Investment protection and sustainable development: key issues

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1. Introduction: the role of Foreign Direct Investment in promoting development

This introductory chapter aims at assessing critically in perspective and in their mutual relations two key concepts within the subject matter of this volume, i.e. the current status of the investment protection regime and the principle of sustainable development (SD). This chapter sketches the historic background of these principles and highlights their potentials, but addresses also shortcomings and ambiguities in their inter-relation. The legal value of the concept of sustainable development is often unclear. Yet, sustainable development represents an important normative principle, which can serve as a tool to adjust imbalances within the current investment protection system. The chapter will also consider the notion of state regulatory autonomy, which is an important tool to ensure a host State's capacity to adapt its policies to the changing needs of sustainable development while there is concern that international commitments to foreign investors may unduly limit this flexibility.[2]

A central issue of growing concern in the area of legal regulation of international investments is, indeed, how to ensure that also through treaty making and treaty application the promotion and protection of foreign direct investment (FDI) is beneficial for the recipient host countries, especially developing countries.

Seen from the point of view of those in charge of promoting the development of host countries, the issue is how to ensure that those treaties effectively promote the contribution of foreign investment to the development goals of the recipient countries and do not represent a hurdle for their efforts.

Generally speaking, the positive role of foreign direct investment (FDI) for development appears to be taken nowadays for granted. The emphasis is rather, on one hand, on the responsibility of enterprises engaged in direct foreign investment to pursue responsible policies irrespective of the applicable legal framework' and, on the other hand, on instruments and rules that would encourage sustainable development.

As an example of the first proposition, the importance of foreign investment for development has been stressed recently by no one else than UN Secretary- General Ban Ki-moon in his preface to the UNCTAD

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[2] See generally Gehring M.-C. Cordonnier-Segger, M.W. Gehring, A. Newcombe, *Sustainable development in World Investment Law*, Wolters Kluwer 2011; for an exercise in policy guidance see *Integrating Sustainable Development into International Investment Agreements: A Guide for Developing Countries*, by the Commonwealth Secretariat (2012), https://publications.thecommonwealth.org.

2014 World Investment Report. After noting that *"after a decline in 2012 global foreign direct investment flows rose by 9% in 2013, with growth expected to continue in the years to come"*, the Secretary-General goes on to conclude as follows: "*This demonstrates the great potential of international investment, along with other financial resources, to help reach the goals of a post-2015 agenda for sustainable development. Transnational corporations can support this effort by creating decent jobs, generating exports, promoting rights, respecting the environment, encouraging local content, paying fair taxes and transferring capital, technology and business contacts to spur development."*[3]

As to the role of rules and institutions one can quote an eloquent statement that appears as "key message" on the website of the IISD, the International Institute for Sustainable Development, an NGO active in the field, based in Canada:[4]

"Without investment, sustainable development is impossible. Well planned, high quality foreign investment in developed and developing countries can help make current economic practices more sustainable. Inappropriate investment, however, can undermine communities and the environment, as well as domestic development strategies. IISD examines how the rules and institutions that govern international investment flows can be improved so as to help developing countries, in particular attract the sort of investment that promoted sustainable development."

This ambitious statement reflects a policy approach to the issue that calls for the structuring of domestic policies as well as instruments of economic cooperation that will maximise the contribution of foreign investment to the needs of developing countries. According to the parameters of "sustainable development" this goes beyond just promoting economic growth.

Before going further into the subject matter a few basic points should be made. My exposé and analysis is a *legal* one: it is beyond my scope to address the economic policy issues underpinning the choice that a given country sets for itself, as well as the domestic instruments put in place to attain a country's development objectives and the role given therein to foreign investment. In respect of encouraging and selecting foreign direct investment (FDI), this includes not only international instruments, but foremost also domestic measures. Among these financial or tax incentives in order to stimulate the flow of FDI in general, or to promote it in certain sectors (such as mining or manufacturing), in certain part of the territory of that country, or in certain forms (such as joint-ventures). Institutions such as UNCTAD, in its annual World Investment Report, and the World Bank have done great work in this area; studying the implications of such policies would go beyond the scope of the present contribution by a lawyer.[5]

Generally speaking everybody, and not just lawyers, should be aware of the limits that legal instruments and legal analysis inherently have when addressing policy issues and evaluating the contribution of legal instruments to complex economic goals, whose content is debated among economist and policy makers, such as "*sustainable development"*. While the first term of my theme *"investment protection"* is essentially legal, the second term *"sustainable development"* is essentially economic or policy-based, although consistent efforts have been devoted to elaborate on its legal implications. A caveat is, thus, appropriate as to "balancing" such diverse, somehow heterogeneous concepts: at first sight, the title seems to imply a link, be

[3] UNCTAD, *World Investment Report 2014. Investing in the SDGs* [Sustainable Development Goals]*: An Action Plan,* UN, New York and Geneva 2014, at iii.
[4] See www.iisd.org /investment, visited 5 October 2014.
[5] See UNCTAD, *The Role of IIAs in Attracting FDI to Developing Countries*, 2009.

it correlation or causation, possibly even an inverted one: an equation where the greatest the protection of foreign investments, the lesser will or might be their contribution to development, and vice-versa. However, there is no support generally for this approach in policy documents by international organisations focusing on development, as the above quotations from authoritative statements show. Such an approach would leave out, moreover, an important term, that is the correlation between protection, be it under international instruments or domestic law (including the looser, comprehensive and currently popular concept of "good governance")[6] and investment flows in a host country.

Traditionally, BITs and other International Investment Agreements (IIAs), including investment chapters of more comprehensive regional agreements, have been rather restricted in scope and generic in content. Moreover, liberalisation of FDI has not been a prerequisite, nor an outright goal of these agreements, notwithstanding the statements found usually in their preambles in favour of the reciprocal promotion of foreign investment among the parties. They have not been conceived as policy instruments but rather as a framework of minimum standards expressing in general terms a pro-investment protective approach.

Any evaluation of the impact of *international* legal instruments focused on the protection of foreign direct investment, on the promotion of sustainable development in a host country should consider moreover that such instruments, because of how they have been traditionally drafted, though potentially significant tend to play a more limited role than focused domestic instruments and policies, such as specific incentives and the quality of the legal and institutional environment in terms of good governance.

