
The Role of Developing Countries in Investor-State Arbitration: Reflections on *Tethyan Copper v Islamic Republic of Pakistan*

Sarah Ahmad*

ABSTRACT

This article explores the role of developing countries in Investor-State Arbitration, using the dispute of Tethyan Copper Company Pty Limited v Islamic Republic of Pakistan as a case study. It argues that the international investment treaty regime disfavors developing countries and often poses an obstacle to sustainable economic growth and development. The article therefore proposes the construction and implementation of a good governance framework that would help rebalance the obligations between foreign investors and host States.

* Sarah Ahmad is an LLM candidate at LSE Law School, where she previously read law (LLB) as an undergraduate. Her main interests include public international law and global economic governance. The author would like to thank Oliver Hailes and the Editorial Board for their valuable comments on earlier drafts. All errors remain her own.

INTRODUCTION

When the Government of Pakistan publicised its plans to revive the controversial Reko Diq project, the announcement to resume mining activities in one of the world's largest gold and copper reserves in the Province of Balochistan was met with outrage and concern.¹ After all, Pakistan had previously lost arbitration proceedings at the International Centre for Settlement of Investment Disputes (ICSID)² as well as the International Chamber of Commerce (ICC)³ arising out of the Reko Diq project. The resulting US\$ 11 billion in awards placed a significant financial burden on an already debt-stricken country, making former Prime Minister Imran Khan call for the termination of 23 of the country's Bilateral Investment Treaties (BITs) to avoid being sued in further disputes.⁴ What prompted Pakistan, signatory to the first-ever BIT with Germany in 1959, to advocate for the suspension of today's investment treaty regime? And why did the Government decide to resume the very same project only a year later, with the Supreme Court of Pakistan constitutionally upholding the Government's US\$ 7 billion Reko Diq deal in December 2022?⁵

This article aims to explore the *Tethyan* dispute⁶ through a historical and sociopolitical lens, examining the position of developing countries in Investor-State Dispute Settlement (ISDS).⁷ It will argue that today's investment

¹ Afshan Subohi, 'Reko Diq - dealing against a tight deadline' (*Dawn*, 28 March 2022) <<https://www.dawn.com/news/1682077>> accessed 12 February 2023.

² *Tethyan Copper Company Pty Limited v Islamic Republic of Pakistan*, ICSID Case No ARB/12/1, Award (12 July 2019).

³ *Tethyan Copper Company Pty Limited v Province of Balochistan*, ICC Case No 18347/VRO/AGF, Partial Award (8 July 2019).

⁴ Manuel Pérez-Rocha, 'Ousted Pakistani Leader Was Challenging Investment Treaties That Give Corporations Excessive Power' (*Inequality.org*, 14 April 2022) <<https://inequality.org/research/pakistan-khan-investment-treaties/>> accessed 12 February 2022.

⁵ Advisory Opinion on Presidential Reference No.2 of 2022 <https://www.supremecourt.gov.pk/downloads_judgements/reference._2_2022.pdf> accessed 12 February 2023.

⁶ *Tethyan Copper Company* ICSID case, Award (n 2).

⁷ This paper distinguishes between 'developed' and 'developing' countries to illustrate the divergent levels of development between host and home States participating in the investment treaty regime, aligned with the classification of economies by the United

treaty regime affords disproportionately extensive protections to foreign investors in comparison to the host State's legitimate public policy concerns.⁸ This is particularly onerous for developing nations, which (i) may not have the financial means to pay such high damages awards and (ii) are less likely than developed countries to maintain the high standards of transparency and security promised in investment treaties due to weaker institutional and legal structures. Part I will briefly outline the *Tethyan* saga, which serves as a point of reference in this article, contextualising the dispute and the tribunals' reasoning. Part II will provide a critical analysis of the investment treaty regime, exploring its geopolitical origins and effect on economic development. This analysis will show how ambiguous language in investment treaties allows tribunals to adopt interpretations that favour investors over developing host States. Part III will conclude with recommendations for reforming the international investment treaty regime, exploring how developing countries could participate more equally in the system and benefit from an elaborate good governance framework.

I. CONTEXTUALISING THE TETHYAN DISPUTE

This piece begins by outlining the facts of the *Tethyan* dispute in greater detail, as it is emblematic of the shortcomings of the investment treaty regime. Situated in the northern province of Balochistan, the gold and copper reservoir at Reko Diq is estimated to hold more than 5.9 billion tonnes of ore.⁹ It has attracted many foreign investors, lured by the prospect of significant economic gains. Australian mining company Tethyan Copper Company Pty. Limited (Tethyan) was a foreign investor who succeeded BHP Minerals International Exploration Inc in the existing Chagai Hills Exploration Joint Venture Agreement (CHEJVA) with the Government of Balochistan, dated 29 July 1993. From 2006 to 2011, Tethyan, later acquired by the Canadian Barrick Gold Corporation (Barrick) and Chilean Antofagasta in equal shares, invested heavily

Nation Conference on Trade and Development. No judgment is meant to be associated with the use of this terminology.

