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LEGAL OPINION ON SUSTAINABLE DEVELOPMENT AND CLIMATE TRANSITION IN INVESTMENT AGREEMENTS

Canada, European Union, Japan, Netherlands, and United States of America

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K. Nadakavukaren et al.

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EXECUTIVE SUMMARY

Sustainable development and climate change are among the most discussed issues of international policymakers, with attention to them growing particularly in the last decade. Within the realm of investment law, however, treaty practice has been slow to embrace the terms. While references to environmental and labor protections were found in many of the agreements examined, there are fewer explicit examples of the term “sustainable development” itself. Where found, these references are frequently only in preambles. The appearance of substantive provisions on sustainable development in recent IIAs indicates that this may change in the near future, but it is too early to determine if this will be so beyond the European sphere.

Explicit investment treaty mention of “climate change” is even rarer than that of sustainable development. This study’s author located few treaties and no jurisprudence on the term climate change.

The European Union is the exception to the general impression established in the study regarding both sustainable development and climate change. The EU is clearly the frontrunner in giving attention to sustainable development and climate change in its investment agreements. Not only were EU agreements the first to have explicit references to sustainable development in their texts, but they are currently the agreements with the most elaborate provisions on the topic. While CETA’s chapter on investment does not use the terms “sustainable development” or “climate change,” all of the EU investment agreements post-CETA take up sustainable development. Many of the EU’s FTAs and Partnership Agreements with investment chapters also have a separate chapter on “Trade and Sustainable Development,” which extends to investment policies. Interestingly, the 2023 EU Model BIT contains separate articles on investment and environment, investment and labor, and investment and climate change, but Commission commentary indicates the tie-in with sustainable development.

The United States’ practice regarding sustainable development is still sparse, with only the USMCA mentioning sustainable development in the overall Agreement’s preamble. The US approach is to underline treaty Parties’ right to adopt and apply regulations to investments to ensure that investments are “undertaken in a manner sensitive to environmental, health, safety, or other regulatory objectives” (e.g., USMCA Art. 14.16). The investment chapter also supports corporate social responsibility, including labor and other social rights, but does not make these mandatory or objectives of the commitments. There is, further, no mention of climate change in US investment agreements.

Canada is more like the United States than the EU in referring to sustainable development in preambular language but has material provisions on non-derogation from environmental and health and safety laws. Some of the more recent agreements also refer to responsible business conduct and/or corporate social responsibility. Most Canadian BITs also fail to address climate change, although the 2021 Model FIPA does. The CPTPP goes further than most Canadian IIAs by containing Chapter 23 on Development, wherein the Parties “affirm their commitment” to fostering investment that supports economic development for the benefit of all and by having a mechanism for dialogue should environmental measures not be effectively enforced.

While Dutch IIA practice does not witness references to sustainable development or climate change, the 2019 Model BIT innovates with not only preambular references to sustainable development (and to “sustainable economic development”), but also calls for promoting “responsible investment,” for strengthening the bringing of “investments that contribute to sustainable development,” and a stand-alone article on “Sustainable Development.” The latter article emphasizes environmental, labor, and gender values and calls for cooperation in multilateral fora on the relationship between investment and sustainable development.

Japan's approach to sustainable development has long remained one of preambular mention and non-derogation clauses for environmental and labor regulation. No BITs concluded by Japan mention climate change, either. More recent practice in EPAs, however, reflects an expanding role for climate change attention, with the EU-Japan EPA and the Japan-UK CEPA recognizing the need to attend to the UFCCC and Paris Agreements and facilitating investments in climate change mitigation goods and services.

Given the paucity of such clauses globally, it is not surprising that investor-State arbitration awards have yet to analyze any explicit sustainable development or climate change provisions. Sustainable development references have been made by a few tribunals, in particular when looking at whether a host's actions could be justified. The finding of a sustainable development concern, however, is not a guarantee for the host state's release from liability. Sustainable development may enter arbitration awards in other ways, however. One case envisaged sustainable development concerns as something that third parties may legitimately invoke as grounds for making a non-disputing party submission to a tribunal.

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I. QUESTIONS

The State Secretariat for Economic Affairs (SECO) has requested a report concerning sustainable development and climate transition in international investment agreements (IIAs), looking at different types of treaties, including bilateral investment treaties (BITs), treaties with investment provisions (TIPs), mainly investment chapters of preferential trade agreements (PTAs), as well as model agreements.

For the purpose of this report, SECO has defined certain treaties and model instruments as priorities, namely, the 2016 Comprehensive Economic and Trade Agreement (CETA); the 2016 United States – Mexico – Canada Agreement (USMCA); the 2018 Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP); Canada’s Foreign Investment Promotion and Protection Agreement (FIPA) Model (2021); the US Model Bilateral Investment Treaty (2012); and the Netherlands Model Investment Agreement (2019). Japanese treaty practice is also to be surveyed. References to other agreements concluded by the European Union (EU) are also welcomed.

A detailed list of the agreements examined in this legal opinion is found in Annex 1. To avoid repetition, for an analysis of CETA and the EU – Japan Economic Partnership (2018), see the EU section. Likewise, for an analysis of the CPTPP, see the Canada section, and for the analysis of the USMCA, see the US section.¹

II. ANALYSIS

1. Sustainable Development and Investment Treaties

The term “sustainable development” is attributed to Hans Carl von Carlovitz, the Royal Minister of Mines in Saxony, who in the 17th century urged “*Nachhaltigkeit*” as a principle for the use of wood in the wake of a crisis in the available supply of wood in 17th century Germany. The term’s popularization came in 1757, when Wilhelm Gottfried Moser set out “*nachhaltige Wirtschaft*” of forests in his widely read “Principles of Forest Management,” published in 1757. The idea of sustainable development was subsequently adopted in numerous areas of study, entering international law over five decades ago. It has, however, only recently found its way into international investment law.

Early Legal Expressions of Sustainable Development

In 1972, the United Nations Conference on the Human Environment (UNCHE) was held in Stockholm. This was the first world conference on the environment, where the 113 participant states adopted a series of principles for environmental management, including a conference declaration and an Action Plan for the Human Environment. The Declaration of the United Nations Conference on the Human Environment (known as the Stockholm Declaration) placed the human’s relationship to her environment at the forefront of international concerns, noting in the first paragraph of the preamble

¹ SECO mentioned as a background document the OECD Working Paper “The Future of Investment Treaties – Track 1 sustainability cluster. Illustrative case study on goals and challenges in treaty policy – exceptions clauses. Note by the Secretariat” (2021). David Gaukrodger (2021), “The Future of Investment Treaties – Track 1 sustainability cluster. Illustrative case study on goals and challenges in treaty policy – exceptions clauses”, OECD Note by the Secretariat, No. DAF/INV/TR1/WD (2021)1, OECD Publishing, Paris, <https://doi.org/10.1787/4a6f4f17-en>. For that reason, we will refrain from an in-depth discussion about that paper here. However, we mention the provisions cited in that report when they refer to sustainable development or climate transition provisions.

that “[m]an is both creature and moulder of his environment” and that both “the natural and the man-made [aspects of the human environment] are essential to his well-being and to the enjoyment of basic human rights – even the right of life itself.” The 26 Principles set forth in the Stockholm Declaration formed the basis for what is today international environmental law. Central to the Principles is the idea that humans have both the right to benefit from the environment and the obligation to protect the environment. In the words of Principle 1:

Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations. [...]

The discussions at the UNCHE started a dialogue between developed and developing countries on the linkage between economic growth, the pollution of the air, water, and oceans, and the well-being of people worldwide. One major result of the Stockholm conference was the creation of the United Nations Environment Programme (UNEP) in Nairobi, Kenya, in 1972.² In 1987, the United Nations World Commission on Environment and Development (also known as the “Brundtland Commission”) published its report “Our Common Future,” in which it defines sustainable development as “development that meets the needs of the present without compromising the ability of future generations to meet their own needs,” providing a framework for the integration of environment policies and development strategies.³

Since the 1992 Rio de Janeiro Earth Summit, the concept of sustainable development has become ubiquitous and has been incorporated into international treaties and the national constitutions and laws of many countries around the world.⁴

In 2002, the World Summit on Sustainable Development (WSSD) adopted the Johannesburg Declaration on Sustainable Development. This Declaration recorded the expansion of sustainable development from the environmental dimension to the social dimension, and included provisions covering a series of activities and measures to be taken in order to achieve development that takes into account respect for the environment.⁵

On 25 September 2015, the United Nations General Assembly formally adopted a sustainable development agenda, titled “Transforming Our World: the 2030 Agenda for Sustainable Development”. The agenda included the adoption of several Sustainable Development Goals (SDGs), which include the protection of the environment, fight against climate change, eradicate poverty, promote prosperity and well-being for all.⁶

² United Nations, Report of the United Nations Conference on the Human Environment, Stockholm, 5-16 June 1972, A/CONF.48/14/Rev.1, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/NL7/300/05/PDF/NL730005.pdf?OpenElement>.

³ United Nations, Report of the World Commission on Environment and Development: Our Common Future (1987), <https://sustainabledevelopment.un.org/content/documents/5987our-common-future.pdf>.

⁴ Carlos Alberto Ruggerio, Sustainability and sustainable development: A review of principles and definitions, Science of The Total Environment, Volume 786 (2021), 147481 Elsevier, <https://www.sciencedirect.com/science/article/pii/S0048969721025523>.

⁵ United Nations, Report of the World Summit on Sustainable Development, Johannesburg, South Africa, 26 August - 4 September 2002, A/CONF.199/20, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N02/636/93/PDF/N0263693.pdf?OpenElement>.

⁶ United Nations General Assembly, "Transforming Our World: The 2030 Agenda for Sustainable Development. A/RES/70/1", <https://sdgs.un.org/2030agenda>.

Investment and Sustainable Development

The relationship between foreign investment and sustainable development is complex. On the one hand, most economic studies promote the idea that inflows of foreign capital are beneficial to fostering income growth, building and strengthening productive capacity, and promoting an increase in exports. Foreign investment (abbreviated here as “FDI,” although it need not be “direct” to be covered by most treaty-based investment protections), understood as an investment that reflects lasting interests, controlled by a foreign national,⁷ can therefore play an essential role in achieving sustainable development objectives such as technology and skills transfer, employment generation, higher wages, and poverty eradication.⁸ Indeed, the global development community points to the need for substantially higher investments in developing and least-developed countries if the SDGs are to be met. According to UNCTAD, a total annual investment of between \$3.3 trillion and \$4.5 trillion in relevant sectors in developing countries is needed.⁹ Given current levels of funding, some estimate a yearly financing gap of around \$2.5 trillion will need to be filled to achieve the goals.¹⁰ If promises of investment protection will lead to more flows of capital into sustainable development-promoting projects, the investment-sustainable development relationship should be mutually reinforcing. The dispute proceedings based on investors in the renewable energy sector reacting to host revocations or changes of incentive regimes for such renewable energies could even be viewed as a positive step for investment-sustainable development from this perspective.

However, the call for increased FDI does not mean that there is a global consensus on promoting, facilitating, or protecting foreign investment. Nor does it mean that everyone regards international instruments as fit for promoting development that is sustainable in the full sense of the term. This ambiguity in the investment-sustainable development relationship is due to the nature of the effects of some investment projects on the one hand, and the factual power of investment protection agreements to attract investment.

Much of the concern about FDI’s relationship to sustainable development is based on the experiences of many host communities with foreign investments that have contributed to environmental degradation, social disturbances, and/or violations of human rights. Such may be based on the type of underlying activities (mineral extraction, for example, is inherently damaging to the environment) or on the lack of attentiveness of the investors to ensure that negative impacts are minimized if not avoided. Where any of the thousands of IIAs exist, sustainable development can be even more infringed if the polluting (or otherwise anti-social/-environmental concern) investor relies on the treaty’s protection to challenge host state measures to protect the development goals through investor-state dispute settlement (ISDS).¹¹ Indeed, investment disputes touching on developing issues seem to be on the rise. Over the past few years, disputes have surged as host States engaged in the

⁷ UNCTAD, Handbook of Statistics 2022, “Foreign Direct Investment”, <https://unctad.org/publication/handbook-statistics-2022>.

⁸ United Nations Committee for Development Policy (CDP), Report on the Eighteenth Session (14-18 March 2016). Economic and Social Council Official Records, 2016. Supplement No. 13 E/2016/33, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N16/096/70/PDF/N1609670.pdf?OpenElement>.

⁹ UNCTAD, World Investment Report 2014. Investing in SDGs: An Action Plan (United Nations 2014) 140, http://unctad.org/en/PublicationsLibrary/wir2014_en.pdf.

¹⁰ Djeneba Doumbia and Morten Lykke Lauridsen, “Closing the SDG Financing Gap—Trends and Data” (2019) 73 EMCompass - International Finance Corporation 8, 1–2.

