

Sustainable Development Goals and International Investment: In Pursuit of Compatibility

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Sustainable Development Goals: What role for investment?

❖ *Agenda 2030*

- *25 September 2015*
- *17 Goals, 169 targets*

Goal 1. End poverty in all its forms everywhere

- 1.b Create sound policy frameworks [...], based on pro-poor and gender-sensitive development strategies, to support accelerated **investment** in poverty eradication actions.

Goal 2. End hunger, achieve food security and improved nutrition and promote sustainable agriculture

- 2.a Increase **investment**, including through enhanced international cooperation, [...] in order to enhance agricultural productive capacity in developing countries, in particular least developed countries.

Goal 7. Ensure access to affordable, reliable, sustainable and modern energy for all

- 7.a By 2030, enhance international cooperation to facilitate access to clean energy research and technology, [...], and promote **investment** in energy infrastructure and clean energy technology.

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Goal 10. Reduce inequality within and among countries

10.b Encourage official development assistance and financial flows, including foreign direct **investment**, to States where the need is greatest, in particular least developed countries, African countries, small island developing States and landlocked developing countries [...].

Goal 17. Strengthen the means of implementation and revitalize the Global Partnership for Sustainable Development

17.5 Adopt and implement **investment** promotion regimes for least developed countries.

❖ *Bottom line:*

67. Private business activity, **investment** and innovation are major drivers of productivity, inclusive economic growth and job creation. [...] We call upon all businesses to apply their creativity and innovation to solving sustainable development challenges.

Research Questions

- ❖ *Is the objective of sustainable development compatible with international investment law?*
 - *Levels of scale*
 - *Search for examples – Expropriation, Exceptions, Definitions*
- *How to integrate sustainable development with international investment law?*
 - *Selecting examples*
 - *Creating new proposals*



Sustainable development framework

❖ Documents used

- *Brundtland Report, 1987*
- *Rio Declaration, 1992*
- *New Delhi Principles, 2002*
- *2030 Agenda, 2015*

Framework

Which option ...

Universal Part

... meets the needs of the present without compromising the ability of future generations to meet their own needs?

... pays the most deference to Economic, Social and Environmental considerations?

Provision dependent Part
...

Sustainable development framework

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Framework

Which option ...

Universal Part

...

Provision dependent Part

... potentially contributes the most towards ...

... ensuring sustainable use of natural resources?

... ensuring investor compliance with the polluter-pays principle ?

... ensuring respect for due process and the rule of law ?

Parameters of Expropriation

❖ *Metalclad v. Mexico*

Metalclad v. Mexico, Award, 2000



Expropriation includes incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State.

❖ *Appropriation parameter*

The determination of whether a Measure or a series of Measures have an effect equivalent to expropriation requires a case-by-case, fact-based inquiry, and usually requires evidence that there has been:

[...]

(iii) an appropriation of the Investment by the Host State which results in transfer of the complete or near complete value of the Investment to that Party or to an agency or instrumentality of the Party or a third party.

India draft Model BIT, 2015



Sparks of reform

❖ *Systemic reform is open to state negotiations*

Morocco Model BIT, 2019 ()*

3.3 Investment means assets invested in good faith by an investor of a Party in the territory of the other Party that contribute to the sustainable development of the latter Party, and which involves a certain commitment of capital or other similar resources, an expectation of profit and the taking of risks.

Note: Both Parties confirm their understanding that the contribution of investment to sustainable development can be measured through increase in production capacity, economic growth, the quality of jobs created, the duration of the investment, the transfer of technology and poverty reduction.

❖ *Exclusively capital-importing countries*

- *Morocco-Nigeria BIT 2016; Morocco-Congo BIT 2018*
- *Morocco-Japan BIT 2020*

() Author's translation from French*

Results

❖ Which parameter ...

... pays the most deference to Economic, Social and Environmental considerations?

122. After establishing that regulatory actions and measures will not be initially excluded from the definition of expropriatory acts, in addition to the negative financial impact of such actions or measures, the Arbitral Tribunal will consider, in order to determine if they are to be characterized as expropriatory, whether such actions or measures are proportional to the public interest presumably protected thereby and to the protection legally granted to investments, taking into account that the significance of such impact has a key role upon deciding the proportionality.

Tecmed v. Mexico, Award, 2003

... potentially contributes the most towards ... ensuring sustainable use of natural resources?

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India draft Model BIT, 2015

Call for a Paradigm Shift

Desiring to intensify **economic cooperation** to the mutual benefit of both countries;

With the intention to create and maintain favorable conditions for investments by investors of one Contracting Party which implies the transfer of capital in the territory of the other Contracting Party;

Recognizing that the reciprocal promotion and protection of such foreign investments favour the **economic prosperity** of both countries;

Poland-Chile BIT, 1995



EU Model BIT 2023

RECOGNISING the importance of strengthening their investment relations, in accordance with the **objective of sustainable development** in the economic, social and environmental dimensions, and of promoting investment between them, mindful of the needs of the business communities of each Party, in particular small and medium-sized enterprises, and of high levels of environmental and labour protection through relevant internationally recognised standards and international agreements, to which both Parties are party;

REAFFIRMING their commitment to the principles of **sustainable development** and transparency;

The Contracting Parties,

DESIRING to strengthen their ties and to **pursue and promote sustainable development** in their respective territories by creating conditions with a view to stimulate socially and environmentally responsible foreign investment between them, and

[...]

Author's proposal

❖ ~~*Protection of all investors*~~

❖ *Achievement of sustainable development (goals)*

➤ *Protection as reward for conscious, responsible investors*

Thank you for your attention!

❖ *Are there any questions?*

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