra* note 19, 32-3.

<sup>22</sup> Most recent studies of foreign investment decisions rely on a property rights approach. See E Helpman, *Understanding global trade* (Harvard UP, 2011) 154-5.

<sup>23</sup> C Lipson, *Standing Guard: Protecting Foreign Capital In The Nineteenth And Twentieth Centuries* (University of California Press, 1985); Jacob Viner, *International Economics: studies* (Free Press, 1951) 218.

has been a major justification for the international investment regime since the 1950s.<sup>24</sup>

Investment law literature, however, suggests that arbitrators' main task is to enforce investment treaty standards and foreign investor rights. McLachlan and Douglas have claimed that this regime is necessary to enforce, and not to expand, these rights.<sup>25</sup> Douglas is probably the author who has dedicated more time to examining foreign investor rights. His view is that investment tribunals should rely on conflict of law rules to decide the applicable law. These rules would normally lead the tribunal to host state law, resolving any dispute related to foreign investor rights.<sup>26</sup> More recently, Douglas has noted that there is 'another source of expectations relating to property that do not overlap precisely with legal entitlements created by the law of property.'<sup>27</sup> But even acknowledging that international law may be a source of expectations does not solve the problem. As Alexander claims in his book on global constitutional property, the interpretation of these sources and the emerging rights remains the central issue.<sup>28</sup>

Investment tribunals often rely on international law to specify the scope of foreign investor rights. In *Metalclad v. Mexico* and *Tecmed v. Mexico*, the arbitrators relied on legitimate expectations and international law to find that Mexico had committed an indirect expropriation. More recently, however, investment tribunals prefer to address the issue of legitimate expectations in the context of the FET.<sup>29</sup> When discussing this treaty standard, arbitrators often interpret foreign investor rights following the doctrine of legitimate expectations, which most scholars agree is an issue of

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<sup>24</sup> G. Schwarzenberger, 'The Abs-Shawcross Draft Convention on Investments Abroad: A critical commentary', 9 *Journal of Public Law* (1960) 147, 148; P Proehl, 'Private Investments Abroad', 9 *Journal of Public Law* (1960) 362, 362. More recently, see UNCTAD, *World Investment Report 1994: Transnational Corporations, Employment and the Workplace* (United Nations, 1994) 286-8.

<sup>25</sup> C McLachlan, 'Investment Treaties and General International Law', 57 *International and Comparative Law Quarterly* (2008) 361, 372; Z Douglas, 'Nothing if not Critical for Investment Treaty Arbitration: Occidental, Eureko and Methanex,' 22:1 *Arbitration International* (2006) 27, 38.

<sup>26</sup> Z Douglas, *International Investment Claims* (Cambridge UP, 2009), 41, 52-71. See also H Kjos, *Applicable law in investor-state arbitration: the interplay between national and international law* (Oxford UP, 2013) 247.

<sup>27</sup> Z Douglas, 'Property, investment and the scope of investment protection obligations,' in J Pauwelyn, Z Douglas & J Viñuales, *The Foundations of International Investment Law: Bringing Theory into Practice* (Oxford UP, 2014) 363, 394

<sup>28</sup> G Alexander, *The Global Debate over Constitutional Property: lessons for American takings jurisprudence* (Chicago, UP 2006), 1-6, 57-62.

<sup>29</sup> S Fietta, 'Expropriation and the 'Fair and Equitable' Standard,' 23:5 *Journal of International Arbitration* (2006) 375, 378-85. See more recently *Franck Charles Arif v. Moldova*, ICSID Case No. ARB/11/23, Award, 8 April 2013, ¶¶ 417-20, 530-7, 542-55; *Philip Morris v. Uruguay*, ICSID Case No. ARB/10/7, Award, 8 July 2016, ¶¶ 177-8, 235-71, 421-35

international law.<sup>30</sup> This does not change if arbitrators decide to interpret FET according to general international law. Investment tribunals have concluded that the minimum standard of treatment (MST) also requires the protection of legitimate expectations.<sup>31</sup>

The awards finding that foreign investors have legitimate expectations, such as *Micula v. Romania* and *Crystallex v. Venezuela*, are amongst the most controversial decisions.<sup>32</sup> When the facts of the case suggest that legitimate expectations were created and subsequently frustrated by the host state, arbitrators frequently conclude that the state should pay some compensation.<sup>33</sup> Such expectations can also serve to reinforce a different claim, as happened in *Bilcon v. Canada*.<sup>34</sup> These decisions have proved controversial amongst countries with a strong interest in protecting foreign investment, such as the United States and Canada. The United States has submitted to a number of investment arbitrations that these expectations should not be taken into account when deciding a dispute. Canada has claimed that the frustration of these expectations should not constitute sufficient reason to order a state to pay compensation.<sup>35</sup> These two states, in addition, have also introduced different qualifications to foreign investor expectations in the CETA and TPP texts.<sup>36</sup>

These reactions against foreign investor legitimate expectations should not come as a surprise. Rose claims that a vital question to decide an expropriation dispute is “[w]hat does your property right include?”<sup>37</sup> This should not be any different in the case of investment disputes. Arbitrators need to define a baseline to review host state behavior.<sup>38</sup> The interpretation of foreign investor rights according to the doctrine of legitimate expectations and international law is therefore crucial. Following an

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<sup>30</sup> Z Douglas, *supra* note 26, 81. See also *Total v. Argentina*, ICSID Case No. ARB/04/01, Decision on Liability, 27 December 2010, ¶¶ 128; *LG&E v. Argentina*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, ¶ 130.

<sup>31</sup> *Glamis Gold v. the U.S.A.*, UNCITRAL – NAFTA, Award, 8 June 2009, ¶¶ 621-2; *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, 22 September 2014, ¶¶ 575-6 (Hereafter I refer only to FET although my argument applies to the use of legitimate expectations under both the FET and the MST).

<sup>32</sup> *Ioan Micula v. Romania*, ICSID Case No. ARB/05/20, Award, 11 December 2013; *Crystallex v. Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016.

<sup>33</sup> See M Potestà ‘Legitimate expectations in investment treaty law: understanding the roots and the limits of a controversial concept,’ 28:1 *ICSID review* (2013) 88.

<sup>34</sup> *Bilcon v. Canada*, UNCITRAL, PCA Case No. 2009-04, Award on Jurisdiction and Liability 17 March 2015.

<sup>35</sup> L Johson & L Peterson, ‘As Canada straddles CETA and NAFTA, an effort is made in a new pleading to define legitimate expectations’ *IAReporter*, 26 May 2015.

<sup>36</sup> Draft of TPP Art. 9.6 (4 and 5); Draft of CETA Art. 8.9-10.

<sup>37</sup> C Rose, *Property and persuasion Essays on the history, theory, and rhetoric of ownership* (Westview Press, 1994) 50, 49-70.