Recent agreements tend to be more detailed and to take into account the specific needs, economic structure and policy goals of the signatories, as will be highlighted and discussed hereunder, also in respect of the development implications of this change of approach. This makes the issue set forth in the above quotation from the website of the International Institute for Sustainable Development more pressing, since more detailed investment agreements call for a more careful "custom-made" approach to their drafting so to reflect better any development policy and needs of the parties and their right to structure such policies in the future. On the other hand, the ability of policy makers to structure the normative framework for foreign investment so as to ensure the contribution of actual investments to the attainment of defined economic and social development objectives is a challenge that cannot be met just by a more accurate drafting of legal instruments. Economic and financial incentives may be called for, as well as rules of conduct for multinational enterprises by home countries,[7] and, finally, a "favourable investment climate" in the host

[6] See the World Bank, Governance Indicators, http://info.worldbank.org/governance/wgi/index, last accessed 24 October 2014. The website gives the following definition: *"Governance consists of the traditions and institutions by which authority in a country is exercised. This includes the process by which governments are selected, monitored and replaced; the capacity of the government to effectively formulate and implement sound policies; and the respect of citizens and the state for the institutions that govern economic and social interactions among them."* The Worldwide Governance Indicators (WGI) project reports are described as follows: they "aggregate and individual governance indicators for 215 economies over the period 1996–2013, for six dimensions of governance: Voice and Accountability; Political Stability and Absence of Violence; Government Effectiveness; Regulatory Quality; Rule of Law: Control of Corruption. These aggregate indicators combine the views of a large number of enterprise, citizen and expert survey respondents in industrial and developing countries."

[7] Thus, as to the role and responsibility of home countries, the Columbia Center on Sustainable Investment in presenting the Ninth Annual Columbia International Investment Conference, entitled "Raising the Bar: Home Country Efforts to Regulate Foreign Investment for Sustainable Development" at Columbia University, November 12-13, 2014, has described its aims as follows (http://ccsi.columbia.edu/2014/01/01/raising-the-bar-home-country-efforts-to-regulate-foreign-investment-for-sustainable-development/: "In recent years there has been growing dialogue over whether, in addition to supporting their firms in making foreign direct investments, home countries should also monitor or regulate the activities of companies operating abroad, for example, with regards to the disclosure of tax payments, or impacts on human rights, the environment, or development. Legal experts have argued that home countries have extraterritorial obligations under international law, including with respect to regulating the activities of both publicly controlled as well as private companies. The increasing pressure on home countries to monitor or regulate the overseas activities of multinational companies also results from a sense of moral duty, the desire for greater coherency of governmental

country as may result from domestic instruments and good governance policies (such as reducing the level of corruption).[8]
This leads us to defining the terms of the relationship: "sustainable development" on one hand and "investment agreements" and the protection they afford to foreign investors on the other hand.

2. The concept of "sustainable development": economic background

As is well known, the concept of "sustainable development" (SD) stems from the *Bruntland Commission* Report "Our Common Heritage" of 1987 where it was defined as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs"[9]. The Rio Declaration on Environment and Development of 1992 and the Agenda 21 stemming therefrom heavily endorsed and elaborated the concept as a road map for a global development strategy.[10] Principle 4 of the Rio Declaration clarifies that the concept aims at incorporating environmental concerns and protection into purely economic development strategies. Today "SD is broadly understood as a concept that is characterized by (1) the close linkage between policy goals of economic and social development and environmental protection; (2) the qualification of environmental protection as an integral part of any developmental measure, and vice-versa; and (3) the long-term perspective of both political goals, that is the State's inter-generational responsibility".[11]
The subsequent elaboration of the concept of sustainable development in operative terms by international organizations focusing on developmental policies should be also be considered. Other concepts have been added to for measuring economic development in addition to the rate of GDP growth and other purely economic quantitative indicators: besides environmental protection also social development in its multi-facet aspects. Broader "welfare" indicators are now considered, as reflected in the Human Development Index (HDI), a composite statistic of life expectancy, education, and income indices developed by the UNDP since the 1990s, to which in 2010 inequality measurement has been added (including gender inequality). Growth in extractive industries and manufacturing, building of large infrastructures, which used to be synonymous of development, where often foreign technological and capital contribution is crucial, have given the way to other priorities and agendas. Thus, the rate of poverty reduction has become the focus of the UN Global Compact, following the Millennium Summit (2000), and of the policies of the World Bank and other development agencies, not to speak of criteria which are difficult to measure in quantitative terms, such as good governance and the rule of law. From respect and promotion of core labour standards, to empowerment of women and indigenous populations, the list of what is included here is quite substantial. Democratic representative government and respect for fundamental human rights and liberties should also be high on this list but it must be noted with regret that this is not often the case. Finally, the concept of financial stability has recently become a predominant concern, an element that had been totally neglected until then.

The more ambitious the objectives and multi-faced the policies meant to attain them, the more difficult it is to pinpoint a univocal meaning for SD. On the one hand, centralized industrial policies have been

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policies and actions, and perceptions of potential political or economic self-interest. Yet, while home countries have influence over outward investors, are willing to exercise extraterritorial power in certain contexts, and are often committed to sustainable development, their policies and actions are not always coherent." The limits of extraterritorial legislation of home countries in protecting human rights affected by the conduct of multinational companies abroad has been made evident by the restrictive interpretation of the Alien Tort Statute by the US Supreme Court in the well-known *Kiobel v. Royal Dutch Petroleum* decision of 17 April 2013, 133 S.Ct. 1659 (2013).

[8] See Transparency International, Corruption Perception Index, annually, http://www.transparency.org/cpi2013, showing most least development countries in the bottom part of the listing.

[9] World Commission on Environment and Development, UNGA Res 42/87, 11 December 1987

[10] Rio Declaration on Environment and Development, UNGA/CONF.151(26 (Vol.I) of 12.8.1992.

[11] See U. Beyerlin, *Sustainable development,* MPEPIL (2009), para. 9.

abandoned, as well as those based on import-substitution[12] in view of their poor results and the social cost often associated with them. On the other hand, liberal market-based policies of the type advocated in the 1990s by the "Washington Consensus"[13] have also often failed. It is clear that countries pursue their development strategies in differentiated ways, as to institutional set up, priorities and strategies or mix of policies. While the progress of individual countries towards certain quantitative objectives can be measured, the debate goes on as to the policies that for a given country would stimulate sustainable development. A good example is the divide between countries as to the approach of the Kyoto Protocol to the protection of the environment and the lack of consensus on the causes, responsibilities and policies to fight global warming. A recent debate between Nobel prize winners for economy as to the biggest problems facing the global economy of the future do not pay any specific attention to SD, but rather focus directly to some of its objectives such as coping with global warming (George A. Akerlof), promoting inclusiveness (Michael Spencer), reducing inequality (Joseph E. Stiglitz).[14] The focus of another Nobel prize winner, Amartya Sen, on (self) empowerment of the poor and on recognition of individual and collective rights as key to overcome underdevelopment and extreme poverty should not be overlooked.