¹¹ See among many others: Michael Waibel, Asha Kaushal, Kyo-Hwa Chung and Claire Balchin (eds.), *The Backlash Against Investment Arbitration: Perceptions and Reality*, Austin 2010; UNCTAD (ed.), *Reforming International Investment Governance* (United Nations 2015); UNCITRAL, “Working Group III: Investor-State Dispute Settlement Reform”, https://uncitral.un.org/en/working_groups/3/investor-state.

energy transition, including the phasing-out of nuclear and coal-fired power plants, and bans on oil, gas, and shale-gas projects.¹²

Even where investment would not be problematic, the sustainable development goals may be undermined by the failure of IIAs to attract the resources necessary to pursue development. Despite dozens of attempts to prove the hypothesis that binding promises of protection will generate investment flows to a host territory, the evidence on whether aggregate FDI flows have increased due to IIAs remains inconclusive. While some find no clear or limited link between treaty protections and investment, other research has focused on the conditions under which treaties may influence investment flows positively.¹³

In this context, some authors have advanced that the object and purpose of investment treaties need to change from investment protection for economic prosperity to investment protection for sustainable development.¹⁴ Others have called for a reform and an alignment of IIAs with the SDGs,¹⁵ to include more sustainable and balanced commitments in these agreements,¹⁶ or consider the inclusion of labor rights and environmental protection commitments.¹⁷ Certain institutions, like the International Institute for Sustainable Development (IISD), the United Nations Conference on Trade and Development (UNCTAD), and the International Institute for Environment and Development (IIED), have developed models¹⁸ or guidelines¹⁹ in this regard.

¹² Magali Garin Respaut, "Environmental Issues in ISDS", Jus Mundi, 23 October 2023, <https://jusmundi.com/en/document/wiki/en-environmental-issues-in-isds>.

¹³ Peter Egger, Alain Pirotte and Catharine Titi, "International investment agreements and foreign direct investment: A survey", *The World Economy*, vol. 46, issue 6, June 2023, 1524-1565, <https://doi.org/10.1111/twec.13429>; Josef C. Brada, Zdenek Drabek and Ichiro Iwasaki, 'Does Investor Protection Increase Foreign Direct Investment? A Meta-Analysis' (2020) *Journal of Economic Surveys* 34-70, <https://doi.org/10.1111/joes.12392>; OECD Working Papers on International Investment, 2018/01, http://www.oecd-ilibrary.org/finance-and-investment/societal-benefits-and-costs-of-international-investment-agreements_e5f85c3d-en.

¹⁴ Federico Ortino, "Investment Treaties, Sustainable Development and Reasonableness Review: A Case Against Strict Proportionality Balancing International Law and Practice", 30 *Leiden Journal of International Law* (2017), 71-91.

¹⁵ Lise Johnson, Lisa Sachs and Nathan Lobel, "Aligning International Investment Agreements with the Sustainable Development Goals", 58 *Columbia Journal of Transnational Law* (5 February 2020), <https://www.jtl.columbia.edu/journal-articles/aligning-international-investment-agreements-with-the-sustainable-development-goals>; Bhumika Muchhala, "International Investment Agreements and Industrialization: Realizing the Right to Development and the Sustainable Development Goals", Human Rights Council Working Group on the Right to Development Nineteenth session 2018, A/HRC/WG.2/19/CRP.5.

¹⁶ Nathalie Bernasconi, Aaron Cosbey, Lise Johnson and Damon Vis-Dunbar, "Investment Treaties and Why They Matter to Sustainable Development: Questions and Answers", International Institute for Sustainable Development 2012, https://www.iisd.org/system/files/publications/investment_treaties_why_they_matter_sd.pdf.

¹⁷ J Anthony Vanduzer, *Sustainable Development Provisions in International Trade Treaties: What Lessons for International Investment Agreements?*, Oxford 2016, <https://academic.oup.com/book/25332/chapter/192355975>.

¹⁸ International Institute for Sustainable Development and others, "IISD Model International Agreement on Investment for Sustainable Development", https://www.iisd.org/system/files/publications/investment_model_int_handbook.pdf.

¹⁹ UNCTAD, *Investment Policy Framework for Sustainable Development (IPFSD) 2015*, <https://investmentpolicy.unctad.org/investment-policy-framework>; Lorenzo Cotula, *Foreign*

2. Climate Change and Investment Treaties

While sustainable development is still high on the international political agenda, the last several years have witnessed increasing attention to the impacts of climate change on populations across the globe. As the awareness of the damaging potential of climatic events becomes more apparent, there has been greater pressure on governments to search for alternatives to conventional sources of energy and to take actions to minimize greenhouse gas emissions. Because many actions to protect against the threat of climate change and ease the energy transition require large amounts of capital, investment is again seen as a requirement. For developing and least developed countries, foreign investment is particularly important. While UNCTAD reports that investment in climate change mitigation (particularly in renewable energy) is increasing, most such investment is in developed economies.²⁰

The pressure for regulatory action has led to a corresponding increase in the debate regarding the effects that IIAs might have on the implementation of national or international policies to combat climate change. Certain scholars consider that the current investment regime is potentially in conflict with the implementation of such policies.²¹ Some believe that the regime is actually an impediment to enacting climate policies, with the “regulatory chill” of ISDS keeping governments from taking steps to implement the Paris Agreement, for example.²² Others have proposed a carve-out in investment treaties to insulate climate change policies from ISDS.²³ Others have called for an effective reform of the investment regime that puts climate change at its center.²⁴

Investment, Law and Sustainable Development: A Handbook on Agriculture and Extractive Industries, International Institute for Environment and Development ed, 2016.

²⁰ UNCTAD, International Investment in Climate Change Adaptation and Mitigation. Trade and Policy Developments, November 2022, <https://unctad.org/publication/international-investment-climate-change-adaptation-and-mitigation>

²¹ Lise Johnson, International Investment Agreements and Climate Change: The Potential for Investor-State Conflicts and Possible Strategies for Minimizing It, *Environmental Law Reporter News & Analysis* 39, no. 12 (December 2009): 11147-11160, <https://www.elr.info/articles/elr-articles/international-investment-agreements-and-climate-change-potential-investor>.

²² Kyla Tienhaara, Regulatory Chill in a Warming World: The Threat to Climate Policy Posed by Investor-State Dispute Settlement. *Transnational Environmental Law*, 7(2) 2018, 229-250. <https://doi:10.1017/S2047102517000309>; David Lark, Investor-State Dispute Settlement and Climate Action, *LawNow* 44, no. 2 (November/December 2019): 28-30, <https://www.lawnow.org/investor-state-dispute-settlement-and-climate-action/>.

²³ Joshua Paine and Elizabeth Sheargold, A Climate Change Carve-Out for Investment Treaties, *Journal of International Economic Law*, Volume 26, Issue 2, June 2023, Pages 285-304, <https://doi.org/10.1093/jiel/jgad011>; Gus van Harten, An ISDS Carve-Out to Support Action on Climate Change, *Osgoode Legal Studies Research Paper No. 38/2015*, September 2015, <https://digitalcommons.osgoode.yorku.ca/olsrps/113/>.

²⁴ Lorenzo Cotula, International Investment Law and Climate Change: Reframing the ISDS Reform Agenda. *The Journal of World Investment & Trade*, 24(4-5) 2023, 766-791. <https://doi.org/10.1163/22119000-12340310>; Daniel B. Magraw and Sergio Puig, Greening Investor-State Dispute Settlement, *Boston College Law Review* 59, no. 8 (November 2018): 2717-2734, <https://lira.bc.edu/files/pdf?fileid=8287895d-4a27-491b-827b-1255dc3cd7f2>.

Taking on the perspective of an alleged incompatibility of such agreement with EU law²⁵ and the EU's enhanced climate ambition under the European Green Deal and the Paris Agreement²⁶, many European countries and the EU have decided to exit from the Energy Charter Treaty (ECT). This, even though in recent years, the ECT was subject to a reform process to address environmental concerns, including climate change.²⁷

Although still not the main voices, some observers have considered the positive potential of the investment regime on climate action. These authors recognize that even as fossil fuel investors may attempt to use ISDS to hold host States accountable for implementing more stringent regulations on their investments, other investors can invoke IIAs and their ISDS mechanisms to challenge hosts that breach their climate change obligations.²⁸ Similarly, Tribunals might take investors' violations of climate change laws into consideration, either excluding such "illegal" investors from IIA's scope of protection, or considering such illegality into account in the determination of the merits, or even when they calculate damages.²⁹ Finally, these authors point out that to the (albeit limited) extent that host states may bring a counterclaim against a complainant foreign investor, the host could potentially make the investor responsible for breaches of its own contributions to climate change.³⁰ Thus, both investors and host states could invoke the Paris Agreement in investor-state arbitrations - the former to protect their "green investment," and the latter to comply with the agreement's commitments.³¹

In light of the clear interconnection between climate change mitigation and investment, international organizations have called for a reform or adaptation process to increase the compatibility between the investment and climate change regimes. In 2021, the Organisation for Economic Co-operation and Development (OECD) established an inter-governmental work program on climate change policy and investment law, and has hosted two conferences (in 2022 and 2023) considering the question of how to align investment treaties with the Paris Agreement and Net Zero commitments, together with a public consultation and a survey of governmental climate policies for investment treaties.³² UNCTAD has also started to monitor national and international policy developments concerning international investment and climate change adaptation and mitigation. It points out the risk that ISDS is being used

²⁵ Nikos Lavranos, *The Conflict between EU Law and International Investment Law: The Energy Charter Treaty (ECT) as a Case Study*. In *Reflections on International Law*. Leiden, The Netherlands: Brill Nijhoff, 133-156. https://doi.org/10.1163/9789004545946_010.

²⁶ European Commission, *European Commission proposes a coordinated EU withdrawal from the Energy Charter Treaty*, 7 July 2023, https://energy.ec.europa.eu/news/european-commission-proposes-coordinated-eu-withdrawal-energy-charter-treaty-2023-07-07_en

²⁷ International Energy Charter, *Agreement in Principle on the modernised ECT*, 24 June 2022, <https://www.energycharter.org/fileadmin/DocumentsMedia/CCDECS/2022/CCDEC202210.pdf>

²⁸ Rodrigo Polanco, Joëlle de Sépibus, and Kateryna Holzer, *TTIP and Climate Change: How Real Are Race to the Bottom Concerns?* *Carbon & Climate Law Review* 11, no. 3 (2017): 206–22. <https://www.jstor.org/stable/26245360>.

²⁹ Angelos Dimopoulos, 'Climate Change and Investor-State Dispute Settlement: Identifying the Linkages' in Panagiotis Delimatsis (ed), *Research Handbook on Climate Change and Trade Law* (Edward Elgar Publishing 2016).

³⁰ Diego Mejía-Lemos, 'The Suitability of Investor-State Dispute Settlement and Host State Counterclaims for Implementing Climate Change International Responsibility' (2023) 32 *Review of European, Comparative & International Environmental Law* 334.

³¹ Arman Sarvarian, *Invoking the Paris Agreement in Investor-State Arbitration*, *ICSID Review - Foreign Investment Law Journal*, Volume 38, Issue 2, Spring 2023, Pages 422–440, <https://doi.org/10.1093/icsidreview/siad006>.

³² OECD, *Investment treaties, the Paris Agreement and Net Zero - Towards alignment?*, <https://www.oecd.org/investment/conference-investment-treaties.htm>

to challenge climate policies, and suggests immediate reform steps to alleviate ISDS risks and create the necessary policy space for States to take urgent climate action.³³

3. Overview of Sustainable Development Provisions in IIAs

Most IIAs negotiated in the last ten years have made express reference to sustainable development, environment, labor, corporate social responsibility, or human rights in the preamble or the substantive provisions.³⁴ However, the inclusion of such language is still rare if we consider the overall stock of IIAs,³⁵ being present more often in PTAs with investment chapters than in BITs.

While the inclusion of some key sustainability obligations, ranging from soft to hard, has become the norm in recent PTA practice, the “proceduralization” of these rules represents a particular challenge for trade actors. The degree of judicialization of settlement of disputes, compliance monitoring, and enforcement has traditionally varied among PTAs, and few of them provide for a direct dispute settlement mechanism concerning sustainable development provisions.³⁶ In contrast, although the inclusion of such clauses is more limited in BITs, when included, they usually allow more policy space to host States in matters of sustainability in the framework of existing investor-state dispute settlement (ISDS).

Numerous works have mapped sustainable development provisions in IIAs: the OECD,³⁷ the United Nations Economic and Social Commission for Asia and the Pacific (UNESCAP),³⁸ and UNCTAD³⁹.

Considering that sustainable development is a broad, evolutive, and multi-faceted concept,⁴⁰ in this report, we have included both the provisions that explicitly refer to sustainable development and those that are commonly identified as part of that notion, in the literature and previous mapping efforts previously cited. Thus, we include environmental protection provisions, labor protection provisions, and climate change provisions. Concerning the environment, we have tried to avoid duplication with

³³ UNCTAD, Treaty-based Investor–State Dispute Settlement Cases and Climate Action, IIA Issues Note, No. 4, September 2022, https://unctad.org/system/files/official-document/diaepcbinf2022d7_en.pdf.