<sup>38</sup> See J Sprankling, *The international law of property* (Oxford UP, 2014) 4, 18, 251-92; J Paulsson, ‘Universal arbitration – what we gain, what we lose,’ The Alexander Lecture - Chartered Institute of Arbitrators, 29 November 2012 (Draft 3 December 2012) 10.

important strand of property literature, the study of this interpretation requires an inquiry into what the arbitrators and most influential actors imagine to be the justification, comprehensive view, or purpose of foreign investor rights.<sup>39</sup> This is the first step to understanding the interpretative framework that guides arbitrators.

## **2. The purpose of foreign investor rights: wealth maximization**

The purpose of property can be normatively closed or plural and diverse. This may reflect a delicate balance or unresolved normative tensions. In the United States, for instance, many scholars refer to constitutional property law as a muddle.<sup>40</sup> This muddle is the result of unresolved conflicts between stability and change, the individual and the community, and wealth maximization and propriety. In the last decades, some of the most important studies on property have explored these tensions relying on different frameworks: general-based and special-based rights (Waldron); neo-utilitarianism and propriety (Rose); or commodity and propriety (Alexander).<sup>41</sup> These frameworks highlight different tensions in the interpretation of property, but also deal with a common issue: the conflict between property as a way to create, maintain, or destroy a community, and property as a means to facilitate wealth maximization.

According to Rose and Alexander, the interpretation of property depends on whether we follow a propriety or wealth maximization conception. The idea of propriety focuses on the social importance of property. Property as propriety aims at promoting civic habits. This conception of property highlights the importance of this legal institution for the creation and maintenance of a proper social order. In this understanding, property serves to ensure individual autonomy as much as it promotes a society where individuals have rights and obligations towards the community. Property as wealth maximization, on the contrary, promotes the conditions under which individuals engage in efficient economic activities. The starting point is the individual incentive to maximize self-interest. As opposed to propriety, then, wealth maximization highlights the private character of property rights and the need for a social order capable of enabling self-interest.

The relationship between wealth maximization and propriety can be useful for understanding the arbitral interpretation of foreign investor

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<sup>39</sup> See G Alexander, *supra* note 28; C Rose, *supra* note 37; J Waldron, *The Right To Private Property* (Clarendon, 1988) 433.

<sup>40</sup> C Rose, 'Mahon Reconstructed: Why the Takings Issue is Still a Muddle,' 57 *Southern California Law Review* (1984) 561.

<sup>41</sup> See above 39 and G Alexander, *Commodity & Propriety: Competing Visions of Property in American Legal Thought, 1776-1970* (Chicago UP, 1997).



rights. My argument is that arbitrators privilege wealth maximization over other purposes such as propriety. This does not mean that investment tribunals always favor foreign investors. The claim is that arbitrators follow this utilitarian conception of property in both a descriptive and a prescriptive way. First, awards focus on interpretations that correspond to the efficient use of local resources by foreign investors. Secondly, they promote a social order where societies are better off when they maximize net wealth. This interpretation may favor foreign investor interests, but it would be a mistake to assume that this is the ultimate purpose of foreign investor rights. After all, some economic prosperity is important for most conceptions of property. But the problem is that investment arbitrators pay excessive attention to wealth maximization (A), overlooking the normative and distributional consequences of this preference (B).<sup>42</sup>

### **A. Foreign investor rights and wealth maximization**

The positive role of foreign investment for economic activity is a major reason for international investment protection. Foreign investment can help countries to catch up with the global economy and increase their competitiveness. In this regard, the Grand Bargain in most investment treaties consists of an exchange between capital protection and the ‘prospect of more capital in the future.’<sup>43</sup> Protecting foreign investor rights through international arbitration is a means to promote foreign investment and facilitate business operations. The international investment regime, in this way, is part of a neoliberal project for economic development.<sup>44</sup> According to this project, states should create property institutions capable of enabling efficient actors –in this case multinational corporations (MNCs)– to determine the best use of resources.<sup>45</sup>

Most investment tribunals follow this idea. Arbitrators note that private property, contracts, and regulatory institutions play a fundamental role in attracting foreign investment and facilitating multinational corporate activity. They praise the work of the World Bank and the United Nations in assisting countries to implement institutions that ensure the certainty of foreign investor rights and obligations.<sup>46</sup> They also react negatively when states make substantial or political reforms to their regulatory

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<sup>42</sup> This reasoning borrows from G Alexander & E Peñalver, *supra note 9*, 17-34.

<sup>43</sup> Salacuse & Sullivan, ‘Do BITs Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain,’ 46 *Harvard International Law Journal* (2005) 67, 77.

<sup>44</sup> See D. Schneiderman, *Constitutionalizing Economic Globalization. Investment Rules and Democracy’s Promise* (2008).

<sup>45</sup> See D North, *Structure and Change in Economic History* (1981) 20-4.

<sup>46</sup> *CMS v. Argentina*, ICSID case No. ARB/01/8, 12 May 2005, Award, ¶¶ 134-137; *TECO v. Guatemala*, ICSID Case No. ARB/10/23, 19 December 2013, Award, ¶¶ 89, 90, 94, 506, 533; *Guaracachi v. Bolivia*, UNCITRAL, PCA Case No. 2011-17, Award, 31 January 2014, ¶¶ 97-102, 104, 113-114.

environments.<sup>47</sup> Tribunals underscore that predictability enables foreign investors to make rational calculations. And the protection of these calculations is fundamental for promoting foreign investment and economic prosperity. The tribunal in *Suez v. Argentina* notes that

The theoretical basis of this approach no doubt is found in the work of the eminent scholar Max Weber, who advanced the idea that one of the main contributions of law to any social system is to make economic life more calculable and also argued that capitalism arose in Europe because European law demonstrated a high degree of ‘calculability.’<sup>48</sup>

A similar idea lies behind the creation of the International Centre for Settlement of Investment Disputes (ICSID).<sup>49</sup> The Washington Convention begins by highlighting ‘the need for international cooperation for economic development, and the role of private international investment therein.’<sup>50</sup> Many investment awards follow this premise. Arbitrators describe foreign investment protection not only as a privilege of foreign investors but also as a means to economic development. For them, foreign investors deserve protection because they invest for profit as much as to assist countries in reaching their economic goals. The Libyan awards put forward this argument in the 1970s,<sup>51</sup> and were followed later in *AMCO v. Indonesia*, where the arbitrators underscore that

the [ICSID] 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>52</sup>

The premise that foreign investment is a major catalyst for economic growth became very popular in the 1990s, hand in hand with neoliberalism, and it still maintains much of this momentum. According to this economic

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<sup>47</sup> See Vandeveld, ‘A unified theory of fair and equitable treatment,’ 43 *New York University Journal of International Law and Politics* (2010) 43, 60-3; D. Schneiderman, *Resisting economic globalization: critical theory and international investment law* (Palgrave, 2013) 62-70.