It is not surprising that the impact of FDI on economic growth is debated among qualified economists, although the importance of FDI as an important source of capital, managerial and technological know-how, employment is acknowledged, as well as its positive impact on the improvement of the competitive environment in closed local markets.[15]

The adoption of liberal market based economic models and the opening-up of markets worldwide have rendered out of fashion centralized industrial policies such as the import substitution approach. As a result in the context of globalisation, the instruments available to most countries to promote independently a definite model of (sustainable) development are limited and of dubious effectiveness. Direct investment spreads throughout the world propelled by market opportunities, cost efficiency (such as outsourcing due to high labour costs in industrialized countries), different levels of productivity and of rates of return, which individual host countries can hardly influence. Uncoordinated, unilateral regulatory efforts may be inefficient to govern and select the flows of inward FDI; on the contrary such policies may fuel undesired regulatory arbitrage by companies. They are able to shift the location of their investments in response to the diversity of incentives and the inherent advantages of different market, thus favouring some countries to the expense of others.

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[12] Import substitution industrialization is a trade and economic policy that advocates replacing foreign imports with domestic production, also by raising tariffs and other barriers against imports, see *A Comprehensive Dictionary of Economics*, N. Brian ed., 88, 2009. This policy is based on the premise that a country should attempt to reduce its foreign dependency through the local production of industrialized products to foster economic independence and endogenous development.

[13] This is the set of 10 policies that the US government , the IMF and the WB especially considered were necessary elements of "first stage policy reform" that all countries should adopt to increase economic growth. At its heart is an emphasis on the importance of macroeconomic stability, fiscal discipline and integration into the international economy - in other words a neo-liberal view of globalization, http://www.who.int/trade/glossary/story094/en/ accessed 24 October 2014.

[14] See *Looming Ahead. Five Nobel Prize winners discuss what they each see as the biggest problem facing the global economy of the future,* Finance & Development (IMF), September 2014, 14

[15] See E. Borennsztein, J. De Gregorio, J. Lee, *How does Foreign Direct Investment Affect Economic Growth,* J. Int. Economics, 45, 1998, p 115-135; T.H. Moran, E.M. Graham, M. Blomstrom, (eds.) *Does Foreign Direct Investment Promote Development?*, IIE, Washington 2005; L. Resmini, *Il ruolo degli investimenti esteri*, Le nuove forme di sostegno allo sviluppo nella prospettiva del diritto internazionale (G. Venturini ed.), Giappichelli, Torino, 2009, pp. 67-80.

One should also consider that globalization has not only encouraged FDI as a mean of internationalizing production: the development of industrial capabilities also in least developed countries has allowed the establishment of transnational supply chains of production (value chains) based on long-term contractual arrangements rather than direct investment controlled by the master minds of such schemes. There are multinational companies based in advanced economies which own the brands under which these products are sold worldwide.[16]

3. Content and legal definitions of "sustainable development"

There are conflicting views among legal authors as to the normative content of SD and its binding scope, although one can agree that, in general terms, SD has won international recognition as a broad legal principle, beyond being a policy principle.[17] But what about its specific content and effects on the interpretation and application of norms and obligations? The ICJ has been cautious in the *Gabcicovo-Nagymaros* decision as to the consequences that can be derived from the "concept of sustainable development", when recognizing it as a basis for the "need to reconcile economic development with protection of the environment". The Court just concluded that "the parties should look afresh at the effects on the environment of the operation of the Gabcicovo plant".[18]

The most elaborate legal reflection is found in the ILA New Delhi Declaration of 2002 on "Principles of International Law relating to Sustainable Development", which lists seven principles, each articulated in more detailed sub-principles:

1. The duty of States to ensure sustainable use of natural resources;
2. The principle of equity and eradication of poverty;
3. The principle of common but differentiated responsibilities;
4. The principle of the precautionary approach to human health, natural resources and ecosystems;
5. The principle of public participation and access to information and justice;
6. The principle of good governance;
7. The principle of integration and interrelationship, in particular in relation to human rights and social, economic and environmental objectives.

This definition is not exhaustive. The absence of any specific principle on the right to regulate foreign investment and the responsibility of investors strikes.[19] The latter concern has been somehow covered by

[16] The effect of this change can be seen looking at the disastrous collapse in Bangladesh on 13 May 2013 of a building hosting textile factories, the deadliest garment-factory accident in history, with a toll of more than 1000 clothing workers, mostly women, due to poor labour conditions and inexistent health, building and environmental controls, in patent breach of any SD policy. No foreign investor was directly and legally implicated although most of those factories worked under exclusive contracts for international brands. The result was a voluntary but binding "Accord on Factories and Buildings Safety in Bangladesh", signed by a number of foreign buyers (but refused by Walmart), see www.bangladeshaccord.org in order to ensure standards which local authorities do not care enforcing.

[17] See P. Sands, *Principles of International Environmental Law*, (2nd ed) CUP 2003, at 254.

[18] ICJ, *Gabcicovo-Nagymaros* case (Hungary-Slovakia), 1997, at para.140.

[19] See the text at http://www.ila-hq.org/en/committees/index.cfm/cid/25; also as an Appendix to the volume discussing the issue *International Law and Sustainable Development, Principles and Practice*, N. Schrijver and F. Weiss (eds.), M. Nijhoff Leiden/Boston, 2004. The focus on SD as a set of principles seems to indicate a change of perspective in respective of the approach to the "right to development" as an individual "inalienable" human right, expressed in the UN/GA Resolution A/RES/41/128 of 4 December 1986. See recently C. Tietje, *The Right to Development within the International Legal Order*, Reflections on the Constitutionalisation of International Economic Law, *Liber Amicorum*, E.-U. Petersmann, Brill 2014, 381.

putting the responsibility to protect, respect and enhance human rights directly on multinational enterprise by the UN "Guiding Principles on Business and Human Rights" of 2011.[20]

This broad approach to the coverage, implication and methods to promote SD underlines the responsibility of host States in respect of foreign investment. It is understandable that concern has been voiced as to the possible interference of legal commitments stemming out of IIAs, especially directly in favour of foreign investors, with the right and ability of host States to pursue policies aimed at promoting or safeguarding SD. This right and ability is often understood in the broadest sense, protecting the use of a State "policy space" for an almost indefinite range of reasons and ends.[21] However, if governments consider that it is in the interest of their economy to give assurances, backed by international law, of "reasonable" treatment to investors from abroad, they have to take into account this hurdle when adopting new policies that may infringe existing rights, besides deterring new investments.

Finally, is SD a concept essentially applicable only to "developing countries", assuming that this category still reflects reality and is of a conceptual usefulness? In this respect, one must note from the heart of the European Union, that there are doubts whether there is a single concept of SD applicable throughout countries with diverse levels of development. In Europe we rarely hear about this concept in the political and economic debate. Sustainability is rather declined with debt or pensions and linked to growth, stability, unemployment.