⁸ Such public policy concerns include especially health and the environment; see Rahim Moloo and Justin M Jacinto, 'Environmental and Health Regulation: Assessing Liability under Investment Treaties' (2011) *Berkeley Journal of International Law*.

⁹ *Abdul Haque Baloch v Government of Balochistan* (PLD 2013 SC 641) [2].

in the mineral exploration at Reko Diq.¹⁰ When the Government of Balochistan declined Tethyan's mining lease application on 15th November 2011, Tethyan initiated arbitration proceedings under the Pakistan–Australia Investment Treaty at the ICSID,¹¹ as well as ICC proceedings based on the CHEJVA.¹² As this article examines the role of developing countries in ISDS, subsequent analysis will disregard other commercial arbitration proceedings arising from the Reko Diq project.

The ICSID tribunal awarded damages of US\$ 5.9 billion to Tethyan.¹³ It reasoned that by refusing to extend Tethyan's lease, Pakistan had violated the standard of fair and equitable treatment.¹⁴ Pakistan was also held to have breached its obligation not to impact the claimant's investment, which de facto amounted to unlawful expropriation of Tethyan.¹⁵ This was because Tethyan had 'spent more than US\$ 240 million on its exploration work' before filing the mining lease application 'which would have allowed [the] Claimant to amortize the expenditures it had incurred during the exploration period'.¹⁶ The Government of Balochistan's decision to refuse the lease rendered useless the information gathered during this exploration period, and 'the value of both the CHEJVA and TCCP [Tethyan's local subsidiary] was effectively neutralised'.¹⁷ Moreover, the tribunal considered that the Government of Balochistan's denial of the lease application was driven by the intention to establish its own mining project and discontinue the collaboration with Tethyan, which 'excluded the classification of the denial as a *bona fide* regulatory measure'.¹⁸ However, it should be mentioned that the Government of Balochistan's refusal to extend the lease could be explained by allegations of corruption and fraud involving Government officials, deduced inter alia from the conflicts of interests by the Balochistan Development Authority's chairman.¹⁹ In fact, in *Abdul Haque Baloch*

¹⁰ *Tethyan Copper Company Pty Limited v Islamic Republic of Pakistan*, ICSID Case No ARB/12/1, Decision on Jurisdiction and Liability (10 November 2017).

¹¹ BIT Pakistan–Australia (1998) art 13(2).

¹² *Tethyan Copper Company* ICC case (n 3).

¹³ *Tethyan Copper Company* ICSID case (n 2).

¹⁴ BIT Pakistan–Australia art 3(2) and art 7(1).

¹⁵ *ibid* art 3(3).

¹⁶ *Tethyan Copper Company*, Decision on Jurisdiction and Liability (n 10) [1328].

¹⁷ *ibid*.

¹⁸ *Tethyan Copper Company* ICSID case (n 2) [157].

¹⁹ Jeffrey D Sachs, 'How World Bank Arbitrators Mugged Pakistan' (*Project Syndicate*, 26 November 2019)

vs. Government of Balochistan,²⁰ the Supreme Court of Pakistan declared void the initial CHEJVA agreement of 1993 and, consequently, the emanating agreements with Tethyan. This was because the ‘sweetheart deal’ violated the relevant provincial and federal mining legislation²¹ and, by granting BHP utmost favourable conditions to the detriment of the people of Balochistan, the benefits bestowed upon the foreign investor undermined public policy.²² This set of facts is important, as it illustrates the multifaceted nature of problems arising in the context of BITs and informs the discussion of reform proposals advanced in this piece.

On balance, the *Tethyan* case led to an arguably perverse outcome: Pakistan was held liable to pay damages equivalent to its 2019 IMF loans for a mining project that never proceeded beyond the planning stage.²³ This is reflective of wider structural, conceptual, and ideological deficiencies of the investment treaty regime. The following Part will critically analyse the present investment system, examining how economic inequality is perpetuated to the detriment of developing countries through the regime’s core elements.

II. A CRITICAL PERSPECTIVE ON ISDS: HOW THE INVESTMENT TREATY REGIME DISFAVOURS DEVELOPING COUNTRIES

Investment treaties are often hailed as ‘depoliticised’ for offering legal resolution separate from local courts.²⁴ Disputes involving foreign investors ought to be resolved peacefully in investment tribunals without instigating diplomatic tensions with the host State, while at the same time offering investors protection abroad.²⁵ After the Second World War, States intended to hedge

<<https://www.project-syndicate.org/commentary/world-bank-corrupt-arbitration-ruling-against-pakistan-by-jeffrey-d-sachs-2019-11>> accessed 12 February 2023.