<sup>48</sup> *Suez and others v. Argentina*, ICSID Case No. ARB/03/17, 30 July 2010, Decision on Liability, ¶¶ 222, 207. Similarly, *TECMED v. Mexico*, ICSID Case No. ARB (AF)/00/2, 29 May 2003, Award, ¶ 156; *Thunderbird v. Mexico*, NAFTA - UNCITRAL, 1 December 2005, Thomas Wälde’s Separate Opinion, ¶¶ 5, 47.

<sup>49</sup> A Parra, *The History of ICSID* (Oxford UP, 2012) 12-26

<sup>50</sup> Preamble, Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 18 March 1965, 575 U.N.T.S. 192.

<sup>51</sup> A Anghie, *Imperialism, Sovereignty and the Making of International Law* (2004) 226-9; M. Sornarajah, *The International Law on Foreign Investment* (2010) 291.

<sup>52</sup> *Amco v. Indonesia*, ICSID Case No. ARB/81/1, 25 September 1983, Decision on Jurisdiction, ¶ 23. Similarly, *Siemens v. Argentina*, ICSID Case No. ARB/02/8, 3 August 2004, Decision on Jurisdiction, ¶ 81; *Vivendi v. Argentina*, ICSID Case No. ARB/97/3, 20 August 2007, Award, ¶ 7.4.4.

policy, states need to attract as much foreign investment as possible, while refraining from interfering with private rational calculations. In the preamble of the US 1984 model BIT, the purpose of these treaties is described as a way to create ‘a stable framework for investment and maximum effective utilization of economic resources.’ This rhetoric remains the same in the 2004 and 2012 model BITs, which just add that this stable framework would also ‘improve living standards,’ in a reference to trickle-down economics.<sup>53</sup>

Investment tribunals have echoed this win-win rhetoric in the awards. Like in the neoclassical account of free trade, the premise is that maximizing wealth through foreign investment benefits everybody: host states, local actors, and foreign investors. The outcome of this interpretation, in other words, should not just be protecting foreign investor rights. The arbitrators in *El Paso v. Argentina* and *Ulysseas v. Ecuador* underscore this point when explaining that

the reference to the Preamble said that its object and purpose was to maintain ‘a stable framework for investment and maximum effective use of economic resources;’ however, in determining what these purposes implied for the interpretation of FET, the tribunals in these two cases only retained the first purpose, in order to conclude that a stable legal and business environment is an essential element of fair and equitable treatment, without taking into account the goal that any State has to pursue as well, which is to guarantee to its population maximum effective use of its economic resources.<sup>54</sup>

This passage shows that favoring wealth maximization is not the same as promoting foreign investor interests. These two awards highlight that host states are responsible to maximize the benefits and minimize the costs of foreign investment. The interpretation of FET, therefore, cannot amount to freezing the public regulation of business. The tribunal in *Saluka v. The Czech Republic* made a similar point when noting that supporting wealth maximization implies not only sanctioning political measures that do not promote foreign investment, but also reconsidering interpretative outcomes that could deter host states from attracting foreign investors.<sup>55</sup>

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<sup>53</sup> The US Model BITs are available at <http://www.bilaterals.org/?-us-bits-> (6 January 2017).

<sup>54</sup> *El Paso v. Argentina*, ICSID Case no ARB/03/15, 31 October 2011, Award, ¶ 369; *Ulysseas v. Ecuador*, UNCITRAL, 12 June 2012, Award, ¶ 248. Similarly, see *TECMED v. Mexico*, ICSID Case No. ARB (AF)/00/2, 29 May 2003, Award, ¶ 156.

<sup>55</sup> *Saluka v. the Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, ¶¶ 300, 304; *LG&E v. Argentina*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, ¶ 158.

## **B. Wealth maximization and other purposes**

The problem of excessively focusing on wealth maximization, as Alexander and Rose highlight, is that this may occlude other normative and the relational dimensions of property. The consensus in progressive property theory is that property responds to the characteristics of each community. Dagan explains that ‘the meaning of property is not homogeneous but varies instead with its social settings.’<sup>56</sup> The arbitral interpretation of foreign investor rights, however, contrasts with a plural conception of property. Foreign investor rights should not vary according to the social setting because they serve to facilitate foreign investment globally. As Schneiderman claims, the international investment regime operates as a ‘normatively closed’ but ‘cognitively open’ legal regime.<sup>57</sup> The interpretation of investment tribunals is cognitively open regarding the process of wealth maximization, which is increasingly global, but normatively closed when it comes to the social and local dimension of property.

The substitution of the concept of investment for the concept of property in investment treaties is an important indicator of this normative preference. Most investment literature and awards draw a connection between the notion of investment and economic development. Foreign investments represent a bundle of assets capable of facilitating economic development, as opposed to, for instance, simple speculation.<sup>58</sup> But this dominant view has overlooked that the notion of investment also serves to occlude other purposes for local resources. Contrary to a plural view of property, an investment is limited to the maximization of local wealth. It is about the rational use of resources for a period of time, with the goal of creating wealth and the expectation of making a profit.<sup>59</sup>

Most investment tribunals include an additional aspect to the definition of investment: the assumption of a business risk.<sup>60</sup> A foreign investor creates a series of business, social, and cultural risks when establishing in a host country.<sup>61</sup> But most tribunals find that the criterion to distinguish an investment from other economic activities is just business risk. In this way, tribunals presume that foreign investors are only assuming the business risks, whereas the social and cultural risks remain allocated to host states and local communities. This distribution may seem unfair; however, it is

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<sup>56</sup> H Dagan, *Property, Values and Institutions* (2011) 44; J Waldron, *supra* note 39, 52.

<sup>57</sup> D Schneiderman, ‘Legitimacy and Reflexivity in International Investment Arbitration: A New Self-Restraint?’, 4 *Journal of International Dispute Settlement* (2011) 471, 494.

<sup>58</sup> See *Fedax v. Venezuela*, ICSID Case No. ARB/96/3, 11 July 1997, Decision on Jurisdiction, ¶ 43.

<sup>59</sup> *Pey Casado v. Chile*, ICSID Case No. ARB/98/2, May 8, 2008, Award, ¶ 232; UNCITRAL, *Romak v. Uzbekistan*, UNCITRAL, PCA Case No. AA280, November 26, 2009, Award, ¶ 207.

