CHAPTER 15

International Investment Law

The Anarchical Society Where Development and Sustainability Are Frenemies and Participation Plays Gooseberry

Paolo Turrini

1 Introduction

Discussing in a short chapter how Sustainable Development (SD) relates to international investment law is an almost herculean task. This is due both to the inextricable yet non-linear link between the two, which have multiple points of contact, and to the many doctrinal sources focusing on such a relationship, which can be studied from both a practical and legal perspective. The practical approach aims to understand the actual contribution of Foreign Direct Investment (FDI) and International Investment Agreements (IIAs) to SD (a role which is schematically outlined in Section 2). The legal approach questions how SD has been, and could be, factored into international investment law (a problem briefly addressed in Section 3). The first part of this chapter will show that, despite the fact that the economic literature does not unanimously confirm the positive role of FDI in fostering development and, also, of IIAs in promoting FDI, States are not demonstrating a true interest in properly redesigning this branch of law. The reform currently under consideration mainly deals with procedural questions, whereas the legal novelties of substantive nature scattered all over the investment regime tackle the issue of SD in an erratic manner. Something similar can be said with regard to public participation, which, also due to the legitimacy crisis that hit the investment system, has recently drawn the attention of scholars and international institutions (Section 4). How participation and SD can be best combined, however, is a problem that deserves greater consideration.

2 Investment (Treaties) and (Sustainable) Development

Although this chapter, and the book it is a part of, takes a legal perspective on the idea of SD, one cannot forget that reality takes precedence over legal fiction. Thus, if it were to be proven beyond doubt, for instance, that international

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investment law does not in fact further SD, or even just development, a legal analysis of how IIAs account for SD would be pointless. Of course, this requires that a definition of SD is decided upon beforehand (whereas the notions of development and economic development are slightly less problematic). Although empirical studies consider various parameters as proxies for sustainability, the aim of this section is simply to inform the reader about the existence of a host of analyses on the actual effects of IIAs. This issue is known by many legal scholars, who have also discussed it at times, but since it risks shaking the very foundations of the investment regime, lawyers usually avoid it. This is not a good reason, however, to ignore it when addressing the subject of SD, especially from a participation perspective: people taking part in decision-making should be acquainted with the literature on the consequences of IIAs in order to make informed choices.[1]

Despite the factual and sometimes law-grounded claim that the aim of IIAs is to protect investment, it can be maintained that this goal is of less importance than the attainment of socio-economic prosperity.[2] The latter view may be based on the preambles of some IIAs and that of the International Centre for Settlement of Investment Disputes (ICSID) Convention, which variously evoke the idea of development. The preamble of the ICSID Convention was also used to create the so-called *Salini* test,[3] which includes a 'contribution to the economic development of the host State' among the requirements aimed at establishing which investments are afforded protection through ICSID arbitral proceedings. However, the superficial analyses of this prerequisite carried out by arbitrators make clear how difficult its application is, because of the absence of an objective benchmark against which to assess whether an investment contributes to development and is thus worth being brought under the aegis of the ICSID Convention.[4]

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1 The effect of this knowledge on people's attitudes towards FDI has been studied: Hye-Sung Kim and Youngchae Lee, 'The Effects of Environmental Costs on Public Support for Foreign Direct Investment: Differences Between the United States and India' in Cosimo Beverelli, Jürgen Kurtz and Damian Raess (eds), *International Trade, Investment, and the Sustainable Development Goals* (CUP 2020) 270.

2 Anne van Aaken and Tobias A Lehmann, 'Sustainable Development and International Investment Law: A Harmonious View from Economics' in Roberto Echandi and Pierre Sauvé (eds), *Prospects in International Investment Law and Policy: World Trade Forum* (CUP 2013) 330–31.

3 *Salini et al v Morocco*, ICSID Case No ARB/00/4, Decision on Jurisdiction, 23 July 2001, para 52. The test states that only transnational economic activities that entail (a) a contribution of money or assets, (b) a risk, (c) a certain duration and (d) a contribution to the host state's economy, can be deemed an "investment" and as such deserve the protection of international investment law.

4 Souvik Mukherjee and Nirmal Kanti Chakrabarti, 'Is "Contribution to the Host States Development" an Essential Criterion to Define Investment Under International Investment Law? A Search Through the Lens of Arbitral Awards' (2021) 42 Liverpool L Rev 429.

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This is one of the reasons why arbitrators have engendered an inconsistent case law on the abovementioned requirement, which further exacerbated the unpredictability of investment protection,[5] and why all but a handful of IIAs do not incorporate the *Salini* test,[6] including the treaties of some prominent actors (although this is not enough to set aside the development requirement under the "double keyhole" condition).[7] However, legal qualifications apart, does FDI actually contribute to development?

Economists have long investigated this issue and arrived at no concrete answer. A recent literature review has stressed that few scholars doubt that 'there is a strong correlation between FDI and growth', although 'the direction of causality is less clear'.[8] This is due to the fact that certain conditions, relating to both the type of the investment and the domestic setting of the host country, are needed for FDI to unleash growth, so that one can assume that 'FDI inflows do not exert an independent influence on economic growth'.[9] States may enact policies that, according to some commentators, are key to success, including certain performance requirements. Governments can demand that corporations have a local investment partner (joint venture requirement), transfer their technologies to such a partner (technology transfer requirement) and buy inputs for their products in the host country (local contents

5 Alex Grabowski, 'The Definition of Investment Under the ICSID Convention: A Defense of *Salini*' (2014) 15 Chicago J Intl L 287. To avoid this problem, the author suggests to stick to the *Salini* requirements. *Contra*, van Aaken and Lehmann, n 2, who think SD considerations should be raised at the merit stage, not the jurisdiction phase (at 334–35), and Diane Desierto, 'Development as an International Right: Investment in the New Trade-Based IIAs' (2011) 3 Trade L & Development 296.

6 Ole Kristian Fauchald, 'International Investment Law in Support of the Right to Development?' (2021) 34 Leiden J Intl L 181, 189.

7 Gus Van Harten, 'The European Union's Emerging Approach to ISDS: A Review of the Canada-Europe CETA, Europe–Singapore FTA, and European-Vietnam FTA' (2016) 1 Bologna U L Rev 138, 153–54 (the European Union); Mukherjee and Chakrabarti, n 4, at 461 (the US in its model treaty, India in its actual agreements despite its model treaty).

8 Liesbeth Colen, Miet Maertens and Johan Swinnen, 'Foreign Direct Investment as an Engine for Economic Growth and Human Development: A Review of the Arguments and Empirical Evidence' in Olivier De Schutter, Johan Swinnen and Jan Wouters (eds), *Foreign Direct Investment and Human Development: The Law and Economics of International Investment Agreements* (Routledge 2013) 115. Reviews of relevant empirical studies are not uncommon and may address a number of issues, including those raised here. See eg Aaron Cosbey, *International Investment Agreements and Sustainable Development: Achieving the Millennium Development Goals* (Intl Institute Sustainable Development 2005).

9 Maria Carkovic and Ross Levine, 'Does Foreign Direct Investment Accelerate Economic Growth?' in Theodore H Moran, Edward M Graham and Magnus Blomström (eds), *Does Foreign Direct Investment Promote Development?* (Institute for Intl Economics 2005) 219.

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requirement).[10] However, in order to ensure growth, positive factors must offset the negative ones. For instance, foreign companies do not always pay taxes in the host state (and they repatriate capital); they cannot pass their technical knowledge to the host economy if there are no local firms operating in the same sector; and host state companies may suffer a 'crowding out' effect in the credit market.[11]

It should also be noted at this point, that growth (meant as an increase in GDP) is not development, since the latter also entails a larger societal improvement capable of nurturing the former. Thus, development implies economic (eg distribution of wealth) as well as non-economic (eg human capital) aspects, even though no simple definition of it can be given.[12] Moreover, in this respect, too, scholars tend to think that the effects of investment are mixed and uncertain. Considering only a couple of economic parameters, it seems that, overall, investment may contribute to reducing poverty in the host country but, at the same time, it may increase inequality,[13] although high education levels and effective institutions may mitigate or even invert this latter outcome.[14]

However, even in those cases where true development is realised, it is necessary to consider at what cost this occurs. Is rampant growth, although beneficial to all population strata, worth defiling waters? Just as growth is not development, development cannot be equated to SD, which is usually intended as comprising social values such as human rights and a healthy environment from an intergenerational perspective. Again, experts are unable to reach unequivocal conclusions as to the role of investment, and studies show both positive and negative outcomes. For some, foreign investment facilitates the achievement of the United Nations Sustainable Development Goals (SDGs),

10 The catalogue of performance requirements is richer: International Institute for Sustainable Development, *Investment Treaties & Why They Matter to Sustainable Development: Questions & Answers* (Intl Institute Sustainable Development 2012) 27.

