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ARTICLE

Investment Contracts and the Reform of Investment Arbitration: Towards Sustainability

Sondra Faccio[1]

Abstract—This article aims to contribute to the debate surrounding the reform of international investment law and arbitration, focusing on the role of the investment contract. It will discuss how this instrument can make international investment law and arbitration more balanced, by imposing *ad hoc* obligations upon the investor to strengthen the sustainability of foreign direct investment (FDI); and by providing for State-investor arbitration in case of breach. The article will also assess how contractual provisions may have the effect of grounding counterclaims by States in investment treaty arbitration, allowing for new avenues for sustainable development in investor-State arbitration.

I. INTRODUCTION

It is well known that international investment law and arbitration have been designed to promote and protect FDI by offering the investor, most often a multinational company, a neutral forum to bring claims against the host State for breach of international investment treaty standards. Although FDI may impact the host State economy, environment and social context, and affect the State's capacity to achieve sustainable development goals, treaties usually do not contain provisions establishing any 'sustainability' obligations upon investors, and investors are usually not involved in investment treaty-based arbitration as respondents.[2] Counterclaims by States have also been rare due to the limited jurisdiction of treaty-based arbitration and the lack

[1] Assistant Professor of International Law, School of International Studies and Law Department, University of Trento, Italy. Email: sondra.faccio@unitn.it.

[2] As to treaties containing investors' obligations, see Reciprocal Investment Promotion and Protection Agreement between the Government of the Kingdom of Morocco and the Government of the Federal Republic of Nigeria (signed 3 December 2016, not in force) (Morocco–Nigeria BIT) art 18; Supplementary Act A/SA.3/12/08 Adopting Community Rules on Investment and the Modalities for their Implementation with Economic Community of West African States (ECOWAS) (signed 18 December 2008, entered into force 19 January 2009) (ECOWAS Supplementary Act on Investment) art 14; Markus Krajewski, 'A Nightmare or a Noble Dream? Establishing Investor Obligations through Treaty-Making and Treaty-Application' (2020) 5(1) BHRJ 105. As to international law instruments providing for specific commitments upon multinational corporations—such as the UN Guiding Principles on Business and Human Rights —, they are mostly soft law. See Stephanie Lagoutte, 'The UN Guiding Principles on Business and Human Rights. A Confusing "Smart Mix" of Soft and Hard International Human Rights Law' in Stephanie Lagoutte and others (eds), *Tracing the Role of Soft Law in Human Rights* (online edn, Oxford Academic 2017) 235.

of instruments capable of making investors accountable for their wrongdoings. This has contributed to the backlash against the international investment law regime and the investor-State dispute settlement (ISDS) mechanism, which have been accused of 'primarily benefiting the investor to the detriment of the state'.[3]

Against this backdrop, the article analyses a selected number of investment contracts in the extractive industry.[4] The reason is two-fold: first of all compared to other FDI activities, 'extractive activities tend to leave a strong environmental [and social] footprint' in the areas where they take place and have a significant impact on States' sustainable development.[5] Second, the extractive industry is one of the few sectors where transparency initiatives such as the Extractive Industries Transparency Initiative (EITI) have flourished leading to the publication of a significant number of investment contracts.[6] Contracts have been sourced from the database resourcecontract.org[7] and involve countries with the lowest capabilities to respond to health emergencies according to the Global Health Security Index.[8] The article will discuss contractual provisions committing the foreign investor to contribute to the host State's efforts towards sustainable development, specifically provisions requiring the company to fund and develop social and health programmes to the benefit of the local population in the host State.

Social and health programmes are the prism through which the impact of investment contracts on the host State's sustainable development is assessed. The article

[3] Mehmet Toral and Thomas Schultz, 'The State, a Perpetual Respondent in Investment Arbitration?' in Michael Waibel and others (eds), *The Backlash against Investment Arbitration. Perceptions and Reality* (Kluwer Law International 2010) 578.

[4] The nature of the investment contract has long been discussed by scholars and courts, see among the many: Giorgio Sacerdoti, *I contratti tra Stati e stranieri nel diritto internazionale* (Giuffré and Editore 1972); Robert von Mehren and Nicholas Kourides, 'The Libyan Nationalizations: TOPCO/CALASIATIC v Libya Arbitration' (1979) 12(2) Nat Resources Law 419, 426; Prosper Weil, 'Droit international et contrats d'Etat' in *Mélanges offerts à Paul Reuter: le droit international: unité et diversité* (1981) 549, 566; Ahmed S El-Kosheri and Tarek F Riad, 'The Law Governing a New Generation of Petroleum Agreements: Changes in the Arbitration Process' (1986) 1(2) ICSID Rev—FILJ 257, 480; Georges R Delaume, 'The Proper Law of State Contracts and the *Lex Mercatoria*: A Reappraisal' (1988) 3(1) ICSID Rev—FILJ 79, 87; Nagla Nassar, 'Internationalization of State Contracts—ICSID, the Last Citadel' (1997) 14 J Intl Arb 192; Charles Leben, 'La théorie du contrat d'état et l'évolution du droit international des investissements' (2003) 302 Recueil des Cours de l'Académie de Droit International 197; Irmgard Marboe and August Reinisch, 'Contracts between States and Foreign Private Law Persons' (2011) MPEPIL 1, 15; *Case Concerning the Payment of Various Serbian Loans Issued by France (France v Kingdom of the Serbs, Croats and Slovenes)* (Judgement) (12 July 1929) PCIJ Rep Series A No 20/21, 41; *Saudi Arabia v Arabian American Oil Company* (ARAMCO), Award (23 February 1955) (1963) 27 ILR 117, 165; Libyan law and Egyptian law, as examined in the case *Texaco Overseas Petroleum Company and Calijornia Asiactic Oil Co v Government of Liby*a, Award (19 January 1977) (1978) 17 ILM 1.

[5] Claudine Sigman and Leonardo Garcia, 'Extractive Industries: Optimizing Value Retention in Host Countries' (2012) UNCTAD/SUC/2012/1, 14; S James Anaya, 'Report of the Special Rapporteur on the Rights of Indigenous Peoples' (6 June 2011) Addendum, UN Doc A/HRC/18/35, 14; Tony Addison and Alan Roe (eds), *Extractive Industries. The Management of Resources as a Driver of Sustainable Development. A Study Prepared by the United Nations University World Institute for Development Economics Research* (Oxford Academic 2018).

[6] 'Extractive Industries Transparency Initiative' <www.eiti.org> accessed 18 July 2023.

[7] As to 'resourcecontracts.org' <resourcecontract.org> accessed 18 July 2023, according to the 'About' section:

> Despite the critical role these contracts play in setting the rules for investments in extractive industries, they are often difficult to discover. … This can result in a critical lack of knowledge for governments as they try to negotiate the best terms for their citizens, and can result in missed opportunities to learn from others' past successes or missteps. *ResourceContracts.org was developed to fill the knowledge gap by providing searchable contracts in machine-readable format with rich metadata and annotations to provide key insights into each contract* (emphasis added).

[8] Global Health Security Index, 'Building Collective Actions and Accountability' <https://www.ghsindex.org/wp-content/uploads/2020/04/2019-Global-Health-Security-Index.pdf> accessed 18 July 2023. The countries involved are: Somalia (rank 193), Equatorial Guinea (rank 191), Mozambique (rank 188), Sao Tomé and Principe (rank 186), Yemen (rank 184), Niger (rank 179), Gabon (rank 178), Malawi (rank 176), Angola (rank 170), Republic of Congo (rank 161), Afghanistan (rank 161), Guinea (rank 166), Democratic Republic of Congo (rank 119). More recent data show both improvement and worsening: for example, Somalia ranked 166 in 2021 (it was 193 in 2019), Yemen ranked 194 in 2021 (it was 184 in 2019). See the 2021 Global Health Security Index, 'Building Collective Actions and Accountability' <https://www.ghsindex.org/wp-content/uploads/2021/12/2021_GHSindexFullReport_Final.pdf> accessed 18 July 2023.

starts from the assumption that health is a necessary precondition for all three dimensions of sustainable development (economic, social and environmental) and one of the most sensitive aspects touched upon by FDI projects in the extractive industry.[9] Therefore, it represents a suitable parameter to measure investment contracts' contribution to sustainable development in the host State.

The article will further discuss remedies and arbitration clauses contained in investment contracts, with the aim of illustrating their capacity to attract claims and counterclaims by States vis-à-vis investors in the case the investor fails to comply with the obligations undertaken under the contract.

The main argument will be that the investment contract currently represents the most useful tool in the hands of the State to regulate FDI while meeting some of the most pressing public international law concerns related to international investment law and arbitration. Investment contracts could effectively complement IIAs in achieving the goal of safeguarding and fostering sustainable development by imposing upon the foreign investor specific obligations. Hence, criticism against the 'one sided' nature of investment law and arbitration would be addressed.

Further to this introduction, the article is structured in three Sections. Section II will illustrate the main concerns currently faced by international investment law and arbitration and the potential role of the investment contract in meeting these concerns. Section III will provide a detailed analysis of a selected number of investment contracts in the extractive industry. It will discuss provisions featuring investors' obligations in relation to sustainable development, with special focus on social clauses and health programmes. Section III will further explore remedies available to the State in case of breach of the contractual obligations by the investor, notably termination and investment arbitration. Section IV will make some concluding remarks.

