

SMU Classification: Restricted

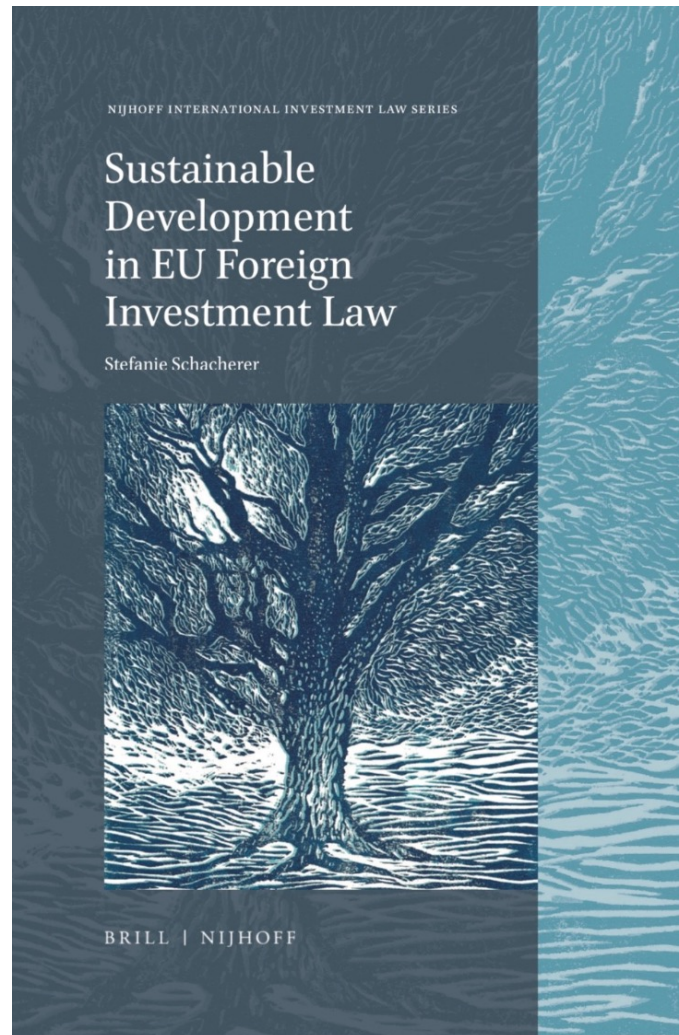
Sustainable Development in EU Foreign Investment Law

Re-Globe Lecture (1), University of Bologna, 20 March 2023

Asst Prof Stefanie Schacherer
Yong Pung How School of Law
Singapore Management University
sschacherer@smu.edu.sg



SMU Classification: Restricted



Published August 2021

Book launch December 2021:

<https://www.youtube.com/watch?v=Qu2uJ32ymLs>

Outline

1. Methodology
2. Sustainable development in international law and IIL
3. Sustainable development in EU law and the CCP
4. Assessing the contribution of the EU
 - Linkages: TSD Chapters and their impacts on FDI
 - Policy space for sustainability measures
5. Outlook – beyond international investment treaties



Commission Communication (2022)

“The EU is strongly committed to ensuring that its trade agreements foster sustainability, so that economic growth goes together with the protection of human rights, decent work, the climate and the environment, in full adherence with the Union’s values and priorities.”

Methodology

- **Hypothesis:** The EU has become an important global actor in transforming international investment law in light of sustainable development.
- **Research question:** Whether and to what extent the post-Lisbon international investment law-making of the EU integrates sustainable development?

Methodology

Limits of the scope of the enquiry:

- The book is not on how international investment agreements ought to integrate sustainable development
- The book is not an empirical investigation of whether EU's trade and investment agreements effectively led to sustainable development outcomes

Methodology

Research question: Whether and to what extent the post-Lisbon international investment law-making of the EU integrates sustainable development?

Double-benchmark method

1. International normative framework on sustainable development
2. EU's constitutional framework

Methodology

Sustainable development in international law and international investment law (Chapter 2)	Sustainable development in EU law and EU's common commercial policy (Chapters 3 and 4)
<ul style="list-style-type: none">• Sustainable development goals• Sustainable development principles• Soft law instruments + model IIAs• IIA practices• Work of international organisations and non-governmental organisations (NGOs)	<ul style="list-style-type: none">• Articles 3(5) and 21 TEU• Link to the CCP: Arts. 205, 207(1) TFEU; 21(3) TEU• Opinion 2/15• Principle of integration• Principle of policy coherence• EU soft law instruments