<sup>60</sup> *Ibid.*

<sup>61</sup> C Dannreuther & R Lekhi, ‘Globalization and the political economy of risk,’ 7 *Review of International Political Economy* (2000) 574.

consistent with the purpose of maximizing wealth through foreign investment. From a neoliberal point of view, this purpose could be defeated if foreign investors were supposed to include social and local relations in their calculations.<sup>62</sup>

The late-2000s recalibration of the international investment regime does not change this purpose significantly. At first, in the early 2000s, investment awards focused on the stability of the business framework, but this has changed as more recent decisions aim to strike the correct balance between foreign investor rights and states' regulatory authority.<sup>63</sup> This recalibration has been accompanied by the effort of influential scholars to focus on economic development as the purpose of the international investment regime. These authors claim that the primary function of this regime is to promote economic development, while also allowing states to curb negative externalities.<sup>64</sup> This position describes the international investment regime as a field cognitively open to the needs of economically efficient regulation.<sup>65</sup> As noted before, wealth maximization is not a synonym for foreign investor interests. But this does not mean that new regulation could promote different normative preferences and disrupt foreign investor legitimate expectations. When it comes to assessing regulatory change, as Vandeveldel notes, tribunals favor consistency.<sup>66</sup>

In a similar vein, the use of proportionality in investment awards does not amount to a paradigmatic shift in the purpose of foreign investor rights.<sup>67</sup> Proportionality operates within the dominant interpretative framework. In his study of global constitutional property, Alexander recognizes some advantages of using proportionality but he observes that what really matters is the purpose that guides the interpretation of the rights. Proportionality cannot change an excessive focus on wealth maximization. At best, it can enable states to implement economically efficient regulation, i.e. to reduce the costs.<sup>68</sup> In this way, it transpires that after recalibrating the

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<sup>62</sup> M Foucault, *The Birth of Biopolitics: Lectures at The Collège de France, 1978—1979* (Palgrave, 2010) 279; Schneiderman, *supra* note 47, 44.

<sup>63</sup> Contrast *Occidental v. Ecuador* (Number 1), LCIA Case No. UN3467, 1 July 2004, Award, ¶ 183 and *CMS v. Argentina*, ICSID Case No. ARB/01/8, 12 May 2005, Award, ¶ 274 against *Saluka v. Czech Republic*, UNCITRAL, 17 March 2006, Partial Award, ¶ 307; and *El Paso v. Argentina*, ICSID Case No. ARB/03/15, 31 October 2011, Award, ¶¶ 338-55.

<sup>64</sup> Schreuer & Kriebaum, 'From Individual to Community Interest in International Investment Law,' in Ulrich Fastenrath et al. (Eds.) *From Bilateralism to Community Interest Essays in Honour of Bruno Simma* (2011) 1080; Y Radi, 'International Investment Law and Development: A History of Two Concepts,' in S Schill et al. *International Investment Law and Development: Bridging the Gap* (Edward Elgar, 2015) 69.

<sup>65</sup> Schneiderman, *supra* note 57, 494.

<sup>66</sup> Vandeveldel, *supra* note 47, 49-51.

<sup>67</sup> The use of proportionality has been promoted as an interpretative method to recalibrate the international investment regime. See Schill, *supra* note 19.

<sup>68</sup> Alexander, note 28, 207-8, 214-8. A more pessimistic view about proportionality is put forward by Schneiderman, who claims that proportionality follows the legal typology that

international investment regime, foreign investor rights continue protecting foreign investment from competing normative preferences.

### **3. Specifying foreign investor rights: a transactional view of foreign investor relations**

The purpose of wealth maximization shapes the arbitral interpretation of foreign investor rights. The objective of this section is to identify and trace this influence in the awards. To start with, this requires explaining how this purpose impacts on the interpretative framework used by investment arbitrators. Rose notes that there is a close link between the purpose of wealth maximization and the contractualization of property. This occurs when property is justified on individual labor or, as in this case, on the act of investing.<sup>69</sup> Waldron arrives at a similar conclusion when he compares Lockean (special-based) and Hegelian (general-based) conceptions of property. While special-based property frames the individual relationship with the state in contractual terms, a general-based view of property focuses rather on the political relationship that property creates between individuals and the state.<sup>70</sup>

Most investment tribunals follow a special-based conception of property. The act of investing in itself justifies the protection of foreign investor rights because of the potential economic benefits of foreign investment. This is a good reason for conceptualizing the relations between foreign investors and host states according to a transactional model. Conceptualizing these relations in transactional terms is an important feature of an ‘MNC-assisted restructuring’ of host states.<sup>71</sup>

For investment tribunals, states have the ‘responsibility to create an adapted and evolutionary framework for the development of economic activities,’<sup>72</sup> and this calls for the contractualization of foreign investment relations.<sup>73</sup> In traditional liberal terms, contracts relate to the promotion of an individualized image of humanity and a limited government. This view draws a clear line between the private and the public. The current idea of contractual governance slightly changes this traditional approach by

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Weber associates with the diffusion of capitalism and investor calculability. See D Schneiderman, ‘Judging in Secular Times: Max Weber and the Rise of Proportionality,’ 63 *Supreme Court Law Review* (2013) 557, 558-60.

<sup>69</sup> Rose, *supra* note 37, 49-70.

<sup>70</sup> Waldron, *supra* note 39, 106-36.

<sup>71</sup> UNCTAD, *World Investment Report 1995: transnational corporations and competitiveness* (United Nations, 1995) 262.

<sup>72</sup> *El Paso v. Argentina*, ICSID Case No. ARB/03/15, 31 October 2011, Award, ¶ 650.

Investment arbitrators have been even more vocal about this responsibility in the past, see *MTD v. Chile*, ICSID Case No. ARB/01/7, May 2004, Award, ¶ 113.

<sup>73</sup> Teubner, ‘In The Blind Spot: The hybridization of contracting,’ 8 *Theoretical Inquiries in Law* (2007) 51, 69-70.

making the limitations included in transactions internal to the operation of governments.<sup>74</sup> This has little to do with a *laissez-faire* economic model. States are expected to play major roles in foreign investment relations. An evolutionary framework for the development of economic activities, such as the one promoted by investment tribunals, places these governmental roles –whether or not they follow a contractual model– within a transactional paradigm of formal equality, autonomy, and of no effects on third parties. This means that most foreign investor rights do not come from above. They emerge from below.

These rights emerge as the outcome of transactions disconnected from local preferences and expectations. In the investment law literature, it is common to find positive references to the transactional paradigm of foreign investor and host state relations. The argument is that this model promotes neutrality by depoliticizing investment disputes. Most of the time, the literature explains that this is because investment arbitration eliminates state-to-state diplomatic controversies.<sup>75</sup> A closer look at the international investment regime, however, reveals that this alleged depoliticization also strengthens the particular politics of wealth maximization through foreign investment. As Van Harten claims, this regime puts foreign investors on the same level as host states in relationships that normally are proprietary or regulatory, and not contractual.<sup>76</sup>

This transactional paradigm has important consequences for the interpretation of foreign investor rights. Foreign investors do not like adverse changes to their entitlements. Whereas the main principle of property is that the law is meant to change, the transactional paradigm that rules foreign investment is inspired by the principle of *pacta sunt servanda* according to international law. This is a very rigid interpretation of contracts. In the field of foreign investment, Anghie and Sornarajah have shown that international tribunals –including investment tribunals– conceptualize the relationships between host states, home states, and foreign investors in strict contractual terms.<sup>77</sup> This conclusion is not unavoidable, as Koskenniemi notes, since sovereignty can be justified in either contractual or communitarian terms.<sup>78</sup> But the choice of *pacta sunt servanda* is consistent with the purpose of wealth maximization. After foreign investor rights pass through the prism of *pacta sunt servanda*, the

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<sup>74</sup> Zumbansen, 'The Law of Society: Governance Through Contract,' 14 *Indiana Journal of Global Legal Studies* (2007) 191, 203-6.