II. PUBLIC CONCERNS IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION AND THE POTENTIAL ROLE OF THE INVESTMENT CONTRACT

It is well known that investment law and the ISDS mechanism have met significant criticism in the last decades. The discontent has concerned mainly three aspects: treaties' undue limitation to States' sovereign powers and their capacity to tackle public needs and pursue sustainable development goals, the investors' responsibilities in this regard, and the one-sided structure of the ISDS mechanism.[10]

With reference to the first two aspects, criticism emerges from the circumstance that IIAs allow for arbitrators' adjudicatory control over host States' exercise of public authority and, for this, they are perceived as jeopardising States' freedom to pursue economic, social or environmental policies. Many scholars have observed that the issues investment arbitration tribunals are called to decide involve matters of public

[9] UN Conference on Environment and Development, 'Report of the United Nations Conference on Environment and Development (Rio de Janeiro, 3–14 June 1992)', Annex I – Rio Declaration on Environment and Development, UN Doc A/CONF.151/26 (vol I) 12 August 1992, Principle 1; UN Economic and Social Council, 'Report of the Special rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen, submitted in accordance with Commission resolution 2001/65', E/CN.4/2003/90, 21 January 2003, 3.

[10] For example: Toral and Schultz (n 3); Gloria Maria Alvarez and others, 'A Response to the Criticism against ISDS by EFILA' (2016) 33(1) J Intl Arb 1.

concern, which touch upon States' sovereignty; and transcend the borders of a mere economic relationship between the foreign investor and the host State.[11]

States have progressively negotiated IIAs to consider public needs and avoid excessive limitations to their regulatory powers.[12] For example, the European Union (EU)'s IIAs expressly provide for the State's right to regulate 'to achieve legitimate policy objectives'; such regulation in principle does not amount 'to a breach of an obligation under [the treaty]'.[13]

States have also increasingly started to include express reference to sustainable development in their IIAs. For example, the Agreement in principle for the China-EU Comprehensive Agreement on Investment includes a specific section on sustainable development, which features commitments to labor and environmental protection.[14] With these clauses, States aim to ensure that FDI are designed and implemented in a way 'that meets the needs of the present generation without compromising the ability of future generations to meet their own needs'.[15]

However, the capacity of IIAs to promote sustainable FDI remains limited.[16] First of all, the legal status of sustainable development under international law is still uncertain;[17] and scholars are divided as to whether it fulfills the criteria to become the object of an obligation under customary international law or whether it could only be used as an interpretive tool in the hands of judges.[18] In the *Gabčíkovo–Nagymaros Project (Hungary–Slovakia)* case, the International Court of Justice (ICJ) ruled that the implementation of the treaty between Hungary and Slovakia should 'reconcile economic development with the protection of the environment', mentioning

[11] Stephan W Schill, 'International Investment Law and Comparative Public Law. An Introduction' in Stephan W Schill (ed), *International Investment Law and Comparative Public Law* (OUP 2010); Andreas Kulick, 'Book Review: Stephan W Schill (ed), *International Investment Law and Comparative Public Law*. Oxford: Oxford University Press, 2010, pp 836' (2011) 22 EJIL 917, 917–18; Tullio Treves, 'Foreign Investment, International Law and Common Concerns' in Tullio Treves and others (eds), *Foreign Investment, International Law and Common Concerns* (Taylor and Francis 2013) 1–5; Attila Tanzi, 'Public Interest Concerns in International Investment Arbitration in the Water Services Sector: Problems and Prospects for an Integrated Approach' in Tullio Treves and others (eds), *Foreign Investment, International Law and Common Concerns* (Taylor and Francis 2013) 318–35.

[12] Tarcisio Gazzini, 'Bilateral Investment Treaties and Sustainable Development' (2014) 15 JWIT 929; European Commission, 'Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of Regions. Towards a Comprehensive European International Investment Policy' COM(2010)343 final (7 July 2010) 9; UNCTAD, World Investment Report (2018) UNCTAD/WIR/2018, 104; UNCTAD, World Investment Report (2013) UNCTAD/WIR/2013, 101, 117, fn 13; European Commission, 'Trade for All: Towards a More Responsible Trade and Investment Policy' (October 2015), Foreword by Cecilia Malmström EU Trade Commissioner .

[13] Comprehensive Economic Trade Agreement between the EU and Canada (signed 30 October 2016, entered into force 21 September 2017) art 8.9. See also: Agreement between Japan and the Oriental Republic of Uruguay for the Liberalization, Promotion and Protection of Investment (signed on 26 January 2015, entered into force 14 April 2017) art 22. Some investment contracts feature similar provisions: for instance, art 26.3 of the of the Exploration and Production Contract between the Islamic Republic of Mauritania and Kosmos Energy Mauritania "Bloc C6" of 2016 (EPC Mauritania–Kosmos (2016)) safeguards the State's power to apply legislative and regulatory provisions which are generally applicable in the matter of safety of persons and of protection of the environment or employment law.

[14] European Commission, 'EU–China Comprehensive Agreement on Investment (CAI)' <www.trade.ec.europa.eu/doclib/press/index.cfm?id=2237> accessed 18 July 2023. See also the EU-United Kingdom Trade and Cooperation Agreement (TCA), Preamble (8), <www.eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22021A0430(01)&from=EN> accessed 18 July 2023; Sustainable Investment Protocol of the African Continental Free Trade Area (AfCFTA), mentioned by the UNCTAD, IIAs Issues Note 'Recent Developments in the IIA Regime: Accelerating IIA Reform' (August 2021) <www.unctad.org/system/files/official-document/diaepcbinf2021d6_en.pdf> accessed 18 July 2023.

[15] World Commission on Environment and Development, 'Our Common Future' (1987) UN Doc A/42/427.

[16] Morocco–Nigeria BIT (n 2); ECOWAS Supplementary Act on Investment (n 2); Krajewski (n 2) 114–16.

[17] Virginie Barral, 'Sustainable Development in International Law: Nature and Operation of an Evolutive Legal Norm' (2020) 23(2) EJIL 377–400; Lorenzo Cotula, 'Investment Contracts and International Law: Charting a Research Agenda' (2020) 31(1) EJIL 353–68, 365.

[18] Vaughan Lowe, 'Sustainable Development and Unsustainable Arguments' in Alan Boyle and David Freestone (eds), *International Law and Sustainable Development: Past Achievements and Future Challenges* (Oxford 1999) 19–37; *contra* Barral (n 17) 385–88.

'sustainable development'.[19] The Court, however, did not rule in the sense that sustainable development has a customary law status.[20] Second, in most cases sustainable development is primarily designed to set an objective for States to strive for.[21] In the *Pulp Mills on the River Uruguay (Argentina v Uruguay)* Case, the ICJ considered ' sustainable development' as an objective that requires the States 'to strike a balance between the use of the waters and the protection of the river'.[22] A goal-oriented approach to sustainable development has also been endorsed by the UN General Assembly's *2030 Agenda for Sustainable Development*.[23] The goals and targets set by the *Agenda* aim to stimulate action by States in areas of critical importance for humanity and the planet, to achieve the three dimensions of sustainable development. For example, with reference to people's wellbeing (Goal 3), States are called to '[a]chieve universal health coverage … access to quality essential healthcare services and access to safe, effective, quality and affordable essential medicines and vaccines for all';[24] in relation to availability and sustainable management of water and sanitation for all (Goal 6) the *Agenda* asks States to '[s]upport and strengthen the participation of local communities in improving water and sanitation management'.[25] FDI is an instrument to achieve the goals set by the *Agenda* and they are expressly mentioned in relation to Goal 10 ('reduce inequality within and among countries').[26]

In this context, FDI has gained increasing importance based on the assumption that the achievement of sustainable development requires a veritable 'partnership for development' involving all relevant actors, including foreign investors, governments and local communities.[27] It is disputed, however, whether IIAs, as currently designed, are truly fit for purpose.[28] So far, only a few IIAs refer to sustainable development and establish investors' obligations in this respect.[29] These obligations tend to be formulated in broad terms,[30] and often in the negative. For example, the ECOWAS Supplementary Act on Investment requires the investor *not to* undertake actions that may endanger the enjoyment of people's human rights, or '*[not] to* operate the investments in a manner that circumvents human rights obligations, labour standards …

[19] *Case Concerning the Gabčíkovo–Nagymaros Project (Hungary–Slovakia)*, Judgment (25 September 1997) ICJ Rep 1997, para 140.

[20] ibid para 140.

[21] Barral (n 17) 377.

[22] *Pulp Mills on the River Uruguay (Argentina v Uruguay)*, Judgement (20 April 2010), ICJ Rep 2010, para 177.

[23] UNGA Res 70/1 (25 September 2015) UN Doc A/RES/70/1, *Transforming OurWorld: The 2030 Agenda for Sustainable Development*.

[24] ibid para 26, Goal 3.8.