²⁰ *Abdul Haque Baloch v Government of Balochistan*[122].

²¹ *ibid* [44].

²² *ibid* [44].

²³ ‘Pakistan: History of Lending Commitments as of February 29, 2020’ (*International Monetary Fund*)

<<https://www.imf.org/external/np/fin/tad/extarr2.aspx?memberKey1=760&date1key=2020-02-29>> accessed 12 February 2023.

²⁴ Ursula Kriebaum, ‘Evaluating Social Benefits and Costs of Investment Treaties: Depoliticization of Investment Disputes’ (2018) 33 *ICSID Review* 14.

²⁵ *ibid* 16.

against political risk through law. With the first Bilateral Investment Treaty (BIT) between Pakistan and Germany,²⁶ the project of economic integration through law *beyond* Europe began in 1959.²⁷ Though concluded between States, BITs include standards of protection for foreign investors in host countries. Once foreign investors are covered by a BIT, they are subject to different standards of protection than citizens in both their home and the host countries, having special legal standing under international jurisdiction.²⁸ While foreign investors are obliged to follow local laws, the treatment they are subject to will not be determined by local courts, but through judicial review by investment tribunals with the power to award damages against the host State.²⁹

2.1 The Fallacy of Reciprocity in the Investment Treaty Regime

Notably, a core feature of this regime is the doctrine of reciprocity: both host and home States equally commit to protect the respective foreign investors.³⁰ While reciprocity is established from a *legal* perspective, one-sided investment flows from developed to developing countries and economic imbalances have prevented balanced investment flows.³¹ From 1959, Germany would conclude BITs with countries where no significant investment activity would flow to Germany; Germany was therefore not exposed to investment claims because the respective host countries were at the receiving end of German investments. This imbalance of investments makes reciprocity a legal fiction rather than an economic reality. Indeed, the Office of the High Commissioner for Human Rights warned that ‘the need to attract direct foreign investment coupled with an asymmetrical access to information and negotiation capacity often leads to unequal reciprocity ... in North-South investment

²⁶ BIT Pakistan–Germany (1959).

²⁷ Kenneth J Vandeveld, ‘A Brief History of International Investment Agreements’ in Karl P Sauvart and Lisa E Sachs (eds), *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows* (Oxford University Press 2009).

²⁸ William W Burke-White and Andreas von Staden, ‘Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties’ (2007) 48 *Virginia Journal of International Law* 307.

²⁹ *ibid* 372.

³⁰ Vandeveld (n 27) 14.

³¹ *ibid* 15.

agreements'.³² By default, States that receive numerous foreign investments are at a higher risk of being exposed to claims for damages by foreign investments. In the absence of reciprocal investments by their own citizens, this risk for host States cannot be adequately offset. Thus, BITs are de facto mostly a tool of protection for (developed) home countries, while exposing (developing) host countries to excessive liability. Albeit the 'need for international cooperation for economic development, and the role of private international investment therein' is explicitly acknowledged in the preamble of the ICSID Convention,³³ the present investment treaty regime arguably fails to live up to these aspirations.

2.2 How the Core Language of BITs perpetuates Economic Imbalances and hinders Development

The imbalance between home and host States is further perpetuated by the wording of BITs. Notably, BITs adopt very ambiguous language with *open-ended* core standards of non-discrimination (maintained in national treatment and most favoured nation provisions)³⁴ as well as absolute standards of fair and equitable treatment (which protects the legitimate expectations of foreign investors from arbitrary treatment).³⁵ In the 2009 Pakistan-Germany BIT, the revised version of the 1959 treaty, both States committed to 'promote *as far as possible* investments by investors of the other Contracting State'.³⁶ Similarly, there is an obligation to accord 'investors of the other Contracting State, *fair and equitable treatment*'.³⁷ The Contracting States must also 'give *sympathetic consideration* to applications for the entry and sojourn of persons of either Contracting State who wish to enter the territory of the other Contracting

³² United Nations Human Rights Office of the High Commissioner, 'Reforming International Investment Agreements' (2018) <<https://www.ohchr.org/sites/default/files/documents/issues/development/resources/2022-08-04/Reforming-International-Investment-Agreements.pdf>> accessed 12 February 2023.

³³ Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (1966) preamble.

³⁴ Okezie Chukwumerije, 'Interpreting Most-Favoured-Nation Clauses in Investment Treaty Arbitrations' (2007) 8 *Journal of World Investment & Trade* 597, 604.

³⁵ Nick Gallus, 'The 'fair and equitable treatment' standard and the circumstances of the host State' in Chester Brown and Kate Miles (eds), *Evolution in Investment Treaty Law and Arbitration* (Cambridge University Press 2011).

³⁶ BIT Pakistan–Germany (2009) art 2(1) (emphasis added).