³⁴ Manjiao Chi, "Sustainable Development Provisions in Investment Treaties", (UNESCAP - ARTNet 2018), <https://www.unescap.org/sites/default/files/Sustainable%20Development%20Provisions%20in%20Investment%20Treaties.pdf>

³⁵ Ortino, op. cit.

³⁶ Arman Melikyan, Dispute Settlement Procedures: Trade and Sustainable Development Chapters of Free Trade Agreements, Max Planck Encyclopedias of International Law, August 2023, <https://opil.ouplaw.com/display/10.1093/law-mpeipro/e3942.013.3942/law-mpeipro-e3942?print=pdf>.

³⁷ Based on a sample comprising 70% of all IIAs, the OECD estimated in 2014 that only 12% contained a sustainable development-related reference. Kathryn Gordon, Joachim Pohl and Marie Bouchard, “Investment Treaty Law, Sustainable Development and Responsible Business Conduct: A Fact Finding Survey”, Organisation for Economic Co-operation and Development 2014, OECD Working Papers on International Investment <http://www.oecd-ilibrary.org/content/workingpaper/5jz0xvgx1zlt-en>. This number is out of

³⁸ Chi, op. cit. (UNESCAP analyzed and compared SDPs incorporated in a selected sample of 20 Model IIAs and 340 BITs of eighteen Asia-Pacific LDCs and LLDCs).

³⁹ UNCTAD, "Mapping of IIA Content", Investment Policy Hub, February 2021, <http://investmentpolicyhub.unctad.org/IIA/mappedContent#iialInnerMenu> (mapping 2575 IIAs for health and environment provisions, labor standards, and corporate social responsibility, among other topics).

⁴⁰ Virginie Barral, "Sustainable Development in International Law: Nature and Operation of an Evolutive Legal Norm", 23 European Journal of International Law (2012), 377-400.

our earlier opinion (23-001-E), where most of its concerns have been addressed. Additionally, we have not analyzed clauses referring to corporate social responsibility (CRS) or responsible business conduct (RBC), as they have been examined in a previous report (Avis 23-001-E). We have taken this more restrictive approach based on the consideration that assessing all investment treaty provisions connected with the 17 United Nations' Sustainable Development Goals (SDGs) would exceed our available resources.

To identify sustainable development provisions in existing IIAs, we have mainly used the Electronic Database of Investment Treaties (EDIT). That database currently includes the text of 3935 IIAs, consisting of 3337 BITs, 500 other IIAs, and 96 Model BITs.⁴¹

3.1. Typology of Sustainable Development Provisions in Investment Treaties

Provisions or references to sustainable development or its components remain the exception rather than the rule in IIAs. Nevertheless, given the increase in these references, some scholars have begun to develop taxonomies of such provisions.

Gazzini has grouped sustainable development provisions into nine categories: a) Preambles and Interpretative Statements; b) Substantive Provisions and Commitment Not to Relax Environmental, Health, Safety, Human Rights and Labor Standards; c) Policy Space Provisions; d) Exception Clauses; e) Conflict and Coordination clauses; f) Presumptions; g) Access to Information and Consultation; h) Transparency and Arbitration; and i) Corporate Social Responsibility.⁴²

Based on their "subject matter", Chi identifies eight major types of sustainable development provisions and their sub-types: a) General sustainable development provisions (GENs), including the declaration of the pursuit of sustainable development (DEC); b) Anti-corruption provisions (ATC), which include declaration of the pursuit of sustainable development (DEC), anti-corruption obligations on states (AOS), and anti-corruption obligations on foreign investors (AOI); c) Environmental provisions (ENV), which include non-derogation of sustainable development standards (NDG), confirmation of sustainable development obligations (CON), exceptions that exempt states from the responsibilities (EXP); d) Labor rights and human rights provisions (LHR), which include reference to external sustainable development standards (REF), non-derogation of sustainable development standards (NDG), confirmation of sustainable development obligations (CON), and exceptions that exempt states from the responsibilities (EXP); e) Substantive transparency provisions (TRL), which include publication of laws and regulations or arbitral documents (PUB), requirements of communication for law-making and policy-making (COM), and engagement of stakeholders (ENG); f) Procedural transparency provisions (TRA), which include publication of laws and regulations or arbitral documents (PUB), transparency of arbitral hearings (HER), third party participation in investment dispute settlement proceedings (TPB), and reference to UNCITRAL Transparency Rules (UTR); g) National security provisions (NES), including exceptions that exempt states from the responsibilities (EXP); and h) Responsible business practices (RBPs), which include reference to external sustainable development standards (REF), obligations on states for ensuring or supervising responsible business practices (ROS), and obligations on investors for engaging in responsible business practices (ROI).⁴³

⁴¹ Electronic Database of Investment Treaties (EDIT) is a comprehensive, full-text, and machine-readable database of IIAs from the World Trade Institute - University of Bern, <https://edit.wti.org/>. See Wolfgang Alschner, Manfred Elsig and Rodrigo Polanco, "Introducing the Electronic Database of Investment Treaties (EDIT): The Genesis of a New Database and Its Use", 20 *World Trade Review* (2021), 73-94.

⁴² Tarcisio Gazzini, "Bilateral Investment Treaties and Sustainable Development", *The Journal of World Investment & Trade*, 15(5-6), 929-963. <https://doi.org/10.1163/22119000-01506008>.

⁴³ Chi, *op. cit.*

Polanco has tried a simpler classification, between preambular provisions and substantive provisions. Concerning the latter, he distinguishes sustainable development provisions (SDPs), labor protection provisions (LPP), and environmental protection provisions (EPPs). EPPs include climate change provisions (CCPs).⁴⁴ This report follows the three-part typology.

3.1.1. Sustainable Development Provisions (SDPs)

SDPs can appear in a variety of forms, more or less specific and more or less binding. What distinguishes SDPs is that they refer to the term “sustainable development” as such. These, therefore, include preambular references, which may be stated as to sustainable development. Over time, other sub-types of SDPs have emerged in IIAs. One is the general confirmation of sustainable development commitments under international law. Such confirmations generally are found in individual standalone provisions on sustainable development. Most of these references are to specific environmental or labor commitments, such as Agenda 21 of the United Nations Conference on Environment and Development (UNCED) of 1992.⁴⁵

The most recent IIA texts found within overall free trade agreements may contain a chapter directed toward sustainable development within the overall agreement. The as-yet not in effect EU-New Zealand FTA, for example, has Chapter 19 (Trade and Sustainable Development) that applies the Chapter’s objective of “enhance[ing] the integration of sustainable development, notably its environmental and social dimensions (in particular the labour aspects), in the trade and investment relationship between the Parties” to the entire treaty – including the investment chapter (Art. 19.1.5). The Sustainable Development chapter defines “sustainable development” (Art. 19.1.2) and specifically indicates climate change as an aspect of sustainable development (Art. 19.1.4). Its provisions set forth broad party commitments to implement international agreements on labor protection and environmental protection, gender equality and women’s economic empowerment. It recognizes the urgent need to address climate change and obliges the parties to “effectively implement” the Paris Agreement (Art. 19.6). At the same time, the Chapter recognizes the need to promote sustainable development-enhancing investment. Thus, Article 19.11.1(a) obliges the parties to promote investment in “goods and services that are related to the protection of the environment or that contribute to enhancing social conditions.”

SDPs may also appear as cooperation commitments. The Treaty Establishing the European Economic Community, after the amendments introduced by the Treaty of Maastricht in 1992 (and renamed since then and the Treaty Establishing the European Community - TEC), was the first one to include a mention of “*sustainable economic and social development of the developing countries, and more particularly the most disadvantaged among them*” as one of the cooperation activities that the Community shall foster.⁴⁶ This type of commitment is commonly found in subsequent EU agreements with the “right of establishment” and not in the investment chapters proper (see *infra* 3.4.ii.a)).

A final variation of the SDPs is found in the 2020 Trade and Cooperation Agreement (TCA) between the United Kingdom and the EU. This is a consultation requirement for the state parties to consult with civil society on sustainable development issues. Among the suggested stakeholders, the treaty

⁴⁴ Rodrigo Polanco, “Sustainable Development in Swiss International Investment Agreements”, *Swiss Review of International and European Law* 31, n.º 2 (2021): 211-30.

⁴⁵ See for example, the EU Agreements with Canada (2016), Singapore (2018) and Vietnam (2019); Canada – Korea FTA (2014); China – Korea FTA (2015); Brazil – Chile FTA (2018); and in the UK Agreements with the EU (2020), Moldova (2020), Japan (2020), Ukraine (2020), Georgia (2019) and Korea (2019).

⁴⁶ Art. 130u TEC.

mentions “independent civil society organisations [...] active in [...] sustainable development, social, human rights, environmental and other matters”.⁴⁷

3.1.2. Environmental Protection Provisions (EPPs)

Like with SDPs, there are five other important sub-types of EPPs in IIAs in addition to preambular references. The first are “non-derogation obligations,”⁴⁸ “balancing clauses,”⁴⁹ or “non-regression clauses,”⁵⁰ essentially requiring contracting states not to lower or relax their environmental laws or standards to promote foreign investment to avoid a “race to the bottom” in environmental protection. These have been set out in our earlier opinion (23-001-E).

The second sub-type of EPPs are exception clauses designed to relieve the state from its IIAs obligations⁵¹ or state responsibility for taking environmental measures otherwise inconsistent with their IIA obligations.⁵² These have been set out in our earlier opinion (23-017-E).

The third subtype of EPPs confirms environmental commitments under international or national law.⁵³ These can be either in the preamble or in the main text, and they can be stated as “pure” environmental provisions or in relation to sustainable development. In either case, the text usually refers to international obligations or principles. They may, in particular, refer to the Johannesburg Plan of Implementation on Sustainable Development of 2002.⁵⁴ Some also mention the Millennium Development Goals (MDGs).⁵⁵ Some IIAs explicitly recall the SDGs, either in their preamble,⁵⁶ or a stand-alone provision in the text of the agreement.⁵⁷

The fourth subtype of EPPs clarifies the notion of “indirect expropriation.” Several IIAs stipulate that non-discriminatory regulatory actions designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute an expropriation, except in “rare circumstances.”⁵⁸ However, few of these agreements clarify what is understood by such

⁴⁷ EU-United Kingdom TCA (2020), Arts. 7, 13 and 14.

⁴⁸ Chi, op. cit., p. 17,22.

⁴⁹ Alessandra Asteriti, “Waiting for the Environmentalists: Environmental Language in Investment Treaties”, in: Rainer Hoffman & Christian J Tams (eds), *International Investment Law and Its Others*, Baden-Baden 2012.

⁵⁰ Andrew D. Mitchell and James Munro (2023), “An International Law Principle of Non-Regression from Environmental Protections”, *International & Comparative Law Quarterly*, 72(1), 35-71. doi:10.1017/S0020589322000483.

⁵¹ Asteriti, op. cit.

⁵² Chi, op. cit., p. 17,22.

⁵³ Id.

⁵⁴ See Albania – EFTA FTA (2009), Art. 31, EU – Korea FTA (2010), Art. 131; Colombia - Ecuador - EU - Peru FTA (2013), Art. 267, among others.

⁵⁵ See for example, Central America - EU Association Agreement (2012), Art. 1; Eastern and Southern Africa States - European Union EPA (2009), Art. 2; ECOWAS Supplementary Act on Investments (2008), Art. 16.

⁵⁶ See, for example, Kuwait - Lao People's Democratic Republic BIT (2008), Morocco - Nigeria BIT (2016), and Afghanistan - Azerbaijan BIT (2017).

⁵⁷ See, for example, China - EU Comprehensive Agreement on Investment (2021), Section IV, Subsection I, Art. 1; CPTPP (2018), Art. 23.1.5.

⁵⁸ See for example, Georgia - Japan BIT (2021), Art. 11(4); China - Mauritius FTA (2019), Ch. 8, Annex B; Armenia - Singapore Agreement on Trade in Services and Investment (2019), Annex 3-A; Myanmar - Singapore BIT (2019), Annex II.

circumstances. For example, when a measure or a series of measures is extremely severe or disproportionate in light of its purpose⁵⁹ (see also our earlier opinion 23-016-E).

Environmental cooperation commitments are a fifth sub-type of EPPs. Although cooperation clauses are standard when referring to sustainable development in general, specific cooperation activities are less common in IIAs. Most agreements with such provisions are PTAs with investment chapters. One of the few BITs including them is the announced EU – China Comprehensive Agreement on Investment (CAI), which has not been formally concluded.⁶⁰

3.1.3. Labor Protection Provisions (LPPs)

As with SDPs and EPPs, there are five sub-types of LPPs in IIAs besides references in their preamble⁶¹: non-derogation provisions; provisions referring to (without necessarily incorporating) international labor rights standards – usually from the International Labour Organisation (ILO); exception clauses; and provisions that confirm or recognize that the contracting states bear the primary obligations to protect labor rights; and cooperation on labor matters. As with the environmental provisions, the first four have been discussed in earlier studies. The cooperation provisions on labor are often found when referring to sustainable development in general.⁶²

3.2. Origin of Sustainable Development Provisions in Investment Treaties

The proportion of SDPs in IIAs has increased substantially over time. While only 1% of the IIAs concluded in 2000 contained references to sustainable development, ten years later, that figure had grown to 23%, and in 2020, around two-thirds of the agreements concluded that year included such provisions.