11 Ha-Joon Chang, *Economics: The User's Guide* (Pelican 2014) 427–29.

12 The idea of development can be split into multiple factors: eg Sumei Luo *et al*, 'Can FDI and ODI Two-Way Flows Improve the Quality of Economic Growth? Empirical Evidence from China' (2021) 53 Applied Economics 5028, analyses the quality of economic growth against the parameters of efficiency, stability and sustainability, the last one being made up only in part of environmental criteria.

13 Colen, Maertens and Swinnen, n 8.

14 Quoc Hoi Le *et al*, 'The Impact of Foreign Direct Investment on Income Inequality in Vietnam' (2021) 9 27 Economies 1. Incidentally, education and political institutions are also crucial factors in participatory processes.

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except with regard to climate change,[15] whereas for others, it 'benefits the environment in wealthy countries … but degrades it in poor countries'.[16]

Let us posit, against part of the available evidence, that FDI promotes SD. Can we also say that IIAs promote FDI? Needless to say, inquiries are, in the aggregate, inconclusive. Econometric models detect a positive impact, no impact or even a negative impact of IIAs, depending on how the analyses are conducted.[17] Although some authors endorse the idea of a correlation between IIAs and FDI inflow, many others believe that the former's influence is marginal, and that investment treaties do not compensate for the lack of other requisites.[18] Among the variables to be considered – as suggested by a literature review finding a small role of IIAs and a major role of economic determinants – there are taxes, market size, GDP per capita, growth rate, labour cost, trade deficit, exchange rates, infrastructure, human capital, presence of investment promotion agencies, corruption and political stability.[19] As for the extractive sector, which is of paramount importance, unsurprisingly 'FDI is largely driven by geology'.[20] Equally obvious is the pivotal role played by an open trade and investment policy, that is, by guarantees for a frictionless flow of goods and

15 Viktoria Aust, Ana Isabel Morais and Inês Pinto, 'How Does Foreign Direct Investment Contribute to Sustainable Development Goals? Evidence from African Countries' (2020) 245 118823 J Cleaner Production 1.

16 Nadia Doytch and Merih Uctum, 'Globalization and the Environmental Impact of Sectoral FDI' (2016) 40 Economic Systems 582, 591. This cautions against drawing lessons from legal studies too swiftly, such as the one stating that, when it comes to arbitration, 'in environmental cases developing states seem to fare better than developed states' (Michael Faure and Wanli Ma, 'Investor-State Arbitration: Economic and Empirical Perspectives' (2020) 41 Michigan J Intl L 1, 47).

17 Joachim Pohl, 'Societal Benefits and Costs of International Investment Agreements: A Critical Review of Aspects and Available Empirical Evidence' (2018) OECD Working Papers on International Investment 2018/01, 16–31, <www.oecd-ilibrary.org/docserver/e5f85c3d-en.pdf> last accessed 31 March 2022.

18 Karl P Sauvant and Lisa E Sachs (eds), *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows* (OUP 2009) pt II (whose chapters are almost equally divided between supporters and critics of the causal relationship).

19 Liesbeth Colen, Miet Maertens and Johan Swinnen, 'Determinants of Foreign Direct Investment Flows to Developing Countries: The Role of International Investment Agreements' in De Schutter, Swinnen and Wouters (eds), n 8. Similar conclusions on the limited significance of BITs are in Josef C Brada, Zdenek Drabek and Ichiro Iwasaki, 'Does Investor Protection Increase Foreign Direct Investment? A Meta-Analysis' (2021) 35 J Economic Surveys 34.

20 Theodor H Moran, *Foreign Direct Investment and Development: The New Policy Agenda for Developing Countries and Economies in Transition* (Peterson Institute for Intl Economics 1998) 22.

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capital. Given the focus of this chapter, it is worth noting that market liberalisation as a condition of credit by international financial institutions may be a problem if seen through the lens of participation, especially where democratic institutions are young and fragile.[21]

In light of the importance of internal factors, the difficulty of disentangling the effects of IIAs and of domestic reforms has been noted, so that polls would be a more trustworthy probing method.[22] Interestingly, the findings of the limited effect of investment treaties are usually confirmed through interviews with practitioners.[23] Moreover, the greater weight of domestic aspects is not at odds with the (seemingly substantiated) idea that IIAs lead to a boost of capital inflow only if they are complied with, that is, when a country is not challenged before arbitral panels. Conversely, FDI declines when a state is brought to ICSID and, even more so, when the dispute is lost by the government.[24] This can be explained with the hypothesis that IIAs primarily work as a proxy for governments' reliability in ensuring a favourable investment environment.

With few exceptions,[25] these studies do not consider the content of IIAs, only their being into force or concluded. Indeed, as we will see in Section 3, the true level of protection afforded by these agreements is hard to estimate. Therefore, one might argue that the actual provisions of an IIA do not significantly determine the magnitude of its contribution to capital influx. Somewhat ironically, the importance of such contribution may result in being inversely proportional to the spread of investment treaties: the more numerous they are, the less difference they make when all domestic factors – the economy, the legal and institutional framework – are roughly the same. The more successful (ie diffuse) IIAs are, the less successful (ie effective) they are. This provides ammunition against the multilateralisation and universalisation of the investment regime.

21 Daniel Kalderimis, 'IMF Conditionality as Investment Regulation: A Theoretical Analysis' (2004) 13 Soc & L Studies 103, 122–23.

22 Jason Yackee, 'Do BITs Really Work? Revisiting the Empirical Link Between Investment Treaties and Foreign Direct Investment' in Sauvant and Sachs (eds), n 18.

23 Lauge Skovgaard Poulsen, 'The Importance of BITs for Foreign Direct Investment and Political Risk Insurance: Revisiting the Evidence' in Karl P Sauvant (ed), *Yearbook on International Investment Law & Policy 2009–2010* (OUP 2010). Many other sources are quoted in Pohl, n 17, at 31–34.

24 Todd Allee and Clint Peinhardt, 'Contingent Credibility: The Impact of Investment Treaty Violations on Foreign Direct Investment' (2011) 65 Intl Org 401.

25 Jay Dixon and Paul Alexander Haslam, 'Does the Quality of Investment Protection Affect FDI Flows to Developing Countries? Evidence from Latin America' (2016) 39 World Economy 1080.

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These issues, albeit known to many legal scholars, are by and large neglected in the debate on the reform of investment law, despite this field having been harshly criticised by states and academics alike in the last two decades. The current work on the investor–state dispute settlement system conducted by Working Group III (WGIII) of the United Nations Commission on International Trade Law (UNCITRAL) does not cover the potential uselessness of investment treaties in fostering SD, which might imply they could be disposed of. Of course, one could not expect WGIII to 'abolish' the bulk of international investment law. However, this could be a wasted opportunity to discuss a topic of utmost importance. As some representatives in WGIII noted, the fact that negative perceptions on the investment regime are not grounded in definitive empirical evidence should not hinder the needed reform.[26] In light of this, UNCITRAL would have been a proper forum to address these perceptions, maybe through a bottom-up approach with the involvement of the public, rather than the suggested top-down manner.[27]

3 The Investment Regime and Its Consequences on (the Idea of) Sustainable Development

In a well-contained legal regime, based on a single treaty or, at most, a limited set of harmoniously-designed instruments, looking into how SD is understood and pursued is relatively straightforward. This is the case, for example, of the other main branch of international economic law, that is, international trade law, which, despite some centrifugal tendencies, is quite solidly grounded in the few conventions establishing the World Trade Organisation. This system, in turn, has developed a fairly consistent case-law. Unfortunately, this is not the case of international investment law, which is exceptionally fragmented and can hardly be seen as a 'legal system' *stricto sensu* (Section 3.1). It is made up of countless agreements, whose interpretation is entrusted to arbitral panels that have often construed even identically-phrased provisions differently. This situation is not without consequences for our purposes. Here I stress three aspects. First, a decentralised regime is, in principle at least, ill-equipped in promoting communal values like SD (again, Section 3.1). Second, the lack of a common mechanism aimed at avoiding that investment protection comes

26 UNCITRAL, Report of Working Group III (Investor-State Dispute Settlement Reform) on the Work of its Thirty-fifth Session (New York, 23–27 April 2018), 14 May 2018, UN Doc A/CN.9/935, para 96.