³⁷ *ibid* art 2(2) (emphasis added).

State, in connection with an investment'.³⁸ From a literal reading, it is unclear what 'as far as possible', 'fair and equitable treatment' and 'sympathetic consideration' amount to and when such standards are breached. Whilst some flexibility is needed to allow tribunals to make case-by-case judgments, leaving standard clauses undefined may result in inconsistent interpretations by tribunals which tended to side with foreign investors.³⁹ This perpetuates inequalities and unequal economic gain between developed and developing countries. If host States are found to be in breach of the applicable investment treaty, they may be liable for a substantial amount of compensation.⁴⁰ This is especially concerning for developing nations, which may not have the means to pay high damages.⁴¹

Developing countries are also less likely than developed countries to live up to the high standards of transparency and security promised in investment treaties due to weaker institutional and legal structures.⁴² Indeed, Samples shows empirically that the vast majority of investors advancing claims are from high-income countries; the majority of States being sued are low or middle-income countries.⁴³ In the *Tethyan* dispute, persistent corruption allegations, leading to a deal that violated local laws, made the Supreme Court of Pakistan void the initial CHEJVA agreement.⁴⁴ Weak rule of law compliance on provincial levels allowed for a deal that largely ignored the local population's needs and their economic interests in their natural resources.⁴⁵ Illustrative of this

³⁸ *ibid* art 3(5) (emphasis added).

³⁹ International Bar Association, 'Consistency, efficiency and transparency in investment treaty arbitration' (November 2018) <https://uncitral.un.org/sites/uncitral.un.org/files/investment_treaty_report_2018_full.pdf> accessed 12 February 2023.

⁴⁰ 'Primer on International Investment Treaties and Investor-State Dispute Settlement' (*Columbia Center on Sustainable Investment*, January 2022) <<https://ccsi.columbia.edu/content/primer-international-investment-treaties-and-invest-or-state-dispute-settlement>> accessed 12 February 2023.

⁴¹ David Schneiderman, 'International Investment Law and Discipline for the Indebted' (2022) 33 *European Journal of International Law* 65, 73.

⁴² *ibid* 72-73.

⁴³ Tim Samples, 'Winning and Losing in Investor-State Dispute Settlement' (2010) 56 *American Business Law Journal* 115, 165.

⁴⁴ *Abdul Haque Baloch v Government of Balochistan*(n 9).

⁴⁵ This is a common critique of the investment treaty regime; see Nicolás M Perrone, 'The "Invisible" Local Communities: Foreign Investor Obligations, Inclusiveness, and the

is the third-party petition filed in the Supreme Court of Pakistan on 4 January 2011 on behalf of the Sanjrani tribe of the Chagai Hills.⁴⁶ The Sanjrani claimed that in the absence of the tribe's express permission, both the Government of Pakistan and the Provincial Government were not authorised to grant land rights for exploration.⁴⁷

2.3 Developing Countries' Challenges in ISDS

With the investment treaty regime arguably functioning in favour of rich countries and foreign investors, one may question why Pakistan, after losing the *Tethyan* dispute, chose to enter into a settlement agreement and resume exploration activities with foreign investors at the Reko Diq mine. Historically, as testimonies from witnesses show, developing countries vastly underestimated the obligations they were about to enter into.⁴⁸ BITs were often negotiated by non-lawyers who did not fully understand the nature of the investment treaty regime and developing countries intended to show good cooperation by signing them.⁴⁹ Poulsen argues that '[t]he majority of developing countries thereby signed up to one of the most potent international legal regimes underwriting economic globalization without even realizing it at the time'.⁵⁰ As a former Chilean negotiator conceded, 'we signed a lot of treaties not knowing sometimes what we were committing ourselves to'.⁵¹ In Pakistan's case, when signing the very first BIT in 1959, no one could have predicted how the investment treaty regime would develop and how arbitral tribunals would interpret BITs.⁵²

International Investment Regime' (2019) 113 *American Journal of International Law* Unbound 16.

⁴⁶ Constitution Petition No.1 of 2011, Qazi Siraj-ud-Din Sanjrani and another Versus Federation of Pakistan & others. See also Oliver Hailes, 'Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan' (2022) 20 *ICSID Reports* 453, 463.

⁴⁷ *ibid.*

⁴⁸ Lauge N Skovgaard Poulsen, *Bounded Rationality and Economic Diplomacy: The Politics of Investment Treaties in Developing Countries* (Oxford University Press 2015) 109.

⁴⁹ *ibid.*

⁵⁰ *ibid.* xvi.

⁵¹ Lauge N Skovgaard Poulsen, 'Bounded Rationality and the Diffusion of Modern Investment Treaties' (2014) 58 *International Studies Quarterly* 1, 10.