3.2.1. Sustainable Development Provisions

The early years of IIA development were not ones of significant attention to sustainable development. The first references are from the early 1990s but were not clearly tied to investment protection. Both the 1992 EC-EFTA Agreement Establishing the European Economic Area⁶³ and the 1992 North American Free Trade Agreement (NAFTA) refer to the promotion of sustainable development as part of their overall Preambles, but not in the specific provisions on investment. Early exceptions included El Salvador – Switzerland BIT (1994), which has a Protocol that mentions the concepts of sustainable development and environmental protection as applicable to all investments, with respect to encouragement, admission, and non-discrimination. More notably, the 1994 Energy Charter Treaty's

⁵⁹ Japan – Morocco BIT (2020), Annex; South Korea - Uzbekistan BIT (2019), Annex I; Chile - Hong Kong SAR Investment Agreement (2016), Annex I.

⁶⁰ EU-China CAI, Art. 3: “Dialogue and Cooperation on Investment-related Labour Issues. The Parties agree to dialogue and cooperate as appropriate on investment-related labour issues of mutual interest arising under this Section in a manner complementary to the efforts under existing bilateral and multilateral mechanisms”.

⁶¹ Here we largely follow the typology described by Chi, *op. cit.*, p. 22.

⁶² EU-China CAI, Art. 3. : “Article 3. Dialogue and Cooperation on Investment-related Labour Issues. The Parties agree to dialogue and cooperate as appropriate on investment-related labour issues of mutual interest arising under this Section in a manner complementary to the efforts under existing bilateral and multilateral mechanisms.”.

⁶³ The 1992 Agreement Establishing the European Economic Area (EC-EFTA), which had a right to establishment of investments, also had preambular language that noted the Parties were “DETERMINED to preserve, protect and improve the quality of the environment and to ensure a prudent and rational utilization of natural resources on the basis, in particular, of the principle of sustainable development [...]”. EC-EFTA (1992), Preamble.

Part III (Investment Promotion and Protection) was an early agreement with a somewhat fuller view of sustainable development. In that Part, Article 19 on “Environmental Aspects” begins by noting, “In pursuit of sustainable development [...]” (Art. 19(1)) and continues to mandate (“Contracting Parties shall”) that Parties “take account of environmental considerations throughout the formulation and implementation of their energy policies” (Art. 19(1)(a)) and promote research, awareness, and cooperation on matters of environmentally sound practices. Still, the sustainable development tie-in to investment protection obligations mostly came somewhat later.

The majority of the IIA sustainable development provisions started to appear after 2005, the year in which the IISD published its model agreements on investment for sustainable development.⁶⁴

In the case of BITs, the first explicit mention of “sustainable development” is in the Preamble of the Canada – Peru BIT from 2006, which mentions it as one of the BIT goals.⁶⁵ As mentioned, the evolution of environmental and labor provisions in IIAs was similar, with non-linear growth in the number of agreements, including such provisions. For environmental interests, most IIAs from prior to 2010 make no references to the environment at all, whether in the preamble or in the body of provisions. By the mid-2010s, environmental issues were more in the focus of IIA drafters, with many covered as a part of “sustainable development.” Labor provisions began appearing in number even more recently. Still much less common than sustainable development or environment provisions, labor provision drafting increased substantially as of 2018.

3.2.2. Climate Change Provisions

We have identified at least 97 IIAs with climate change provisions (CCPs). Most of them are TIPs with investment chapters or provisions (86 IIAs) and only 3 BITs and 8 Model BITs.

The proportion of CCPs in IIAs has also increased over time, and 75% of the agreements that include them have been signed in the past 20 years, and 55% in the last decade.

3.3. Where Sustainable Development Provisions Are Found

a) Within the Treaty

The placement of sustainable development provisions within the text of IIAs varies. The majority of agreements (297 IIAs) include SDPs in the preamble, 180 TIPs, 97 BITs, and 20 Model BITs. Likewise, the majority of these treaties (302 IIAs) have general environmental references in the preamble, 147 BITs, 141 TIPs, and 14 Model BITs. A similar pattern is found concerning labor provisions. Most IIAs have reference to labor rights in the preamble (286 IIAs), 152 BITs, 112 TIPs, and 22 Model BITs.

There is an important difference with respect to climate change provisions, as the large majority of treaties that include them do so in cooperation provisions. Only the United Kingdom’s FTAs with Türkiye (2020) and New Zealand (2022), the Afghanistan - Azerbaijan BIT (2017), the Azerbaijan Model BIT (2016), and the Energy Charter Treaty (1994), refer to climate change in the preamble.

b) Geographically

The EU and Canada are the main drivers of the inclusion of sustainable development provisions in IIAs. Outside these countries, such provisions are increasingly found in agreements concluded by Brazil, Chile, and the European Free Trade Association (EFTA). African countries have acceded to numerous

⁶⁴ Alschner, Elsig and Polanco, op. cit., p. 91.

⁶⁵ Canada-Peru BIT (2006), Preamble: “RECOGNIZING that the promotion and the protection of investments of investors of one Party in the territory of the other Party will be conducive to the stimulation of mutually beneficial business activity, to the development of economic cooperation between them and to the promotion of sustainable development”.

instruments embodying sustainable development provisions, bilaterally, regionally, and multilaterally.⁶⁶ The Investment Protocol of the African Continental Free Trade Area Agreement (“AfCFTA”) has specific requirements in the definition of protected investments. These include the requirements of “substantial business” in the host state and a “significant contribution” to the latter’s sustainable development, as well as a chapter dedicated to the states’ right to regulate and sustainable development. The Protocol also promotes the introduction of incentives for sustainable investments and sets out a list of binding obligations for investors related to sustainable development and business ethics.⁶⁷

3.4. Sustainable Development Provisions in Selected IIAs

The following analysis looks at sustainable development provisions (SDPs) of the defined priority agreements and countries. Where we have deemed it necessary to understand the origin or development of the provisions analyzed, we have included references to prior or newer agreements beyond those required by SECO.

3.4.1. European Union’s Treaty Practice

Until the 2009 Lisbon Treaty gave the European Union exclusive competences over foreign direct investment, investment protection⁶⁸ – and hence IIAs – was a matter of Member State competence. Since gaining the competence to conclude IIAs, the EU has regularly included sustainable development provisions in dedicated clauses in the main text of the agreements.

i. CETA (2016)

a) Sustainable Development Provisions (SDPs)

CETA is the first EU agreement with extensive investment commitments and investor-state dispute settlement.

CETA’s preamble reaffirms the commitment of the Contracting Parties “to promote sustainable development and the development of international trade in such a way as to contribute to sustainable development in its economic, social and environmental dimensions.” This suggests a commitment to non-derogation, but as a preambular language, this is hortatory.

In Chapter Twenty-Two on “Trade and Sustainable Development,” the parties recall several sustainable development commitments under international law, like the Rio Declaration on Environment and Development of 1992, the Agenda 21 on Environment and Development of 1992, the Johannesburg Declaration on Sustainable Development of 2002 and the Plan of Implementation of the World Summit on Sustainable Development of 2002, the Ministerial Declaration of the United Nations Economic and Social Council (ECOSOC) of 2006, the ILO Declaration on Social Justice for a Fair Globalisation of 2008, and the SDGs.

However, the rest of the provisions found in this chapter do not explicitly refer to the relationship between investment and sustainable development, focusing exclusively on trade.

⁶⁶ Collins C. Ajibo, Sustainable Development Agendas in African Investment Treaties: Reconciling Principle with Practice, *Australasian Review of African Studies*, 2019, 40(2), 55-70, https://afsaap.org.au/assets/Ajibo_55-70.pdf.

⁶⁷ Protocol to the Agreement Establishing the African Continental Free Trade Area on Investment, Draft (January 2023), <https://edit.wti.org/document/show/e5d51824-c467-4e24-922b-3fb376d89550>.

⁶⁸ See generally Joachim Karl, The Competence for Foreign Direct Investment: New Powers for the European Union, 5 *J. World Investment & Trade* 413 (2004) (setting out the development of the foreign investment competences in the European Union prior to the Lisbon Treaty).

In the investment protection chapter (Chapter 8), there is no mention of “sustainable development” or “climate change,” although environmental protection interests are foreseen as legitimate grounds for regulation.

b) Labor Protection Provisions (LPPs)

According to CETA, each Party shall ensure that its labor laws and practices embody and provide protection for working conditions that respect the health and safety of workers. However, when preparing and implementing such measures, each Party shall take into account existing relevant scientific and technical information and related international standards, guidelines, or recommendations if the measures may affect investment between the Parties (Art. 23.3).

Under the agreement, the Parties commit not to lower labor standards in order to promote foreign investment and to effectively enforce them:

Article 23.4. Upholding Levels of Protection

1. *The Parties recognise that it is inappropriate to encourage trade or investment by weakening or reducing the levels of protection afforded in their labour law and standards.*
2. *A Party shall not waive or otherwise derogate from, or offer to waive or otherwise derogate from, its labour law and standards, to encourage trade or the establishment, acquisition, expansion or retention of an investment in its territory.*
3. *A Party shall not, through a sustained or recurring course of action or inaction, fail to effectively enforce its labour law and standards to encourage trade or investment.*

c) Environmental Protection Provisions (EPPs)

CETA mentions “environment” a number of times, each time establishing several obligations directed to the State Parties. Environmental protection laws are referred to in the investment chapter as grounds for the State Parties to avoid the treaty’s other obligations. The right to regulate to protect the environment is repeated in both the Market Access provision (Art. 8.4) and in the investment protection section on regulatory measures (Art. 8.9), where the preambular language on “legitimate policy objectives” is again set out as including “the protection [...] of the environment”. The nature of environmental protection as a legitimate area of state regulation is underscored by the reference to the environment in the explanatory language on indirect expropriation. Annex 8-A (Expropriation) confirms that “non-discriminatory measures of a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety, and the environment, do not constitute indirect expropriations.”

Other parts of the treaty have provisions for cooperation on environmental issues related to investment, including investment in environmental goods and services, environmental and green technologies and practices, renewable energy, energy efficiency, water use, conservation, and treatment, as well as the environmental impact of investment rules on the development of environmental regulations and policy (Art. 24.12 (d)(f)).

The Parties agree “to make efforts” to facilitate and promote investment in environmental goods and services, including through addressing the reduction of related non-tariff barriers (Art. 24.9).

Likewise, when preparing and implementing measures aimed at environmental protection that may affect investment between the Parties, each Party commits to take into account relevant scientific and technical information and related international standards, guidelines, or recommendations (Art. 24.8).

Finally, the Parties commit not to lower environmental standards in order to promote foreign investment, and to effectively enforce them:

Article 24.5. Upholding Levels of Protection

1. *The Parties recognise that it is inappropriate to encourage trade or investment by weakening or reducing the levels of protection afforded in their environmental law.*
2. *A Party shall not waive or otherwise derogate from, or offer to waive or otherwise derogate from, its environmental law, to encourage trade or the establishment, acquisition, expansion or retention of an investment in its territory.*
3. *A Party shall not, through a sustained or recurring course of action or inaction, fail to effectively enforce its environmental law to encourage trade or investment.*

d) Climate Change Provisions (CCPs)

CETA includes only two references to climate change: first, to “pay special attention” to facilitate the removal of obstacles to investment in goods and services of particular relevance for climate change mitigation and, in particular, investment in renewable energy goods and related services (Art. 24.9). Second, a commitment to cooperating on trade-related aspects of the current and future international climate change regime, as well as domestic climate policies and programmes relating to mitigation and adaptation. The latter includes issues relating to carbon markets, ways to address adverse effects of trade on climate, as well as means to promote energy efficiency and the development and deployment of low-carbon and other climate-friendly technologies (Art. 24.12).

ii. Other EU IIAs

a) Prior to CETA

Before CETA, the earliest EU agreement with investment commitments (“right of establishment”) that included references to sustainable development was **the 1994 European Communities (EC) – Ukraine Partnership and Cooperation Agreement (PCA)**, Article 1 of which contained an objective of the agreement to “*promote trade and investment and harmonious economic relations between the Parties and so to foster their sustainable development.*” A similar provision was found in subsequent agreements, including the agreements with Russia (1994), Moldova (1994), Kazakhstan (1995), Kyrgyzstan (1995), Belarus (1995), Armenia (1996), and Georgia (1996).