Methodology

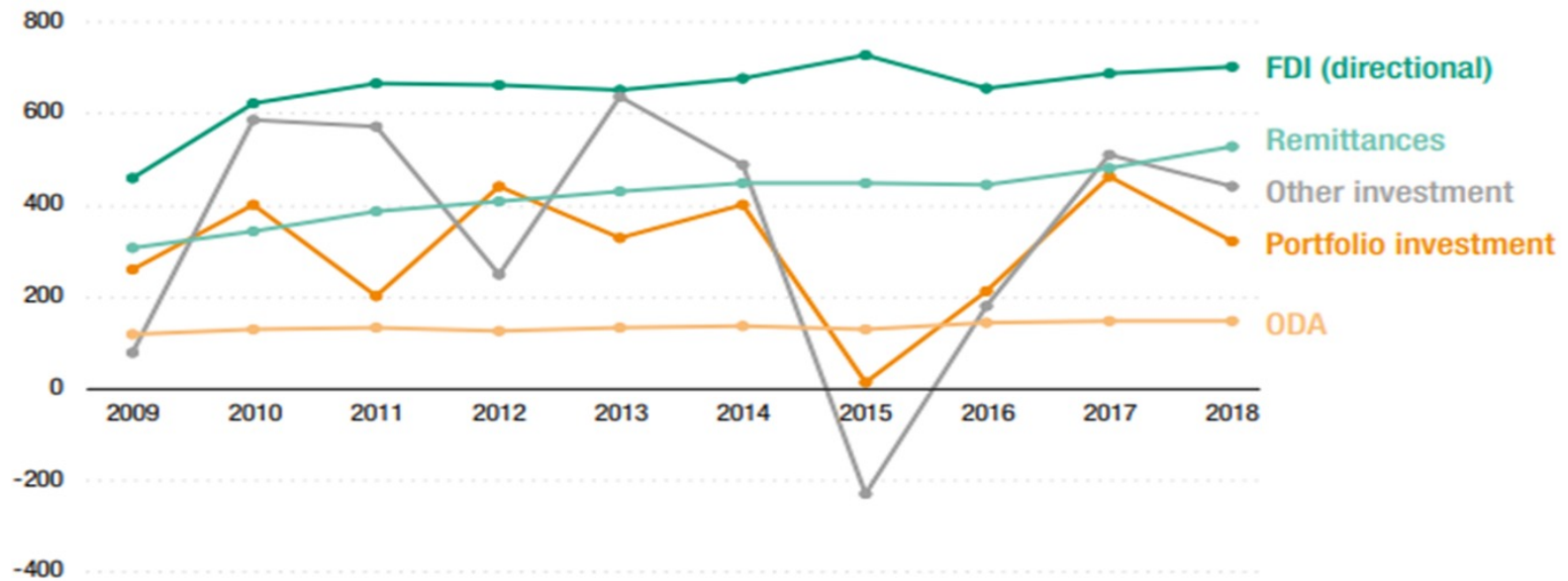
Assumptions

- FDI leads to (sustainable) development: correlation assumed
- Investment agreements enhance FDI inflow: correlation assumed
- Need for reform in light of sustainable development: starting point assumed