<sup>75</sup> I Shihata, 'Towards a Greater Depoliticization of Investment Disputes: The Role of ICSID and MIGA,' 1 *ICSID Review* (1986) 1; *Ecuador v. United States*, 4 April 2012, Expert Opinion with respect to jurisdiction of Professor W. Michael Reisman, ¶ 37.

<sup>76</sup> Van Harten, *supra* note 18, 45.

<sup>77</sup> A Anghie, *supra* note 51, 239-40; M Sornarajah, *supra* note 51, 291.

<sup>78</sup> M Koskenniemi, 'The Politics of International Law,' 1 *European Journal of International Law* (1990) 4, 30.

public considerations that support the exercise of sovereign discretion are squeezed out and a strong conception of foreign investor rights is justified.

The reasoning of investment awards shows this outcome in many ways. The moment of establishment always plays a crucial role for the specification of foreign investor rights and privileges, promoting an analogy between a foreign investment and a transaction or bargain.<sup>79</sup> Following this analogy, many tribunals rely on the principle of good faith to affirm that states can modify the law in a general and non-discriminatory manner, but only as long as they take into account foreign investor expectations.<sup>80</sup> Most arbitrators recognize that host states have a right to regulate and that no foreign investor could rationally expect that the laws affecting their business will never change. This expectation, they note, would not be the result of a rational investment decision. At the same time, investment tribunals emphasize that states need to respect foreign investor expectations because they serve to ‘facilitate rational planning and decision making.’<sup>81</sup>

The promotion of consistency in favor of foreign investors is a means to facilitate foreign investor calculations and promote wealth maximization. According to a neoliberal economic model, foreign investor rights are instrumental in increasing economic growth. The process of wealth maximization requires that foreign investors remain blind to local preferences related to foreign investment.<sup>82</sup> Investment arbitration, in this sense, facilitates foreign investment in two different ways. First, it diverts the attention from the interconnectedness of the legal order. The relationship between foreign investors and host states is transactional (and host state laws apply according to these terms). This can affect states’ regulatory authority as well as any propriety dimension of foreign investor rights. Secondly, in the event of a dispute, most investment tribunals would look at the controversy from a contractual perspective, typical of arbitration, paying less if any attention to factors that escape a strict transactional view of foreign investment relations.<sup>83</sup>

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<sup>79</sup> C Schreuer and U Kriebaum, ‘At What Time Must Legitimate Expectations Exist?’, in J Werner & A Ali (eds.) *A Liber Amicorum: Thomas Wälde* (2009) 265, 271.

<sup>80</sup> *TECMED v. Mexico*, ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003, ¶ 122. Similarly, *CME v. The Czech Republic*, UNCITRAL, Partial Award, 13 September 2001, ¶ 611; *BG Group Plc. v. Argentina*, UNCITRAL, 24 December 2007, at 343-344, 409.

<sup>81</sup> *Frontier Petroleum v. the Czech Republic*, UNCITRAL, 12 November 2010, Award, ¶ 285. Similarly, see *Saluka v. the Czech Republic*, UNCITRAL, 17 March 2006, Partial Award, ¶ 306; *Total v. Argentina*, ICSID Case No. ARB/04/01, 27 December 2010, Decision on Liability, ¶ 123; *El Paso v. Argentina*, ICSID Case No. ARB/03/15, 31 October 2011, Award, ¶ 358.

<sup>82</sup> Foucault, *supra* note 62.

<sup>83</sup> M Hirsch, ‘Investment tribunals and human rights treaties: a sociological perspective,’ in F Baetens (ed.) *Investment Law within International Law: Integrationist perspectives* (2013)



This transactional view contrasts with the large relational effects of foreign investment on local actors. The scope of the relational effects is supposed to be a key distinction between contract and property. Contracts, as opposed to property, produce effects as between the parties only.<sup>84</sup> But this distinction does not hold when the object of the transactions is to modify the right to use resources, as is the case with most foreign investor rights. When a host state enters into negotiations with a foreign investor to transfer the operation of a waste disposal unit, as in *TECMED v. Mexico*, the effects of these dealings and any eventual bargain exceeds the state's right to regulate.<sup>85</sup>

In this transactional model of foreign investment relations, it is not difficult to assume that everything worth considering is included in the act of investing. For arbitrators, foreign investors contribute to public welfare by mixing their ownership advantages with the locational advantages of host states. Along these lines, tribunals tend to deny any form of solidarity beyond the strict terms of the foreign investment bargain – i.e. beyond the act of mixing ownership with locational advantages. This follows a Lockean interpretation of property rights. This reasoning assumes that the bargains include most relevant information (A), making the interpretation of each bargain very significant (B).

### **A. The foreign investment bargain**

Investment law literature and awards often follow a contractualist conception of property. According to this conception, individuals acquire property because of their human condition, and after mixing their labor with resources. A common critique of contractual theories of property is that they do not deal with the private side of the agreement. They only refer to the risks posed by the public authority, overlooking or minimizing private power. Supporters of these theories rarely acknowledge that the historical origin of property may also lie in conquest, domination, or unfair bargaining terms.<sup>86</sup> In the international investment regime, the basis for the acquisition and protection of foreign investor rights lies in the act of investing, but there is no substantial difference in terms of outcome. On the one hand, the need to protect foreign investor rights from host state intervention; on the other, the consequent downplaying of foreign investor power and local preferences.

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<sup>85</sup> 99; *Glamis v. United States*, NAFTA –UNCITRAL, 8 June 2009, Award, ¶¶ 1-7; ICSID, *Minnotte & Lewis v. Poland*, ICSID Case No. ARB (AF)/10/1, 16 May 2014, Award, ¶ 155.

<sup>84</sup> Alexander & Peñalver, *supra* note 9, 2.

<sup>85</sup> *TECMED v. Mexico*, ICSID Case No. ARB (AF)/00/2, 29 May 2003, Award, ¶¶ 88-92.

<sup>86</sup> J Singer, 'Original Acquisition of Property: From Conquest & Possession to Democracy & Equal Opportunity', 86 *Indiana Law Journal* (2011) 763, 764-6; L Wenar, 'Original Acquisition of Private Property', 107 *Mind* (1998) 799.