The **EC – Israel Association Agreement (1995)** instead includes a cooperation provision according to which: “*The Parties shall promote cooperation in the tasks of preventing deterioration of the environment, controlling pollution and ensuring the rational use of natural resources, with a view to ensuring sustainable development and promoting regional environmental projects*” (Art. 50). A similar clause is included in the agreements with Jordan (1997), Egypt (2001), Algeria (2002) and Chile (2002).

The **Cotonou Agreement (2000)**, which has provisions on investment promotion, investment finance, and investment insurance, considers several references to sustainable development, both in the preamble and in the main text of the treaty, mostly cooperation commitments.⁶⁹ Similar clauses are found in the agreements with CARIFORUM States⁷⁰ (2008), ESA⁷¹ (2009), and Iraq (2012). Brief references to sustainable development in the preamble and cooperation provisions are also found in the agreements with Montenegro (2007), Serbia (2008), Bosnia (2008), Côte d’Ivoire (2008), and Kosovo (2015).

⁶⁹ See Cotonou Agreement (2000), Preamble, Arts. 1, 9, 11, 19, 24, 27, 28, 29, 32, 34, 72A, and 89.

⁷⁰ CARIFORUM States are Dominican Republic and Caribbean Community states: Antigua and Barbuda. The Bahamas. Barbados. Belize. Dominica. Grenada. Guyana. Jamaica. Saint Lucia. Saint Vincent and the Grenadines. Saint Kitts and Nevis. Suriname. Trinidad and Tobago.

⁷¹ Eastern and Southern Africa States (ESA) includes the Indian Ocean islands (Comoros, Madagascar, Mauritius and Seychelles), countries from the Horn of Africa (Djibouti, Ethiopia, Eritrea and Sudan) and some countries of Southern Africa (Malawi, Zambia and Zimbabwe).

A more detailed approach is found in the **EU – Korea FTA (2010)**, which, besides preambular references, takes up sustainable development as one of the objectives of the agreement (Art. 1). A separate chapter on trade and sustainable development (Chapter 13) recalls Agenda 21 of 1992, the Johannesburg Plan of 2002 and the 2006 Ministerial Declaration of the ECOSOC on Full Employment and Decent Work of 2006 (Art. 13.1). It also includes provisions on not lowering environmental and labor laws to encourage investment (Art. 13.7), and on promoting investment foreign direct investment in environmental goods and services, including environmental technologies, sustainable renewable energy, energy-efficient products and services and eco-labelled goods, including through addressing related non-tariff barriers (Art. 13.6). The agreement also establishes a treaty-body dealing with sustainable development issues: the specialized Committee on Trade and Sustainable Development (Arts. 13.12 and 15.2.1).

This more detailed approach is also followed in the FTAs with Colombia and Peru (2012),⁷² and with Central America⁷³ (2012), as well in the Association Agreements with Georgia (2014), Moldova (2014), Ukraine (2014), Kazakhstan (2015) and the Economic Partnership Agreement (EPA) with SADC (2016).⁷⁴ In contrast, the Cooperation Agreement with Mexico (2001) only includes a general reference to sustainable development in the preamble.⁷⁵

b) Post-CETA

All EU international investment agreements concluded after CETA consider provisions on sustainable development. With the notable exception of the agreement with Angola (2022), these agreements typically go beyond the provisions found in CETA and - following or building on those of the EU – Korea FTA (2010) - they include sustainable development provisions applicable to investment in “trade and sustainable development” chapters.

The **Comprehensive Economic Partnership Agreement (CEPA) with Armenia** (2017) largely follows the agreement with Korea, including preambular references to sustainable development, referencing it as one of the agreement’s general principles (Art. 2), and a chapter on trade and sustainable development (Title VI, Chapter 9). The chapter recalls Agenda 21 of 1992, the ILO Declaration on Fundamental Principles and Rights at Work of 1998, the Johannesburg Plan of 2002, the ECOSOC Ministerial Declaration of 2006, the ILO Declaration on Social Justice for a Fair Globalization of 2008, the Outcome Document of the UN Conference on Sustainable Development of 2012 entitled “The Future We Want” and the UN 2030 Agenda for Sustainable Development of 2015 (Art. 272). It also has a “right to regulate provision,” recognizing the right of each Party to determine its sustainable development policies and priorities (Art. 273), a commitment to “strive to facilitate and promote” investment in environmental goods and services, including through addressing related non-tariff barriers, and the removal of obstacles concerning goods and services of particular relevance for climate change mitigation and adaptation, such as sustainable renewable energy and energy-efficient products and services (Art. 276). It also has a clause not to lower environmental or labor laws in order to promote investment (Art. 280) and several cooperation commitments concerning this issue.⁷⁶

⁷² Since November 2016, this agreement also includes Ecuador.

⁷³ Central America includes Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and Panama.

⁷⁴ The Southern African Development Community (SADC) comprises Angola, Botswana, Comoros, Democratic Republic of Congo, Eswatini, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, United Republic Tanzania, Zambia and Zimbabwe.

⁷⁵ A specific reference is made in Art. 25 concerning cooperation activities for the sustainable development of tourism.

⁷⁶ See EU-Armenia CEPA (2017), Arts. 42, 45, 68, 73, 74, 77, 84, and 91.

A similar approach was taken by the **EU – Japan EPA (2018)**, which includes references to sustainable development in the preamble, and a dedicated chapter on trade and sustainable development (Chapter 16), which recalls the same environmental or labor commitments as in the agreement with Armenia (Art. 16.1). It also has provisions on the right to regulate and not lowering labor or environmental laws and regulations to attract investment (Art. 16.2), as well as commitments to “strive to facilitate” investment favoring sustainable development, in environmental goods and services and environmentally sound practices (Art. 16.5), and cooperation commitment to facilitate and promote investment in environmental goods and services (Art 16.12(c)). The agreement also establishes a Committee on Trade and Sustainable Development (Arts. 16.13 and 22.3).

The **Investment Protection Agreements (IPAs) and FTAs with Singapore (2018) and Vietnam (2019)** include sustainable development objectives as part of the preamble. In addition, FTA’s chapters deal with “Trade and Sustainable Development” in essentially the same terms as the agreements with Korea and Japan.⁷⁷ However, they include more detailed provisions concerning the transparency of environmental or labor measures that may affect investment between the parties, establishing that they shall be introduced and implemented in a transparent manner, with due notice and an opportunity for interested persons to provide their views.⁷⁸ The agreement with Singapore also includes a more detailed provision on the promotion of sustainable investment, particularly concerning climate change:

Article 12.11. Trade and Investment Promoting Sustainable Development

*1. The Parties resolve to **make continuing special efforts to facilitate and promote trade and investment in environmental goods and services**, including through addressing related non-tariff barriers. The Parties also recognise the usefulness of efforts to promote trade in goods that are the subject of voluntary or private sustainable development assurance schemes, such as eco-labelling, or fair and ethical trade.*

*2. The Parties shall pay special attention to **facilitating the removal of obstacles to trade or investment concerning climate-friendly goods and services**, such as sustainable renewable energy goods and related services and energy efficient products and services, including through the adoption of policy frameworks conducive to the deployment of best available technologies and through the promotion of standards that respond to environmental and economic needs and minimise technical obstacles to trade.*

*3. The Parties recognise the need to ensure that, when developing public support systems for fossil fuels, proper account is taken of the need to reduce greenhouse gas emissions and of the need to limit distortions of trade as much as possible. While subparagraph 2(b) of Article 11.7 (Prohibited Subsidies) does not apply to subsidies to the coal industry, the Parties share the goal of progressively reducing subsidies for fossil fuels. Such reductions may be accompanied by measures to alleviate the social consequences associated with the transition to low carbon fuels. In addition, both **Parties will actively promote the development of a sustainable and safe low-carbon economy, such as through investment in renewable energies and energy efficient solutions.***

*4. When promoting trade and investment, the **Parties should make special efforts to promote corporate social responsibility practices** which are adopted on a voluntary basis. In this regard, each Party shall refer to relevant internationally accepted principles, standards or guidelines to which it has agreed or acceded, such as the Organization for Economic Cooperation and Development Guidelines for Multinational Enterprises, the UN Global Compact, and the ILO Tripartite Declaration of Principles concerning Multinational Enterprises*

⁷⁷ See EU-Singapore FTA (2018), Chapter 12, Arts.12.1, 12.11, and 12.12; and EU-Vietnam FTA (2019), Chapter 13, Arts. 13.1, 13.3, 13.10, 13.12 and 13.14.

⁷⁸ EU-Singapore FTA (2018), Article 12.13; EU-Vietnam FTA (2019), Art. 13.12.

and Social Policy. The Parties commit to exchanging information and cooperating on promoting corporate social responsibility.

The **EU-United Kingdom TCA (2020)** addresses sustainable development as relevant to competition. The TCA has a separate Title XI concerning “Level Playing Field for Open and Fair Competition and Sustainable Development.” Chapter 1 of that Title recognizes sustainable development as one of the principles of the agreement – including climate neutrality:

Article 355. Principles and Objectives

1. The Parties recognise that trade and investment between the Union and the United Kingdom under the terms set out in this Agreement, require conditions that ensure a level playing field for open and fair competition between the Parties and that ensure that trade and investment take place in a manner conducive to sustainable development.

2. The Parties recognise that sustainable development encompasses economic development, social development and environmental protection, all three being interdependent and mutually reinforcing, and affirm their commitment to promoting the development of international trade and investment in a way that contributes to the objective of sustainable development.

3. Each Party reaffirms its ambition of achieving economy-wide climate neutrality by 2050.

4. The Parties affirm their common understanding that their economic relationship can only deliver benefits in a mutually satisfactory way if the commitments relating to a level playing field for open and fair competition stand the test of time, by preventing distortions of trade or investment, and by contributing to sustainable development. However the Parties recognise that the purpose of this Title is not to harmonise the standards of the Parties. The Parties are determined to maintain and improve their respective high standards in the areas covered by this Title.

The same chapter also includes provisions on the right to regulate, the precautionary approach, and the need to consider scientific and technical information when preparing or implementing measures aimed at protecting the environment or labor conditions that may affect investment (Art. 356).

Chapter 8 of Title XI (“Other Instruments for Trade and Sustainable Development”), recalls several international commitments on labor and environmental matters (Art. 397), including SDGs, multilateral labor standards and agreements (Arts. 399 and 405), and multilateral environmental agreements – MEAs (Arts. 400 and 402). Concerning climate change, the Parties recognize the importance of taking urgent action to combat climate change and its impacts, and the role of investment in pursuing that objective in line with the United Nations Framework Convention on Climate Change (UNFCCC), with the purpose and goals of the Paris Agreement and with other MEAs and multilateral instruments in the area of climate change. In light of that, each Party shall facilitate the removal of obstacles to investment in goods and services of particular relevance for climate change mitigation and adaptation (such as renewable energy, energy efficient products and services) through addressing tariff and non-tariff barriers or through the adoption of policy frameworks conducive to the deployment of the best available solutions. (Art. 401).

A provision on “rebalancing measures” is included in case labor, social, environmental, or climate change policies would be introduced in the future. This would allow the Party materially affected by them to adopt “measures to address the situation” of the benefits of the overall agreement having been reduced by the new measures:

Article 411. Rebalancing

1. The Parties recognize the right of each Party to determine its future policies and priorities with respect to labour and social, environmental or climate protection, or with respect to subsidy control, in a manner consistent with each Party’s international commitments,

including those under this Agreement. At the same time, the Parties acknowledge that significant divergences in these areas can be capable of impacting trade or investment between the Parties in a manner that changes the circumstances that have formed the basis for the conclusion of this Agreement.

2. If material impacts on trade or investment between the Parties are arising as a result of significant divergences between the Parties in the areas referred to in paragraph 1, either Party may take appropriate rebalancing measures to address the situation. Such measures shall be restricted with respect to their scope and duration to what is strictly necessary and proportionate in order to remedy the situation. Priority shall be given to such measures as will least disturb the functioning of this Agreement. A Party's assessment of those impacts shall be based on reliable evidence and not merely on conjecture or remote possibility. (...)

Such rebalancing measures can be applied only after a prior notification process. If no mutually acceptable solution is found, the concerned Party may adopt those measures no sooner than five days from the conclusion of the consultations, unless the notified Party requests, within the same period, the establishment of an arbitration tribunal (Art. 411).

Lastly, as mentioned (supra 3.1.1.), this agreement is also the first to include a **novel type of SDP, which considers the consultation with civil society groups** to discuss the implementation of the Agreement on sustainable development matters.⁷⁹

If concluded, the proposed **China - EU Comprehensive Agreement on Investment (CAI)** would be the first sole EU investment treaty with sustainable development provisions in the main text of the treaty (and not only in the preamble). CAI's Section IV, "Investment and Sustainable Development," recognizes sustainable development as an overarching principle of the agreement, recalling the same international labor and environmental commitments as in other post-CETA treaties (Subsection 1, Art. 1), including ILO's concerning investment favoring decent work (Subsection 3, Art. 5). Likewise, the agreement recognizes the right of each Party to determine its sustainable development policies and priorities, to establish its own levels of domestic labor and environmental protection, and to adopt or modify its relevant laws and policies accordingly, consistently with its multilateral commitments in the fields of labor and environment (Subsections 2 and 3, Arts. 1). Subsection 2 of the proposed agreement include provisions promoting investment favoring green growth (Art. 5), and fostering the coordination of the investment and climate regime (Art. 6):

Article 5. Investment Favours Green Growth

In accordance with their commitment to enhance the contribution of investment to the goal of sustainable development, including its environmental aspects, the Parties: a. shall facilitate and encourage investment in environmental goods and services, b. agree to co-operate by exchanging experiences and good practices related to environmental impact assessments in respect of investments which are likely to have significant impact on the environment.