27 Ibid para 95.

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at the expense of SD has the effect of outsourcing this objective to individual states, which are free to choose, among many, the strategies they deem best-suited to promote SD (Section 3.2). Third, these strategies represent different means pointing at different aims, since, in the absence of a central law-making and adjudicatory authority, SD objectives are primarily those a state thinks they are. In such a scenario, the best way not to get lost in the maze of bilateral treaties is perhaps relying on 'big data' analyses by external observers: that is, reviewing how scholars and institutional actors categorise (their own understanding of) SD goals across a myriad of legal instruments (Section 3.3).

3.1 *Main Features of International Investment Law*

Some consequences for SD stem from the structure and content of the investment regime. As for the structure, the regime is mostly organised as a bundle of two-sided legal relations, taking the shape of Bilateral Investment Treaties (BITs). Their number now approaches 3,000 treaties, most of them still in force, and their content can be varied, despite similarities abound, with respect to both substantive and procedural provisions. The latter include reliance on a dispute settlement system with its fulcrum on investor-state arbitration managed by ICSID. An exception can be seen by Brazil's recent Cooperation and Investment Facilitation Agreements, which, albeit bilateral in nature, resort to classic state-state arbitration. In all such cases, one end of the bilateral relationship may be a multi-state subject, one example being the (not yet in force) 2020 Comprehensive Investment Agreement between China and the European Union (EU).

Further exceptions to the norm (ie BITs) can be isolated by looking at two parameters. First, content: some actors opt for concluding bilateral treaties encompassing a larger array of issues and including an investment chapter. These Free Trade Agreements (FTAs) are generally more 'structured' and thus the compliance mechanisms and bodies they set up may contribute to promoting SD more effectively than a simple BIT. Similarly, rules relevant to investment, and to SD, can be found in agreements primarily focusing on other themes. For instance, in matters of performance requirements, which are dealt with in a variety of ways in IIAs,[28] a key instrument is the Trade-Related Investment Measures Agreement, belonging to the World Trade Organisation galaxy. The second parameter is the number of parties: plurilateral agreements on investment are gaining momentum, like those in force among the members of

28 UNCTAD, *Foreign Direct Investment and Performance Requirements: New Evidence from Selected Countries* (United Nations 2003) 36 ff.

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the Common Market for Eastern and Southern Africa and of the Association of Southeast Asian Nations.

Bilateral accords are still preponderant, though, which may have an effect on SD. One possible consequence regards the protection of common goods,[29] such as climate. FDI is likely to have a non-negligible role in bringing about climate change, but this problem is best tackled through concerted multilateral action, which cannot be adequately hosted in, and fully secured by, a multitude of BITs.[30] Indeed, a legal framework conceived as a cohesive system, rather than a loose set of distinct items, favours the design of rules and institutions aimed at coping with common problems. Thus, WGIII is now musing upon the establishment of an advisory centre for developing countries along the lines of the one existing in the field of trade law since 2001 (though not affiliated to the World Trade Organisation). However, the most far-reaching effect of the bilateral nature of the investment regime concerns the level of promotion of SD as opposed to investors' interests. Developing states usually have less bargaining leverage vis-à-vis capital-exporting powers and the former's *desiderata* do not always enter the final agreement; what is worse, these countries might not even be willing to enshrine SD-provisions in their BITs, since they might prefer to run a 'race to the bottom'.

The problem can be summarised as follows: since states are convinced they can attract a larger share of FDI if they promise more favourable investment conditions than those offered by competing countries, environmental and human rights standards will remain low. While the actual role of a fragmented system on the persistence of low standards can be debated,[31] as these can have a number of justifications, it seems safe to conclude that such a model does not provide a strong incentive to raise the standards. Remarkably, such an

29 Lise Johnson, Lisa Sachs and Nathan Lobel, 'Aligning International Investment Agreements with the Sustainable Development Goals' (2019) 58 Columbia J Transnational L 58, 116–18. See also Giorgio Sacerdoti, 'Investment Protection and Sustainable Development: Key Issues" in Steffen Hindelang and Markus Krajewski (eds), *Shifting Paradigms in International Investment Law: More Balanced, Less Isolated, Increasingly Diversified* (OUP 2016) 38 (but the example the author puts forth in the footnote sees the use of domestic resources, rather than their protection, as a common concern!).

30 Indeed, investors have already begun to challenge state measures aimed at tackling climate change: see Matteo Fermeglia *et al*, '"Investor-State Dispute Settlement" as a New Avenue for Climate Change Litigation'(Climate Law Blog, 2 June 2021) <http://blogs.law.columbia.edu/climatechange/2021/06/02/investor-state-dispute-settlement-as-a-new-avenue-for-climate-change-litigation> last accessed 31 March 2022.

31 Although the race-to-the-bottom hypothesis is dismissed by some scholars, others found support for it: see, in the field of labor laws, William W Olney, 'A Race to the Bottom? Employment Protection and Foreign Direct Investment' (2013) 91 J Intl Economics 191.

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incentive would not necessarily stem from a uniform system (a multilateral investment agreement), should states merely be free to adopt high standards. As long as the so-called right to regulate remains a right as opposed to a duty, a centralised system could engender the same results as a fragmented one. Admittedly, freedom is key in a context where high standards have been rejected first and foremost by developing countries as a strategy of industrialised states to hinder the former's development, a strategy inspired by a questionable 'one-size-fits-all' approach, whereas SD should be pursued differently in different places. Again, this is worth emphasising in light of the focus of this chapter on participation, since the exogenous imposition of standards would narrow the scope of political self-determination of 'rule-taking' countries. A simple non-regression obligation would be more acceptable, provided that the degree of protection afforded by two distinct norms can be compared, which is not always the case. However, it could still be problematic from the standpoint of democracy: is a country not free to change its legislation so as to strike the best-suited balance between sustainability and development?

At any rate, currently, SD-related provisions are to be found in different sources.[32] IIAs do not generally provide for binding environmental and human rights standards, as they 'merely' set out investors' guarantees and, conversely, fence in the host states' room for manoeuver. Both types of rules, however, are capable of encroaching on SD.

On the one hand, standards of treatment of investors limit governmental leeway, to the effect that a non-justifiable breach of one such standard entails the state's duty to pay compensation to the investors. Practically all these norms have a bearing of some sort on SD,[33] be they general in character (such as the most-favoured-nation-treatment, the national-treatment, the fair-and-equitable-treatment and the full-security-and-protection standards) or more specific (like those ruling out restrictions on capital movements). Competition among investment-seeking states may take two paths: by including certain rules in an IIA or by phrasing them in a way more constraining for the state. Yet it must be said that, even if they have an identical wording, two provisions may still result in being construed differently by arbitrators. This is another significant outcome of the fragmentation of the investment regime, devoid of

32 As this chapter focuses on investment law, the sources addressed here do not include those rules primarily covering economic (eg trade and finance) or non-economic (eg labour and the environment) aspects, which are not investment, nor soft law instruments, which are not law. Nonetheless, one should be aware that these other sources – even the non-binding ones – may support SD and/or participatory practices in investment.

33 International Institute for Sustainable Development, n 10. See also below n 38.

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any centralised judicial authority (even though WGIII is primarily working on this issue).