Harnessing investment for sustainable development

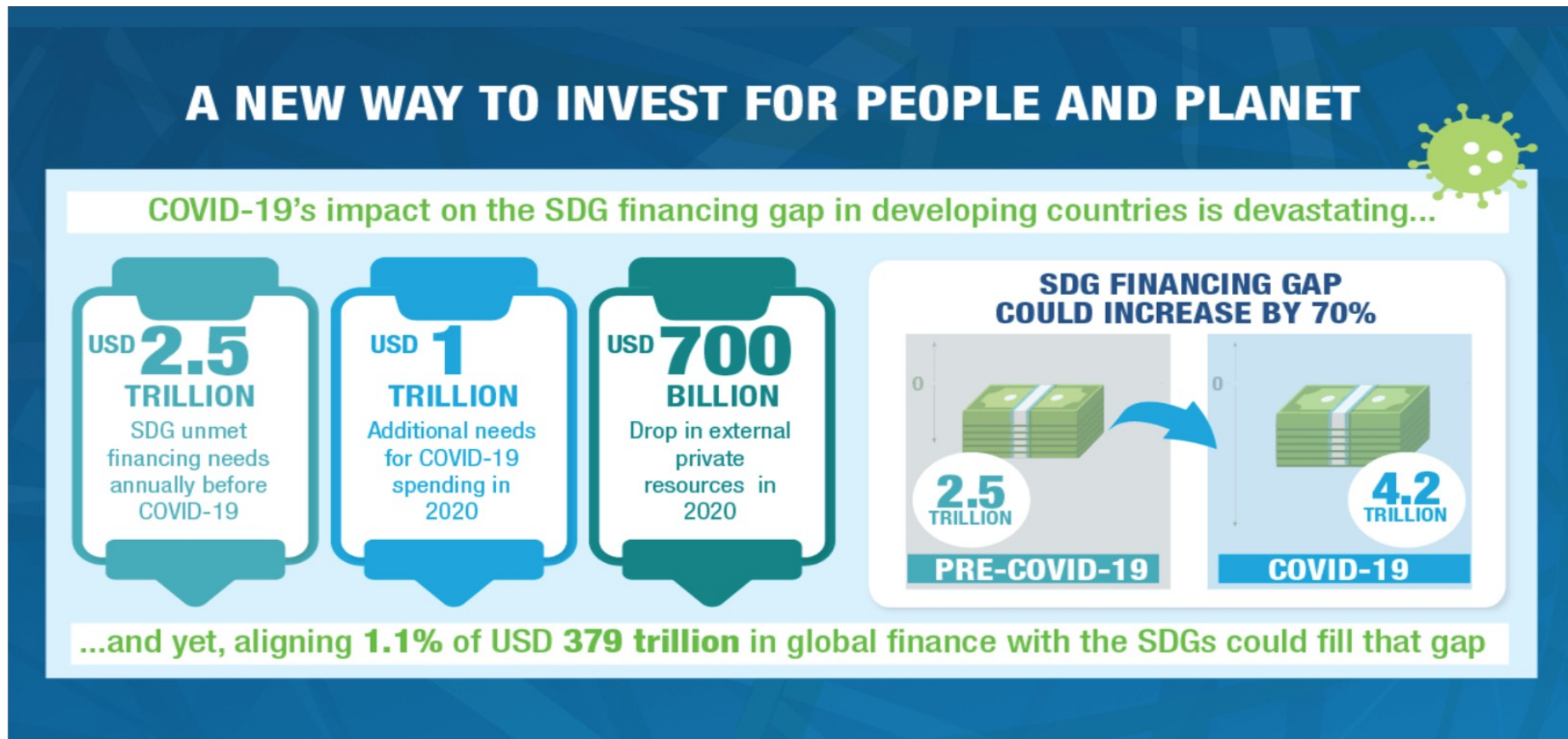
Figure I.10. Developing economies: sources of external finance, 2009–2018
(Billions of dollars)



Source: UNCTAD, based on KNOMAD (for remittances), UNCTAD (for FDI), IMF World Economic Dataset (for portfolio investment and other investment) and OECD (for ODA).

Note: Remittances and ODA are approximated by flows to low- and middle-income countries, as grouped by the World Bank.

Harnessing investment for sustainable development



Harnessing investment for sustainable development

FDI does not automatically support sustainable development, it depends on some of the following factors:

- Type of investment
- Motives of investment
- Entry mode of investment
- Corporate culture of investor
- Institutional and regulatory framework of host state

Sustainable development



United Nations DPI

2

2015 UN General Assembly Resolution,
A/RES/70/1

- 17 goals and 169 targets
- 193 States are committed

<https://www.youtube.com/watch?v=RpqVmvMCmp0>

SD Agenda: 1992 Rio Declaration

- 1970s start of environmental awareness
- 1987 Brundtland Report: first mention of SD
- **1992 Rio Conference on Environment and Development**
 - Rio Declaration and Agenda 21
 - Two main pillars: Environment and Development
 - Legalistic nature of the principles
 - Led to new multilateral environmental agreements

Global partnership:

States
International Organizations
Civil society
Corporations
People

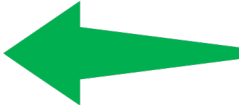
SD Agenda: RIO follow-up process

- 2002 Johannesburg Declaration (Rio+10)
 - Strengthening of the social pillar
 - Definition: “a collective responsibility to advance and strengthen **the interdependent and mutually reinforcing pillars of sustainable development - economic development, social development and environmental protection (...)**” (para. 5)
 - Principle of integration and reconciliation

- 2012 Rio+20 Conference on SD
 - Confirmation of sustainable development
 - Focus on political implementation