[25] ibid Goal 6.b. As to the involvement of local communities, see also Goal 15 concerning the protection of ecosystems and forests.

[26] ibid Goal 10.b.

[27] Kathryn McPhail, 'Enhancing Sustainable Development from Oil, Gas and Mining: From an "All of Government" Approach to Partnerships for Development' in Tony Addison and Alan Roe (eds), *Extractive Industries. The Management of Resources as a Driver of Sustainable Development* (OUP 2018) 342–65.

[28] Lise Johnson, Lisa Sachs and Nathan Lobel, 'Aligning International Investment Agreements with the Sustainable Development Goals' (2019) 58 Colum J Transnatl L 57–120.

[29] Morocco–Nigeria BIT (n 2); ECOWAS Supplementary Act on Investment (n 2); Krajewski (n 2) 114–16. As to the long-debated issue concerning the capacity of individuals, and multinational corporations in particular, to be subjects of international law and thus holders of international obligations under international treaties, see among the others: Merja Pentikainen, 'Changing International Subjectivity and Rights and Obligations under International Law—Status of Corporations' (2012) 8(1) Utrecht L Rev 145–54; Niccolò Zugliani, 'Towards Human Rights Obligations Binding on Foreign Investors: Recent Developments in the International Investment Framework' in Maria Caterina Baruffi and Matteo Ortino (eds), *Trending Topics in International and EU Law: Legal and Economic Perspectives* (Dipartimento di Scienze Giuridiche dell'Universita' di Verona-Sezione Raccolte e Atti di Convegno 2019) 148.

[30] ECOWAS Supplementary Act on Investment (n 2) art 14.1: '[i]nvestors shall uphold human rights in the workplace and the community in which they are located'.

environmental and social obligations to which the host State and/or the home State are Parties'.[31]

In light of the above, the present article argues that the investment contract may be better off stimulating the investor to undertake activities in areas of critical importance for the sustainable development of the State. As opposed to treaties, which are concluded by States with the aim of providing *all* FDI originating from the other contracting State and located in the host State's territory with certain standards of treatment, the investment contract is concluded by and between the host State and the investor, it concerns a *specific* investment project, and it details how rights and obligations are distributed between the parties involved.[32] Thus, the contract may be more apt to include 'sustainable development obligations', for example by imposing the investor to channel part of the resources deriving from FDI towards the realisation of health, education and infrastructure projects in the host State.

Moreover, by providing for specific obligations upon the investor, the investment contract may respond to criticism to the one-sided structure of the ISDS mechanism.[33] Indeed, it is argued that '[d]espite [a] recent paradigm shift in treaty drafting, international investment law is still composed of traditional IIAs whose main function is to prescribe how host States treat foreign investors'.[34] As a consequence, States are usually the respondents before investment arbitration tribunals and very few cases have been submitted by claimant States in relation to FDI projects, all on the basis of investment contracts.[35] Counterclaims by States also remain exceptions, due to the limited jurisdiction of treaty-based arbitration.[36] In this respect, it has been observed that '[b]ecause [these] treaties generally impose obligations on the host State but

[31] ECOWAS Supplementary Act on Investment (n 2) art 14.2 (emphasis added). By contrast, the Morocco–Nigeria BIT (n 2) expressly requires the foreign investor to proactively contribute to the host States' efforts to achieve sustainable development, for example art 18 of the treaty establishes that '[c]ompanies in areas of resource exploitation and high-risk industrial enterprises shall maintain a current certification to ISO 14001 or an equivalent environmental management standard … Investors and investments shall uphold human rights in the host state. Investors and investments shall act in accordance with core labour standards' (Tarcisio Gazzini, 'The 2016 Morocco–Nigeria BIT: An Important Contribution to the Reform of Investment Treaties' (*IISD Analysis*, 26 September 2017) <https://www.iisd.org/itn/en/2017/09/26/the-2016-morocco-nigeria-bit-an-important-contribution-to-the-reform-of-investment-treaties-tarcisio-gazzini/> accessed 30 August 2023).

[32] See references (n 2).

[33] Tanaya Thakur, 'Reforming the Investor-State Dispute Settlement Mechanism and the Host State's Right to Regulate: A Critical Assessment' (2021) 59 IJIL 173; Justine Touzet and Marine Vienot de Vaublanc, 'The Investor-State Dispute Settlement System: the Road to Overcoming Criticism' (*Kluwer Arbitration Blog*, 6 August 2018) <www.arbitrationblog.kluwerarbitration.com/2018/08/06/the-investor-state-dispute-settlement-system-the-road-to-overcoming-criticism/> accessed 18 July 2023.

[34] Stefanie Schacherer and others, 'International Investment Law and Sustainable Development: Key Cases from 2010s' (*IISD*, 17 October 2018) <www.iisd.org/system/files/publications/investment-law-sustainable-development-ten-cases-2010s.pdf> accessed 18 July 2023.

[35] As to claims brought by claimant States, see *Gabon v Société Serete SA*, ICSID Case No ARB/76/1, Order Taking Note of the Discontinuance Issued by the Tribunal (27 February 1978); *Tanzania Electric Supply Company Limited v Independent Power Tanzania Limited*, ICSID Case No ARB/98/8 (Tanzania v Independent Power), Award (12 July 2001); *Government of the Province of East Kalimantan v PT Kaltim Prima Coal and others*, ICSID Case No ARB/07/3 (East Kalimantan v Kaltim), Award on Jurisdiction (28 December 2009); *Republic of Equatorial Guinea v CMS Energy Corporation and others*, ICSID Case No CONC(AF)/12/2 (Guinea v CMS), Report of the Conciliation Commission (12 May 2015); *Republic of Peru v Caravelí Cotaruse Transmisora de Energía SAC*, ICSID Case No ARB/13/24 (Peru v Caravelí), Procedural Order Taking Note of the Discontinuance of the Proceeding (26 December 2013). See also Gustavo Laborde, 'The Case for Host State Claims in Investment Arbitration' (2010) 1(1) JIDS 97; Toral and Schultz (n 3) 589–90. As to counterclaims, see Schacherer and others (n 35); *Urbaser SA Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v Argentine Republic*, ICSID Case No ARB/07/26, Award (8 December 2016) paras 1110–1211.

[36] James Crawford, 'Treaty and Contract in Investment Arbitration' (2008) 24(3) Arb Intl 351, 364; Xuan Shao, 'Environmental and Human Rights Counterclaims in International Investment Arbitration: at the Crossroads of Domestic and International Law' (2021) 24(1) JIEL 157.

not on investors, States cannot normally bring a counterclaim based on the alleged violation of a treaty obligation'.[37]

The International Centre for the Settlement of Investment Disputes (ICSID) statistics show that 15 per cent of all ICSID cases (from 1973 up to 2023) have been based on contracts,[38] but only a few have been brought by claimant States against investors;[39] while the majority of claims (59 per cent) have been filed by investors on the basis of IIAs.[40] This circumstance has contributed to the backlash against the ISDS mechanism, leading to a process of reform. The current debate surrounding the reform of the ISDS, however, is focused on procedure and the key concerns with sustainable development and States' claims and counterclaims are mostly neglected. The UNCITRAL Working Group III observed 'that providing a mechanism for [s]tates to raise counterclaims was an important aspect of ensuring an appropriate balance between respondent States and claimant investors as well as for promoting procedural efficiency, fairness and the rule of law';[41] but, it decided not to address the topic, as its work should focus on the procedural aspects of dispute settlement rather than on the substantive provisions in investment treaties.[42]

In this context, the role of the investment contract may be crucial. As it will be discussed in the following section, the investment contracts under analysis entitle the State to enforce the obligations undertaken by the investor through arbitration, most often under the aegis of ICSID. Moreover, investors' contractual obligations may ground States' counterclaims in (treaty) investor-State arbitration. This may have the effect of rebalancing the one-sided structure of the ISDS, or even leading to the creation of a State-Investor Dispute Settlement (SIDS) in parallel to the treaty-based ISDS system.

III. CONTRACTUAL CLAUSES AND HOW THEY MAY CONTRIBUTE TO SUSTAINABLE DEVELOPMENT IN THE HOST STATE

A. *Social Clauses*

Social clauses or social investment programmes are often envisaged by the parties to the investment contract to ensure sustainable economic and social benefits for the people in the host State.[43] These clauses may involve the implementation of nation-scale infrastructures and activities in the host State, often linked to the purpose of achieving better health and living conditions for the host State's citizens.

[37] Mees Brenninkmeijer and Fabien Gélinas, 'Counterclaims in Investment Arbitration: Towards an Integrated Approach' (2023) 38(3) ICSID Rev—FILJ. Mees Brenninkmeijer and Fabien Gélinas, 'Counterclaims in Investment Arbitration: Towards an Integrated Approach' (*ICSID Rev—FILJ Blog Series*, 18 July 2023) <https://icsid.worldbank.org/news-and-events/speeches-articles/counterclaims-investment-arbitration-towards-integrated-approach> accessed 15 August 2023.

[38] ICSID, 'The ICSID Caseload-Statistics (Issue 2023-2)' <https://icsid.worldbank.org/sites/default/files/publications/The_ICSID_Caseload_Statistics_Issue.2_ENG.pdf> accessed 15 August 2023.