On the other hand, provisions preserving states' regulatory power and shielding non-discriminatory actions taken in the public interest against investors' entitlements also affect SD, this time, in a potentially positive way. Again, these safeguards may be formulated reductively by a government trying to secure a competitive advantage. In any case, irrespective of the language, and as already noted, it is up to states to exploit the leeway they are accorded and put it to good use.[34] Governments can do so not just through their own general laws, but also by enacting investment legislation[35] and concluding contracts[36] with investors. These are the other sources alluded to above that may explicitly, though not necessarily effectively, raise the issue of compliance with human rights, environmental standards and other SD-related norms (such as performance requirements, for instance the transfer of green technologies).

Having ascertained that most rules lying on the different planes of the multilayered investment regime are capable of having more or less immediate beneficial as well as adverse effects on SD, we should ask which are the possible strategies to pursue a reasonable equilibrium between sustainability and socio-economic progress.[37]

3.2 *Sustainable Development Strategies in International Investment Law*

Overall, the ways to promote SD through investment law can be traced back to three groups, which can roughly be said to be centered on the host state, the investor (or home state) and the investment.[38]

The first approach is quite obvious and consists of broadening governmental regulatory space, either by acting on the rules that carve out exceptions

34 As concluded by Lukas Stifter and August Reinisch, 'Expropriation in the Light of the UNCTAD Investment Policy Framework for Sustainable Development' in Hindelang and Krajewski (eds), n 29.

35 Fauchald, n 6, at 191–94.

36 Lorenzo Cotula, 'Rethinking Investment Contracts Through a Sustainable Development Lens' in Elena Blanco and Jona Razzaque (eds), *Natural Resources and the Green Economy: Redefining the Challenges for People, States and Corporations* (Brill | Nijhoff 2012).

37 UNCTAD has identified ten principles aimed at striking such a balance: UNCTAD, *Investment Policy Framework for Sustainable Development* (United Nations 2015) 30–36.

38 Albeit following a different categorisation, an analytical list of policy options is in ibid at 85, 91–121 (where the SD implications of each option are spelt out). Narrower in scope but discussed at length and accompanied by treaty practice are the ideas put forth in J Anthony VanDuzer, Penelope Simons and Graham Mayeda, *Integrating Sustainable Development into International Investment Agreements: A Guide for Developing Countries* (Commonwealth Secretariat 2012) 251–398.

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ultimately based on the pursuit of public interest or the protection of the most vulnerable subjects such as workers or indigenous peoples, or by directly reducing the scope of the rights and privileges afforded to investors. These results, in turn, may be attained by different means. Some promises usually made to investors may be omitted from an IIA (or domestic investment law, or investor-state contract). Conversely, a clause may be included that allows the host state to take measures which have a legitimate SD-related aim. In multilateral IIAs, such commitments by the parties may be diversified and in tune with each state's individual stage of development.[39] Another option is the narrowing down of the scope of vaguely phrased provisions, which turns out to be an effective strategy in a field, such as that of investment law, where most protection standards are formulated as open-ended rules, perhaps as principles. Of course, exceptions to treatment standards, too, may be clarified so as to grant states non-easily-compressible room for maneuver. A third possibility is to pass through the interpretation rather than the reform of investment rules,[40] and more generally through judicial activity, for instance by avoiding that the reasonableness of the host state's conduct be assessed by resorting to a strict proportionality test.[41]

The second group of strategies stresses the duties of investors and the role of the home states in enforcing such duties or discharging their own responsibilities. The task of ensuring that investors comply with human rights and environmental standards rests primarily with the host state, which may be urged by an IIA to ratify treaties protecting such standards, although this has usually a simple hortatory value. These standards may also be included as investors' duties in IIAs or investor-state contracts, so that a breach arises not (only) from the violation of the host state's domestic laws but from the violation of the IIA or contract itself.[42] This would be conducive to arbitral claims where the investor is the defendant rather than the plaintiff. In the absence of similar clauses, one could maintain that investors' duties are set out directly

39 Desierto, n 5 (presenting the case of ASEAN).

40 Katharina Berner, 'Reconciling Investment Protection and Sustainable Development: A Plea for an Interpretative U-Turn' in Hindelang and Krajewski (eds), n 29. See also Sacerdoti, n 29, at 39 (who, however, thinks that BITs are not the main route to promote SD, as they are primarily aimed at protecting investment).

41 Federico Ortino, 'Investment Treaties, Sustainable Development and Reasonableness Review: A Case Against Strict Proportionality Balancing' (2017) 30 Leiden J Intl L 71. A similar position is taken by Roland Kläger, 'Revising Treatment Standards – Fair and Equitable Treatment in Light of Sustainable Development' in Hindelang and Krajewski (eds), n 29.

42 A similar effect is generated by the inclusion – which is common – in the treaty or contract of a provision demanding compliance with state law on the part of the investor. Of course, self-standing SD-related standards would afford greater flexibility.

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by customary international law, perhaps a sort of international development law applicable to investors.[43] Nevertheless, enforcing them through investment arbitration would be hard for a series of reasons related to jurisdictional issues (eg demonstration of investors' consent to arbitration), the international subjectivity of natural and legal persons (in a context where corporations are usually seen as incapable of bearing real duties) and the relationship of investment rules with domestic law and international law at large (which is a major problem in light of the traditional uncertainty about the law applicable in investment arbitral proceedings).[44] It is unsurprising that claims against investors, or better, counterclaims, have rarely been successful.

As for the role of capital-exporting countries (home states), this could take the form of an improbable international law obligation not to act to the detriment of sustainability,[45] at least by way of due diligence, that is, by watching over the conduct of corporations abroad and possibly envisaging penalties for wrongdoers. A similar retributive but more plausible approach relies on the attachment of conditionalities to FTAs, whereby SD-related standards are upheld by the threat of lifting the benefits bargained with the counterpart. Viable options could also be the merger of SD considerations into the home state's decision-making process (what in the EU is known as the policy integration principle),[46] as well as the monitoring of policy outcomes, which may themselves be fed into the decision-making process. This is the so-called sustainability impact assessment, which is again regularly performed by the EU before concluding FTAs, and is crucial despite the uncertain calculation of such an impact. It is pointless to ask *in abstracto* if FTAs are beneficial or detrimental to SD, as this analysis must be conducted on a case-by-case basis and capture possible future scenarios in order to provide data for planning. Policymakers should know, *inter alia*, which sectors will be advantaged and those which will be impaired by the agreement; whether SD-oriented regulation in the capital-importing country will be more financially burdensome and politically costly following the liberalisation of investment and trade; and how

43 Daniel D Bradlow, 'Development Decision-Making and the Content of International Development Law' (2004) 27 Boston College Intl & Comp L Rev 195, 212 and 214–15.

44 Hege Elisabeth Kjos, *Applicable Law in Investor-State Arbitration* (OUP 2013).

45 Aaron Cosbey *et al*, *Investment and Sustainable Development: A Guide to the Use and Potential of International Investment Agreements* (Intl Institute Sustainable Development 2004), where an undefined duty to respect 'basic norms of sustainable development' is hypothesised, at 33.

46 Stephanie Schacherer, *Sustainable Development in EU Foreign Investment Law* (Brill | Nijhoff 2021).

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many additional resources, made available through economic development, will be possible to invest in SD-related measures and technologies.

This brings us to the third approach to sustainability in investment law. Since investment may further as well as hinder SD, rules – at the international level but also at the domestic level of both the host state and the home state – should be designed to promote FDI that is beneficial to SD and discourage FDI that undermines it. In addition to the already mentioned sustainability impact assessment undertaken before concluding FTAs or during their implementation, home states could adopt a wide array of measures aimed at facilitating 'good' investment over 'bad' investment.[47] The host state, for its part, might refine the *Salini* test and refuse the entry of, or simply exclude from protection, certain investments: thus, the government might decide to target only those that are more problematic in light of SD (eg sector-specific restrictions or other limitations based on development priorities).[48] Conversely, SD-compatible FDI might be attracted into the host country by favourable legislation, which might entail the creation of SD-based special economic zones.[49] In addition, provisions for investment facilitation could be included in IIAs to attract 'recognized sustainable investors'.[50] However, the actions aimed at directing FDI towards the realisation of SD, also in light of the SDGs, are many more.[51]

3.3 *Looking for Sustainability in International Investment Law*

At this point, one might ask whether there is a definition of SD in international investment law. Apparently, although a number of IIAs refer to the concept, only a few attempt to explain it. For instance, the parties to the EU-Korea FTA unoriginally 'recognise that economic development, social development and environmental protection are interdependent and mutually reinforcing components of sustainable development'.[52] Even though the scope of the provision

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47 An analytical list is provided by Karl P Sauvant and Evan Gabor, 'Facilitating Sustainable FDI for Sustainable Development in a WTO Investment Facilitation Framework: Four Concrete Proposals' (2021) 55 J World Trade 261, 283.