- 2015: SDGs and Agenda 2030

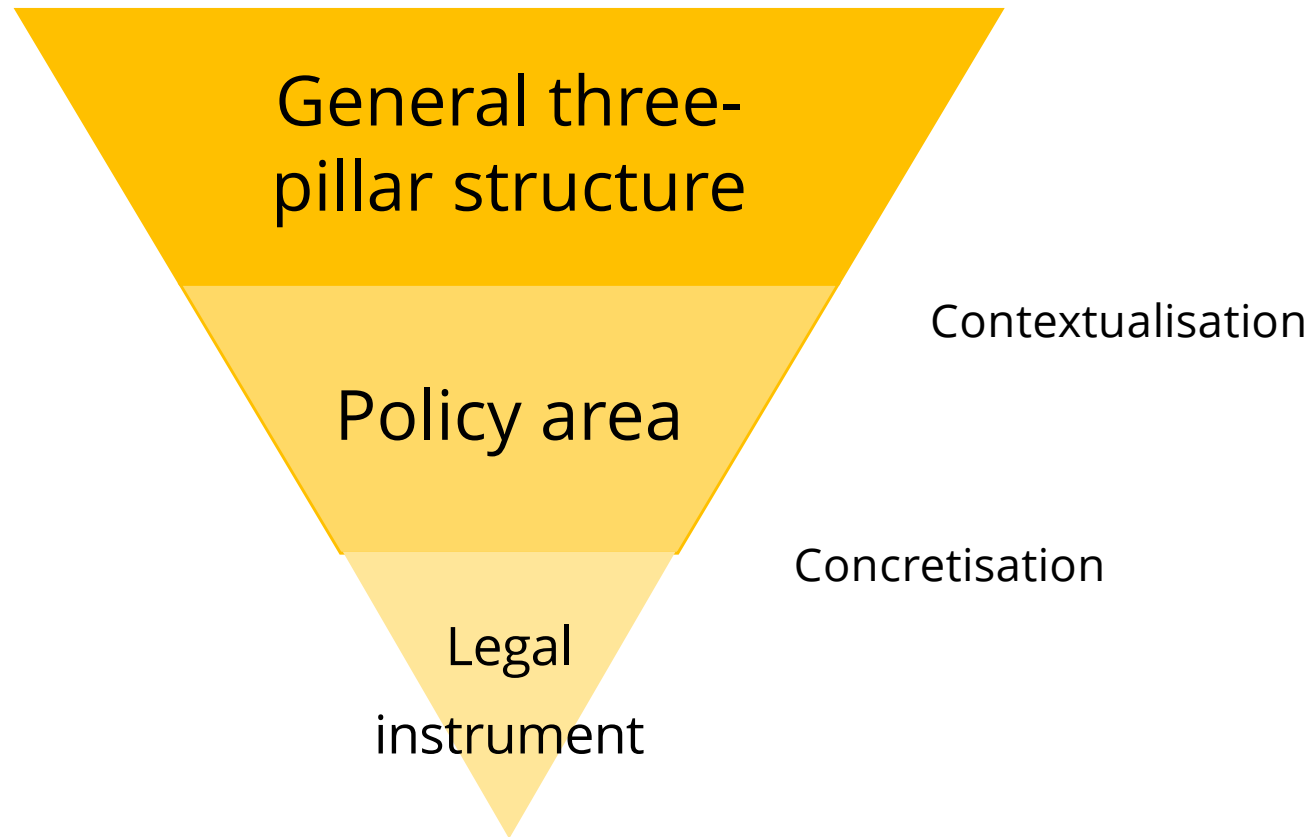
The main principles of the Rio Declaration (1992)

- The right to a healthy environment (Pr. 1)
 - Inter-generational equity (Pr. 3)
 - Intra-generational equity (Pr. 5, 6, 7)
 - **Principle of integration (Pr. 4)** 
 - Principle of public participation (Pr. 10)
-
- Principle of prevention (Pr. 2)
 - Principle of precaution (Pr. 15)
 - Polluter pays principles (Pr. 16)
 - Principle of environmental impact assessment (Pr. 17)

Principles and goals

Environmental principles, human rights, labour protection standards, economic development, e.g.:	2015 Sustainable Development Goals (SDGs)
<ul style="list-style-type: none"> • National law: <ul style="list-style-type: none"> • National environmental law • National energy law • National social security regulations • Regional instruments: <ul style="list-style-type: none"> • African Charter on Human and Peoples Rights • Espoo Convention • Aarhus Convention • ASEAN Agreement on Transboundary Haze Pollution • International treaties: <ul style="list-style-type: none"> • Paris Agreement on Climate Change • Convention on Biological Diversity • ILO Conventions • Investment and trade agreements 	<ul style="list-style-type: none"> GOAL 1: No Poverty GOAL 2: Zero Hunger GOAL 3: Good Health and Well-being GOAL 4: Quality Education GOAL 5: Gender Equality GOAL 6: Clean Water and Sanitation GOAL 7: Affordable and Clean Energy GOAL 8: Decent Work and Economic Growth GOAL 9: Industry, Innovation and Infrastructure GOAL 10: Reduced Inequality GOAL 11: Sustainable Cities and Communities GOAL 12: Responsible Consumption and Production GOAL 13: Climate Action GOAL 14: Life Below Water GOAL 15: Life on Land GOAL 16: Peace and Justice Strong Institutions GOAL 17: Partnerships to achieve the Goal

What is sustainable development integration?