Article 6. Investment and Climate Change

Recognising the importance of pursuing the ultimate objective of the United Nations Framework Convention on Climate Change (UNFCCC) and the purpose and goals of the Paris Agreement adopted by the Conference of the Parties to the UNFCCC at its 21st session (the Paris Agreement) in order to combat climate change and its impacts and committed to enhance the contribution of investment to climate change mitigation and adaptation, each Party shall:

a. effectively implement the UNFCCC and the Paris Agreement adopted thereunder, including its commitments with regard to its Nationally Determined Contributions;

⁷⁹

EU-United Kingdom TCA (2020), Arts. 7, 13 and 14.

b. promote and facilitate investment of relevance for climate change mitigation and adaptation; including investment concerning climate friendly goods and services, such as renewable energy, low-carbon technologies and energy efficient products and services, and by adopting policy frameworks conducive to deployment of climate-friendly technologies;

c. cooperate with the other Party on investment-related aspects of climate change policies and measures bilaterally and in international fora, as appropriate.

The texts of the **EU-Organisation of African, Caribbean and Pacific States (OACPS) Africa and Pacific Regional Protocols**, even though they do not include a “traditional” investment chapter with ISDS, have several provisions concerning investment. Mobilizing investment and fostering private-sector development with a view to achieving sustainable and inclusive growth and creating decent jobs for all, are two of the objectives of the agreement (Arts. 1 and 40, among others). Title IV, Chapter 1 of the agreement includes a provision regarding the mobilization and promotion of investment for sustainable development purposes:

Article 41. Mobilisation of Sustainable and Responsible Investment

1. The Parties undertake to mobilise sustainable and responsible investment with a view to enhancing inclusive and sustainable economic growth and development. *To that end, they shall establish a conducive investment climate, which attracts domestic and foreign investment, including investment from their diaspora, and maintains the right to regulate through transparent, predictable and efficient regulatory, administrative and policy frameworks.*

2. The Parties agree to support the necessary economic and institutional reforms and policies that are grounded in a country's overall development strategy and that are coherent and synergistic at the national, regional and international levels, with a view to creating a conducive environment for sustainable investment and facilitating the development of a dynamic, viable and competitive private sector.

3. The Parties shall cooperate to establish sound financial systems to mobilise investment for sustainable projects. *They shall take measures to support investment by increasing access to financing through technical assistance, grants, guarantees and innovative financial instruments to mitigate risk, boost investor confidence and leverage private and public sources of finance. In doing so, they shall also take account of the need to address market failures or sub-optimal investment situations while ensuring additionality of investment that would not have taken place without those support measures. They shall pay special attention to the priority sectors laid out in Article 44(6).*

(...)

5. The Parties understand and recognise the importance of responsible investment by the relevant actors as a means to achieving long-term sustainable economic, social and environmental value. *In support of this objective, they shall therefore promote corporate social responsibility (CSR) practices and responsible business conduct (RBC), including internationally recognised implementation guidelines, standards and applicable instruments that provide guidance to investors, governments and other actors on implementation of CSR and RBC as a complement to national laws and other applicable legislation.*

The same agreement also includes a clause of not encouraging investment by lowering or offering to lower the level of domestic protection afforded in environmental or labor laws, or their enforcement (Art. 49.2), and to promote investment in goods and services of particular relevance for climate change mitigation, including in low-carbon manufactured and remanufactured products, renewable energy, and energy-efficient products and services, in accordance with their international commitments (Art. 49.4). The parties also commit to mainstream environmental sustainability, the fight against climate change and the pursuit of environmentally sustainable growth into all policies, plans and investments (Art. 54.2), making all investments and financial flows consistent with the Paris Agreement (Art. 57.3).

Similar provisions are found in the protocols of the agreement, like the Africa Regional Protocol, where the Parties undertake to work jointly to unlock “sustainable and responsible investment” from domestic and foreign public and private sources. They shall pay particular attention to sectors that are essential for economic development, that have a high potential for sustainable job creation, particularly in value-adding sectors, and that foster environmental sustainability (Art. 13). In the Caribbean Regional Protocol, the Parties undertake to bolster public and private investment, especially in added-value sectors “with a high potential for sustainable job creation and high economic growth” (Art. 11). Finally, according to the Pacific Regional Protocol, the Parties agree to attract and retain “sustainable and responsible public and private investment,” including foreign direct investment, through blending, guarantees and other innovative financial instruments to boost investor confidence (Art. 15).

The **EU – Angola Sustainable Investment Facilitation Agreement (2022)** includes sustainable development concerns in the preamble and the main text of the agreement, being one of its objectives (Art. 1). Other references are made when recognizing the negative effects that corruption and other illegal activities have on sustainable development (Art. 1.5.), promoting investment with linkages to the host economy (Art. 2.6), as well as part of the conduction of impact assessments for purposes of regulatory coherence (Art. 4.4).

Most importantly, this is the first EU agreement with **an entire chapter devoted to investment and sustainable development** (Chapter V). The objective was to enhance sustainable development’s integration (notably in the labor and environmental dimensions) in the Parties’ investment relationship in a manner that contributes to the achievement of the Sustainable Development Goals of the UN 2030 Agenda. The chapter starts with a definition: “(...) *sustainable development encompasses economic development, social development and environmental protection, all three being inter-dependent and mutually reinforcing and affirm their commitment to facilitate investment in a way that contributes to the objective of sustainable development*” (Art.5.1).

Like in prior EU agreements, this treaty recognizes the right of each Party to determine its sustainable development policies and priorities, to establish the levels of domestic environmental and labor protection it deems appropriate, and to adopt or modify its relevant laws and policies, and a non-derogation clause (Art. 5.2). Parties also agree to facilitate and encourage investment in sustainable production and consumption, in environmental goods and services, and investment of relevance for climate change mitigation and adaptation (Art. 5.6.1).

The chapter follows with a provision affirming multilateral labor standards and agreements, like the 1998 ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up, the 2008 ILO Declaration on Social Justice for a Fair Globalization, and the 2019 ILO Centenary Declaration for the Future of Work. In that context, the Parties agree to promote investment policies that further the objectives of the Decent Work Agenda, establish and maintain effective labor inspection systems, and cooperate on investment-related aspects of labor policies and measures (Art. 5.3.)

Likewise, in another provision, Parties affirm multilateral environmental governance (like the UN Environment Assembly (UNEA) of the UN Environment Programme (UNEP)), commit to effectively implement MEAs (in particular the Convention on Biological Diversity (CBD) and its protocols, the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)), stress the need to enhance the mutual supportiveness between investment and environment policies, and agree to cooperate on investment-related aspects of environmental policies and measures. The Parties also recognize the importance of sustainable management of forest and marine biological resources and ecosystems, and the role of investment in pursuing this objective (Arts. 5.4 and 5.6).

A dedicated clause deals with the relationship between investment and climate change, focusing on the mutual supportiveness of both regimes:

Article 5.5. Investment and Climate Change

1. *The Parties recognise the importance of taking **urgent action to combat climate change** and its impacts, and the role of investment in pursuing this objective, consistent with the UN Framework Convention on Climate Change (UNFCCC), the purpose and goals of the Paris Agreement adopted by the Conference of the Parties to the UNFCCC at its 21st session, and with other MEAs and multilateral instruments in the area of climate change.*

2. *Each Party shall:*

(a) effectively implement the UNFCCC and the Paris Agreement adopted thereunder, including its commitments with regard to its Nationally Determined Contributions;

*(b) promote **the mutual supportiveness of investment and climate policies** and measures thereby contributing to the transition to a low greenhouse gas emission, resource-efficient economy and to climate-resilient development.*

3. *The Parties shall work together to strengthen their cooperation on investment-related aspects of climate change policies and measures bilaterally, regionally and in international fora, as appropriate, including in the UNFCCC, the WTO, the Montreal Protocol on Substances that Deplete the Ozone Layer and the International Maritime Organisation (IMO).*

The Chapter closes with one provision referred to CSR and RBC (already referred to in Avis 23-001-E) and another on investment and gender equality, where Parties recognize that inclusive investment policies can contribute to advancing women’s economic empowerment and gender equality, in line with SDG 5, and agree to work together bilaterally and/or in other relevant fora as appropriate to strengthen their cooperation on investment-related aspects of gender equality policies and measures (Art. 5.8)

The **Chile - EU Interim Trade Agreement (2022)** also includes sustainable development in the preamble and as one of the objectives of the agreement (Art. 1.2). As prior EU agreements do, Chapter 26 (“Trade and Sustainable Development”) recalls international labor and environmental commitments and the SDGs (Art. 26.1), include a provision on recognizing the right of each party to determine or modify its sustainable development policies and priorities – including levels of domestic labor and environmental protection – and not to weaken or reduce such levels of protection in order to encourage investment. It also adds a commitment not to apply such policies in a manner that would constitute a disguised restriction on investment. (Art. 26.3). The agreement also considers cooperation activities on the reciprocal impact of labor and environmental law and standards on investment (art. 26.7).

According to other provisions, when establishing or implementing measures aimed at protecting the environment or labor conditions that may affect trade or investment, each Party shall take into account available scientific and technical evidence and the views of interested persons and stakeholders (Arts. 26.4.1 and 26.5(a)). When such a measure has an impact investment between the Parties, a Party may request to the Party adopting the measure to provide information indicating that the measure adopted is consistent with its own level of protection and may request discussion of the matter in the Trade and Sustainable Development (TSD) Sub-Committee established in the same agreement (Art. 26.4). This provision recalls the “rebalancing” clause of the EU – United Kingdom TCA but establishing a simpler and not binding mechanism to deal with the impact of such measures.

This agreement also includes a provision recognizing the importance of MEAs in the area of climate change and biological diversity, in particular, the UNFCCC, the Paris Agreement, and the CBD (Arts. 26.10.1 and 26.13.1). Each Party shall facilitate and promote investment in goods and services of relevance for climate change mitigation and adaptation, sustainable renewable energy, and energy efficiency (Art. 26.10.2(c)). Likewise, Parties commit to take measures to conserve biological diversity when it is subject to pressures linked to investment (Art. 26.13.2).

Finally, Article 26.19 establishes a Sub-Committee on Trade and Sustainable Development, which shall have specific sessions for environment and labor matters, as well as cross-cutting issues.

The **EU - Kenya Economic Partnership Agreement (2023)** also includes sustainable development in the preamble of the text and as one of the objectives of the treaty (Art. 2.1(a)). However, the treaty only considers general cooperation commitments in this regard (Arts. 75 and 82) as well as in the fields of fisheries (Art. 53) and agriculture (Art. 59), leaving future negotiations on sustainable development issues for future negotiations.

As with all prior post-CETA agreements concluded by the EU, the **EU - New Zealand FTA (2023)** includes references to sustainable development in the preamble. A Chapter on “Trade and Sustainable Development” (Chapter 19) has explicit reference to the SDGs, with the Parties affirming their commitment to promote the development of international investment in a way that contributes to the objective of sustainable development (Art. 19.1). The objective of this Chapter is to enhance the integration of sustainable development, notably its environmental and social dimensions (in particular the labor aspects), in the trade and investment relationship between the Parties, including through strengthening dialogue and cooperation (Art. 19.5). It has a number of cooperation commitments: to examine the reciprocal impact of labor and environmental law and standards on investment (Arts. 19.3.10(d) and Art. 19.5(d)); to remove obstacles to investment that contribute to a circular economy (Art. 19.5(a)(ii)); and to encourage investment in environmental goods and services (Art. 15.5(c)).

The chapter includes provisions on not lowering the levels of protection afforded in its environmental or labor law to encourage investment, and not establishing or using its environmental or labor law or measures in a manner that would constitute a disguised restriction on investment (Art. 19.2); to facilitate the removal of obstacles to investment in goods and services of particular relevance for climate change mitigation and adaptation, such as renewable energy and energy efficient products and services (Arts. 19.6.4(b) and 19.11.4); and to take into account available scientific and technical information, relevant international standards, guidelines or recommendations, when establishing or implementing measures aimed at protecting the environment or labor conditions that may affect investment (Art. 19.13), providing interested persons and stakeholders with a reasonable opportunity to comment on them (Art. 19.14).