48 Fauchald, n 6, at 196.

49 UNCTAD, *World Investment Report 2019: Special Economic Zones* (United Nations 2019) 195–205.

50 Sauvant and Gabor, n 47, at 272–78.

51 This may entail mere promotion of investment in developing countries – the aim of Target 17.5 of SDGs – or, more specifically, investment in the goals themselves: see UNCTAD, *UNCTAD: Investing in Sustainable Development Goals* (United Nations 2015).

52 EU-Korea FTA, Art 13.1(2). This formula dates back at least to the 1995 Copenhagen Declaration on Social Development and now appears in several EU FTAs. A variant in a non-binding instrument can be found in Italy's 2020 Model BIT, speaking of SD 'in its economic, social and environmental dimensions' (Preamble). The definition stresses the

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hosting the definition is limited to the trade relationship of the parties,[53] it cannot be excluded that such an article may have a larger interpretative value that also covers the investment parts of the treaty. Moreover, it is not that important that social and environmental conditions in a given country improve thanks to the 'strings' attached to trade rules rather than investment rules, as long as the effects are real. This must be remembered in light of the current spread of sophisticated, all-embracing FTAs.

At any rate, there are only a handful of similar provisions and these cannot be deemed to be representative of an entire branch of law, especially due to the fragmentation of the investment law regime, which hinders the emergence of a clear juridical idea of SD. This is also true when one tries to grasp the meaning of the notion by looking into either the context where SD is mentioned or the treaty part devoted to SD. The EU-CARIFORUM FTA is a good example of both cases. On the one hand, in its Preamble it states that the parties 'need to promote economic and social progress for their people in a manner consistent with sustainable development by respecting basic labour rights in line with the commitments they have undertaken within the International Labour Organisation and by protecting the environment in line with the 2002 Johannesburg Declaration':[54] the word 'by' indicates that labour rights and environmental protection are not by-products but an integral part of SD.[55] On the other hand, in an article named after SD, the parties express their understanding that this notion entails the 'commitment that: (a) the application of this Agreement shall fully take into account the human, cultural, economic, social, health and environmental best interests of their respective population and of future generations; (b) decision-taking methods shall embrace the fundamental principles of ownership, participation and dialogue', so that the parties 'agree to work cooperatively towards the realisation of a sustainable development centred on the human person, who is the main beneficiary of development'.[56]

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interconnection and lack of hierarchy between what seem to be ends; the Trans-Pacific Partnership Agreement takes an analogous approach in speaking the language of means, claiming that SD can be attained "through mutually supportive trade and environmental policies and practices" (Preamble).

53 The same definition appears also in Sect IV, Art 1, of the abovementioned EU-China Comprehensive Investment Agreement, which is entirely devoted to investment. To my knowledge, this is one of the few IIAS mentioning "the welfare of [...] future generations".

54 EU-CARIFORUM Economic Partnership Agreement, Preamble.

55 But see the Preamble and Sect IV, Sub-Sect 2, Art 1, of the EU-China Comprehensive Investment Agreement, where SD and environmental and labour protection are "merely" juxtaposed, with no explicit causal implication.

56 Ibid, Art 3(2)–(3).

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This locution draws near to being an open-ended definition of SD; however, such a choice is not particularly common, especially in IIAs that are not FTAs. Even the recent (2019) Model BIT of the Netherlands, for instance, in a section entirely devoted to SD, provides no definition. It simply restates the importance of maintaining high standards in labour and environmental matters and of complying with international obligations (in force for the parties) related to the protection of the environment, labour rights and human rights; it mentions the idea of corporate social responsibility as referred to the same fields; it invokes women's empowerment, but as a means to SD rather than an embodiment of it.[57]

The path followed by the abovementioned model agreement – ie the expression of some non-economic concerns and the specific ways to address them, in place of a general definition of SD – is very common in BITs, which are the backbone of the investment regime. Moreover, each BIT takes its own approach to the matter, by citing some issues and not others (the most common being human rights, labour, health, the environment and, to a lesser extent, corruption and transparency) and by devising some strategies and not others (non-relaxation of standards, *renvoi* to international obligations, well-defined power to regulate and so on). This is where treaty surveys come in useful. Indeed, scholars such as Chi,[58] Cordonier Segger,[59] Sauvant and Mann,[60] Fauchald,[61] Gordo, Pohl and Bouchard,[62] and institutions like the United Nations Conference on Trade and Development,[63] have tried to 'take photographs' of SD in IIAs, based on a variety of criteria. Their work is valuable for two reasons. First, it provides us with a rich statistical overview of the presence

57 Model BIT of The Netherlands, Arts 6–7.

58 Manjiao Chi, *Integrating Sustainable Development in International Investment Law: Normative Incompatibility, System Integration and Governance Implications* (Routledge 2018).

59 Marie-Claire Cordonnier Segger, *Crafting Trade and Investment Accords for Sustainable Development: Athena's Treaties* (OUP 2021) 341–96.

60 Karl P Sauvant and Howard Mann, 'Making FDI More Sustainable: Towards an Indicative List of FDI Sustainability Characteristics' (2019) 20 J World Investment & Trade 916.

61 Fauchald, n 6, at 191.

62 Kathryn Gordon, Joachim Pohl and Marie Bouchard, 'Investment Treaty Law, Sustainable Development and Responsible Business Conduct: A Fact Finding Survey' (2014) OECD Working Papers on International Investment 2014/01, <www.oecd-ilibrary.org/docserver/5jz0xvgx1zlt-en.pdf> last accessed 31 March 2022.

63 In its annual reports, UNCTAD regularly provides an overview of the 'reform-oriented provisions' in the IIAs concluded the year before, also stressing the most innovative features in state practice. At the time of writing, the most recent issue is UNCTAD, *World Investment Report 2020: International Production Beyond the Pandemic* (United Nations 2020). This body has also identified priority sectors for investment with respect to SD and a list of indicators of the impact of FDI on SD: UNCTAD, n 37, at 21 and 54, respectively.

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of SD-related clauses in IIAs. Secondly and more important to our purposes, it allows us to open a window onto the multifarious components of SD according to states and, especially, academics and specialised bodies. In a fragmented context such as the one of investment law, SD is best spoken of as a 'narrative' or 'discourse', rather than as a coherent, circumscribed notion.

However, some caveats are due with regards to similar surveys. 'Big data' analyses do not always render properly the complexity of rules (two sentences formulated with almost identical language may conceal major differences as to their meaning), or the relevance of such rules, which might be somewhat superfluous because of their content (as when an IIA provision demands compliance with the host state's domestic law) or their container (as is the case for those new model BITs compiled by states that have ceased concluding such bilateral agreements).

More generally, one must remember that SD clauses may differ as to their bindingness, completeness,[64] enforceability and, ultimately, effectiveness.[65] Indeed, what counts is facts, not the law. For example, it is not a great relief to know that BITs have no significant adverse impact on domestic SD standards if, as it has been argued, these treaties worsen the actual conduct of investors on the field and therefore widen the gap between rules and practices.[66]

4 Participation in Investment Matters: A Door to Sustainability?

Many individuals take part in transboundary investment processes and are accorded a role by international investment law. However, by default only investors and "capital-friendly" parties enjoy such a role (Section 4.1), whereas the contribution of those affected by the investment, or of the population of the host state, is only occasionally sanctioned by law. In fact, it is believed by some that investment law diminishes the democratic potential of host states' politics by restricting the margins of political and legal self-determination of those states to a greater extent than it is usually done by international law,

64 Lorenzo Cotula, 'EU-China Comprehensive Agreement on Investment: An Appraisal of Its Sustainable Development Section' (2021) 6 Bus & Human Rights J 360, 364 (for a reference to labor rights).