[39] See cases listed (n 35).

[40] ICSID Caseload-Statistics (n 38).

[41] UNCITRAL, 'Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fourth session—Part II' (Vienna, 27 November–1 December 2017) UN Doc A/CN.9/930/Add.1/Rev.1, para 5 <https://uncitral.un.org/en/multilateralpermanentinvestmentcourt> accessed 18 July 2023.

[42] ibid 6.

[43] Lorenzo Cotula, *Investment Contracts and Sustainable Development: How to make Contracts for Fairer and more Sustainable Natural Resource Investments* (International Institute for Environment and Development 2010) 60.

The impact of social clauses or social investment programmes on the capacity of the State to promote the well-being of its people in accordance with *The 2030 Agenda for Sustainable Development* depends mostly on the level of engagement of the local community and the quality and quantity of the financial means committed by the investor. In this regard, the analysis of investment contracts shows a multifaced scenario.

(i) *The engagement of local communities*

In relation to the engagement of local communities, the investment contracts under analysis can be classified in three main categories: the first category relates to contracts which require the investor to create a dialogue with the local community on certain sensitive matters such as health and quality of life, without a real obligation to conclude an agreement with it; the second category requires the investor to conclude agreements with local community representatives; the third involves the local community only indirectly through the State.

The mining contract between Afghanistan and Silk Road Mining (Afghanistan–Silk Road Mining Contract) falls into the first category. It commits the foreign company to entering into consultations and negotiations with the objective of concluding agreements with the community impacted by the investment project in order 'to promote *sustainable development* and enhance the *general welfare* and *quality of life of inhabitants* (emphasis added)'.[44] The company shall enter into consultation and negotiations within 30 days from the signature of the investment contract. The agreements concluded with the local community shall prevail over the terms and conditions of the investment contract, unless the contract specifically states otherwise. The contract commits the investor to liaising with the local community, but not to reaching an agreement.

The Convention Guinea–Henan, by contrast, contains wording that commits the investor to 'concluding' a 'Local development agreement' with the local community within 12 months from the signature of the investment contract. Such agreement shall include, *inter alia*: the adoption of measures to protect the environment and the local community's health; procedures for the development of social projects; the amount of the investor's contribution to the 'Local development fund'.[45]

Contracts that oblige the investor to 'conclude' agreements with the local community appear to be more effective than contracts that only ask the investor to 'consult and negotiate' with local representatives, as they introduce an obligation of result (conclude) and require the investor to genuinely engage with the local community. Provisions that expressly state that local community agreements prevail over the terms and conditions of the investment contract, such as the Afghanistan–Silk Road Mining

[44] Mining Contract relating to Shaida Project between the Ministry of Mines and Petroleum of the Government of the Islamic Republic of Afghanistan and Silk Road Mining of 2018 (Afghanistan–Silk Road Mining Contract (2018)) art 21 (emphasis added).

[45] Concerning the investor's obligation to 'conclude', see Convention de Base Amendée et Consolidée entre la République de Guinée et la Société de Développement de Mines Internationales du Henan SA (China), la Société de Développement de Mines Internationales Henan–Chine Guinée SA (Guinea), pour la Construction et l'Exploitation d'une Mine de Bauxite, d'une Usine d'Alumine et d'un Chemin de Fer (17 December 2018) (Convention Guinea–Henan (2018)) art 17.2.2; Convention de Base Portant sur la Raffinerie d'Alumine de Debele et la Mine de Bauxite de Garafiri between the Republic of Guinea and Société des Bauxites de Guinée SA and SBG Bauxite and Alumina NV Conakry of 14 May 2018 (Convention Guinea-SBG Bauxite (2018)) art 20. Concerning the investor's commitment to negotiating or cooperating, see Production Sharing Contract between the Republic of Equatorial Guinea and Guinea Ecuatorial de Petroleos and Kosmos Energy Equatorial Guinea for Block W of 2017 (PSC Equatorial Guinea–Kosmos (2017)) art 23.4.

Contract, are also likely to be effective, as they (theoretically) allow the local community to amend *ex post* (through an *ad hoc* agreement with the company) the investment contract and impact on the design and development of the FDI project.

The question remains as to whether the local community has the capacity to meaningfully negotiate with the foreign investor and protect its own interests. For example, it has been observed that direct negotiations with community representatives 'can concentrate power into the hands of local leaders who are not always incentivized to act in the interests of the community, or to ensure the community remains abreast of developments and provides its FPIC [free and prior informed consent]'.[46] In addition, often the local community (and sometimes also the host State) lacks the necessary tools and resources to plan, prepare for, and negotiate with the foreign investor. In this respect, a number of projects have been developed to provide support for communities in their negotiations with major investors.[47]

The third category refers to investment contracts that require the investor to cooperate with the host State's government, rather than the local community.[48] For example, the investment contract between the Democratic Republic of Congo and Perenco (Avenant N 8) establishes that the investors will coordinate with the DCR's Ministry of Hydrocarbons for the realisation of social projects to the benefit of the local population in the field of health.[49] On the one hand, by leaving the negotiations to the State these clauses may respond to criticism concerning local communities' lack of capacity; on the other, if the local communities are involved only indirectly, through the State, their impact on the selection and monitoring of development projects may be weakened.[50]

According to guidelines on the negotiation of investment contracts, the investment project should aim to reach 'effective community engagement'.[51] This requires that: the potentially affected communities and individuals are identified before the contract is finalised; the parties to the contract agree on methods of communicating to the affected communities and set their roles, responsibilities and accountability in

[46] Sam Szoke-Burke and Kaitlin Cordes, 'Mechanisms for Consultation and Free, Prior and Informed Consent in the Negotiation of Investment Contracts' (2020) 41(1) Northwest J Intl L & Bus 53.

[47] For example, the Community–Investor Negotiation Guides elaborated by the Columbia Center on Sustainable Investment and Namati <https://ccsi.columbia.edu/content/community-investor-negotiation-guide-2-negotiating-contracts-investors> accessed 30 August 2023.

[48] Republic of Mozambique and Exxonmobil Moçambique Exploration and Production of Petroleum Concession Contract (October 2018) (Mozambique–Exxonmobil (2018)) art 16.6; Convention d'Exploitation Miniere Relative au Gisement de Fer du Mont Nabemba entra la République du Congo et Congo Iron SA of 2016 (Convention Congo–Congo Iron (2016)) arts 20.3.2, 20.3.3: this contract provides for the creation of a 'comité de gestion', made up by 10 members: five appointed by the investor and five appointed by the State; Production Sharing Contract between the Democratic Republic of Sao Tome and Principe and Equator Exploration STP Block 12 Ltd of 19 February 2016 (PSC Sao Tome–Equator Exploration (2016)) art 2.5 provides that the social projects shall be determined by agreement between the Contractor and the Sao Tome National Petroleum Agency. Failing such agreement, the Contractor and the National Petroleum Agency shall each submit a proposal to an expert appointed by the World Bank and such expert shall determine which of the two proposals shall be implemented.

[49] The Agreement between the Democratic Republic of Congo (DRC) and the group PERENCO (Muanda International Oil Company Ltd and Societé de Recherche et Exploitation Petroliere du Litoral Congolaise), Avenant no 8 at the Convention dated 9 August 1969 (DRC/PERENCO Avenant 8) art 3.8.

[50] For example, the 'comité de gestion' envisaged by the Convention Congo–Congo Iron (2016) (n 48) shall include members of the local communites affected by the project (ie 'L'Etat s'assurera que le Conseil Départemental de la Sangha et les autres organs représentatifs des communatutés locales seront repreésentés au comité de gestion du Fonds Communatutaire dans les members choisis par l'Etat'). The 'comité' will be in charge of the management of the funds for the community and to establish rules for the selection of the projects to be implemented. See Cotula (n 43) 61–62.

[51] Human Rights Council, 'Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie'. Addendum. Principles for Responsible Contracts: Integrating the Management of Human Rights Risks into State-Investor Contract Negotiations' (25 May 2015) UN Doc A/HRC/17/31/Add.3, Principle 7.

relation to the involvement of the local community; a community engagement plan is in place with proper costs and resources.[52] In addition, according to article 16(2) of the International Labour Organization (ILO)'s Indigenous and Tribal Peoples Convention of 1989 (No 169) the free and informed consent shall be obtained from local people whenever the investment project envisages their relocation as an exceptional measure.[53]

Whether all these aspects have been complied with in relation to the projects contemplated by the investment contracts under analysis is difficult to find out. However, the fact that investment contracts contain provisions on the engagement of the local community can be taken as evidence of an increased awareness that sustainable FDI can only be achieved by involving all relevant actors (investors, governments, local communities). The challenge is strengthening the negotiating capacity of the local community and the host State in order to improve their ability to maximise benefits deriving from the investment project.[54]

(ii) *The financial commitment of the investor*

The financial commitment of the investor is another important aspect to be considered in the assessment of the capacity of the contract to achieve sustainable development in the host State. The quantity and quality of the financial commitment of the investor may vary significantly from one contract to another and impact on the type of infrastructures and services that could be implemented in the host State.