In EU countries it is taken for granted that any (economic) development – and hence public and private decision making - must respect other priorities and values, including the respect of fundamental individual rights, both civil and social. Our complex political democratic systems, the elaborate formation of our administrative decisions, the multiple rights of recourse granted to those potentially affected to national and European courts for redress are meant to ensure this balance. On the other hand, the European Union subscribes to the concept of SD in its international relations, including in "North-North" contexts. Thus, the EU Council mandate to the Commission for the negotiations of the Transatlantic Trade and Investment Partnership[22] with the USA states as Objective n. 8 that:

This Agreement should recognize that sustainable development is an overarching objective of the Parties and that they will aim at ensuring and facilitating respect of international environmental and labour agreements and standards while promoting high levels of protection for the environment, labour and consumers, consistent with the EU acquis and Member States' legislation. The Agreement should recognize that the Parties will not encourage trade or foreign direct investment by lowering domestic environmental, labour or occupational health and safety legislation and standards, or by relaxing core labour standards or policies and legislation aimed at protecting and promoting cultural diversity".

Reverting to the global level, the most recent elaboration by UNCTAD of the "Sustainable Development Goals", states that these goals are "meant to galvanize action by government, the private sector, international organizations, non-governmental organizations (NGOs) and other stakeholders worldwide by providing

[20] HR/PUB/11/04, implementing the UN "Protect, Respect and Remedy Framework", annexed to the Special Representative of the Secretary-General (prof. John Ruggie) Final Report on the issue of human rights and transnational corporations and other business enterprises to the Human Right Council (A/HRC/17/31), endorsed by the Council in its resolution 17/4 of 16 June 2011.

[21] See A. Newcombe, T*he Boundaries of Regulatory Exrpopriation in International Investment Law,* 20 ICSID Rev., 1 (2005)

[22] The mandate of 17 June 2013 has been declassified in October 2014, see http://data.consilium.europa.eu/doc/document/ST-11103-2013-DCL-1/en/pd of 8 October 2014.

direction and setting concrete targets in areas ranging from poverty reduction to food security, health, education, employment, equality, climate change, ecosystems and biodiversity, among others".[23] These goals, to be adopted hopefully in 2015 in furtherance of the Millenium Development Gaols agreed in 2000 at the UN Millenium Summit, point to objectives which are key for developing economies. They have, clearly, a different focus than those listed by the EU as objectives in the negotiations of the TTIP under the same heading of sustainable development.

4. Foreign investment: international protection and regulation

Let us turn now to the second term namely "investment protection", focusing on the scope and limits of "international legal protection", thus under international instruments.
Two categories of instruments have to be considered here: (a) self-standing treaties, essentially bilateral investment treaties (BITs), and (b), especially more recently, regional investment treaties and investment chapters of treaties covering also trade, be they bilateral (such as the FTAs which the EU has been negotiating with Canada and Singapore and the Transatlantic Trade and Investment Partnership or TTIP with the USA), or among several parties (such as NAFTA), some being currently concluded in South-East Asia, and the Transpacific Trade Partnership (TTP).

Starting with BITs, let's consider first their typical format – initiated by Germany at the end of the 1950s , as they have been traditionally framed and still mostly are. The texts of these treaties are rather short and contain mostly general provisions which provide for their coverage (definitions), the substantive rights granted directly to the investors and the remedies made available to them, often with few details. The terms used must be interpreted in the light of relevant international customary concepts when no specific definitions under the treaty, or as guidance to arbitral tribunal, is included in the text[24]. I would point out to the following features, as being relevant for the present analysis:

1. The stated *purpose* of these BITs is to promote and protect foreign (direct) investments. However their content, the object of their provisions, that is the legal obligation they create, are aimed at providing for general and specific levels/standards/duties of *protection* for the investors, who are nationals of either party and their investments in the other party. Promotional provisions, such as incentives by the signatories, are extraneous to the structure of such BITs. On could define them as "static" instrument; they are not dynamic policy instruments meant to promote economic cooperation between the parties.[25]
2. As to *definitions*, investments are broadly defined, usually including existing investments, through a non-exclusive long list of any kind of assets, that may qualify as an investment of an investor of one party in the territory of the other party.
3. *Nationality* of the protected investors is also broadly defined: natural and legal persons, private and public entities (State-Owned Enterprise, SOEs, and Sovereign Wealth Funds, SWFs, mostly from

[23] World Investment Report 2014, 136.

[24] This is notably the case of the more articulated and considerably longer text of the current 2012 US Model of BIT (going back to the previous one of 2004), www.state.gov/documents/organization/188371.pdf, accessed 24 October 2014. The arbitral case law is also relevant to interpret standard terms such as "fair and equitable treatment", although arbitral case law does not have a precedential value *stricto sensu*; see the contribution of the present writer *Precedent in the Settlement of International Economic Disputes: the WTO and the Investment Arbitration Models*, Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 2010, (A. Rovine ed.), Martinus Nijhoff 2011, 225.

[25] This is usually true also for the home country. However separate domestic investment support facilities (such as foreign investment public insurance) may be subject to the condition that a BIT exists with the host country of the investment concerned.

developing nations are an important recent addition) are included, based usually on formal links, such as place of incorporation, making the nationality of shareholders and the origin of the capital invested immaterial. This allows recourse to "treaty-shopping" by investors especially in case of dispute: investors from one country can establish holding companies in a third country as conduit for their investments in the host country when the country of the holding company has a BIT with the host country, while their home country has none or it contains less favourable terms.