65 Ibid at 365. A binding and enforceable provision might still be ineffective, perhaps due to power inequality.

66 Fangjin Ye, 'The Impact of Bilateral Investment Treaties (BITs) on Collective Labor Rights in Developing Countries' (2020) 15 Rev Intl Organizations 899. See also Ronald B Davies and Krishna Chaitanya Vadlamannati, 'A Race to the Bottom in Labor Standards? An Empirical Investigation' (2013) 103 J Development Economics 1.

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due to the specificities of investment law (Section 4.2). This concern lies at the heart of today's legitimacy crisis of the investment regime and the ensuing attempts to reform it. However, little can be expected from these attempts, and other avenues must be explored so as to grant people that capacity to affect investment projects – by improving them or halting them – that is not always ensured through democratically elected bodies (ie the main door for participation). Involvement in the implementation of projects and in adjudication of disputes between state and investor are two such avenues. Other paths exist, but one must wonder whether all these means are capable of advancing the cause of SD (Section 4.3).

4.1 *The Protagonists on the Investment Stage*

Discourse on participation in investment matters cannot underestimate the fact that international investment law is one of the very few branches of international law where individuals play a prominent role. Of course, this is limited to the investor. In principle, the protection afforded by investment law, even the part that has attained customary status, can only be invoked by investors if a state has expressed its consent to arbitration through a BIT negotiated with the home state. Apparently, despite the huge number of existing treaties, only a small fraction of bilateral relations between countries (the host state and the home state) is covered.[67] Moreover, arbitral costs are extremely high and this cuts out other companies.

However, neither aspect is an insurmountable impediment, and both can be circumvented by means that increase the number of participants on the investors' side. On the one hand, the problem of high costs can be overcome through third-party funding, that is, the involvement of a subject extraneous to the dispute who financially supports the arbitration in order to obtain a share of the compensation eventually awarded (if any). As this practice may encourage specious litigation,[68] the WGIII is now considering how to regulate it. On the other hand, the issue of the lack of an IIA between the host state and the state of nationality of the investor can be bypassed by merely incorporating a new company – in fact, a subsidiary of the main investor – in a country that concluded an IIA with the host state (treaty shopping). In addition, multinational

67 Patrick Dumberry, 'The Legal Standing of Shareholders Before Arbitral Tribunals: Has Any Rule of Customary International Law Crystallised?' (2010) 18 Michigan State J Intl L 371 (of course, not all relations are equally important).

68 By the investor against the state. But, in principle, powerful states could sustain, both financially and legally, international claims by weak states against investors who incurred in violations of their obligations toward such states.

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corporations can be complex juridical persons comprising a number of shareholders: investment tribunals have built up a case law that quite generously accords indirect shareholders the right to bring claims,[69] thus broadening the potential plaintiffs' basin indefinitely. This fact, also in light of the pivotal role played by shareholders in a company's decision-making, should be given consideration in the ongoing debate on sustainable corporate governance.

4.2 *Investment (Law) and Democracy*

If the investing company, its subsidiaries or otherwise controlled entities, its shareholders, as well as its funders, take part in investment litigation as 'representatives' of capital-exporting countries, who are the participants within FDI-importing countries? In general terms, international investment law does not recognise participatory rights (as opposed to a mere faculty) to people affected by investment projects or those acting on their behalf. This is a serious issue, since this branch of international law can, by design, reduce democratic spaces in the host state.

Indeed, many IIAs contain so-called stabilisation clauses,[70] that 'freeze' the laws of a host state throughout the duration of a contract with the investor (freezing clauses) or require the investor to comply with new laws but upon governmental compensation for the costs thus incurred (economic equilibrium clauses). As is evident, this can make changes in the domestic legislative framework very costly for the host state. Moreover, irrespective of this kind of clauses, a similar outcome may still stem from the abovementioned fair-and-equitable-treatment standard, which is included in all IIAs and may now have attained customary status. It requires the state to duly consider the investors' legitimate expectations,[71] which may be grounded on general regulations as well as on specific commitments undertaken by the government with the investors.[72] But, absent IIAs and thus in an even broader perspective,

69 Lukas Vanhonnaeker, *Shareholders' Claims for Reflective Loss in International Investment Law* (CUP 2020), especially ch 4.

70 See, with reference to SD, Jola Gjuzi, *Stabilization Clauses in International Investment Law: A Sustainable Development Approach* (Springer 2018).

71 Although expectations of economic gains can and should be discounted for the expectations of likely regulatory amendments, one cannot completely rule out the possibility of a risk-shifting effect, due to the use of an IIA as a sort of insurance for investors against a substantial legislative change, so that they do not feel pressured to comply in advance with future higher standards: Lise Johnson and Oleksandr Volkov, 'Investor-State Contracts, Host-State "Commitments" and the Myth of Stability in International Law' (2013) 24 American Rev Intl Arbitration 361.

72 This may result in different thresholds for establishing a breach: Sondra Faccio, 'The Assessment of the FET Standard Between Legitimate Expectations and Economic Impact

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violation of contractual obligations owed to investors could result in a full compensation duty based on the *pacta sunt servanda* principle.[73]

It follows that the host state's legislature will not be free to amend the country's domestic laws – which include tax regulations –[74] without running the risk of being requested to pay significant sums as compensation for the investors' economic losses, which also cover those related to missed opportunities. Democracy might, therefore, suffer a condition known as 'regulatory chill', with law-making bodies being discouraged from enacting new rules promoting the public good and SD but prejudicing the investors' interests. In addition, the chilling effects may be protracted by the existence of a sunset clause, which prolongs the application of an IIA to investments made while the treaty was in force for some, even many, years after the host state's denunciation of the IIA. Although the anecdotal recounting of the existence of the regulatory chill has met with a few large-scale empirical studies downplaying the risk,[75] it seems wise to share the view taken by the OECD, which, while disproving the idea of the race to the bottom, admits that "[t]he possibility of a "regulatory chill" … is harder to refute for the lack of a counterfactual scenario".[76]

In any case, international investment law can compress a country's political self-determination in other ways. For instance, a government could somewhat lose control of its own legislation during arbitration proceedings, should adjudicators decide to show little or no deference to the state's interpretation and application of its laws. Construing domestic rules as law or as facts and adopting a greater or smaller degree of judicial self-restraint in attributing a meaning to the defendant's laws when establishing eg whether the investor complied

in the Italian Solar Energy Investment Case Law' (2020) Zoom-in 71 Questions Intl L 3.

73 Jason Webb Yackee, '*Pacta Sunt Servanda* and State Promises to Foreign Investors Before Bilateral Investment Treaties: Myth and Reality' (2009) 32 Fordham Intl L J 1550 (who probes arbitral practice to argue against the possibility that breaches of contract can either be justified under international law, or give rise to milder compensation duties).

74 Sonia E Rolland, 'The Impact of Trade and Investment Treaties on Fiscal Resources and Taxation in Developing Countries' (2020) 21 Chicago J Intl L 48, 63–70.

75 Carolina Moehlecke, 'The Chilling Effect of International Investment Disputes: Limited Challenges to State Sovereignty' (2020) 64 Intl Studies Q 1; Tarald Laudal Berge and Axel Berger, 'Do Investor-State Dispute Settlement Cases Influence Domestic Environmental Regulation? The Role of Respondent State Bureaucratic Capacity' (2021) 12 J Intl Dispute Settlement 1 (the latter's generalisations have limits that the authors themselves recognise).

76 OECD, *Foreign Direct Investment for Development: Maximising Benefits, Minimising Costs* (OECD 2002) 20.

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with such laws,[77] are actions that locate decision-making power mainly within or outside the state and its elected bodies.