⁵² The exchange of notes between Pakistan's Ministry of Finance and Germany's Ministry of Foreign Affairs shows that both parties, but especially Pakistan, attempted to narrow the scope of provisions after signing the 1959 BIT. This is illustrative of the overall tentativeness and unknowingness about how investment treaties would come to work. See 'Pakistan and Federal Republic of Germany Treaty for the Promotion and Protection

Consequently, the Pakistani Government could not foresee the complications of vague treaty language or excessively high damages.⁵³ Strikingly, when the country was first sued by Switzerland in 2001, the Government had to ask Switzerland for the final text of the treaty because it could not find a copy.⁵⁴ This shows how, most likely, the potential economic harm caused by international investment treaties was grossly underestimated and not taken seriously enough by Pakistan and many other countries.⁵⁵

Since 1959, a very close-knit community of arbitrators, who have tended to interpret generic provisions in BITs in a very investor-favoured manner, has emerged.⁵⁶ As Bjorklund and others argue, a ‘chronic diversity deficit’⁵⁷ detrimentally affects the legitimacy of ISDS: arbitrators are ‘repeat players’ who may be ‘be incentivized to have, or at least be perceived as having, a tendency to decide in favor of those ... [making their] appointments’.⁵⁸ In the *Tethyan* case, a member of the arbitral tribunal used the ‘same expert put forward by TCC [Tethyan] for another case in which the arbitrator is acting as counsel’.⁵⁹ Despite said arbitrator’s failure to disclose this conflict of interest, the other two arbitrators rejected Pakistan’s demands to disqualify him and proceedings continued as usual.

of Investments (with Protocol and exchange of notes). Signed at Bonn, on 25 November 1959’

<<https://treaties.un.org/doc/Publication/UNTS/Volume%20457/volume-457-I-6575-English.pdf>> accessed 12 February 2023.

⁵³ *ibid.*

⁵⁴ Pia Eberhardt, ‘The Zombie ISDS’ (*Corporate Europe Observatory*, March 2016)

<https://corporateeurope.org/sites/default/files/attachments/the_zombie_isds_0.pdf> accessed 12 February 2023.

⁵⁵ Poulsen (n 48) 12.

⁵⁶ Andrea K Bjorklund and others, ‘The Diversity Deficit in International Investment Arbitration’ (2020) 21 *Journal of World Investment & Trade* 410.

⁵⁷ *ibid.* 440.

⁵⁸ Steven Ratner and others, ‘Lack of Independence and Impartiality of Arbitrators’ (2019) ISDS Academic Forum Working Group 6

<https://www.cidss.ch/images/Documents/Academic-Forum/6_Independence_-_WG6.pdf> accessed 12 February 2023.

⁵⁹ Sachs (n 19). See also Ina C Popova and Jessica L Polebaum, ‘Emerging Expectations for Arbitrators: “Issue Conflict” in Investor-State Arbitration and Beyond’ (2018) 41 *Fordham International Law Journal* 937, 942.

ICSID proceedings are a very expensive undertaking for host States, with the arbitration costs for the *Tethyan* award in 2019 exceeding US\$ 3.7 million in total.⁶⁰ Even more concerning is the trend of multi-billion-dollar awards that have the potential to seriously disrupt economic stability in developing countries.⁶¹ In the *Tethyan* case, Pakistan argued that ‘immediate enforcement would entail immediate payment of the full amount of the US\$ 5.9 billion award that would have an “immediate and potentially devastating effect on Pakistan’s fragile economy”’. It would cause the ‘removal of funding for health, social, and welfare programs’ that would have ‘disastrous impacts for the people of Pakistan ... particularly the most disadvantaged and vulnerable’.⁶² For illustration, the ‘atypical[ly]’⁶³ high US\$ 5.9 billion award amounted to nearly as much as the IMF loan given to the country in 2019 and made up approximately 10% of Pakistan’s total annual budget.⁶⁴ Immense economic pressure, and the need to avoid fighting enforcement proceedings of the arbitral award in multiple jurisdictions,⁶⁵ thus explain the revival of the Reko Diq project. In light of this, it is questionable how the ICSID, the investment tribunal of the World Bank, can claim to be genuinely committed to facilitating development while ‘mugg[ing]’⁶⁶ developing countries through crippling ‘[b]illion-dollar-plus awards’ that fundamentally threaten their economic order.

Yet, despite the controversy around the investment treaty regime and its evident dysfunctions, developing countries are hugely dependent on foreign investors’ contributions to their economies. The *Tethyan* case clearly illustrates this. After the 2019 ICSID award, then Prime Minister Imran Khan announced

⁶⁰ *Tethyan Copper Company* ICSID case (n 2) [1847].

⁶¹ Martins Paporinskis, ‘Crippling Compensation in the International Law Commission and Investor–State Arbitration’ (2022) 37 ICSID Review 289.