4. The treaties are all *reciprocal* so that investments by investors of both parties are covered and subject to the same standards, irrespective of the prevailing investment flows. This aspect had not been considered by industrialized countries when they had initially promoted these instruments in order to protect their outward private direct investments in developing countries. Those countries have realized only recently that countries labelled traditional as "developing economies" have also become the origin of FDI, including by SOEs and SWFs, so that they had to cease viewing themselves exclusively as home countries.
5. BITs contain *only obligations on the States which are parties* thereto, essentially the host country, not on investors. The only obligation on investors, which is rather a condition for their protection, is that an investment be made in conformity with the domestic law of the host country. This reflects the traditional view that foreign investments are generally subject in their daily operations to the law of the host State, as the law of the place of establishment. Host countries are thus able to enforce any general or specific requirement and obligations laid down therein upon foreign investors through domestic judicial, administrative and any other enforcement means, without the need to initiate arbitration against a foreign investor under the BIT. The treaty provisions are in substance relevant only as a guarantee for the investors, when those internal provisions and requirements fall below what the treaty requires, which operates as a kind of "safety net". [26]
6. BITs do not usually include among the obligations listed the right of an investor from the other signatory to make an investment, that is they do not grant "market access" (in trade law terminology) or "pre-establishment" rights (in investment law terminology). Those BITs that do include this right (the US approach) contain detailed "negative" lists, specific to each signatory, setting forth the sectors excluded. The right of a host country to restrict access by foreign investors in specific sectors of its economy and thus to reserve certain activities to nationals is theeby safeguarded.
7. Substantive rights granted by BITs to foreign investors may be distinguished according to the following criteria:
   a) *Contingent standards*, that is rights whose content depends on how the host State treats other similarly situated investors. Basically, these are the Most-Favoured Nation (MFN) and the National Treatment (NT) standards.
   b) *Absolute standards:* such as "fair and equitable treatment" (sometimes limited or specified with reference to "conformity with international law" or to "the minimum standard provided by international law") and "full protection and security". Since the contingent and absolute "standards" listed are rather undetermined as to their content in the abstract, the import of the obligations to be respected by the host State in a given situation requires an analysis of what is generally practiced and is considered lawful or due under different yardsticks (customary international law, practice based on a comparative law evaluation, general principles of law, the treatment made to similarly situated other investors).
   c) Absolute general rights: first of all the right to compensation (full, effective) for direct expropriation (transfer of property to public entities for public purposes), as well as for indirect takings/acts equivalent to expropriation.

[26] See G. Sacerdoti, *Bilateral Treaties and Multilateral Instruments on Investment Protection*, RC vol. 269, 1997, pp. 255-460, at 368 ff.

d) *Absolute specific rights*, which focus on the specific needs for the carrying out of foreign investments, such as the right to repatriate dividends, profits, royalties and fees, and the proceeds of divesting; the right to obtain necessary permits and visa for key foreign personnel.

7. As to procedural rights (settlement of disputes) the key, innovative feature of the BITs has been, the availability of direct arbitration (Investor State Dispute Settlement mechanism, or ISDS) by any aggrieved foreign investor covered by the treaty against the host State for breach of the investor's rights stemming from the BIT. A notable feature in this respect is that the institutional setting of the arbitration provided (such as ICSID or international commercial arbitration models) is such as to allow (international) proceedings to take place and a binding decision to be issued, unimpeded by any obstruction of the host State, without usually any need to exhaust previously its domestic remedies.

This basic model, simple and "light", has been the blue print for the conclusion of thousands of such BITs in the last decades. They have been concluded by most countries of the world irrespective of the actual or potential flow of investments between the signatories, their level of development, complementary of their economies, geographical proximity, and political relations. From being an instrument to support the flow of investments from one of the signatories to the other, within a policy of promotion of such investment – as was probably the intent of Germany and Pakistan when they entered in the first of such treaties in 1959 – they have become an almost normal feature of the existing level playing field applicable to international investments in the global economy worldwide.

This success cannot be understood without considering two key factors, which after so many years are often forgotten: *first* that BITs are traditionally "static" and "light". It can be submitted that for a long time host countries had not anticipated that the obligations they were subscribing to could really tie their hands in legitimate law making, granting rather to foreign investors special remedies in case of breaches.[27] An additional element supporting the view that BITs were not considered unduly restraining the regulatory powers of the signatories, is that in case of breach the host State is liable to pay monetary compensation to the investor affected in accordance with the principles of State responsibility as determined in direct arbitration but no to restitution or reestablishment of the *status quo ante*. By contrast, breach of WTO obligations in the area of trade entails no compensation for past wrongful damages but the more constraining obligation to withdraw (with no retroactive effects however) the objectionable measure or to modify any domestic regulation found to be in breach of WTO provisions, so to make it compliant.[28]

Well-run States (which comprise those with the highest level of governance and respect for property rights) recognize in theory and practice in their domestic system the rights listed in the BITs, mostly to both domestic and foreign investors irrespective of their nationality and origin. The small numbers of disputes for several decades, the very few ones brought against industrialized market economies (which are also those where the rule of law and non-discrimination is or should be best observed) is evidence thereof. As to developing countries with weak public institutions, adopting internationally recognized best-practices may

[27] This can explain the lack of safeguard / exception clauses in BITs such as could be patterned after Art. XX GATT. The US model clause safeguarding "essential security interest" reflects rather the military concerns of a world power (cf. Art. XXI GATT), although it could and has been invoked in case of economic emergency by host States, notably by Argentina under the BIT with the US.

[28] See Art 22.1 of the WTO Dispute Settlement Understanding (DSU). Another fundamental difference is that the WTO dispute settlement system is only inter-governmental.

improve and lock-in connected improvements in governance for the benefit also of their domestic enterprises.[29]

Moreover BITs were meant by countries interested in promoting FDI to developing countries to supplement customary principles as to the protection of economic rights of foreigners that communist regimes' nationalizations and the promotion of the New International Economic Order by decolonized developing countries had badly shaken in the 1950s-60s. In addition, direct arbitration, to be conducted in a neutral framework by aggrieved foreign investors, appeared to present an important political benefit. It that it was meant to avoid the pitfalls of diplomatic protection, the politicization of investment disputes, the risk of resort to political pressure and even subversion by powerful nations against small countries for economic reasons that had exacerbated North-South post-decolonization relations.

This is evidenced by the fact that it was the foremost development financial organization, namely the World Bank, which took the initiative to launch the ICSID Convention in 1965, as a specific instrument for settling investment disputes, as stated in its preamble and clarified by the accompanying explicatory report of the Bank's Executive Directors. ICSID was proposed to interested Members of the organization as an optional procedural framework based on their free choice, expressed in contracts or in domestic investment statutes. The development of BITs, laying down substantive standards of protection and opening arbitration to any present and future protected investor against the signatories based just on the treaty clauses, was only starting at that time.[30]

5. The evolution of BITs: from just protecting investors to safeguarding also the rights of host States to pursue their general interest.

Things have in part changed because of several reasons. First, industrialized countries, starting with the US and Canada, have realized after the introduction of direct investment arbitration under the NAFTA , that they had to view themselves also as host countries. They have accordingly amended their models BIT restricting the scope of the most flexible standards (fair and equitable treatment and compensation for indirect expropriation) in order to prevent extensive interpretation of the terms by arbitral tribunals. The aim was to align them to the level of protection granted generally under their domestic law, safeguarding their ability to regulate without discrimination in the general interest.[31]

In many other countries, which had concluded BITs in order to protect their investors abroad, critical positions have emerged in non-business circles (civil society, NGOs, trade unions) as to the purpose of BITs in general. The awareness has spread that the protection that BITs grant may interfere with the pursuit of non-economic values (such as the protection of the environment and health).[32] This criticism has been fuelled by some awards where tribunals have found, under the traditional BITs, that by introducing more restrictive domestic regulation in order to pursue legitimate purposes

[29] See International Property Rights Index, Internationalpropertyrightsindex.org, Americans for Tax Reform Foundation, see also A.T Guzman, *Why LDCs sign treaties that hurt them: explaining the popularity of BITs*, Virginia JIL 38 (1998) 639-688. Tellingly no developing country is listed in the first twenty positions of the Index.