Sometimes the amount of the contribution allocated for social programmes is undefined and it is up to the parties, or the investor and the local community, to find an agreement on the issue in the future. For example, the Convention Congo–Congo Iron of 2016 establishes that the yearly amount to be contributed by the investor with the aim of 'favoriser le dévelopment économique, social et culturel des communatutés locales' will be determined in agreement by the parties.[55] The Afghanistan–Silk Road Mining Contract, by contrast, establishes that the community development agreement between the investor and the local community shall specify how the company's obligation to spend funds for local development shall be met.[56] The Exploration and Production Sharing Contract between the Gabonese Republic and Total Gabon of 2006 (article III-3-12) leaves it up to the company 'if it wishes' to 'make contributions of an economic, social, cultural and sports nature'.[57] This type of clause involves the risk that once the investment contract is in force and the FDI project under way, the host State and/or the local community may lack the needed leverage to negotiate and

[52] ibid.

[53] International Labour Organization (ILO), Indigenous and Tribal Peoples Convention C169, 27 June 1989, art 16(2).

[54] The Columbia Center on Sustainable Investment has set up a dedicated webpage to give support to host governments in the negotiation of investment contracts, see <https://ccsi.columbia.edu/content/negotiation-support-portal-host-governments> accessed 30 August 2023. As to support for local communities, see (n 47).

[55] Convention Congo-Congo Iron (2016) (n 48) art 20(3.1): 'to favour the economic, social and cultural development of local communities'.

[56] Afghanistan–Silk Road Mining Contract (2018) (n 44) arts 21(4), 22(5d).

[57] Exploration and Production Sharing Contract between the Gabonese Republic and Total Gabon of 13 December 2006 (EPSC Gabon–Total (2006)), app no 2 art III(3.12); see also Convention Minière entre la République du Niger et Areva NC pour le Permis pour Grande Exploitation—Périmètre d'Imouraren of 2009 (Exploitation Licence Niger–Areva (2009)) art 13(2): 'the Exploitation Comany undertakes to contribute to the development of the municipalities where it will carry out its activities, by financing collective infrastrucutres'.

obtain the payment of an adequate amount of money for social and local development purposes, in addition to the payments already featured in the contract.

In other cases, the contract clearly indicates in advance the amount that the investor shall allocate to social programmes in the host State. This amount could be fixed, such as in the case of Yemen, Somalia, Equatorial Guinea, Mozambique and DRC contracts,[58] or correspond to a percentage of the turnover of the FDI and/or the production realised by the FDI, as in the case of the Convention Guinea–Henan and the Production Sharing Contract Sao Tome–Equator Exploration.[59]

Fixed amounts could range from very small amounts (ie US$100,000 per year) to relatively significant sums (ie US$200,000,000 in one solution) and may consequently influence the type of health infrastructure and service that could be implemented in the host State. For example, the Production Sharing Contract in place between the Angolan State-owned Company 'Sociedade Nacional de Combustíveis de Angola' and a group of foreign contractors, including BP (United Kingdom) and the Hong Kong company China Sonangol International Holding Ltd, provides for 'a contribution for social projects in the amount of US$200,000,000 (two hundred million US dollars)' to be paid one month after the signature of the contract.[60] In a country such as Angola, which ranks 170 in the Global Health Security Index (2019) and is 'vulnerable to outbreaks, like Yellow fever, malaria, cholera, Zika; registering events that overload the health services and compromise the life and health of their citizens',[61] a contribution of US$200,000,000 may help the host State towards the improvement of the network of care and essential services to diagnose and treat diseases, such as malaria.[62]

Contracts that anchor the amount of the contribution to the turnover and/or the production realised by the FDI have the additional positive outcome that the benefit derived by the local community is proportional to the profits made by the investor and to the natural resources available.[63] For example, the Convention Guinea–Henan

[58] PSC Equatorial Guinea/Kosmos (2017) (n 45) art 23(5); Production Sharing Agreement between the Government of Puntland (Somalia) and Canmex Holdings (Bermuda) II Ltd and others of 2007 (PSA Somalia–Canmex (2007)) art 9(2.3); Production Sharing Agreement between the Republic of Yemen and Occidental of Yemen (Block 75) LLC and others of 2007 (PSA Yemen/Occidental (2007)) art 9(2.4); Production Sharing Agreement between the Republic of Yemen and Yemen Company, Alliance, Ansan Wikfs (Hadramaut) Ltd. and others of 2004 (PSA Yemen/Alliance Ansan (2004)) art 9(2.4); Mozambique/Exxonmobil (2018) (n 48) art 16(6).

[59] Convention Guinea–Henan (2018) (n 45) art 17(2.1); PSC Sao Tome–Equator Exploration (2016) (n 48) art 2(5).

[60] Production Sharing Contract between Sociedade Nacional de Combustíveis de Angola, Empresa Pública (Sonangol, EP) and CIE Angola Block 20 Ltd, Sonangol Pesquisa e Produção SA, BP Exploration Angola (kwanza Benguela) Ltd, China Sonangol International Holding Ltd. In the Area of Block 20/11, 2012 (PSC Angola–CIE Angola Block 20 (2012)) art 22, it provides for 'a contribution for social projects in the amount of US$ 200,000,000.00 (two hundred million US dollars)' to be paid one month after the signature of the contract. See also art 22(3) of the Production and Sharing Agreement between Sociedade Nacional de Combustiveis de Angola—Empresa Publica (Sonangol, EP), Vaalco Angola (Kwanza), Inc, Sonangol Pesquisa e Producao, SA, InterOil Exploration and Production ASA, Block 5/06 of 2006 (PSA Angola–InterOil Block 5/06 (2006)).

[61] World Health Organization, 'WHO Country Cooperation Strategy at a Glance: Angola' (May 2018) WHO Ref No WHO/CCU/18.02/Angola, <www.apps.who.int/iris/handle/10665/136994> accessed 18 July 2023.

[62] For example, according to a systematic review of costs and cost-effectiveness of malaria control interventions of 2011, the median financial cost of diagnosing a case of malaria was $4.32 (range $0.34–$9.34), the median financial cost of treating an episode of uncomplicated malaria was $5.84 (range $2.36–$23.65) and the median financial cost of treating an episode of severe malaria was $30.26 (range $15.64–$137.87). US$ 200,000,000 may correspond to approximately 6,000,000 treatments of severe malaria. See, Michael T White and others, 'Costs and Cost-Effectiveness of Malaria Control Interventions—A Systematic Review' (2011) 10 Malar J 337. See also Gaëtan Moukoumbi Lipenguet and others, 'Evaluation of Direct Costs Associated with the Management of Clinical Stage of Malaria in Children under Five Years Old in Gabon' (2021) 20 Malar J 334.

[63] Marco Pertile and Sondra Faccio, 'Extractive Industry for Sustainable Development? Some Reflections on the Role of Investment Contracts in Ensuring Benefit Sharing and Community Participation in Natural Resource Governance' in Daniëlla Dam-de-Jong and Britta Sjostedt (eds), *Research Handbook on International Law and Environmental Peacebuilding* (Elgaronline 2023) 355–380.

establishes that the contribution to the local development fund shall correspond to the 0.5 per cent of the yearly turnover.[64]

B. *Clauses on 'Community Health'*

Besides social clauses or social investment programmes, some investment contracts feature detailed provisions dealing with 'community health' and require the foreign investor to set up health facilities to the benefit of its workers, dependents and people living in the proximity of the seat of the FDI project.

For example, section 4 of article 21 of Afghanistan–Silk Road Mining Contract requires the investor to cooperate with the Ministry of health:

> in carrying out the Government's responsibilities to provide subsidised medical treatment, care and attention at acceptable standards to all inhabitants of the communities affected by the Project … and to maintain an adequate and properly staffed dispensary or hospital headed by a resident medical doctor.[65]

In addition, during the term of the contract, the company shall maintain and operate health facilities to ensure free medical treatment and care for all company employees, their dependents and provide reasonable access to such health facilities to members of local communities for ambulatory or emergency care.

Article 2 of the Concession Agreement between the Government of the Republic of Malawi and Nyala Mines Ltd of 2008 states that the company shall:

> provide funds and materials to refurbish the local hospital at Katsekera and among other, shall procure new bed and linen, install a solar panel at the local hospital at Katsekera to provide lighting, support the operations of the Clinic through the provision of drugs, medicines, dressings and other general medical supplies for use within the local community, including anti-retroviral drugs for the treatment of AIDS. Nyala's financial assistance provided to the Clinic shall be but not limited to US$ 20,000.00 per calendar year.[66]

Article 20.1 (a) of the Development Agreement between Malawi and Paladin Energy Minerals NL and others of 2007 also requests the investor to pay for two qualified Malawi doctors to be trained in Australia.[67]

As observed by Cotula, from the investor's perspective this type of clause 'may be considered part of the company's social responsibility and may help to establish local support for the investment project'.[68] However, their value in terms of sustainable development is limited, as they often involve risible amount of money or only aim to grant minimum healthcare services to workers and families living in remote areas nearby the location of the FDI project.