⁶² *Tethyan Copper Company Pty Limited v Pakistan*, ICSID Case No ARB/12/1, Decision on Stay of Enforcement of the Award (17 September 2020) para 143. See *ibid* 290.

⁶³ Schneiderman (n 41) 67.

⁶⁴ The country’s budget for 2019–20 was Rs 8,238.1 billion (approximately US\$ 54.40 billion); see Ministry of Finance, ‘Budget in Brief’ (11 June 2019) <https://www.finance.gov.pk/budget/Budget_in_Brief_2019_20.pdf> accessed 12 February 2023.

⁶⁵ See *Tethyan Copper Company Pty v Islamic Republic of Pakistan* 590 F. Supp. 3d 262 (D.D.C. 2022). See also *Tethyan Copper Company Pty v. Islamic Republic of Pakistan* BVIHC (COM) 2020/0196.

⁶⁶ Sachs (n 19).

plans to suspend the country's BITs.⁶⁷ However, this threat has never been economically viable. On the one hand, the Government needed to enter into a settlement agreement with Tethyan Copper to resume the Reko Diq project in order to offset the immense damages it was held liable for. Without this settlement, Pakistan's strained relationship with the Financial Action Task Force (FATF) would have been further exacerbated and IMF loans jeopardised: Pakistan was put on the FATF's grey list in 2018 due to its 'strategic counter terrorist financing-related deficiencies'.⁶⁸ Compliance with FATF guidelines was one of the strict conditions to receiving the US\$ 6 billion IMF loans.⁶⁹ On the other hand, given the economically precarious situation in the country at the time and the looming threat of default, foreign investments were urgently needed to prevent the economy from collapsing. With the reconstitution of the Reko Diq project comes the creation of employment opportunities and valuable investments into local, underdeveloped infrastructure, which generates much-needed economic activity.

Thus, developing countries are trapped in a system of dependency on foreign investments. Chimni criticised that 'inequitable international investment laws' perpetuate a 'colonial vision of development for the global south that is all about "development of resources not of people"'.⁷⁰ Similarly, Gathii and Puig argue that international investment law offers no answers to the displacement of local communities, environment pollution, and destruction.⁷¹ Such arguments align closely with demands for a New International Economic Order, which call

⁶⁷ Subohi (n 1).

⁶⁸ 'There and back again: A timeline of Pakistan's journey out of the FATF 'grey list' (*Dawn*, 21 October 2022) <<https://www.dawn.com/news/1694958>> accessed 12 February 2023. See also 'Pakistan's progress in strengthening measures to tackle money laundering and terrorist financing' (*Financial Action Task Force*, 2022) <<https://www.fatf-gafi.org/en/publications/mutualevaluations/documents/fur-pakistan-2022.html>> accessed 12 February 2023.

⁶⁹ *Dawn* (n 69). See also Atlantic Council, 'Implications of Pakistan's removal from the FATF greylist' <<https://www.atlanticcouncil.org/event/implications-of-pakistans-removal-from-the-fatf-greylist/>> accessed 12 February 2023.

⁷⁰ Bhupinder S Chimni, 'Capitalism, Imperialism, and International Law in the Twenty-First Century' (2012) 14 *Oregon Review of International Law* 17, 30.

⁷¹ James Gathii and Sergio Puig, 'Introduction to the Symposium on Investor Responsibility: The Next Frontier in International Investment Law' (2019) 113 *American Journal of International Law* 1.

for the ‘restructuring of the global legal and economic order’.⁷² These demands have been largely ignored by developed countries.⁷³ As Salomon argues, industrialised countries ‘were unwilling to enter into genuine global negotiations; and then, as now, were unwilling to see rules created that did not serve their economic interests well’.⁷⁴ The relative failure of the New International Economic Order contributed to an investment treaty regime that urges developing countries to prematurely liberalise their economies and offer investment opportunities to the benefit of foreign traders.⁷⁵ Thus, the investment treaty regime’s ability to impede economic development and perpetuate economic dependencies remains a concern to this date. As Part III will argue, reform proposals need to address the foregoing critique points and consider developing countries’ challenges faced in their role as host States more holistically.

III. REFORMING ISDS: BUILDING A MORE EQUITABLE INVESTMENT TREATY REGIME

With its downsides for developing countries and pertinent transparency and fairness concerns, the ISDS regime has attracted a lot of controversy.⁷⁶ After the *Tethyan* award was rendered, justifiable complaints emerged that ‘global economic governance is broken’.⁷⁷ A fairer investment treaty regime needs to rebalance the obligations of investors and host States. This requires elaborate good governance standards for both foreign investors and host States, developed through consultation of all stakeholders.

⁷² See Charter of Economic Rights and Duties of States 1974 (General Assembly Resolution 3281 XXIX); Gleider Hernandez, *International Law* (Oxford University Press 2019) 563.