[30] For an historical perspective see G. Sacerdoti, *Bilateral Treaties and Multilateral Instruments*, cit. supra nota 26.

[31] See the well-known clause in the US 2004 and 2012 Model BIT stating that "except in rare circumstances" non-discriminatory regulatory action to protect legitimate public welfare objectives (health, safety, environment) does not constitute indirect expropriation.

[32] For a discussion of these issues see the various contributions published in *General Interests of Host States in International Investment Law* (G. Sacerdoti with P. Acconci, M. Valenti, A. De Luca eds.), Cambridge University Press, 2014.

signatories were subject to the obligation to pay compensation to affected foreign investors even in the absence of discrimination, expropriation or arbitrary conduct.[33]

As to legislators, these concerns have been forcefully expressed in the European Parliament,[34] when discussing the future investment treaty policy of the EU, after the granting by the Lisbon Treaty of competence to the EU in the field of the regulation of foreign direct investments within the Common Commercial Policy.[35] Since this new competence is moreover part of the broader "External Action of the Union" it must be carried out according to the principles and objective laid down in that respect by the Treaty on the European Union (TEU) as amended in Lisbon.[36] The EU investment policy must therefore respect and pursue the predominantly ultimately non-economic dimension of the same.[37]

This approach hints at more complex, lengthy but also balanced BITs to be concluded by the EU, replacing previous BITs of individual member States with third countries. The same applies to investment chapters in FTAs (Economic Partnership Agreements). The impact of envisaged obligations has to be accurately evaluated beforehand as to their effects on non-economic values, leading to more careful drafted and detailed provisions. Issues emerge concerning the mutual interaction of the various clauses, their effect on the regulatory powers of the parties, to be balanced with their effectiveness in protecting national investors abroad.[38]

Especially in the context of investment chapters of bilateral or regional treaties establishing free trade areas or economic partnerships, investment provisions are meant to go beyond minimal, static protection. They are meant to stimulate mutual investment flows, just as is the case for trade and other forms of economic cooperation under the other chapters.[39]

The transformation of traditional "protection treaties" into a different species is however not easy, as negotiations currently under way show. This implies, first of all, granting the right of making investment, just as market access is provided to products and services, possibly in the form of progressive liberalization.

Protective clauses (safeguards, exceptions) which are rarely found in traditional BITs become appropriate, such as Art. XX GATT- type clauses included in recent agreements in South-East Asia,[40] to parallel similar

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[33] Or at least this has been the interpretation of these decisions. See *CMS v. Argentina,* ICSID Case No ARB/01/8 of 12 May 2005, criticized but not annulled by the Ad Hoc Annulment Committee of 25 September 2007. See generally R. Pavoni, *Environment Rights, Sustainable Development and Investor-State Case Law: A Critical Appraisal*, Human Rights in International Investment Law and Arbitration, (P-M. Dupuy, E-U Petersmann, and F. Francioni eds), Oxford 2009, 525.

[34] See European Parliament resolution " On the Future European International Investment Policy", 2010/2203 (INI) of6 April 2011.

[35] Art. 207.1 of the Treaty on the Functioning of the European Union (TFEU)

[36] See Art. 205 TFEU, in connection with Art. 21 TEU.

[37] See A. De Luca, *Integrating non-trade objectives in the oncoming EU Investment Policy: what policy options for the EU?* CLEER Working Papers (Asser Institute) 2013/14; A. Perfetti, *Ensuring the consistency of the EU Investment Policy within the EU External Action: The relevance of non-trade values,* General Interests of Host States in International Investment Law, supra note 32, 308-323.

[38] The negotiating mandate for the EU – USA TTIP in respect of the investment chapter (see supra note 20) provides that the provisions of the investment chapters should be "without prejudice to the right of the EU and the Member States to adopt and enforce… measures necessary to pursue legitimate public policy objectives such as social, environmental, security, stability of the financial system, public health and safety in a non-discriminatory manner".

[39] See the text of the negotiating mandate of 17 June 2013 by the EU Council to the Commission for the TTIP with the USA supra note 22.

[40] See the ASEAN Comprehensive Investment Agreement (ACIA) 2009, http://www.asean.org/news/asean-secretariat-news/item/asean-comprehensive-investment-agreement-acia.

clauses concerning trade.[41] Under these provisions the host State may exclude from coverage measures taken for certain public purposes or in certain sectors or circumstances. A caveat here is that these clauses have not been tested yet in respect to investments: if not well calibrated, they might deprive investors from protection even in face of discriminatory measures.

Within FTAs further instruments are available to make the investment provisions more responsive to the specific development and other needs of the signatories. This is the case of the institutional setting normally provided therein to monitor the application of the agreement, such as joint commissions. They may be empowered to address and resolve issues at an early stage and control (or even "rectify") the interpretation given to any provision by arbitral tribunals.[42]

Finally, direct arbitration has become an issue in view of the increasing number of cases brought by investors under BITs. Host States, especially developing countries, are faced with real challenges from an evolution they had not anticipated (number of disputes to be handled, costs, financial implications in case of loss, political reactions against what is perceived outside the business community as a preferential treatment for foreign investors, who can opt-out from domestic jurisdiction). The number of decisions rendered brings to the forefront the inconsistency of interpretation of similar provisions by different tribunals, which adds an element of unpredictability for legislators and business. In the current setting this is inevitable, in view of the (intentional) vagueness of many key terms (which may be moreover defined differently in different treaties) and the entrusting the resolution of individual disputes to ad hoc tribunals. Being composed of a variety of arbitrators chosen mostly by the parties themselves, not subject to an obligation to follow previous decisions, nor controlled by some appeal mechanism capable of developing consistent case law, the outcome is inevitably somehow unpredictable and inconsistent. [43]

On the other hand the availability of effective adjudication in the hands of investors is a key feature of BITs for their effective protection. Reverting to diplomatic protection or resorting to State-to-State arbitration or to a system of panels such as in the WTO, would subject to political interference and pressures the effectivity of mechanisms meant to impartially adjudicate claims of breach of substantive standards of protection of BITs.