The Convention between the Republic of Niger and Areva NC of 2009 is a representative example. Article 14.2 of the Convention states that:

[64] Convention Guinea–Henan (2018) (n 45) 17(2.1).
[65] Afghanistan–Silk Road Mining Contract (2018) (n 44) art 21(4).
[66] Concession Agreement between the Government of the Republic of Malawi and Nyala Mines Ltd of 2008 (Concession Agreement Malawi–Nyala Mines (2008)) art 2.
[67] Development Agreement between Malawi and Paladin Energy Minerals NL and others of 2007 (Development Agreement Malawi/Paladin Energy (2007)) art 20 (1a).
[68] Cotula (n 43) 61.

> [à] partir de la date d'octroi du Permis pour Grande Exploitation, la Société d'Exploitation s'engage à contribuer à: a) l'implantation, l'augmentation ou l'amélioration d'une infrastructure médicale … à une distance raisonnable du Gisement correspondant aux besoins normaux des travailleurs et de leurs familles.[69]

The circumstance that the contract under analysis secures basic health infrastructures and services only to the benefit of workers and their families, excluding the local community's members affected by the mining activities, clashes with concerns raised by a number of NGOs as to the risks of serious damages to the environment and people's health deriving from Areva's mining activities in the country.[70] This is clearly a case where the State was unable to reach a fair bargain with the investor.

In general, the improvement of health facilities may represent a step towards the achievement of sustainable development only if the host State is able to grant the maintenance of the infrastructures and health services in the longer term. In this regard, human resource development and filling the shortage of skilled and knowledgeable personnel remain key and the parties to the investment contract should consider these aspects in designing social clauses and social programmes.

C. *Remedies Available to the State and New Avenues for States' Claims and Counterclaims in Investment Arbitration*

All the investment contracts discussed in the previous subsections provide for remedies in case of breach and refer the settlement of disputes arising out of the application and interpretation of the contract to international arbitration, often under the aegis of ICSID.

These remedies are all useful ways of making the investor more accountable vis-à-vis the host State for its investment choices. The circumstance that the State can terminate the contract, claim damages and even initiate arbitration against the investor in case of default, including in relation to the investor's obligations for social and health programmes, may have the effect of stimulating the investor's efforts towards sustainable development. This is particularly true when the investment contract provides for clear and detailed obligations and an important financial commitment upon the investor.

In addition, contractual provisions may not only give rise to State-investor arbitration claims, but also ground counterclaims by States in investment treaty arbitration, and contribute to rebalance the investment arbitration system. All these aspects will be discussed in the following sub-Sections.

[69] Exploitation Licence Niger–Areva (2009) (n 57) art 14(2): 'from the date of the issuance of the Large Exploitation Permits, the Exploitation Company undertakes to contribute to: a) the establishment, increase or improvement of a medical infrastructure … at a reasonabe distance from the Deposit to face the basic needs of the workers and their families'.

[70] Greenpeace, 'Left in the Dust. Areva's Radioactive legacy in the Desert Towns of Niger' (4 May 2010) <https://media.greenpeace.org/archive/Report—Left-in-the-Dust-27MZIFIXELWO.html#:~:text=A%20Greenpeace%20team%20visits%20Niger,World%20Health%20Organisation%20safety%20limits.> accessed 30 August 2023; Sherpa, 'Health of Uranium Miners at Areva sites in Gabon and Niger' <https://www.asso-sherpa.org/health-of-uranium-miners-at-areva-sites-in-gabon-and-niger> accessed 30 August 2023.

(i) *Termination of the contract and damages*

Termination usually occurs in case of serious breaches and only a few of the contracts illustrated above expressly mention the State's right to terminate the contract in relation to social clauses or health programmes.[71]

A case in point is the Afghanistan–Silk Road Mining Contract (2018), which expressly states that the Ministry of Mines and Petroleum may terminate the contract in case of 'breach by the Company of any of its obligations pertaining to health and safety of labour, human rights, protection of the Environment or protection of affected communities'.[72] In this case, the State is entitled to terminate the contract and the licence in relation to the mining area and to seek, if the case may be, damages from the investor before an ICSID arbitral tribunal.[73] Upon termination, all infrastructure built by the investor for public or community use will automatically become property of the State without paying any price or compensation.[74]

Most often the investment contracts contain broad clauses that allow for termination in case of 'a material breach … of *any* of the provisions of [the] Contract'[75] or if the investor 'fails to make *any* payment to the State when due'.[76] This type of provision does not expressly mention the breach of the investor's obligations deriving from social clauses or health programmes as a legitimate cause of termination, but allows the extension of the State's right to terminate the contract by interpretation. However, in cases where contracts do not clearly specify how the investor's obligation to spend funds for local sustainable development shall be met, it may be very difficult for the State to invoke termination.[77]

In the event of default by the investor, contracts sometimes establish that the remedy available to the State is the payment of damages only or in addition to termination.[78] In certain circumstances, quantifying the amount of damage suffered by the State for the violation of social clauses or health programmes may be quite difficult. For example, when the contract only requests the company contribute to the development of local communities, without specifying the modalities and the amount that it shall pay for social and health infrastructures and services.[79]

In any case, the request of damages, instead of termination, may be a more desirable solution if the State has an interest in keeping the FDI project active within its territory.

[71] For example, the Convention Guinea–Henan (2018) (n 45) and the Convention Guinea–SBG Bauxite (2018) (n 45) do not provide for this right of the State. The Convention Guinea–Henan admits the right of the State to terminate the contract in cases of breach of the investor's obligations concerning the protection of the environment. The Convention Congo–Congo Iron (2016) (n 48) does not establish the right of the State to terminate the contract in case of breach of social clauses, but it includes the approval of the 'Etude d'Impact Environnemental et Social' by the State as a precondition for the entry into force of the convention.

[72] Afghanistan–Silk Road Mining Mining Contract (2018) (n 44) 25(1d).

[73] ibid art 25(1d).

[74] ibid art 26(1g).

[75] PSC Equatorial Guinea/Kosmos (2017) (n 45) 21(1) (emphasis added); Mozambique/Exxonmobil (2018) (n 48) art 25(2d): '[s]ubstantial or repeated breach or non-compliance with applicable law or the terms and conditions of the [contract]'; PSA Somalia–Canmex (2007) (n 58) art 21(1.6): '[t]he DEPARTMENT has the right to cancel this Agreement … [i]f the CONTRACTOR commits any material breach of this Agreement'; PSA Yemen–Occidental (2007) (n 58) art 21(1.6): '[t]he GOVERNMENT has the right to cancel this Agreement by a Republican Resòlution with respect to the CONTRACTOR … If the CONTRACTOR commits any material breach of this Agreement'. See also PSA Yemen–Alliance Ansan (2004) (n 58) art 21(1.6); PSC Angola–CIE Angola Block 20 (2012) (n 60) art 39.

[76] PSC Sao Tome–Equator Exploration (2016) (n 48) art 20(1g) (emphasis added).

[77] For example, Afghanistan–Silk Road Mining Mining Contract (2018) (n 44) arts 21(4), 22(5d).

[78] Exploitation Licence Niger–Areva (2009) (n 57) art 29; Convention Congo/Congo Iron (2016) (n 48) art 31(1); Afghanistan–Silk Road Mining Mining Contract (2018) (n 44) art 27(1).

[79] For example, Exploitation Licence Niger–Areva (2009) (n 57) art 13(2).

(ii) *Arbitration clauses: State v investor claims*

All the investment contracts discussed in the previous sub-Sections refer the settlement of disputes arising out of the application and interpretation of the contract to international arbitration, including under the aegis of ICSID and with the application of the Washington Convention.[80] Contracts providing for ICSID arbitration usually contain wording specifying that the disputes emerging out of the contract concern an 'investment'[81] and that the company is a 'foreign investor' for the purpose of article 25 of the ICSID Convention.[82]

Arbitration provisions adopt a broad language covering '*any* dispute, controversy or claim arising out of or relating to [the contract],' (emphasis added) or alternatively '*any* dispute, controversy, difference or claim … between the Parties in connection with or relating to [the] Contract' (emphasis added), thus including the disputes that may arise in relation to the application of social clauses or health programmes, or more broadly concerning the investor's contribution to the host State sustainable development.[83]

Access to arbitration is recognised for both the State and the investor on an equal footing.[84] This means that States are allowed to bring claims against investors (and vice versa investors may bring claims against States) before international investment arbitration tribunals, including ICSID tribunals, for any violation of the contract.