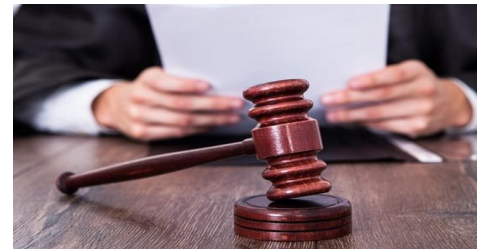


Functions of sustainable development in IIL

- To stimulate investment in areas where capital for the SDGs is most needed



- To preserve policy space for SDGs-advancing national laws

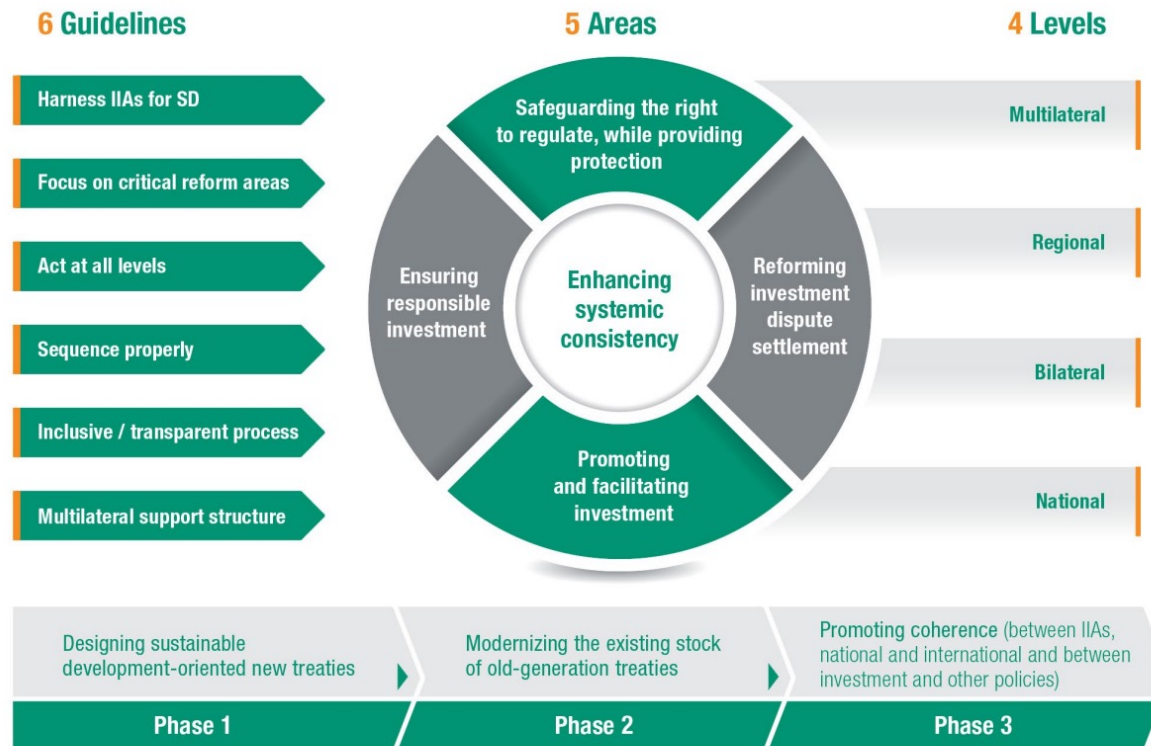


- To enhance and advance international cooperation in the field of sustainable development



Sustainable development in IIL

Figure 1. UNCTAD's Road Map for IIA Reform



- Overlapping with legitimacy crisis

Sustainable development in IIL

Treaty landscape is more complex

- More “actors”
- Different types of instruments
- Different multilateral fora

Ambitious model BITs, Pan-African Investment Code (2016) or Indian Model BIT (2015)

Unratified IIAs, e.g., Nigeria-Morocco BIT (2016)



Sustainable development in EU law

- General internal objective, art. 3(3) TEU
- General external objective, art. 3(5) and 21 TEU
- Transversal objective: horizontal clauses i.e., principle of integration
 - Art. 11 TFEU on environmental integration
 - Art. 9 TFEU on social integration

Union objectives are **binding** upon EU institutions with **limited** justiciability (see work of Joris Larik)

→ EU institutions must integrate sustainable development but have discretion in how they do so