Business and investment law scholars normally describe the acquisition of foreign investor rights using either the hold-up or the obsolescing bargain model (OBM). These two models assert that ‘once the investor makes the investment and thereby places its capital under the sovereignty of the host state, its bargaining power diminishes, and the commitments received risk becoming obsolete in the eyes of the host government.’<sup>87</sup> The starting point is the idea of political risk, which Comeaux and Kinsella describe as ‘the risk that the laws of the country will unexpectedly change to the investor’s detriment after the investor has invested capital in the country, thereby reducing the value of the individual’s investment.’<sup>88</sup>

This way of looking at foreign investor rights has implications for foreign investor and host state bargaining dynamics. Foreign investment relations are not as simple as the OBM and hold-up model predict. Foreign investors have an incentive to make the best possible deals, increasing their profit, and this includes shifting as much as risk as possible to host states and other local actors. Some World Investment Reports warn about this problem, recommending governments to improve their bargaining skills. They recognize, however, that this is difficult because some MNCs have more resources and information than many states.<sup>89</sup> Large firms have connections with financial institutions and their home states, and they may also have the capacity to move their business elsewhere.<sup>90</sup> All this indicates that the OBM and hold-up model focus on only half the story. In practice, both states and foreign investors may become prisoners of the other.

The partial account of foreign investment relations weakens host states’ position. It disregards the bargaining power of foreign investors before and after the establishment of foreign investment. Before establishment, states lacking domestic capital need to attract foreign investment by offering a good investment climate or specific incentives. In the free market of foreign investment, there are no checks on the business-friendly conditions that foreign investors can impose on states, or that host states offer to foreign investors. While there is evidence of unfair deals for host states, foreign investor behavior is restricted by voluntary standards only.<sup>91</sup> After

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<sup>87</sup> Salacuse, *supra* note 1, 451.

<sup>88</sup> P Comeaux & N Kinsella, ‘Reducing Political Risk in Developing Countries: Bilateral Treaties, Stabilization Clauses and MIGA and OPIC Investment Insurance,’ 15 *New York Law School Journal of International and Comparative Law* (1994) 1, 4.

<sup>89</sup> UNCTAD, *World Investment Report 2007: Transnational Corporations, Extractive Industries and Development* (United Nations, 2007) 159; UNCTAD, *World Investment Report 2008: Transnational Corporations and the Infrastructure Challenge* (United Nations, 2008) 143.

<sup>90</sup> E Aisbett & L Poulsen, ‘Relative Treatment of Aliens: Firm-Level Evidence from Developing Countries,’ Oxford University GEG Working Paper 122 (2016) 6-7, 19.

<sup>91</sup> IISD, ‘Lifting the Lid on Foreign Investment Contracts: The Real Deal for Sustainable Development,’ 1 *Sustainable Markets* (2005) 1; A Shemberg, ‘Stabilization Clauses and

establishment, the narrative changes from free markets to political risk and foreign investor need for protection. The OBM and the hold-up model concentrate only on the promises that host states make at the time of investment but may ignore later.

Foreign investment relations, in sum, are not as clear as these models or the idea of *pacta sunt servanda* suggests. Governments accept some conditions explicitly but also resist some demands from foreign investors. An important critique to the OBM and the hold-up models is that they rely on an abstract conception of foreign investment bargains. In practice, there is not always a contract, and contracts are incomplete by definition.<sup>92</sup> The use of the word bargain, in other words, is just part of a narrative. The establishment of an investment can always be described as a *bargain* between foreign investor and host state. But this does not tell us much about the nature of the legal relations or the scope of the emerging rights and duties. Did the host state explicitly agree to provide an incentive? Or did it just convince the foreign investor to establish in that new strategic sector? A restrictive or expansive interpretation of these bargains can have major legal implications. For doctrines like acquired rights, vested rights, or legitimate expectations, this could be the difference between a decision in favor of the foreign investor, or of the host state.

For investment tribunals, states must keep their promises to foreign investors. This is the main mission of the international investment regime. But a problem of fetishizing *pacta sunt servanda* is that this disregards the indeterminate nature of foreign investor rights. These rights are the result of intense negotiations and remain subject to interpretation. When deciding a dispute, arbitrators inevitably face this problem. They can interpret foreign investor rights according to domestic law, or fully embrace a transactional approach. The first solution implies looking for answers in the ground rules created by national sovereigns, which could be more favorable to a plural conception of property and disrupt wealth maximization. The second approach focuses instead on facts that can give rise to state representations and foreign investor legitimate expectations.<sup>93</sup> Investment arbitrators follow this second approach when they apply the doctrine of legitimate expectations under the FET. They lean on a reliance-based

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Human Rights,' International Finance Corporation and the United Nations Special Representative to the Secretary General on Business and Human Rights (2008).

<sup>92</sup> L Eden, S Lenway & D Schuler, 'From the obsolescing bargain to the political bargaining model,' in R. Grosse (ed.) *International Business and Government Relations in the 21st Century* (2005) 249, 255-6, 267-9.

<sup>93</sup> Investment tribunals underline the importance of facts in the context of the FET. See, for instance, ICSID, *Spyridon Roussalis v. Romania*, ICSID Case No. ARB/06/1, 7 December 2011, Award, ¶ 318; NAFTA, *Merrill v. Canada*, UNCITRAL, ICSID Administered Case – NAFTA, 31 March 2010, Award, ¶ 210; ICSID, *Lemire v. Ukraine*, ICSID Case No. ARB/06/18, 14 January 2010, Decision on Jurisdiction and Liability, ¶ 284.

reasoning. As the next section shows, this can be much more than *pacta sunt servanda*. When judges enforce a bargain, as Llewellyn notes, it is difficult to discern where the bargain ends and where judges begin intervening in the legal relationship.<sup>94</sup>

### ***B. Extracting foreign investor expectations through a reliance-based reasoning***

The doctrine of legitimate expectations is an interpretative formula - a magic formula according to Gaillard.<sup>95</sup> It extracts meaning by focusing on foreign investor reliance, as opposed to state consent or the legislation of the host country. Arbitrators claim that FET and the MST impose on them the application of this formula to specify the scope of foreign investor rights. Looking at the sources of international law, however, this is only an alternative. There are sufficient textual and historical reasons to claim the contrary. Previous investment awards are the main and probably only source for the protection of foreign investor legitimate expectations.<sup>96</sup>

The legitimate expectations doctrine and the reliance theory have been influential in many legal systems and fields. But they have also encountered resistance. Reliance is the basis of contract and promissory estoppel in private law.<sup>97</sup> Similarly, it is the justification of substantive legitimate expectations in administrative law. Some administrative law scholars who favor this position, like Schønberg, have been cited approvingly in influential investment decisions.<sup>98</sup> The substantive version of legitimate expectations, however, is resisted in many jurisdictions, including the United Kingdom and France.<sup>99</sup>

Essentially, reliance and legitimate expectations serve to resolve ‘cases whose only common characteristic [is] the absence of a bargain.’<sup>100</sup> This

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<sup>94</sup> K Llewellyn, ‘What Price Contract?—An Essay in Perspective,’ 40 *Yale Law Review* (1931) 704, 731-4.