So far, however, very few cases are known to have been submitted to ICSID by claimant States under contracts.[85] Indeed, although article 36 of the ICSID Convention expressly allows claims from both 'any Contracting State' and 'national of a Contracting State',[86] States are usually respondent before ICSID tribunals.[87]

[80] For example: Convention de Base pour l'Exploitation de Gisements de Bauxite de Boke entre la Republique de Guinee et Dynamic Mining Sarlu et International Gulf FZC of 2018 (Convention de Base Guinea–Dynamic Mining (2018)) art 40 (reference to ICSID); Convention Guinea–SBG Bauxite (2018) (n 45) art 29(3) (reference to ICSID); Convention Guinea–Henan (2018) (n 45) art 30 (reference to ICC); Afghanistan–Silk Road Mining Mining Contract (2018) (n 44) art 33(4) (reference to ICSID); Mining Concession: Lolanj Parwan Travertine Project, Government of the Islamic Republic of Afghanistan, Natural Stone Company (2020) (Concession Afghanistan–Natural Stone Company Lolanj (2020)) art 57(1) (reference to ICSID); Mining Concession: Kunar-Nangarha Marble Project, Government of the Islamic Republic of Afghanistan, Natural Stone Company (2020) (Concession Afghanistan–Natural Stone Company Kunar (2020)) art 57(1) (reference to ICSID); PSC Equatorial Guinea–Kosmos (2017) (n 45) art 26(1.2) (reference to ICSID or ICC); Mozambique–Exxonmobil (2018) (n 48) art 26 (reference to arbitration under UNCITRAL rules); Convention Congo–Congo Iron (2016) (n 48) 33(3) (reference to ICC); PSC Sao Tome–Equator Exploration (n 48) art 25 (reference to ICSID); EPSC Gabon–Total (2006) (n 57) art 50 (reference to ICC); Exploitation Licence Niger–Areva (2009) (n 57) art 8 (reference to domestic court or ICC Senegal); PSA Somalia–Canmex (2007) (n 58) art 23 (reference to ICC); PSA Yemen–Occidental (2007) (n 58) art 23 (reference to ICC); PSA Yemen–Alliance Ansan (2004) (n 58) art 23 (reference to ICC); PSC Angola–CIE Angola Block 20 (2012) (n 60) art 41 (reference to ICC–UNCITRAL).

[81] Convention Guinea–SBG Bauxite (2018) (n 45) art 29(3.3) and 29(3.9); Convention de Base Guinea–Dynamic Mining (2018) (n 80) art 40(2); Afghanistan–Silk Road Mining Mining Contract (2018) (n 44) art 33(4b); Afghanistan–Natural Stone Company Lolanj (2020) (n 80) arts 57(2), 57.11; Afghanistan–Natural Stone Company Kunar (2020) (n 80) arts 57(2), 57(11).

[82] Afghanistan–Natural Stone Company Kunar (2020) (n 80) art 57.3; Convention Guinea–SBG Bauxite (2018) (n 45) art 29(3.9).

[83] For example: Convention Guinea–SBG Bauxite (2018) (n 45) art 29(1.1); Afghanistan–Natural Stone Company Lolanj (2020) (n 80) art 57(1); Afghanistan–Silk Road Mining Contract (2018) (n 44) art 33(2a); Convention de Base Guinea–Dynamic Mining (2018) (n 80) art 40(1).

[84] Sometimes, the State expressly renounces to its sovereign immunity with an *ad hoc* clause included in the contract. For example: Convention Congo–Congo Iron (2016) (n 48) art 33(4); EPSC Gabon/Total (2006) (n 57) art 50; PSC Angola/CIE Angola Block 20 (2012) (n 60) art 41.

[85] See cases listed (n 35) and Laborde (n 35) 97–122. See also: ICSID, 'ICSID Caseload—Statistics (Issue 2021-1)' <www.icsid.worldbank.org/sites/default/files/publications/The%20ICSID%20Caseload%20Statistics%20%282021-1%20Edition%29%20ENG.pdf> accessed 18 July 2023; UNCTAD, 'Fact Sheet on Investor-State Dispute Settlement Cases in 2018', IIA Issues Note No 2 (2019)<www.investmentpolicy.unctad.org/uploaded-files/document/diaepcbinf2019d4_en.pdf> accessed 18 July 2023.

[86] Convention on the Settlement of Investment Disputes between States and Nationals of Other States (adopted 18 March 1965, entered into force 14 October 1966) 575 UNTS 159 art 36: '[a]ny Contracting State or any national of a Contracting State wishing to institute arbitration proceedings shall address a request to that effect in writing to the Secretary-General who shall send a copy of the request to the other party'.

[87] *Government of the Province of East Kalimantan v PT Kaltim Prima Coal and others* (n 35) Award on Jurisdiction (28 December 2009) paras 173–74; Pertile and Faccio (n 63) 378.

This is often due to the circumstance that the State 'may have at its disposal avenues of relief more expedient than investment arbitration' in case of breach of investment contracts.[88] For example, according to Toral and Schultz, the State can often and easily reach its purpose through expropriation rather than arbitration; and it may have a legitimate interest in going to international arbitration only 'in those circumstances when expropriation would not achieve the State's objectives for one of several reasons'.[89]

In the opinion of the author, this trend may well change in the near future. The pandemic, as well as environmental distress, have made States pay increasing attention to sustainable development issues and possibly rendered them keener to engage into international arbitration, once the health and security of their citizens are at stake.[90] The existence of provisions allowing for States' claims in investment contracts may well stimulate State-investor claims. The rigour and detail of the wording of the clauses, as well as the economic value of the obligations undertaken by the investor, will play a major role in determining the State's decision to resort to arbitration. For example, the State will have an interest in filing a claim concerning the breach of a social clause only if it provides for a significant financial commitment on the part of the investor. By contrast, clauses engaging the investor for risible amounts or containing vague formulations may not be worth the costs and risks of the arbitration proceeding.

(iii) *States' counterclaims in investment treaty arbitration*

Counterclaims in investment treaty arbitration are also avenues to enforce investors' obligations and contribute to sustainable FDI.[91] Counterclaims fall into the 'remedies' available to the State once the investor initiates treaty-based arbitration, but fails to comply with its obligations under the investment contract. In these cases, the respondent State may not limit itself to defend claims brough against it, but submit a counterclaim against the investor based on the contract.

Arbitrators have considered investor's obligations in contracts to retain jurisdiction and assess counterclaims raised by States in (treaty) investor-State arbitration in a number of cases.[92]

For example, in *Perenco v Ecuador* (under the France–Ecuador BIT), the State raised an environmental counterclaim alleging that the French investor caused significant environmental damages in two oil blocks situated in the country's Amazonian rainforest, within the area of the investment.[93] Ecuador based its environmental counterclaim on Ecuadorian law and on the investor's obligations under the Participation Contracts. These contracts expressly required the investor to comply with applicable domestic laws and regulations, including environmental regulation; preserve the existing ecological equilibrium of the area and clean it up; and to respect certain

[88] Pertile and Faccio (n 63) 378; Laborde (n 35) 98.
[89] Toral and Schultz (n 3) 600.
[90] UNCTAD, World Investment Report (2021) UNCTAD/WIR/2021.
[91] Maxi Scherer, Stuart Bruce and Juliane Reschke, 'Environmental Counterclaims in Investment Treaty Arbitration' (2021) 36(2) ICSID Rev—FILJ, 413–40, 414.
[92] For example, *Klöckner Industrie-Anlagen GmbH and others v United Republic of Cameroon and Société Camerounaise des Engrais*, ICSID Case No ARB/81/2, Decision of the *ad hoc* Committee (3 May 1985).
[93] *Perenco Ecuador Ltd v Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No ARB/08/6, Interim Decision on the Environmental Counterclaim (11 August 2015) paras 5, 35, 36. Ecuador also advanced similar counterclaims against Perenco's consortium partner, Burlington Resources Inc, see *Burlington Resources Inc v Republic of Ecuador*, ICSID Case No ARB/08/5, Decision on Ecuador's Counterclaims (7 February 2017).

reporting and audit requirements.[94] Based on Perenco's obligations under Ecuadorian law and the investment contracts, the ICSID Tribunal accepted Ecuador's counterclaims.[95]

In another case, *Urbaser v Argentina* (under the Argentina–Spain BIT), a tribunal observed that '[b]oth the principal claim and the claim opposed to it are based on the same investment, or the alleged lack of sufficient investment, in relation to the same Concession'; and that '[t]his would be sufficient to adopt jurisdiction over the Counterclaim as well'.[96] The tribunal ended up accepting jurisdiction on the State's counterclaim based on the contract.[97]

With reference to counterclaims, Crawford suggested that contractual jurisdiction can be invoked in investor-State arbitration under IIAs as long as the contract relates to an investment rather than being an ordinary contract for the supply of goods or services; it is with the State itself and not with a separate legal entity controlled by the State; and it does not have its own dispute resolution clause.[98]

The majority of the investment contracts under analysis meet the above requirements.

First of all, many of the contracts expressly relate to an 'investment' for the purpose of article 25 of the ICSID Convention. For example, according to article 33.4(b) of the Afghanistan–Silk Road Mining Contract '[t]he Parties acknowledge that the transaction to which this contract relates is an investment'; and according to article 29.3.3. of the Guinea–Bauxite Convention the parties agree that the transaction to which the contract relates is an investment for the purpose of article 25 of the ICSID Convention.[99]

Second, they are usually concluded by the investor and the State or by the investor, the State and a State-owned company. For instance, the said Guinea–Bauxite Convention is concluded by and between the Republic of Guinea, on the one hand; and the local company Société des Bauxites de Guinée SA and the Dutch investor SBG Bauxite and Alumina NV, on the other.[100]

Third, the investment contracts contain their own dispute settlement clause, which often point to the same dispute settlement mechanism (ie ICSID) provided for in the relevant investment treaty. In these cases, it is reasonable to conclude that the parties' consent to ICSID arbitration—contained in the treaty and the contract respectively—and the jurisdiction of the ICSID tribunal will cover both investor's treaty claim and the State's contractual counterclaim.[101]

[94] *Perenco v Ecuador* (n 93) paras 108–14.