EU international investment law-making

Origin and competences

- Pre-Lisbon EU IIAs (AAs, EPAs, FTAs)
- Post-Lisbon: “Autonomous” Investment Policy through competence shift, Art. 207 TFEU EU has become a global actor in international investment law, however, autonomy can be questioned

CJEU Opinion 2/15 on EUSFTA

- Express exclusive comp. for FDI
- Shared implied comp. for non-direct investments
- Investment standards it depends whether applied to FDI or not
- Shared implied comp. for ISDS

Sustainable development in the CCP

Orientation

- Articles 3(5) and 21 TEU
- Link to the CCP: Arts. 205, 207(1) TFEU; 21(3) TEU

CJEU Opinion 2/15

Para. 142: “the objective of [SD] henceforth forms an integral part of the common commercial policy” including EU investment law making

Para. 143: “The obligation on the European Union to integrate those objectives and principles into the conduct of its common commercial policy is apparent from the second sentence of Article 207(1) TFEU read in conjunction with Article 21(3) TEU and Article 205 TFEU.”

Sustainable development in the CCP

Does the TSD Chapter fall under the CCP's exclusive competence.

→ Does the objective of sustainable development stretch the scope of the CCP? (Opinion 2/15, paras 139-157).

“a European Union act falls within the common commercial policy if it *relates specifically to international trade* in that it is essentially intended to promote, facilitate or govern trade and *has direct and immediate effects on trade*” [emphasis added], Daiichi Sankyo (Case C-414/11). para 51.

Sustainable development in the CCP

Does the TSD chapter relate to trade (specific link)?

- The FTA's preamble, in combination with the definition of sustainable development within Chapter 13, establishes a link between trade and the social and environmental obligations
- Parties commit to not take advantage of their international social and environmental obligations to introduce arbitrary discriminations or disguised restrictions into their trade relations
- A breach of the TSD provisions would allow one of the Parties to suspend the execution of other provisions of the FTA with Singapore (controversial finding of the Court)

Sustainable development in the CCP

Do the TSD provisions have direct and immediate effects on trade?

- Parties agree not to encourage trade through the diminution of social and environmental protection under an internationally agreed threshold, and not to use the latter for protectionist purposes”.
- Parties would reduce the risk of major disparities between the costs of producing goods and supplying services and thus favour trade.
- Parties’ commitment to fight against the illicit trade of timber and to combat illegal unreported and unregulated fishing will affect the trade in these products.

Sustainable development in the CCP

- 22 June 2022, the Commission adopted the 'Communication on the power of trade partnerships: together for green and just economic growth'.
- 'Trade for All Towards a more responsible trade and investment policy', COM (2015) 497 final



Entry points of EU sustainable development integration

- Objectives: Preambles and provisions stating the objectives of EU IIAs
- TSD Chapters
- But also, chapters like:
 - Corruption (EU-Mexico FTA)
 - Trade and Gender (EU-Chile FTA)
 - Energy and Raw Materials (e.g., Ch 13 EU-NZ FTA)
- Investment Chapters / IPAs
 - Greater protection of policy space
 - Supplemented by interpretative instruments (e.g., CETA)

EU Treaty Practice

EU trade and investment agreements

FTAs with investment chapter or related investment protection agreement (IPA)

- EU-Canada CETA (2016)
- EU-Mexico FTA (2018)
- EU-Vietnam FTA and IPA (2018)
- EU-Singapore FTA and IPA (2018)
- [EU-Chile \(2022\)](#)

FTAs with no investment chapter or related IPA

- EU-Korea FTA (2011)
- EU-Central America FTA (2012)
- EU-Colombia/Peru FTA (2013)
- EU-Japan FTA (2017)
- [EU-New Zealand \(2022\)](#)

Standalone investment agreement
[China-EU CAI](#)

Sustainable development in EU trade and investment agreements

<ul style="list-style-type: none"> To stimulate investment in areas where capital for the SDGs is most needed 	<ul style="list-style-type: none"> Objective statements Provisions on investment promotion 	<ul style="list-style-type: none"> Preamble TSD Chapter
<ul style="list-style-type: none"> To preserve policy space for SDGs-advancing national laws 	<ul style="list-style-type: none"> Investment protection standards Right to regulate Investment liberalisation 	<ul style="list-style-type: none"> Investment Chapter or IPA TSD Chapter General exceptions
<ul style="list-style-type: none"> To enhance and advance international cooperation in the field of sustainable development 	<ul style="list-style-type: none"> Labour Environment Corporate social responsibility (CSR) 	<ul style="list-style-type: none"> TSD Chapter