Finally, the most recent **EU Model BIT (2023)**, which contains annotations to the model clauses for negotiation or re-negotiation of Member States’ BITs with third countries, has three model provisions on investment and environment, investment and climate change and investment and labor:

Article Investment and Environment

- 1. The Parties recognise the right of each Party to determine its sustainable development policies and priorities, to establish the levels of domestic environmental protection it deems appropriate, and to adopt or modify its environmental laws and policies. Such levels, laws and policies shall be consistent with each Party’s commitments to internationally recognised standards and agreements on environmental protection.*
- 2. A Party shall not weaken or reduce the levels of protection afforded in its environmental laws in order to encourage investment.*
- 3. A Party shall not waive or otherwise derogate from, or offer to waive or otherwise derogate from such legislation in order to encourage investment in its territory.*
- 4. Each Party shall effectively implement the multilateral environmental agreements (MEAs), protocols and amendments that it has ratified.*

According to the commentary provided by the European Commission, paragraph 1 recognizes that each Party may determine the sustainable development policies and priorities for itself, establish the levels of domestic environmental protection it deems appropriate, and adopt or modify its

environmental laws and policies. In doing so, each Party must ensure that such levels, laws and policies are consistent with its commitments to internationally recognized standards and agreements on environmental protection. This requirement introduces a floor on the level of ambition of such policies while reserving a State's right to be more ambitious. Paragraphs 2 and 3 introduce non-regression clauses, which are intended to secure a level playing field by preventing situations of conscious lowering of environmental standards by a State to increase investment, which could thus result in an unfair competitive advantage. They address the weakening of levels of protection as a result of a) weakening laws (paragraph 2) and b) waiver or derogation (paragraph 3). Paragraph 4 requires each Party to the agreement to effectively implement the MEAs it has ratified. This reflects the position that the interplay between investment and sustainable development must be addressed comprehensively, putting investment policy in the broader context of other tools supporting sustainability. In this comprehensive approach, Member State bilateral investment agreements (BIAs), together with EU trade and investment agreements, promote the global governance framework, including by upholding the effective implementation of the MEAs they have ratified.

Article Investment and Climate Change

1. The Parties recognise the importance of taking urgent action to combat climate change and its impacts, and the role of investment in pursuing this objective, consistent with the United Nations Framework Convention on Climate Change (UNFCCC), the purpose and goals of the Paris Agreement adopted by the Conference of the Parties to the UNFCCC at its 21st session (the Paris Agreement), and with other MEAs and multilateral instruments in the area of climate change.

2. Each Party shall:

a. effectively implement the UNFCCC and the Paris Agreement adopted thereunder, including its commitments with regard to its Nationally Determined Contributions;

b. promote investment of relevance for climate change mitigation and adaptation; including investment concerning climate friendly goods and services, such as renewable energy, low-carbon technologies and energy efficient products and services, and by adopting policy frameworks conducive to deployment of climate friendly technologies;

3. The Parties shall work together to strengthen their cooperation on investment-related aspects of climate change policies and measures bilaterally, regionally and in international fora, as appropriate.

The European Commission has commented with respect to this model article that Paragraph 1 stresses the importance of urgent action to combat climate change and its impacts against the background of the major instruments that have been pursued at the multilateral level to combat climate change, notably the UNFCCC and the Paris Agreement. Paragraph 2, in the same spirit as the equivalent provisions on the environment, requires the effective implementation of those treaties by each Party to the Agreement, as well as the promotion of investment that is relevant to climate change mitigation and adaptation. Paragraph 3 highlights the importance of cooperation in the field of climate change by requiring Parties to a BIA to work together on investment-related aspects of climate change – not only at the bilateral level, but also at the regional and multilateral level.

Article Investment and Labour

1. The Parties recognise the right of each Party to determine its sustainable development policies and priorities, to establish the levels of domestic labour protection it deems appropriate and to adopt or modify its labour laws and policies. Such levels, laws and policies shall be consistent with each Party's commitments to internationally recognised labour standards and agreements.

2. A Party shall not weaken or reduce the levels of protection afforded in its labour legislation in order to encourage investment.

3 A Party shall not waive or otherwise derogate from, or offer to waive or otherwise derogate from such legislation in order to encourage investment in its territory.

4. In accordance with the ILO Constitution and the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up, as amended in 2022, each Party shall respect, promote and effectively implement throughout its territory the internationally recognised core labour standards as defined in the fundamental ILO Conventions.

5. Each Party shall effectively implement the ILO Conventions it has ratified [and to make sustained efforts towards ratifying, to the extent that it has not yet done so, the fundamental ILO Conventions].

6. Each Party is committed to promote investment policies which further the objectives of the Decent Work Agenda, in accordance with the 2008 ILO Declaration on Social Justice for a Fair Globalisation and the 2019 ILO Centenary Declaration for the Future of Work, including a human-centred approach to the future of work, adequate minimum wages, social protection and safety and health at work.

The Commentary from the European Commission signals the importance of labor in investment-related sustainable development policies. Its structure is largely identical to that of the Article “Investment and Environment” in that it replicates the same principles and tenets in the field of labor. Accordingly, paragraph 1 introduces the right to regulate in the field of labor policies. Paragraphs 2 and 3 are non-regression clauses modeled upon those in the Article “Investment and Environment.” In paragraph 4, each Party undertakes the obligation to respect, promote, and effectively implement throughout its territory the internationally recognized core labor standards as defined in the fundamental ILO Conventions. In paragraph 5, the obligation upon each Party to effectively implement the ILO Conventions it has ratified further extends to making sustained efforts towards ratifying the fundamental ILO Conventions to the extent not yet done so. The fundamental ILO Conventions are considered key to the rights of those working, which is why they benefit from increased commitments. Finally, paragraph 6 introduces each Party’s commitment to promote investment policies which further the objectives of the Decent Work Agenda, in accordance with the 2008 ILO Declaration on Social Justice for a Fair Globalization and the 2019 ILO Centenary Declaration for the Future of Work.

3.4.2. United States Treaty Practice

The United States IIAs generally do not include provisions on sustainable development with respect to investment, beyond preambular references – like in NAFTA (1992), and the FTAs with Morocco (2004) and Oman (2006) - or additional cooperation activities, which are included in NAFTA (1992), and the FTAs with Singapore (2003), Chile (2003), Australia (2004), Central America and Dominican Republic (2004), Bahrain (2004), Peru (2006), Colombia (2006), Panama (2007), South Korea (2007) and the USMCA (2020).

Climate change is not mentioned in any US investment agreement.

i. US Model BIT (2012)

The 2012 US Model BIT does not include sustainable development or climate change provisions.

ii. USMCA (2020)

The USMCA contains a preambular reference to sustainable development in the context of an objective on environmental protection:

“... further the aims of sustainable development, including through mutually supportive trade and environmental policies and practices ...”. Beyond this, two chapters set out commitments related to sustainable development, but not using the term itself. Chapter 23 (“Labor”) recognizes the Parties’ commitments concerning labor rights in ILO Declarations (Arts. 23.2 and 23.3). Likewise, Chapter 24 (“Environment”) recognizes the importance of MEAs and affirms the commitments of several agreements.⁸⁰

There are also chapters on small and medium enterprises (Chapter 25) and corruption (Chapter 27), and references to gender equality (Preamble) and the rights of indigenous peoples (in the General Exceptions, Chapter 32). There is no chapter on climate change.

The USMCA provisions on investment protection, in Chapter 14, do not refer explicitly to sustainable development or climate change. Chapter 14 contains an Article allowing for Parties to implement and enforce measures for environmental, health and safety, or “other regulatory” purposes (Art. 14.16) and limits invocation of indirect expropriation for general regulatory measures intended to protect the environment (Annex 14-B, 3(b)). Chapter 14 also supports the Parties’ encouragement of corporate social responsibility, including the protection of labor rights (Art. 14.17). These, however, are not further tied to sustainability *per se*.

3.4.3. Canada’s Treaty Practice

Early Canadian IIAs only included sustainable development references to investment as part of the preamble, like the FTAs with Costa Rica (2001) and EFTA (2008).

The notable exception is the Canada – Chile FTA (1996), which besides a preambular reference, included a non-derogation provision concerning environmental measures, recognizing that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures, and that *“a Party should not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such measures as an encouragement for the establishment, acquisition, expansion or retention in its territory of an investment of an investor. If a Party considers that the other Party has offered such an encouragement, it may request consultations with the other Party and the two Parties shall consult with a view to avoiding any such encouragement”* (Art. G-14). A similar provision was included in the later BITs with Peru (2006), China (2012), Benin (2013), Tanzania (2013), Cameroon (2014), Nigeria (2014), Serbia (2014), Senegal (2014), Mali (2014), Côte d’Ivoire (2014), Burkina Faso (2015), Guinea (2015), Hong Kong (2016), Mongolia (2016), Kosovo (2018), and Moldova (2018) as well as in the FTAs with Peru (2008), Colombia (2008), Jordan (2009), Panama (2010), Kuwait (2011) and Honduras (2013).

The Canada – Korea FTA (2014) considers references to sustainable development in addition to the preamble and a non-derogation clause (Art. 17.5.3), including obligations not to fail to effectively enforce its environmental law. It also recognizes the Parties’ commitments concerning the environment in MEAs (Art. 17.3) and labor rights in ILO Declarations (Art. 18.1). More relevant to sustainable development itself, this treaty recalls the Agenda 21 on Environment and Development of 1992 and the Johannesburg Plan of Implementation on Sustainable Development of 2002 (Art. 17.1).

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These include the International Convention for the Regulation of Whaling (1946), Convention for the Establishment of an Inter-American Tropical Tuna Commission (1949), the Ramsar Convention on Wetlands of International Importance Especially as Waterfowl Habitat (1971), the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) (1973), the Protocol Relating to the International Convention for the Prevention of Pollution from Ships (MARPOL) (1978), the Montreal Protocol on Substances that Deplete the Ozone Layer (1987), and the Convention on the Conservation of Antarctic Marine Living Resources (Arts. 24.8 - 24.12).

With the exception of the Model FIPA (2021), Canadian BITs do not make references to climate change. Only three Canadian PTAs with investment provisions mention climate change – CETA, the trade agreements with the United Kingdom and Ukraine. However, such clauses are found outside their investment chapters and are not directly applicable to investment.

i. TPP/CPTPP (2016/2018)

As in the FTA with Korea, the 2018 Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) includes references to sustainable development in the preamble, as part of several cooperation activities (Arts. 19.10.6, 19.11, 20.2 and 201.12), non-derogation clauses for both labor (Art. 19.4) and environmental protections (Art. 20.3.6), and provisions upholding levels of protection in the application and enforcement of labor (Art. 19.5) and environmental laws (Art. 20.3.4). Significantly, there is also a commitment to promote investment in environmental goods and services (Art. 20.18).

Likewise, this treaty also recalls the Agenda 21 on Environment and Development of 1992, and the Johannesburg Plan of Implementation on Sustainable Development of 2002 (Art. 17.1), recognizes the Parties' commitments concerning labor rights in ILO Declarations (Art. 19.2 and 19.3) and the environment in MEAs (Arts. 20.4, 20.5, and 20.6).

But, from a Canadian point of view, the CPTPP also includes some novel provisions concerning sustainable development. First, the investment chapter (Chapter 9) has a provision reaffirming the Parties' right to adopt appropriate measures to ensure that investment activities are undertaken in a manner sensitive to environmental objectives (Art. 9.16):

Article 9.16. Investment and Environmental, Health and other Regulatory Objectives

Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental, health or other regulatory objectives.

Second, after declaring that no provision shall be construed to empower a Party's authorities to undertake environmental law enforcement activities in the territory of another Party (Art. 20.3.7), the CPTPP provides for a dialogue mechanism in case of a sustained failure if effectively enforcing environmental laws (Art. 20.12.9):

Article 20.12. Cooperation Frameworks (...)

9. Where a Party has defined the environmental laws under Article 20.1 (Definitions) to include only laws at the central level of government (first Party), and where another Party (second Party) considers that an environmental law at the sub-central level of government of the first Party is not being effectively enforced by the relevant sub-central government through a sustained or recurring course of action or inaction in a manner affecting trade or investment between the Parties, the second Party may request a dialogue with the first Party. The request shall contain information that is specific and sufficient to enable the first Party to evaluate the matter at issue and an indication of how the matter is negatively affecting trade or investment of the second Party.

Furthermore, the CPTPP has a development chapter (Chapter 23), where the Parties affirm the relationship between investment and sustainable development:

Article 23.1. General Provisions

1. The Parties affirm their commitment to promote and strengthen an open trade and investment environment that seeks to improve welfare, reduce poverty, raise living standards and create new employment opportunities in support of development.

2. The Parties acknowledge the importance of development in promoting inclusive economic growth, as well as **the instrumental role that trade and investment can play in contributing to economic development and prosperity**. Inclusive economic growth includes a more broad-based distribution of the benefits of economic growth through the expansion of business and industry, the creation of jobs, and the alleviation of poverty.