⁷³ Hernandez (n 73).

⁷⁴ Margot E Salomon, ‘From NIEO to Now and the Unfinishable Story of Economic Justice’ (2013) 62 *International and Comparative Law Quarterly* 31, 46.

⁷⁵ *ibid.*

⁷⁶ Jane Kelsey and Lori Wallach, “Investor-State” Disputes in Trade Pacts Threaten Fundamental Principles of National Judicial Systems (*Public Citizen*, April 2012) <<https://www.citizen.org/wp-content/uploads/isds-domestic-legal-process-background-brief.pdf>> accessed 12 February 2023.

⁷⁷ Kyla Tienhaara, ‘World Bank ruling against Pakistan shows global economic governance is broken’ (*The Conversation*, 22 July 2019) <<https://theconversation.com/world-bank-ruling-against-pakistan-shows-global-economic-governance-is-broken-120414>> accessed 12 February 2023.

3.1 Designing an Effective Good Governance Framework

This paper, therefore, proposes the implementation of a good governance framework, a set of ‘good conduct’ rules that lay the foundation of negotiations between foreign investors and host States. Such a good governance framework would provide a set of ‘best practice’ standards, outlining the expected responsibilities and legal duties of host States as well as foreign investors. Joint venture agreements should incorporate these standards, which may be industry-specific and should be phrased in plain language to ensure that all actors are cognizant of their obligations. These guidelines would inform future negotiations of joint venture agreements and ought to contribute to greater transparency in the investment treaty system. The proposed governance framework should also provide a set of model provisions to be incorporated into joint venture agreements between host States and foreign investors. Such rules should outline the respective responsibilities extensively and in detail, to counter the vague language in BITs. This may reduce the likelihood of escalating disputes that need to be referred to ISDS: the clearer the joint venture agreement and the obligations of both the foreign investor and the host State, the less the need to rely on opaque and ambiguous BITs. The proposed good governance framework thus aims to prevent the escalation of disputes and to reduce the reliance on ISDS.

The framework needs to consider more holistically the challenges host States face and must adopt a clear stance on foreign investor misconduct. As Sattorova argues, ‘[i]f investment treaties and arbitral tribunals turn a blind eye to illegal acts perpetrated by foreign investors in host states, including bribery and corruption, the investment treaty regime could be complicit in encouraging and perpetuating inadequate and undesirable patterns of behaviour’.⁷⁸ In the *Tethyan* dispute, allegations of corruption of local provincial government officials, which seemingly led to an inequitable and wholly unfavourable joint venture agreement, led the Supreme Court of Pakistan to void the CHEJVA

⁷⁸ Mavluda Sattorova, ‘Do Developing Countries Really Benefit from Investment Treaties? The impact of international investment law on national governance’ (*Investment Treaty News*, 21 December 2018) <<https://www.iisd.org/itn/en/2018/12/21/do-developing-countries-really-benefit-from-investment-treaties-the-impact-of-international-investment-law-on-national-governance-mavluda-sattorova/>> accessed 12 February 2023.

(though the arbitral tribunal's strict standards of proof for corruption were ultimately not met).⁷⁹ The proposed good governance framework would aim to discourage such behaviour by imposing more stringent transparency requirements on foreign investors and representatives of host States. This could include more stringent provisions requiring the disclosure of potential conflicts of interest in the case of an ISDS dispute. It is hoped that such measures, aiming to reduce conflicts of interests and consequently the risk of corruption, also help strengthen the rule of law compliance on provincial levels.

Good governance rules should also contain a set of recommendations designed to ensure that the host State's local populations benefit from foreign investors' activities. Such recommendations could pertain to more equitable ownership structures of investment projects, set levels of sustainable investment into local infrastructure, or the creation of jobs. Pursuant to the CHEJVA agreement, Tethyan obtained 75% of the shareholding and the Provincial Government of Balochistan only the remaining 25%.⁸⁰ As the Supreme Court of Pakistan voided this initial agreement, the reconstituted Reko Diq deal of December 2022 achieved more diversified ownership structures, with Barrick owning 50% of the project.⁸¹ In the revived project, Barrick also committed to establishing community development projects, rather than merely exporting unprocessed copper.⁸² Such measures help empower local communities and contribute to greater mutual benefit of the investment activity.

In this context, special attention to environmental protection should be paid. As with the Reko Diq project, many foreign investment projects potentially harm the environment through mining operations or other activities that extract natural resources.⁸³ A good governance framework must, therefore, strive to safeguard the local environment and mitigate climate change, thereby mitigating investment projects' possibly detrimental environmental impact. This

⁷⁹ Hailes (n 46) 469; *Abdul Haque Baloch v Government of Balochistan* (n 9) [84].

⁸⁰ *ibid.*

⁸¹ 'Reko Diq Pakistan' (*Barrick*)

<<https://www.barrick.com/English/operations/reko-diq/default.aspx>> accessed 12 February 2023.