Overall, the relationship between investment and democracy is complex and possibly negative.[78] Some empirical analyses find that, albeit democratic regimes protect property rights more firmly than autocratic countries (which of course is good in the eyes of investors), the former are also usually more likely to pay attention to the voice of the domestic industry and satisfy its requests to ensure economic equality of arms or even undercut competition against the 'invaders'.[79] Since foreign investors are more concerned with economic freedom than political freedom,[80] it follows that FDI does not necessarily flow towards more democratic states. As always, however, this kind of data-driven observations prove to be contentious, and other scholars have provided documentary evidence of a greater attractivity of democracies in terms of incoming FDI.[81] At any rate, the most interesting question inverts the perspective and asks not whether more democracy fosters FDI but, rather, whether FDI fosters democracy.[82]

Of course, given the fact that banning the inflow of foreign capital is undesirable for a country and perhaps even unfeasible, the rules on foreign investment should be devised so as to promote democracy rather than autocracy and corruption. This can be done in many ways. For instance, FDI in the primary sector (the extraction of natural resources), unlike investment in non-primary sectors (eg manufacturing), might exert a negative influence on democratic parameters in host countries and could thus be accorded a different

77 Jarrod Hepburn, *Domestic Law in International Investment Arbitration* (OUP 2017) ch 5.

78 Academic studies, like those quoted in the following, conceptualise "democracy" differently. Indeed, this many-sided notion should be broken down into its components. The question cannot be addressed in these pages, just like its problematisation – despite the latter's importance. For instance, can we say – with Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (CUP 2004) 253 – that 'governance is now designed to provide the political institutions that will enable the furtherance of globalization'? In other words, that domestic fora, as intended by the international community, are meant to advance economic interests rather than empower individuals and groups?

79 Quan Li and Adam Resnick, 'Reversal of Fortunes: Democratic Institutions and Foreign Direct Investment Inflows to Developing Countries' (2003) 57 Intl Org 175.

80 Aparna Mathura and Kartikeya Singh, 'Foreign Direct Investment, Corruption and Democracy' (2013) 45 Applied Economics 991.

81 Nathan M Jensen, 'Democratic Governance and Multinational Corporations: Political Regimes and Inflows of Foreign Direct Investment' (2003) 57 Intl Org 587.

82 On this see eg Roger Mongong Fon *et al*, 'Does Foreign Direct Investment Promote Institutional Development in Africa?' (2021) 30 101835 Intl Bus Rev 1.

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treatment.[83] Similarly, different rules could be applied to investment projects arising out of contracts concluded with authoritarian regimes whose later fall made way for liberal governments. Currently, arbitrators do not usually take a more lenient approach when deciding cases on a breach of contract in transitional settings, so that investors' "claims may prevent incoming democratic regimes from pursuing their development priorities" and thus from becoming more politically stable.[84]

Another path for states is that of re-appropriating their power to confer meaning to IIAs, by expanding the possibility of issuing joint interpretations of such agreements, thus limiting the role of a supposedly unaccountable international judiciary. This hypothesis, however, is supportive of democracy only insofar as the interpretative power thus reconquered is not managed in an unaccountable manner by the government. Therefore, democratically elected bodies should be involved,[85] especially if they played a role in concluding the IIA, so that the meaning of it as understood by the executive is not seen by the parliament as an undue change in treaty arrangements. But, in more general terms, greater legitimacy requires larger participation, which includes non-state actors.

4.3 *Sustainable Development Through Public Participation*

As noted above, international investment law does not establish real participatory rights yet. This does not mean, however, that such rights are never provided for by other instruments such as investor-state contracts and domestic investment laws. Moreover, other branches of international law, such as environmental law[86] and human rights law,[87] may be used to prop up participation

83 Feng Sun, 'The Dual Political Effects of Foreign Direct Investment in Developing Countries' (2014) 48 J Developing Areas 107.

84 Jonathan Bonnitcha, 'Democracy, Development and Compensation Under Investment Treaties: The Case of Transition from Authoritarian Rule' in Stephan W Schill, Christian J Tams and Rainer Hofmann (eds), *International Investment Law and Development: Bridging the Gap* (Edward Elgar 2015) 288. But see also the subsequent chapter of the same book: Walid Ben Hamida, 'Investment Treaties and Democratic Transition: Does Investment Law Authorize not to Honor Contracts Concluded with Undemocratic Regimes?' in ibid.

85 A similar point is raised in Loris Marotti, 'L'interpretazione autentica dei trattati in materia di investimenti' (2018) 32 Diritto del commercio internazionale 651, 667.

86 Case T-9/19 *ClientEarth v European Investment Bank* (2021) General Court (Second Chamber, Extended Composition) (annulling a decision of the EIB that had rejected an application pursuant to the Aarhus Regulation for an internal review of a decision to finance a biomass power plant in Spain).

87 IACtHR, *Claude Reyes v Chile*, Judgment, 16 September 2006, Series C No 151 (recognising the right of an NGO to access information held by Chile's Foreign Investment Committee so as to exercise social control on a project for the exploitation of Río Cóndor).

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in investment matters. The same is true for the internal procedures of the World Bank and other financial institutions at the regional level whose statutory aim is that of funding projects all over the world, although these codes of conduct also attracted criticisms.[88] Moreover, if we think that adding soft law has any sense, the list of investment-related tools where participation features prominently is even longer.[89]

Investment lawyers, at any rate, are now devoting increasing attention to the issue of participation.[90] They are considering how the public can be given the opportunity to have a say on investment issues, even if this, more often than not, takes the form of a faculty rather than an actual right. There are many possible avenues.

First, the public can be (and has been) asked to express their views on a number of instruments, binding or not. Some states consulted with their citizens before revising their model BITs: for instance, Norway (2008 and again 2015), India (2015), Morocco (2017), the Netherlands (2018) and, for its Cooperation and Investment Facilitation Agreements, Brazil (2021). Ecuador went a lot further when, in 2013, it set up its Citizens' Commission for a Comprehensive Audit of Investment Protection Treaties and of the International Arbitration System on Investments, comprising government officials, academics, lawyers and civil society groups, to assess whether the benefits of concluding IIAs were greater than the attached risks. The EU, for its part, in 2014 launched a wide-ranging consultation on investment protection and investor-to-state dispute settlement in the Transatlantic Trade and Investment Partnership Agreement, and in the same year the Union's civil society was again called upon to send comments in light of the 2015 revision of the Transparency Policy of the European Investment Bank. Similar initiatives have been recently taken at the international level in 2019 for the Hague Rules on Business and Human

88 Sanae Fujita, *The World Bank, Asian Development Bank and Human Rights: Developing Standards of Transparency, Participation and Accountability* (Edward Elgar 2013).

89 See eg Principle 9 of the 2014 Principles for Responsible Investment in Agriculture and Food Systems (known as the RAI Principles) by the Committee on World Food Security. On the issue of sources, see above n 32.

90 See, *inter alia*, Eric De Brabandere, Tarcisio Gazzini and Avidan Kent (eds), *Public Participation and Foreign Investment Law: From the Creation of Rights and Obligations to the Settlement of Disputes* (Brill | Nijhoff 2021); Farouk El-Hosseny, *Civil Society in Investment Treaty Arbitration: Status and Prospects* (Brill | Nijhoff 2018); Chrysoula Mavromati and Sarah Spottiswood, 'Voices That Shape Investment Treaties: Inside, Outside and Among States' in Catharine Titi (ed), *Public Actors in International Investment Law* (Springer 2021).

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Rights Arbitration and in 2020 for the OECD paper on Business Responsibilities and Investment Treaties.

The interest elicited by these initiatives differed from case to case, but it was usually manifested by individual scholars, learned societies, networks of professionals and other well-organised groups more than by ordinary citizens. The same occurs with public participation in institutional (permanent or temporary) fora, like WGIII or the domestic advisory groups the EU has established under the SD chapters of its trade agreements, the latter comprising representatives of business, trade unions and NGOs.[91]

As is evident from the examples above, people can be involved in many decisions such as the drafting of a hard or soft law text, the choice of a stance in matters of investment policy and the implementation of IIAs.[92] However, the same can be replicated on a lesser scale, with the engagement of only a part of the population. Thus, for instance, those affected by an investment project could be allowed to voice their opinion in environmental impact assessments procedures[93] or even be granted the right to make that project conditional upon their free, prior and informed consent.[94] Both paths have been taken in practice, and the latter, in particular, is owed to indigenous peoples under human rights law.[95] The incorporation of the interests of affected communities into the investment contract between the state and the investor has also been carried out, albeit quite rarely, whereas the involvement of those communities as formal parties of the contract is, as of now, merely a doctrinal proposal.[96]

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91 On the composition and work of such groups see Deborah Martens, Diana Potjomkina and Jan Orbie, 'Domestic Advisory Groups in EU Trade Agreements: Stuck at the Bottom or Moving up the Ladder?' (2020) Friedrich Ebert Stiftung, <https://library.fes.de/pdf-files/iez/17135.pdf> last accessed 31 March 2022.