<sup>95</sup> Gaillard, ‘Chronique des sentences arbitrales – Centre International pour le Règlement des différends Relatifs aux Investissements (CIRDI),’ *Revue trimestrielle Lexis Nexis Juris Classeur* (2008) 311, 332.

<sup>96</sup> M Paparinskis, *The international minimum standard and fair and equitable treatment* (Oxford UP, 2013); *Suez and others v. Argentina*, ICSID Case No. ARB/03/17, 30 July 2010, Separate Opinion of Pedro Nikken, ¶¶ 2-4, 12-25, 38-40.

<sup>97</sup> See Duncan Kennedy, ‘From the Will Theory to the Principle of Private Autonomy: Lon Fuller's "Consideration and Form,"’ 100 *Columbia Law Review* (2000) 94; E Bant & M Bryan, ‘Fact, Future and Fiction: Risk and Reasonable Reliance in Estoppel,’ 35 *Oxford Journal of Legal Studies* (2015) 1.

<sup>98</sup> *Thunderbird v. Mexico*, UNCITRAL (NAFTA), 1 December 2005, Separate Opinion of Thomas Wälde, ¶ 38. See S Schønberg, *Legitimate Expectations in Administrative Law* (2000), 9-11.

<sup>99</sup> C Forsyth, ‘Legitimate Expectations Revisited,’ 16 *Judicial Review* (2011) 429; P Reynolds, ‘Legitimate Expectations and the Protection of Trust in Public Officials,’ *Public Law* (2011) 330.

<sup>100</sup> R Barnett, ‘The Death of Reliance,’ 46 *Journal of Legal Education* (1996) 518, 524.

does not mean that implicit or informal representations create rights or privileges because of state intention. According to the reliance theory, what creates foreign investor rights (and the correlative duties) is foreign investor reliance on these representations. The application of reliance specifies private entitlements focusing on the expectations of the promisee, i.e. the foreign investor, instead of concentrating on the intention of the promisor, i.e. the host state. Governments, in this way, can create legitimate expectations without being conscious of it.<sup>101</sup>

The application of the legitimate expectations doctrine opens a large space for the subjectivity of arbitrators. '[W]hen people have different expectations they are apt to see the facts differently.'<sup>102</sup> In the context of large investment projects, investment arbitrators face numerous facts and circumstances that can give rise to expectations of foreign investors. Tribunals have noted on several occasions that the resolution of a dispute depends on these facts and circumstances, but which are relevant and how much they matter is not a question of fact, but a normative issue.<sup>103</sup> Thus, for instance, should investment tribunals pay any attention to state development plans, as Meier proposed in the 1960s or Dolzer suggested in the 1980s, or should they focus on the rationality of private investment decisions?<sup>104</sup>

Investment tribunals look at business rationality. A reliance approach to foreign investor rights serves to expand 'enforcement beyond the requirement of a bargain by identifying an additional factor or factors which justify enforcement.'<sup>105</sup> For most arbitrators, the main factor is that foreign investor expectations emerge from rational business calculations. This occurs, for instance, when a foreign investor decides to establish relying on explicit or implicit state representations.<sup>106</sup> That is to say that different types of state conduct, e.g. a brochure or a road show, could in principle create foreign investor rights. As the tribunal in *Electrabel v. Hungary* put it, in addition, an 'assurance is not always indispensable.'<sup>107</sup>

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<sup>101</sup> A Gold, 'A Property Theory of Contract,' 103 *Northwestern University Law Review* (2009), 22-3.

<sup>102</sup> C B Macpherson, 'The Meaning of Property', in C. B. Macpherson (ed.) *Property, Mainstream and Critical Positions* (University of Toronto Press, 1978) 1, 1.

<sup>103</sup> Koskenniemi, *supra* note 78, 16.

<sup>104</sup> G Meier, 'Legal-Economic Problems of Private Foreign Investment in Developing Countries,' 33 *University of Chicago Law Review* (1966) 463, 465; R Dolzer, 'New Foundations of the Law of Expropriation of Alien Property,' 75 *American Journal of International Law* (1981) 553, 585.

<sup>105</sup> Barnett, *supra* note 100, 522.

<sup>106</sup> *Frontier Petroleum v. the Czech Republic*, UNCITRAL, 12 November 2010, Award, ¶ 285; *Parkerings-Compagniet v. Lithuania*, ICSID Case No. ARB/05/8, 11 September 2007, Award, ¶ 331; *Grand River v. United States*, UNCITRAL – NAFTA, 12 January 2011, Award, ¶ 141.

<sup>107</sup> *Electrabel v. Hungary*, ICSID Case No. ARB/07/19, 30 November 2012, Decision on Jurisdiction, Applicable Law and Liability, ¶ 7.78.

Presently, some tribunals have adopted a more restrictive approach to the issue of representations. Recent awards are stricter when it comes to the specificity of the acts that can serve as a basis for legitimate expectations. State representations need to be directed at the foreign investor. Arbitrators, however, continue to extract expectations from implicit representations, which can emerge from person-to-person meetings or general legislation.<sup>108</sup>

To be protected, in addition, foreign investor reliance needs to be relevant to the specific investment project, such that no rational foreign investor would have invested without being assured of, for instance, the possibility of expanding the business project.<sup>109</sup> This does not mean that investment treaties constitute ‘insurance policies against bad business judgments.’<sup>110</sup> Investment arbitrators do not protect subjective expectations of profit. They only protect investment decisions that result in profitable projects. It can be argued, in this regard, that the economic viability of the project is a fundamental criterion to determine whether the expectation is objective and legitimate. Investment tribunals assess whether the project was economically viable in the concrete social, political, and economic context.<sup>111</sup>

When it comes to specifying foreign investor legitimate expectations, in short, what are important are the views of the rational foreign investor, and not the views of the host state or local actors. Investment arbitrators apply the reliance theory in a one-sided manner. They privilege foreign investor trust and certainty, but at the expense of the certainty and trust of locals on their own rights and institutions.<sup>112</sup> This carries important consequences in a world where the competition to attract foreign investment shapes state attitudes. States take measures to attract foreign investors, but this may not be because they want to be bound in the long term. They may be trying to sell their location as any market actor would do. This is what a neoliberal development policy promotes, and it is not very different from what foreign investors do. They try to convince state authorities that their investment projects will create more jobs or improve living standards. Expectations, in other words, run both ways. But while host states need to behave according to foreign investor expectations, foreign investors have few concerns about

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<sup>108</sup> *Continental v. Argentina*, ICSID Case No. ARB/03/9, 5 September 2008, Award, ¶ 261; *El Paso v. Argentina*, ICSID Case No. ARB/03/15, 31 October 2011, Award, ¶¶ 375-8.