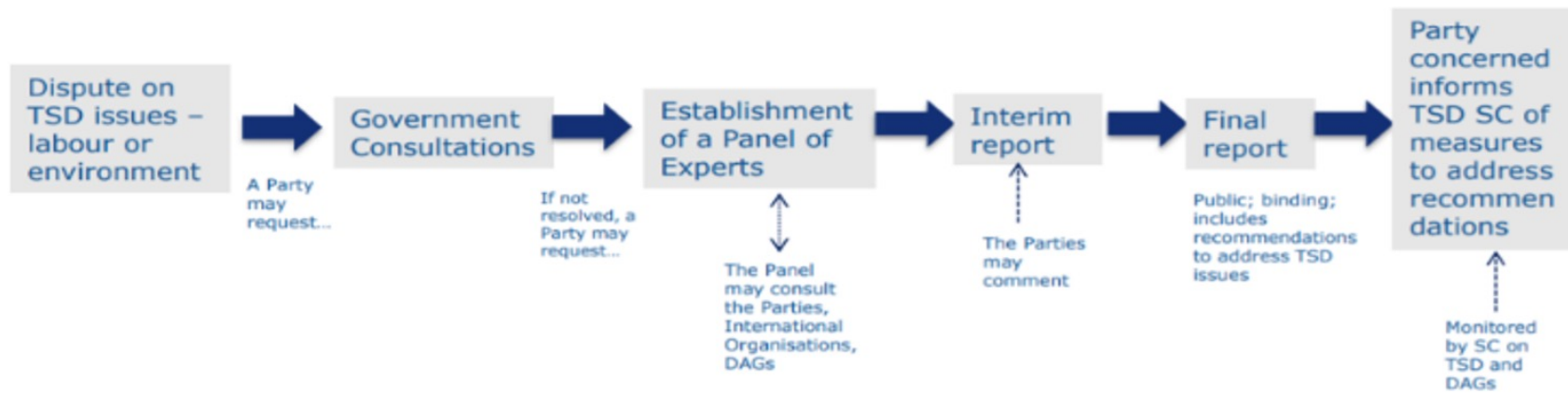
Trade and sustainable development (TSD) chapters

- Embedding trade, investment and sustainable development in the Rio follow-up process
- Strengthening and upholding international environmental and labour standards (reaffirmation of parties' commitments, commitment to ratify core instruments, not to lower standards in order to attract trade or investment)
- Promotion commitments for different sustainability matters (fishing, forestry, CSR, renewable energy and climate change)
- Institutional set-up (DAGs, TSD Committee, enforcement mechanism)

EU-Singapore FTA	US-Korea FTA	Morocco-Nigeria BIT
<p>E.g., labour (art. 12.3)</p> <p>Parties affirm their commitments to:</p> <ul style="list-style-type: none"> • Decent Work for All • Obligations as a ILO member • ILO Declaration on Fund. Principles and Rights at Work + Follow-up • Ratify all eight fundamental ILO Conventions <p>Enforcement: Government consultation and Panel of Experts</p>	<p>E.g., labour (art. 19.2)</p> <p>Parties “shall adopt” and maintain int. labour standards, as stated in the ILO Declaration on Fund. Principles and Rights at Work + Follow-up</p> <p>Enforcement: State-State arbitration, provided that the violations occur in a manner affecting trade and/or investment</p>	<p>E.g., labour (art. 15.1)</p> <p>Parties affirm their commitments to:</p> <ul style="list-style-type: none"> • Obligations as ILO member • ILO Declaration on Fund. Principles and Rights at Work + Follow-up <p>Enforcement: State-State arbitration</p>



TSD Dispute Settlement Mechanism



Trade and sustainable development (TSD) chapters

Strengthening of the enforcement mechanism:

- Commission Communication, 2022
- Sanctions as last resort, see EU-NZ FTA (2022)

What is the relationship between TSD Chapters and Investment Chapters?

- Dispute settlement: mutual exclusiveness
- Right to regulate
- Interpretation

Right to regulate

- Specific provision on the right to regulate in Investment Chapters/IPAs
- Reaffirmation on right to regulate in TSD Chapters
- Fair and equitable treatment (FET)
- Indirect expropriation
- ISDS reform / Investment Court System (ICS)

- Joint Interpretative Instrument
- CETA Joint Committee: Interpretative decision on Investment Chapter (Draft)

Right to regulate (CETA, Art 8.9)