92 Several channels for making one's voice heard at national and supranational level are discussed by Chrysoula Mavromati and Sarah Spottiswood, 'Public Participation in Investment Treaty Making' in Brabandere, Gazzini and Kent (eds), n 97.

93 David A Collins, 'Public Participation in Environmental Impact Assessments for Foreign Investment Projects: A Canadian Perspective' in Brabandere, Gazzini and Kent (eds), n 90.

94 Sam Szoke-Burke and Kaitlin Y Cordes, 'Mechanisms for Consultation and Free, Prior and Informed Consent in the Negotiation of Investment Contracts' (2020) 41 Northwestern J Intl L & Bus 49.

95 Some interesting cases are illustrated by Gloria M Alvarez and Ilias Kazeem, 'Measuring Public Participation in International Investment Treaty Law: A Study of the Latin American Extractive Industries' in Gloria M Alvarez, Mélanie Riofrio Piché and Felipe V Sperandio (eds), *International Arbitration in Latin America: Energy and Natural Resources Disputes* (Wolters Kluwer 2021).

96 Ibironke T Odumosu-Ayanu, 'Governments, Investors and Local Communities: Analysis of a Multi-Actor Investment Contract Framework' (2014) 15 Melbourne J Intl L 473.

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Of course, civil society must have a role in the monitoring of the implementation of the investment contract, once concluded.

In addition to the participation in the creation of rules (of IIAs, contracts or other) and their actual operation 'on the ground', the option exists of public involvement in investment adjudication. This is perhaps the most common entry point for civil society into investment law. Indeed, as of today NGOs have been admitted innumerable times to arbitral proceedings as *amici curiae*,[97] who are allowed to put forth their remarks on the case even if they are not parties to the dispute. Again, the possibility for the representatives of affected population to directly submit claims against the state or the investor is still a doctrinal idea.[98] However, *amici curiae* are not usually permitted to access relevant documents.[99] Indeed, transparency is one of the most serious problems in investment law and policy. Many state-investor contracts are confidential, as is much investment-related information during proceedings. Arbitral awards may also be classified; a survey shows that, of the cases dealt with by ICSID panels between 1972 and 2012, about 40 per cent were kept secret.[100]

As can be seen, the means for a larger participation of the public are numerous. But do such means attain the goal of promoting SD? It goes without saying that the efficacy of the above-mentioned options can vary significantly. Much depends, and this is an aspect of utmost importance, on the kind of participating actors, who may not always be accountable to society at large.[101] Cooptation of representatives of trade unions or of the industry in monitoring bodies and advisory committees might forward sectoral interests rather than the collective good. Perhaps, this risk decreases slightly by organising consultations open to the general public, but this, in turn, would include people with no clear stakes in the matter at hand and who, moreover, would not necessarily foster SD or at least the 'sustainability' part of it.[102] To be honest, partisanship

97 Sondra Faccio, 'Public Participation in Arbitral Proceedings' in Brabandere, Gazzini and Kent (eds), n 90.

98 Stephan Schill, 'From Investor-State Dispute Settlement to a Multilateral Investment Court? Evaluating Options from an EU Law Perspective' in European Parliament (ed), *EU Investment Protection After the ECJ Opinion on Singapore: Questions of Competence and Coherence* (European Parliament 2019) 42.

99 This is deemed to be right by some commentators, as reported by James Harrison, 'Human Rights Arguments in *Amicus Curiae* Submissions: Promoting Social Justice?' in Pierre-Marie Dupuy, Francesco Francioni and Ernst-Ulrich Petersmann (eds), *Human Rights in International Investment Law and Arbitration* (OUP 2009) 406.

100 Faure and Ma, n 16, at 45.

101 Harrison, n 99, at 405–06.

102 Yulia Levashova, 'Role of Sustainable Development in Bilateral Investment Treaties: Recent Trends and Developments' (2011) 1 J Sustainable Finance & Investment 222, 226.

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and promotion of non-sustainable causes cannot be ruled out even when participation is reserved to affected communities. In this case, however, their decisions enjoy greater legitimacy, grounded on those people being directly impacted by the consequences of an investment project.

One should also consider that, irrespective of the goal pursued, actual effects may not be those expected. For instance, the involvement of *amici curiae* in arbitral proceedings may render investment arbitration, which is based on privacy and party autonomy, less attractive.[103] This is not necessarily a problem, provided, on the one hand, that the alternative dispute settlement mechanism equally provides a means of publicity and participation and, on the other hand, that the reduced appeal of dispute settlement does not adversely impact on the attractivity of the country for FDI. Indeed, and more in general, a larger participation can lead to obstacles to investment plans, making the state a 'hostile business environment'.[104] The risk is that of having sustainability-oriented participation at the expense of development.

Open problems are also those related to the precise legal means and consequences of participation. As for the former, for each participatory channel more or less effective strategies can be followed. For example, *amici curiae* may hinge their comments on compliance with human rights and environmental law. However, this language may not be fruitful in terms of concrete results, as it is spoken with arbitrators who are better acquainted with the logic (and purposes) of investment law.[105] As for the latter, it must be noted that different consequences may be attached to the breach of participatory rights. Thus, for instance, investment lawyers must decide whether an investor who did not secure the free, prior and informed consent of affected communities should be punished by considering the contract as void, or merely by curtailing the damages awarded by the arbitral tribunal.[106] These are just some of the wide-ranging choices to be made to combine SD and participation.

103 Eugenia Levine, '*Amicus Curiae* in International Investment Arbitration: The Implications of an Increase in Third-Party Participation' (2011) 29 Berkeley J Intl L 200, 206; Harrison, n 99, 405.

104 Avidan Kent, Tarcisio Gazzini and Eric De Brabandere, 'Public Participation in International Investment Law: Setting the Scene' in Brabandere, Gazzini and Kent (eds), n 97, 7.

105 Harrison, n 99; Maxime Somda, 'Protecting Social Rights Using the Amicus Curiae Procedure in Investment Arbitration: A Smokescreen Against Third Parties?' (2019) 10 Investment Treaty News 14. Using the language of investment law could be a better argumentative strategy – which is consonant with the idea that such a branch of law should not be reformed but, rather, construed differently: see above Desierto n 5.

106 The latter solution is adopted by eg Philippe Sands in his interesting dissenting opinion attached to *Bear Creek Mining Corporation v Republic of Peru*, ICSID Case No ARB/14/21, Award, 30 November 2017.

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5 Conclusion

Drawing conclusions on participation-driven SD in international investment law is as difficult as summarising how this legal field relates to such an intimately-connected notion as SD, and for the very same reasons. It is evident that the purpose of FDI is mainly economic, consisting of the financial gain of both the investor and the host country. Therefore, it is all too easy to see that (economic) development is a sort of "birthmark" for international investment law. Only in the new millennium, and particularly in the last decade, did lawyers discover the other side of SD and begin to seriously address the issue of sustainability. This academic attention has accompanied a process of partial renewal of international investment law that has seen the emergence of a new generation of IIAs attempting to strike a different balance between the interests of investors and those of capital-importing states. These latter interests, unlike the former, are not necessarily economic in character. However, the fact that these adjustments to the fissured building of investment law have stemmed from a legitimacy crisis that has little to do with the pursuit of SD, together with the primarily bilateral nature of investment law which hinders a systemic rethinking of the regime, explain why no clear understanding of the idea of SD has arisen so far. At any rate, this situation does not mean that states' practice cannot offer examples of legal strategies that can be resorted to with a view to fostering SD, nor has it prevented scholars from finding SD in a variety of diverse clauses contained in IIAs. These provisions also include those furthering participation of stakeholders, although the scholarly interest in this field seems to be even more recent. Many avenues for channelling public participation towards investment matters have been identified; now the challenge consists of comprehending whether, how and to what extent participation actually promotes SD.

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