[95] ibid, paras 369, 611. In this case, the claimant investor grounded its claim both on the treaty and the participation contracts, and asked the Tribunal to declare that 'Respondents have breached their obligations under the Participation Contracts' (para 22).

[96] *Urbaser SA and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v Argentine Republic*, ICSID Case No ARB/07/26, Award (8 December 2016) para 1151. The legal connection, according to the Tribunal, is established to the extent the counterclaim is not alleged as a matter based on domestic law only, but as 'a violation of the fundamental right for access to water, which was the very purpose of the investment agreed upon in the Regulatory Framework and the Concession Contract and embodied in the protection scheme of the BIT'.

[97] The Tribunal admitted the counterclaim, but the counterclaim failed on the merits. ibid, paras 1155, 1221.

[98] James Crawford, 'Treaty and Contract in Investment Arbitration, The 22nd Freshfields Lecture on International Arbitration London' (*MUNI*, 29 November 2007), <www.is.muni.cz/el/law/podzim2010/MVV61K/um/20201574/Crawford-Treaty_and_Contract-2.pdf> accessed 18 July 2023, 13.

[99] ICSID Convention (n 86).

[100] Convention Guinea–SBG Bauxite (2018) (n 45).

[101] On the contrary, where the investment contract contains its own exclusive dispute settlement clause, pointing to another forum, a party should not be allowed to rely on the contract as the basis of its claim. *SGS Société Générale de Surveillance SA v Republic of the Philippines*, ICSID Case No ARB/02/0, Award (29 January 2004) para 154.

In addition, a contractual counterclaim is admissible in investment treaty arbitration if it features a 'close connection with the primary [treaty] claim to which it is a response'.[102] According to tribunals' decisions, a 'close connection' exists as far the reciprocal obligations of the State and the investor have 'a common origin, identical sources, and an operational unity [and] [t]hey were assumed for the accomplishment of a single goal'.[103] The contracts under analysis regulate in a comprehensive way the relationship between the State and the investor with the aim of developing a FDI project; with the same purpose States grant certain standards of treatment to investors through IIAs. Thus, States' obligations may have a different source (the treaty) from investors' obligations (the contract), but it is undisputed that they feature an 'operational unity' and they are aimed to achieve 'a single goal', ie the development of FDI projects and, in turn, the development of the host State.

In this respect, Brenninkmeijer and Gélinas have recently argued for the adoption of an 'integrated approach' to counterclaims.[104] This approach focuses on 'what is claimed' and shifts the analysis towards 'the concept of dispute'.[105] According to it, 'what matters is not whether a counterclaim falls within the jurisdiction initially consented to, but whether that counterclaim is part of the main dispute for which the tribunal already has jurisdiction [under the treaty]'.[106] This approach acknowledges the need to consider the relationship between the State and the investor with reference to a FDI project in a comprehensive way, with a view to granting the equality principle and providing a 'response to the backlash against international investment law and the perceived need to make room for [S]tates to strike back'.[107]

IV. CONCLUDING REMARKS

The analysis carried out in this article has focused on a number of investment contracts in the extractive industry and has shown how these contracts require the investor to undertake specific activities and financial commitments to the benefit of the local community, with a view to promoting sustainable development and enhancing the general welfare and quality of life of the host State's population.[108] The article has focused on clauses providing for social and health programmes.[109]

It is argued that these provisions may stimulate States' claims and counterclaims against investors. This may especially occur if the value of the host State's claim vis-à-vis the foreign investor is significant, either in economic, social or environmental

[102] *Saluka Investments BV v Czech Republic*, Decision on Jurisdiction over the Czech Republic's Counterclaim (7 May 2004) paras 61, 65, 76, 81; Report of Working Group III (n 40) para 4. Mees Brenninkmeijer and Fabien Gélinas, 'Counterclaims in Investment Arbitration: Towards an Integrated Approach' (2023) 38(3) ICSID Rev—FILJ 1–28, 15.

[103] *Saluka v Czech Republic* (n 102) para 67, referring to *Klöckner Industrie v Cameroon* (n 92).

[104] Mees Brenninkmeijer and Fabien Gélinas (n 102) 15–27.

[105] ibid 16.

[106] ibid 17.

[107] ibid 28.

[108] As to contracts expressly mentioning 'sustainable development', see Afghanistan–Silk Road Mining Contract (2018) (n 44) arts 6(4e), (i), 17(2) and 21(1); Concession Afghanistan–Natural Stone Company Lolanj (2020) (n 80) art 33(3.2); Afghanistan–Natural Stone Company Kunar (2020) (n 80) art 33(3.2); Convention Guinea–Henan (2017) (n 45) art 17(1.1); Egypt Model Contract, Exploration License (2021), Preamble; Convention Guinea–SBG Bauxite (2018) (n 45) Preamble. The Preamble of the Convention Guinea–SBG Bauxite mirrors the content of art 2 of the Amended 2011 Guinean Mining Code, whose purpose is 'to promote a systematic and transparent management of the mining sector which guarantees *sustainable economic and social benefits* for the Guinean people, within the framework of a mutually beneficial partnership with investors' (emphasis added).

[109] Investment contracts may also include environmental clauses, for example imposing upon the investor the obligation to respect applicable environmental norms and carry out an environmental impact study, or corporate social responsibility obligations; etc. See Pertile and Faccio (n 63) 375–76.

terms, and the contract clearly and precisely spells out the content of the investor's obligations. In this regard, efforts should be made to improve the negotiating capacity of States and local communities. The more the State and local communities are able to negotiate detailed obligations and appropriate economic commitments on the side of the investor, the more the State will be able to enforce investors' obligations and resort to international arbitration in case of breach, ultimately maximising the benefits of the FDI project.

As observed, investment contracts give both the State and the investor access to investment arbitration on an equal footing and a significant number of arbitration clauses refer to ICSID arbitration as the preferred dispute mechanism for the settlement of 'any dispute' arising out of the contract.[110]

Claims under the aegis of ICSID for contractual breaches are not new. At the time of the establishment of ICSID, contractual claims were the primary type of claims, where both parties (State and investor) could equally invoke the violation of the obligations deriving from the investment contract.[111] Subsequently, investment treaties have led to a shift towards the protection of foreign investors, with a progressive increase in treaty arbitration cases initiated by investors against States (the so-called investor-State proceedings).[112] Although over time treaties have become the main focus of practitioners and scholars, contracts have remained an important vehicle of investment regulation, one of the main source of investors' obligations and investment arbitrators' jurisdiction.[113]

For this reason, it is proposed that investment contracts may play a crucial role in the context of the current debate surrounding the reform of investment law and arbitration. The ongoing debate aims to reform investment treaties and change the architecture of the existing investment arbitration system in favour of a multilateral permanent investment court, in order to 'encourage investment that supports sustainable development'.[114] However, the measures under discussion seem to focus mainly on procedural aspects, rather than issues of substance. By contrast, the perspective proposed by this article deals with key concerns of substance related to sustainable development, States' claims and counterclaims. The article demonstrates that most of the criticism emerged in connection with investment law and the ISDS mechanism can be overcome by making good use of existing instruments (ie contracts and ICSID). With detailed obligations for investors and broader opportunities for State-investor claims and counterclaims, contracts may contribute to a more balanced investment arbitration system and sustainable FDI, giving investment law and arbitration a renewed role in the current evolving international scenario.

[110] See n 80 for contracts referring to ICSID arbitration.

[111] Campbell McLachlan, 'Equality of Parties before International Investment Tribunals' (2019) 79 Annuaire de l'Insitut de Droit International 409, 442, 543, 544, 547, 551.

[112] ibid (Andrea Giardina) 547: 'It was only in 1990 that an arbitral tribunal in the ICSID Case *AAPL v Sri Lanka* based its jurisdiction on a BIT, alleging that the treaty contained a standing offer by the State to the foreign investors to arbitrate their investment disputes'. Before the 1990s investment arbitration was mostly concerned with investment contracts, see Gus Van Harten and Martin Loughlin, 'Investment Treaty Arbitration as a Species of Global Administrative Law' (2006) 17(1) EJIL 121, 124.

[113] *Gold Reserve Inc v Bolivarian Republic of Venezuela*, ICSID Case No ARB(AF)/09/1, Award (22 September 2014) para 8; UNCTAD, 'State Contracts - UNCTAD Series on issues in international investment agreements' (2004) 1; Szoke-Burke and Cordes (n 46) 55.

[114] European Commission, 'Multilateral Investment Court Project' <https://policy.trade.ec.europa.eu/enforcement-and-protection/multilateral-investment-court-project_en> accessed 18 July 2023. Sustainable investment is mentioned among the Commission's objectives for the Multilateral Investment Court.