No prompt and generally accepted solution is currently on the table to address the perceived shortcoming of the current system in view of the conflicting interests in presence among actors (investors, home and host countries) and the different objective of different groups of States. Opting-out of BITs is a radical choice that is not appealing to most countries. Elimination of direct investors-State disputes settlement would undermine substantially investors' protection and entangle again signatories in investment disputes. Replacing or amending existing BITs should be the preferred avenue for States which consider their existing treaties inappropriate but still would like to retain the BIT approach. This is or would be however a slow and cumbersome process in view of the massive number of existing BITs and the diversity of views on the

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[41] See B. Legum and I. Petculescu, *GATT Art. XX and international Investment Law,* Improving International Investment Agreements (A de Mestral and C. Levesque eds.), Routledge 2013, 340-362.

[42] The well-known initiatives of the NAFTA Tripartite Commission in respect of the interpretation of the NAFTA by arbitral tribunals (as to the "minimum" standard of international law, transparency and against the carrying-over to the investment chapter of principles found in other chapters) show a clear pro-host State approach / bias shared by the three countries, reducing the scope of their obligations towards investors to the detriment of the latter's protection.

[43] See G. Sacerdoti and M. Recanati, *From Annulment to Appeal in Investor-State Arbitration: Is the WTO Appeal Mechanism a Model?*, WTO Litigation, Investment and Commercial Arbitration (J. A. Huerta-Goldman, A. Romanetti, F. Stirnimann eds.), Kluwer , 2013, pp. 327-356

advisable changes. [44] Such changes involve revising both the substantive obligations of host States towards investors as well as the dispute settlement mechanism. [45]

In respect of the latter minds and interests are especially divided. The current debate within the EU as to ISDS is telling of the new awareness that BITs and direct dispute settlement mechanism should be responsive to broader concerns, shared societal values and should not become an instrument to grant privileges to foreign investors. The text which has emerged from the negotiations between the EU Commission and Canada, as concluded in September 2014, provides for direct arbitration; at the same time the need and appropriateness of ISDS in North-North relations, between countries, whose courts are generally impartial towards foreigners in their dealings with local public authorities, is being questioned.
The text includes in any case many innovative features which should be considered also in North-South relations. Foremost among them, more detailed procedural rules in order to increase transparency of procedure (such as the right of affected non-disputing parties to have a role as *amici curiae*) and ensuring the independence of arbitrators and the absence of conflict of interests. Carve-outs of specific matters and measures from ISDS (such as prudential measures to ensure the stability of the financial system) also goes in the direction of granting more flexibility to host States in regulating key aspects of their economic system in the interest of the society at large. It is notable that the new format has been agreed in the North-North context, where the need of ISDS is questioned in view of the satisfactory operation of justice also in respect of foreigners challenging local authorities' acts, rather than the North-South or South-South context, where SD is a more pressing issue. The result of this engagement of the EU may well result in a EU de facto model which may set the standard beyond the direct reach of the EU.[46]

Proposals have also been made to transform radically the format of BITs, such as introducing obligations on investors or subjecting the exercise of their treaty rights to an assessment of their contribution to development, although these suggestions have failed until now to be effectively considered in treaty drafting.[47] In our view, the case for using BITs to impose obligations on investors and transforming them in instruments for the selective promotion of investment flows which are coherent with the economic policy of the recipient economy, has not been made yet convincingly. Other mechanisms, domestic incentives, international economic cooperation schemes (such as direct financial contribution to technical assistance by international organizations, NGOs, foreign developmental agencies) remain paramount and are more coherent with these objectives. This notwithstanding, changes in substantive standards and the regulation of

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[44] For practical proposals and for a full review of solutions to improve the "development-friendliness" of the BIT system see the Report by Karl P. Sauvant and Federico Ortino, *Improving the International Investment Law and Policy Regime: Options for the Future,* Formin (Finland) 2013 sponsored by the Ministry of Foreign Affairs of Finland

[45] Thus Art. X.9 of the Canada-EU Comprehensive Trade Agreement, as negotiated and released non 26 September 2014 (http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf) provides that " A Party breaches the obligation of fair and equitable treatment referenced in paragraph 1 where a measure or series of measures constitutes: Denial of justice in criminal, civil or administrative proceedings; Fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings; Manifest arbitrariness; Targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief; Abusive treatment of investors, such as coercion, duress and harassment; or A breach of any further elements of the fair and equitable treatment obligation adopted by the Parties in accordance with paragraph 3 of this Article". No such specifications are found in traditional BITs of EU Member States. The Investment Chapter of CETA is made of 43 mostly long articles plus various annexes to be composed with the maximum 15 articles of traditional BITs.

[46] See the special issue of the *J. World Investment and Investment*, 2014, n. 3-4, *The Anatomy of the (Invisible) EU Model BIT*, 2014. The draft text of the EU-Singapore FTA released in October 2014 follows the approach of the EU-Canada FTA in matters of investment and ISDS, rendering the procedural requirements even stricter, see http://trade.ec.europa.eu/doclib/press/index.cfm?id=961 (!7 October 2014)

[47] See the review of proposals the Report by Karl P. Sauvant and Federico Ortino, *Improving the International Investment Law and Policy Regime: Options for the Future,* supra note 44.

procedural mechanisms, such as those promoted by the EU, are a relevant turn around to update the BIT scheme to current needs and concerns of host countries, especially in the developing world. They will thereby contributing to making BITS more "development-friendly".

6. The international regulation and protection of foreign investment and sustainable development: interference and support. Some final reflections

The purpose of an opening contribution is not to draw conclusions but rather to present the issues and to point to a road-map.[48] Before doing so a general remark is appropriate at this stage.
The primary responsibility for the sustainable development of a country rests on its political institutions, more specifically on its government. It is for it to set priorities, standards, conditions for economic activity by locals and foreigners alike, while it is the duty of foreign investors to respect those parameters. In this connection it must be recalled that one of the main problems hindering development in many parts of the world is that government are often not accountable to their citizens; respect for democratic principles and fundamental human rights is far from being universal; corruption in ruling elites is widespread; fighting poverty is often just a slogan.[49]

It is also for the government to set a framework and incentives that may be conducive to the entry and the positive contribution of foreign investment to development, not just in economic terms. Investors from abroad should be encouraged to bring in more advanced technology and management methods. They should be expected to bring in also the higher standards of their country of origin as to environment, labour and industrial relations, health, security, as well as to comply with tax obligations, respect human rights and social standards.[50]

This is the approach pursued under the UN agenda following the Millenium Summit. It is advocated by the 2011 *Guiding principles on business and human rights*, which promote the direct engagement of enterprises in this direction, as mentioned above.[51] On the other hand, the laying of specific requirements by the host States only upon foreign investors, especially if they upset the competitive balance with local entrepreneurs, may deter investment from abroad. It is any case accepted that host countries should not lower their standards and in any case cannot derogate from internationally recognized ones (such as the ILO core labour standards), in order to attract investment from abroad. BITs may be the appropriate instruments to obtain the cooperation of home countries in this respect and statements to this effect have found their way in BITs and investment chapters of trade agreements.[52]

[48] For further reflection see A. Van Aaken and T.A. Lehmann, *Sustainable development and international investment law: a harmonious view from economists*, Prospects in International Investment Law and Policy (R. Echandi and P. Sauvé eds.), Cambridge 2013, p.317-339; M.W. Gehring and A. Kent, *Sustainable development and IIAs: from objective to practice*, Improving International Investment Agreements (A de Mestral and C. Levesque eds.), Routledge 2013, 284-302.