<sup>109</sup> *Lemire v. Ukraine*, ICSID Case No. ARB/06/18, 14 January 2010, Decision on Jurisdiction and Liability, ¶¶ 265-71, 371 (and dissent of Jürgen Voss).

<sup>110</sup> *Maffezini v. Spain*, ICSID Case No. ARB/97/7, 13 November 2000, Award, ¶ 64.

<sup>111</sup> *EDF v. Romania*, ICSID Case No. ARB/05/13, 8 October 2009, Award, ¶ 219; *Duke v. Ecuador*, ICSID Case No. ARB/04/19, 18 August 2008, Award, ¶ 340.

<sup>112</sup> See Reynolds, *supra* note 99, 340-1.

creating the promised jobs or improving living standards (Host states and local actors cannot enforce these promises).

#### 4. Foreign investor rights and local expectations

When applying the legitimate expectations doctrine, the arbitral interpretation of foreign investor rights clashes with a plural understanding of property and a will theory of contracts. Yet, it is consistent with the purpose of foreign investor rights. Many authors criticize reliance because freedom of contracts requires freedom from contracts. From a libertarian perspective, the argument is that intention should be the only source of obligations.<sup>113</sup> From a progressive standpoint, the claim is that the law should concern itself with the fairness of the bargains.<sup>114</sup> But for those who defend the use of legitimate expectations in investment arbitration, reliance is necessary to meet the ‘requirements of a continuum and increased international flows of capital.’<sup>115</sup> This does not mean that arbitrators are unaware of the doctrinal problems of legitimate expectations. Investment arbitrators enforce foreign investor legitimate expectations against host states as if they were strong property rights, but refer to these expectations as ‘non-legally binding’ or ‘less than rights.’<sup>116</sup>

This interpretative outcome represents a form of judicial interventionism. By applying reliance in a one-sided manner, investment tribunals are intervening in foreign investment relations to maximize foreign investor reliance on host state representations.<sup>117</sup> This overlooks that maximizing foreign investor reliance comes with a cost. Strengthening foreign investor rights affects host state sovereignty and the rights of locals. Given that foreign investors are usually sophisticated business actors, the protection of their reliance (and not the reliance of local actors) requires a strong justification. From a progressive view, reliance can serve to protect those

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<sup>113</sup> R Barnett, ‘The Sound of Silence: default rules and contractual consent,’ 78 *Virginia Law Review* (1992) 828.

<sup>114</sup> J Singer, *No Freedom Without Regulation: The Hidden Lesson of the Subprime Crisis* (Yale UP, 2015), 58-94.

<sup>115</sup> Dolzer, *supra* note 104, 580.

<sup>116</sup> *El Paso v. Argentina*, ICSID Case No. ARB/03/15, 31 October 2011, Award, ¶ 376; *CMS v. Argentina*, ICSID Case No. ARB/01/8, 25 September 2007, Annulment Decision, ¶ 89; *Grand River v. U.S.A.*, UNCITRAL – NAFTA, 12 January 2011, Award, ¶ 140. See also Mairal, ‘Legitimate Expectations and Informal Administrative Representations,’ in S. Schill (ed.) *International Investment Law and Comparative Public Law* (2010) 422.

<sup>117</sup> See S Smith, *Contract Theory* (Oxford UP, 2004) 44 (and footnote 5). Similarly, C Fried, *Contract As Promise: A Theory of Contractual Obligation* (Harvard UP, 1981); P S Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford UP, 1979).

who are vulnerable, but this argument would rarely apply in the case of MNCs.<sup>118</sup>

In international investment law, the justification for one-sided reliance is that foreign investment can promote economic prosperity. This is why foreign investment should not ‘depend upon the subtleties and niceties’ of host governments and local actors.<sup>119</sup> But this interpretative attitude deals in a formalistic manner with two central issues. First, it overlooks the distribution of the benefits and costs of foreign investment. There is a lot at stake in infrastructure, extractive and other large economic projects. Secondly, it does not take local expectations seriously. The emphasis on foreign investment as a means to maximize wealth is only legitimate if we assume the validity of an economic view of individuals and communities.<sup>120</sup> The problem with this interpretative attitude, which dominates investment awards, is that it assumes that every state and community is ‘subject to an obligatory end, namely, the pursuit of economic rationality.’<sup>121</sup>

## **Conclusions**

In this article, I have argued that investment arbitrators play a fundamental role in the interpretation of foreign investor rights. When tribunals apply the FET, they specify foreign investor rights using the legitimate expectations doctrine according to international law. Relying on property theory, I have contrasted this interpretation against wealth maximization and propriety. The legal reasoning in most awards promotes the calculations of foreign investors as a means towards economic prosperity. Foreign investor rights and their calculations serve the purpose of wealth maximization. This leads arbitrators to frame foreign investment relations in transactional terms, where the interpretation of foreign investment bargains plays a fundamental role.

In this transactional view, investment tribunals take the perspective of the foreign investor, i.e. a global absent owner, who is interested in carrying out specific economic activities, earning the expected profit, and moving on to the next investment opportunity. The problem of this outcome is not that wealth maximization is unimportant. Some economic prosperity is necessary for maintaining community. It is rather that tribunals overlook

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<sup>118</sup> See M Trebilcock and S Elliott, ‘The Scope and Limits of Legal Paternalism: altruism and coercion in family financial arrangements,’ in P Benson (ed.) *The Theory of Contract Law* (2001) 45; Bant & Bryan, *supra* note 97, 19-21. Kennedy reviews different policy reasons for a reliance approach in Kennedy, *supra* note 97, 157, 164, 171.

<sup>119</sup> *Thunderbird v. Mexico*, UNCITRAL (NAFTA), 1 December 2005, Separate Opinion of Thomas Wälde, ¶ 47.

<sup>120</sup> Teubner, *supra* note 73, 67; Zumbansen, *supra* note 74, 231.

<sup>121</sup> P Benson, ‘The Idea of a Public Basis of Justification for Contract,’ 33 *Osgoode Hall Law Journal* (1995) 273, 335.



that foreign investor rights are also about local preferences, i.e. propriety. Local actors have economic as well as non-economic expectations for the resources. The current interpretation of foreign investor rights often disregards these local preferences, giving rise to a conception of property that can be described as a global right to investment.

Investment tribunals could interpret foreign investor rights differently. There is nothing in the treaties against a more plural interpretation of these rights. To start with, arbitrators could follow those who claim that legitimate expectations should play no role in investment arbitration. Today, this includes the United States. Unless there is a clear contractual commitment, tribunals could rely only on domestic law to specify foreign investor rights, whether in the form of acquired rights, vested rights, or legitimate expectations. This would provide more certainty to states and local actors to decide the terms they want to offer foreign investors, promoting as much freedom of contracts as from contracts. The international investment regime should also concern itself with the fairness of foreign investment bargains. After all, an offer to create specific property entitlements, like a license to produce oil or gas, is a very serious offer that governments make on behalf of the public.