⁸² 'Barrick Targets 2028 for First Production from Reko Diq' (*Barrick*, 16 January 2023)

<<https://www.barrick.com/English/news/news-details/2023/barrick-targets-2028-for-first-production-from-reko-diq/default.aspx>> accessed 12 February 2023.

⁸³ Jason Fry KC and Louis-Alexis Bret, 'Introduction' in Jason Fry KC and Louis-Alexis Bret (eds), *The Guide to Mining Arbitrations* (2nd edn, Global Arbitration Review 2021).

could include advancing new standard provisions in joint venture agreements which would give host States sufficient leeway for domestic policy-making to build climate resilience. Importantly, developing countries are more vulnerable to the effects of climate change due to the ‘economic importance of climate-sensitive sectors ... and their [comparatively] limited human, institutional, and financial capacity to anticipate and respond to the direct and indirect effects of climate change’.⁸⁴ In fact, climate disasters exacerbate existing economic crises by destroying infrastructure, impacting human health and lowering countries’ productivity levels.⁸⁵ This can be seen from the devastating effects of floods in Pakistan which caused over US\$ 40 billion of damage and further deteriorated levels of poverty.⁸⁶ The proposed good governance framework, cognizant of the link between climate change and development, thus needs to advocate for the inclusion of environmental protection standards in joint venture agreements.

In this regard, establishing a comprehensive *institutional* framework for ISDS could help find a more adequate balance between the protection of foreign investors and host countries’ public policy-making capabilities. Such an institution could render authoritative guidelines for interpreting existing BITs and create rules for the drafting of future treaties. It could replicate the good governance guidelines hitherto proposed and make them binding, adding enforcement power to the system. Whilst a multilateral institution could exert the necessary pressure on its members to drive change and strengthen host States’ ability to act against foreign investors, the creation of such an institution

⁸⁴ Organisation for Economic Cooperation and Development, ‘Poverty and Climate Change: Reducing the Vulnerability of the Poor through Adaptation’

<<https://www.oecd.org/env/cc/2502872.pdf>> accessed 12 February 2023.

⁸⁵ Renee Cho, ‘How Climate Change Impacts the Economy’ (*Columbia Climate School*, 20 June 2019)

<<https://news.climate.columbia.edu/2019/06/20/climate-change-economy-impacts/>> accessed 12 February 2023.

⁸⁶ Brian Bushard, ‘Record Flooding: \$40 Billion Of Damage In Pakistan As Monsoons Devastate South Asia’ (*Forbes*, 19 October 2022)

<<https://www.forbes.com/sites/brianbushard/2022/10/19/record-flooding-40-billion-of-damage-in-pakistan-as-monsoons-devastate-south-asia/>> accessed 12 February 2023.

Shiraz Ali Shah and Khusrav Sharifov, ‘Pakistan floods emphasize the need for tackling development from a different perspective’ (UNDP, 7 February 2023)

<<https://www.undp.org/blog/pakistan-floods-emphasize-need-tackling-development-different-perspective>> accessed 12 February 2023.

presupposes political willingness by enough States. The absence of such, however, has rendered the creation of a single comprehensive institution unfeasible.⁸⁷ The development of a good governance framework is therefore instrumental to achieving a more balanced investment treaty regime. It is hoped that the proposed standards, creating better-drafted and more equitable joint venture agreements that adequately protect both foreign investors' and host States' interests, reduce the number of disputes to be decided in the ISDS system.

CONCLUSION

This paper has aimed to critically analyse the current investment treaty regime from a historical and socio-political lens, adopting the perspective of a developing country. Using the *Tethyan* dispute as a case study emblematic of broader dysfunctions within the investment treaty regime, this contribution has sought to illustrate how the notoriously vague provisions and standards in investment treaties, combined with broader structural economic issues (like one-sided investment flows) and transparency issues in ISDS, perpetuate economic imbalances between developed and developing countries. To build a more equitable system that allows developing countries to prosper, this paper has proposed the construction and implementation of a good governance framework. Such a framework ought to inform negotiations of joint venture agreements and help rebalance obligations between foreign investors and host States. Consequently, it should be tailored to the specific challenges foreign investors and host States face, taking into consideration the development dynamics embedded and perpetuated in the system. Developing countries should form part of the investment treaty regime because they derive genuine economic benefit from it, not because they are economically dependent on maximising foreign investments and fear geopolitical repercussions.

⁸⁷ Since the rejection of the 'Singapore Issues', which included a working group for investment, during the World Trade Organization's Ministerial Conference in 1996, no multilateral investment institution could be established. See Peter Muchlinski, 'The Rise and Fall of the Multilateral Agreement on Investment: Where Now' (2000) 34 *International Lawyer* 1033.