[49] See the World Bank Governance Indicators, supra note 6, and the Transparency Corruption Perception Index, supra note 8.

[50] See generally *Human Rights in International Investment Law and Arbitration*, (P-M. Dupuy, E-U Petersmann, and F. Francioni eds), Oxford 2009. However, substantial FDI into developing countries originates currently from emerging economies (such as the BRICs countries) whose corporate investors accountability to these criteria cannot be taken for granted.

[51] See note 22 above.

[52] See above the quote from objective of the EU mandate for the TTIP, note 22, See also P. Acconci, *The "Unexpected" Development-Friendly Definition of Investment in the 2013 Resolution of the Institut de droit international*, 23 IYIL 2013, Brill 2014, p.69 ss.

Another limits of bilateral instruments, including BITs, is that by definition they cannot provide beyond the bilateral context and their application is delimited by the territory of the host country. Sustainable development involves, however, addressing the protection of global commons (public goods), first of all the environment and climate change issues, that involve broader geographical dimensions where multilateral cooperation and taking into account the interest of neighbouring countries is paramount.[53] Irrespective of assistance provided by international organisations (intergovernmental or NGOs) or other countries, sustainable development cannot be pursued in isolation from, or disregarding international obligations binding upon a host State, including those concerning investments, international economic cooperation and trade relations, by beg-your-neighbour policies or otherwise.[54]

A catalogue or milestones of a road map to improve the pro-development features of international investment law instruments could look as follows.

1. The balancing of investment protection and sustainable development does not imply the existence of a conflict in principle. It rather points to the need to reconcile possible areas of interference or friction in order to make the contribution of foreign investment supportive of the efforts of host developing countries to pursue sustainable development policies.[55]
2. International cooperation; multilateral, regional and bilateral instruments -such as investment chapters within FTAs - are key in order to promote investments which conform to these objectives, something that traditional BITs are not meant to, nor capable of ensuring.
3. Changes in BITs format and innovative drafting of investment chapters, most recently by the EU, point to the possibility of making BITs more respectful of the policy space of host States in the pursuit of legitimate general interest, balancing these values with protection from arbitrary, discriminatory conduct and outright expropriation without compensation of foreign investors by host countries.
4. These changes do not transform, however, BITs in development cooperation instruments, since their structure, object and purpose are geared to investment protection through the laying down of general obligations on the host country and access to effective remedies for the investors. BITs are not the appropriate instruments to stimulate and regulate specific investments, a task which pertains to the host country, possibly with the cooperation of the home country.
5. Irrespective from texts' changes, protection provisions in existing BITs can and should be interpreted in the light of sustainable development objectives shared by the signatories. They should not be viewed and interpreted in isolation but rather, in context, in the light of other instruments (notably treaties on human rights, environment, health, labour standards) binding upon the signatories or to which they have broadly subscribed (including non-binding acts). International rules

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[53] See F. Francioni, *Foreign Investments, Sovereignty and the Public Good*, 23 IYIL 2013, Brill 2014, p. 3 ss.; I. Dubava, *The Future of International Investment Protection Law: The Promotion of Sustainable (Economic) Development as a Public Good,* Reflections on the Constitutionalisation of International Economic Law, *Liber Amicorum*, E.-U. Petersmann, Brill 2014, 381.

[54] A recent example might be the disputes brought by various WTO members against China challenging the latter's restrictions to the export of certain raw materials and rare earths, which China justified as necessary to protect its permanent right on natural resources, originally developed by the developing countries at the UN in the 1960s and 1970s as an integral part of their New International Economic Order strategy. The panel and the Appellate Body denied however to China the right to justify its measures under Art. XX-g of the GATT, finding that the restrictions (export bans, quotas and duties) were not "made effective in conjunction with restrictions on domestic production or consumption". See *China-Raw Materials*, WTO/DS 393,394,395, AB Report of 30.1.2012, and *China-Rare Earths,* WTO/DS 431,432,433, Panel Report of 26.3.2014. The Chinese restrictions appear not to be dictated by conservationist policies of those resources, which are world-wide in short supply and much sought for advanced technological use, but rather part of an industrial policy aimed at developing China's domestic transformation industry to the detriment of those of the importing countries.

[55] See *ICC Guidelines for International Investment*, 2012, chapter I, Investment Policies.

on interpretation of treaties require to take into account "any relevant rules of international law applicable in the relations between the parties" (Art. 31.3.c of the VCLT) which include those instruments. An evolutionary interpretation of old treaties in the light of the current context is an accepted approach to treaty interpretation, followed both by the ICJ and the WTO Appellate Body.[56]

6. When it comes to reconciling the right of host States to regulate the economy in the pursue of general interests with the right of foreign investors to protection under an applicable BIT, principles found in the sources mentioned above can be an appropriate yardstick, considering the object and purpose of the various instruments in a broad perspective, including resort to an evolutionary interpretation.
7. While "legitimate expectations" of foreign investors cannot constrain the competence and duty of States to resort "reasonably" to their regulatory powers if these investors are not beneficiary of specific commitments,[57] indemnification of losses suffered by foreign investors, when substantially affected in their operations or specifically singled out, must be anticipated by host States when planning substantial changes of policies. This does not stem just from the duty of States to observe their obligations under BITs but is, most of the time, also in conformity with a good-governance approach to the carrying out of their activities in the furtherance of the general interest.

[56] See ICJ, *San Juan River Dispute*, Costa Rica v. Nicaragua, Judgement of 13 July 2009; WTO Appellate Body, *US-Import Prohibition of Certain Shrimps and Shrimp Products*, WT/DS 58/AB/R, Report of 12 October 1998,

[57] See CETA, supra note 45, at Art. X.9 .4 on fair and equitable treatment: "When applying the above fair and equitable treatment obligation, a tribunal may take into account whether a Party made a specific representation to an investor to induce a covered investment, that created a legitimate expectation, and upon which the investor relied in deciding to make or maintain the covered investment, but that the Party subsequently frustrated."