Article 8.9

Investment and regulatory measures

1. For the purpose of this Chapter, the Parties reaffirm their right to regulate within their territories to achieve legitimate policy objectives, such as the protection of public health, safety, the environment or public morals, social or consumer protection or the promotion and protection of cultural diversity.
2. For greater certainty, the mere fact that a Party regulates, including through a modification to its laws, in a manner which negatively affects an investment or interferes with an investor's expectations, including its expectations of profits, does not amount to a breach of an obligation under this Section.
3. For greater certainty, a Party's decision not to issue, renew or maintain a subsidy:
 - (a) in the absence of any specific commitment under law or contract to issue, renew, or maintain that subsidy; or
 - (b) in accordance with any terms or conditions attached to the issuance, renewal or maintenance of the subsidy, does not constitute a breach of the provisions of this Section.
4. For greater certainty, nothing in this Section shall be construed as preventing a Party from discontinuing the granting of a subsidy ⁽⁹⁾ or requesting its reimbursement where such measure is necessary in order to comply with international obligations between the Parties or has been ordered by a competent court, administrative tribunal or other competent authority ⁽¹⁰⁾, or requiring that Party to compensate the investor therefor.

Right to regulate (CETA, draft Interpretative decision, 2022)

3. Climate Change

In light of the commitments of the Contracting Parties under the Paris Agreement, an investor should expect that the Contracting Parties will adopt measures that are designed and applied to combat climate change or address its present or future consequences, by mitigation, adaptation, reparation, compensation or otherwise.

When interpreting the provisions of the Investment Chapter, the Tribunal should take due consideration of the commitments of the Parties under the Paris Agreement and their respective climate neutrality objectives.

Thus, the Parties confirm their understanding that the provisions of this Chapter shall be interpreted and applied by the Tribunal by taking due consideration of the commitments of the Parties under the Paris Agreement and their respective climate neutrality objectives and in a way that allows the Parties to pursue their respective climate change mitigation and adaptation policies.

Investment liberalization and market access

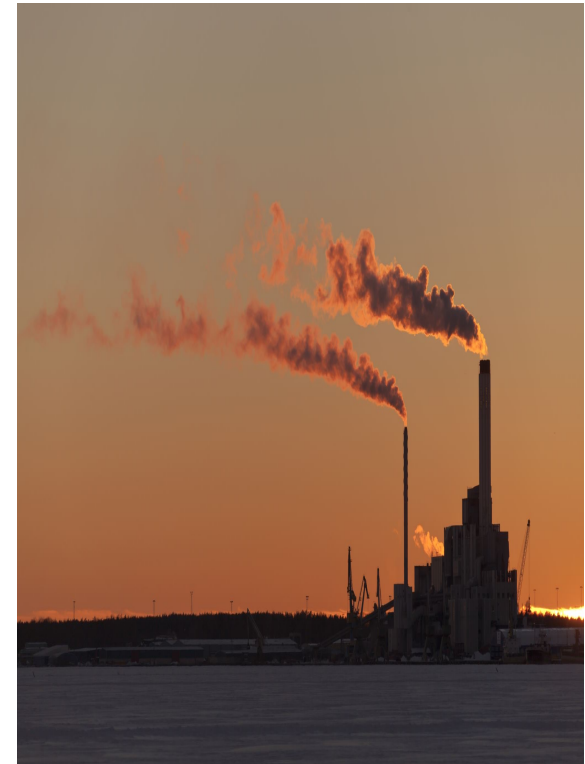
- Market access rights, liberalization commitments (NT and MFN), prohibition of performance requirements
- Narrow meaning: GATS (Art. XVI(2))
- Broad meaning: any factor affecting the attractiveness of investment



EU CETA	CPTPP	Pan-African Investment Code
<p><i>E.g., NT (art. 8.6)</i></p> <p>Each Party shall accord to an investor of the other Party and to a covered investment, treatment no less favourable than the treatment it accords, in like situations to its own investors and to their investments with respect to the establishment, acquisition, expansion, conduct, operation, management, maintenance, use, enjoyment and sale or disposal of their investments in its territory.</p>	<p><i>E.g. NT (art. 9.6)</i></p> <p>Same Plus footnote: “For greater certainty, whether treatment is accorded in “like circumstances” [...] depends on the totality of the circumstances, including whether the relevant treatment distinguishes between investors or investments on the basis of legitimate public welfare objectives.</p>	<p><i>E.g. NT (art. 9.3)</i></p> <p>Same Plus list: “[...] examination, on a case-by-case basis, of all the circumstances of an investment, including, among others: a. its effects on third persons and the local community; b. its effects on the local, regional or national environment, the health of the populations [...] ; c. the sector [...] ; d. the aim of the measure [...] ; ...</p>

Corporate social responsibility

- Direct obligations
- Indirect obligations → best-endeavor commitments to promote
 - OCED Guidelines for Multinational Enterprises
 - UN Global Compact:
 - UN Guiding Principles
 - ILO Tripartite Declaration



Beyond investment treaties



- National law
- Investment contracts
- Other regime of international law
- Soft law and private initiatives

Thank You!