3. The Parties acknowledge that economic growth and development contribute to achieving the objectives of this Agreement of promoting regional economic integration.

4. The Parties also acknowledge that **effective domestic coordination of trade, investment and development policies can contribute to sustainable economic growth**.

5. The Parties recognise the potential for joint development activities between the Parties to reinforce efforts to achieve sustainable development goals.

6. The Parties also recognise that activities carried out under Chapter 21 (Cooperation and Capacity Building) are an important component of joint development activities.

Along the same lines, the Parties also recognize that broad-based economic growth promotes peace, stability, democratic institutions, attractive investment opportunities, and effectiveness in addressing regional and global challenges. Parties may enhance broad-based economic growth through policies that take advantage of investment opportunities in order to contribute to, among other things, sustainable development and the reduction of poverty (Art. 23.3).

However, the first Canadian IIA post-CPTPP, the Canada - Chile Modernized FTA (2017) – which is technically a modernization of the agreement concluded in 1996, does not follow the CPTPP model. As the original version, it only includes a preambular reference to sustainable development and reiterates a non-derogation provision concerning environmental measures (Art. G-14).

ii. **Canada Model FIPA (2021)**

The most recent Canadian Model IIA (FIPA 2021), does not follow the model of the agreement with Korea or the CPTPP. It only includes preambular references to sustainable development and a non-derogation provision:

Article 4. Non-Derogation

The Parties recognize that it is not appropriate to encourage investment by relaxing domestic measures relating to health, safety, the environment, other regulatory objectives, or the rights of Indigenous peoples. Accordingly, no Party shall relax, waive or otherwise derogate from, or offer to relax, waive or otherwise derogate from, such measures in order to encourage the establishment, acquisition, expansion or management of the investment of an investor in its territory. If a Party considers that the other Party has offered such an encouragement, it may request consultations with the other Party and the two Parties shall consult with a view to avoiding the encouragement.

In addition, the model treaty also includes clauses on the right to regulate (Art. 4) and Responsible Business Conduct (Art. 16), which include sustainable development as part of their content.

The only Canadian IIA - up to now - concluded after the Model FIPA (2021), the Canada - Ukraine Modernized Free Trade Agreement (2023), departs from that model, going back to the template of the FTA with Korea and the CPTPP. It again includes a reference to sustainable development in the preamble, a clause recognizing that it is inappropriate to set or use their environmental law in a manner that would constitute a disguised restriction on investment between the Parties (Art. 13.2.5); a provision upholding levels of protection in the application and enforcement of environmental laws (Art. 13.4.1), non-derogation clauses for environmental (Art. 13.4.3) and labor protection (Art. 14.6), a clause establishing that when preparing and implementing measures aimed at environmental protection that may affect investment between the Parties, each Party shall take into account relevant

scientific and technical information and related international standards, guidelines, or recommendations (Art.13.7.1), and the commitment to promote investment in environmental goods and services (Art. 13.23).

Likewise, this treaty also recalls the Parties' commitments in MEAs, especially concerning climate change, protection of the ozone layer, and transboundary movements of hazardous wastes and their disposal, (Arts. 13.9, 13.10, 13.11 and 13.15), as well as with respect to labor rights in ILO Declarations (Art. 14.3).

Finally, the agreement also has provisions on the right to regulate (Art. 17.4) and Corporate Social Responsibility and Responsible Business Conduct (Art. 13.17), which include sustainable development.

3.4.4. Netherland's Model BIT (2019)

Netherlands investment treaty practice does not include references to either sustainable development or climate change.

However, the most recent Dutch model IIA (2019) includes several references to sustainable development. First, the text includes two mentions in the preamble:

Desiring to strengthen their traditional ties of friendship and to extend and intensify economic relations between them by creating conditions with a view to attract and promote responsible foreign investment of the Contracting Parties in their respective territories that contribute to sustainable economic development;

Reaffirming their commitment to sustainable development and to enhancing the contribution of international trade and investment to sustainable development;

Then, the model considers a provision to promote and facilitate investments that contribute to sustainable development:

Article 3. Favorable Conditions for Investment

*1. Each Contracting Party shall, within the framework of its laws and regulations and in accordance with its international obligations, **promote economic cooperation and encourage the creation of favorable conditions for responsible investment in its territory that contribute to sustainable economic development.***

2. Subject to its right to exercise powers conferred by its laws and regulations, each Contracting Party shall admit foreign investments.

3. The Contracting Parties affirm the G20 Guiding Principles for Global Investment Policymaking.

*4. The Contracting Parties strive to **strengthen the promotion and facilitation of investments that contribute to sustainable development**, including but not limited through regular consultations between investment promotion and facilitation agencies and the exchange of information regarding investment opportunities.*

Finally, the text follows with a whole section on sustainable development (Section 3), including provisions on corporate social responsibility and sustainable development (Art. 6). The latter refers to the promotion of investment that contributes to sustainable development, not lowering environmental or labor protection to promote investment, and not adopting and applying domestic laws contributing to the objective of sustainable development in a manner that would constitute unjustifiable discrimination or a disguised restriction on investment.

Article 6. Sustainable Development

1. *The Contracting Parties are committed to **promote the development of international investment in such a way as to contribute to the objective of sustainable development.***
2. *Each Contracting Party shall ensure that its investment laws and policies provide for and encourage **high levels of environmental and labor protection** and shall strive to continue to improve those laws and policies and their underlying levels of protection.*
3. *The Contracting Parties emphasize the important contribution by women to economic growth through their participation in economic activity, including in international investment. They acknowledge the importance of incorporating a gender perspective into the promotion of inclusive economic growth. This includes removing barriers to women's participation in the economy and the key role that gender-responsive policies play in achieving sustainable development. The Contracting Parties commit to promote equal opportunities and participation for women and men in the economy. Where beneficial, the Contracting Parties shall carry out cooperation activities to improve the participation of women in the economy, including in international investment.*
4. *The Contracting Parties recognize that it is **inappropriate to lower the levels of protection afforded by domestic environmental or labor laws in order to encourage investment.***
5. *A Contracting Party **shall not adopt and apply domestic laws contributing to the objective of sustainable development in a manner that would constitute unjustifiable discrimination or a disguised restriction on trade and investment.***
6. *Within the scope and application of this Agreement, the Contracting Parties reaffirm their obligations under the multilateral agreements in the field of environmental protection, labor standards and the protection of human rights to which they are party, such as the Paris Agreement, the fundamental ILO Conventions and the Universal Declaration of Human Rights. Furthermore, each Contracting Party shall continue to make sustained efforts towards ratifying the fundamental ILO Conventions that it has not yet ratified.*
7. *The Contracting Parties are committed to cooperate as appropriate on investment-related sustainable development matters of mutual interest in multilateral fora.*

3.4.5. Japan's Treaty Practice

Japanese IIAs do not commonly refer to sustainable development. The first one is Chile – Japan EPA (2007), which mentions it in the preamble and is implied in a non-derogation provision concerning environmental measures (Art. 87).

Subsequent agreements follow the same template with Brunei Darussalam (2007),⁸¹ Switzerland (2009), and India (2011)⁸² follow the same template of a preambular reference to sustainable development and a non-derogation provision on environmental measures (Art. 71).⁸³ The latest

⁸¹ The agreement with Brunei Darussalam also includes another reference to sustainable development, according to which each Party shall endeavor to minimize, in accordance with its applicable laws and regulations, in an economically efficient manner, harmful environmental impacts of all activities related to energy (Art. 93). However, this provision does not explicitly include investment activities.

⁸² The agreement with India also has a general provision on environmental protection (Art. 8), where Parties acknowledge its importance of and of sustainable development, recognizing the right of each Party to establish its own domestic environmental policies and priorities, and ensuring that its laws and regulations provide for adequate levels of environmental protection and continue to improve them. However, this provision does not explicitly include investment activities.

⁸³ See Brunei Darussalam – Japan EPA (2007), Preamble and Art. 71; Japan. – Switzerland EPA (2009), Preamble and Art. 101; India – Japan CEPA (2011); Preamble and Art. 99.

Japanese PTA including references to sustainable development is RCEP, which it mentions it in the preamble. It is also implied in a provision that establishes that non-discriminatory regulatory actions by a Party that are designed and applied to achieve the protection of the environment do not constitute expropriation (Annex 10.B.4).

The first Japanese BIT including references to sustainable development, is the treaty with Papua New Guinea BIT (2011), which has a preambular reference and a non-derogation provision concerning environmental, health, safety, and labor standards (Art. 22).

A BIT concluded with Colombia in the same year also includes references to sustainable development in the preamble and a non-derogation clause concerning environmental and labor standards (Art. 21.1), but also has novel environmental provisions. First, it includes exceptions based on environmental measures with respect to performance requirements (Art. 5.6), and general exceptions to protect the environment, human, animal, or plant life or health (Art. 15). Second, a clause recognizing each Party's right to regulate investment in a manner that is compatible with environmental law (Art. 21.2).

Article 21. Measures on Health, Safety, Environment and Labor

1. Each Contracting Party recognizes that it is inappropriate to encourage investment activities of investors of the other Contracting Party and of a non-Contracting Party by relaxing its domestic health, safety or environmental measures or by lowering its labor standards. Accordingly, each Contracting Party should not waive or otherwise derogate from such measures or standards as an encouragement for the establishment, acquisition or expansion in its Area of investments by investors of the other Contracting Party and of a non-Contracting Party.

2. Each Contracting Party may adopt, maintain or enforce any measure that it considers appropriate to ensure that investment activities in its Area are undertaken in a manner not incompatible with its environmental law, provided that such measure is consistent with this Agreement.

The latest Japanese BIT with such provisions was concluded with Argentina in 2018. Besides a preambular reference, sustainable development is implied in a non-derogation clause concerning environmental standards (Art. 22) and in a provision clarifying that non-discriminatory regulatory actions by a Contracting Party that are designed and applied to protect the environment, do not constitute indirect expropriations, except in rare circumstances (Art. 11.3(b)).

No Japanese BIT includes references to climate change. Only three Japanese PTAs with investment provisions mention climate change – the trade agreements with Switzerland, the EU, and the United Kingdom.

The Japan – Switzerland FTA (2009) only includes a reference to climate change in the preamble. In the EU – Japan EPA (2018), the parties recognize the importance of complying with and achieving the objectives of the UNFCCC and the Paris Agreement (Art. 16.4.4) and commit to striving to facilitate investment in goods and services of particular relevance to climate change mitigation, such as those related to sustainable renewable energy and energy-efficient goods and services. (Art. 16.5 (c)) Additionally, it considers cooperation commitments on investment-related aspects of environmental and labor policies, which includes climate change (Art. 16.12). The Japan – United Kingdom CEPA (2020) follows the template of the EU Agreement, recalling the importance of the UNFCCC and the Paris Agreement (Art. 16.5.4), includes a provision to facilitate investment in goods and services of particular relevance to climate change mitigation (Art. 16.5(c)), and considers cooperation commitments on investment-related aspects of environmental and labor policies, which includes climate change (Art. 16.12).

3.5. Sustainable Development in International Investment Law Jurisprudence

Whereas investment disputes directly concerning environmental issues are fairly common,⁸⁴ we find scarce references to labor rights⁸⁵ and sustainable development in ISDS decisions, and no publicly known cases have (yet) been brought based on any treaty provisions directly referring to “sustainable development.” There are also no publicly known ISDS cases dealing with climate change issues, although as it has been described before in this report (see supra 2), there are several concerns that investor-State arbitration cases could be brought to challenge the host State’s measures to combat climate change.

When sustainable development is mentioned, it is only an ancillary consideration when deciding the dispute at hand.

For example, in *Lone Pine Resources v Canada* (2022), the case was brought up out of the revocation by the Government of Quebec of the claimant's permits for petroleum and natural gas exploration in the Utica shale gas basin, under the St. Lawrence River. The award held that “taking into account the status of exploration activities under the St. Lawrence River, coupled with the public policy objective of the revocation,” the non-payment of compensation did not meet the “grossly unfair” or “inherently unjust” standard required for a violation of the fair and equitable treatment (FET) standard (NAFTA Art. 1105). The tribunal majority found that other considerations had played a key role in the government’s decision not to grant compensation. This included several factors, including “*the Québec Government’s intention to encourage the **sustainable development of natural resources** with a view to protect the environment of the St. Lawrence River.*”⁸⁶

The majority in *RENERGY v. Spain* – one of the many claims arising out of a series of energy reforms undertaken by the Spanish Government affecting the renewables sector – decided that “a diligent investor” in the wind and concentrated solar projects would, at the time the claimant invested, “*have expected that in case of a global and severe economic crisis and a steep incline of the tariff deficit, the respondent would adopt measures to safeguard the sustainability of the Spanish electricity system.*” However, the majority found that no diligent investor would have anticipated measures with such far-reaching effects as a dramatic and abrupt change in the entire remunerative system, which the tribunal considers to be disproportionate even in the face of the economic crisis prevailing at the time. Therefore, the majority tribunal found the disputed measures were a radical departure from the

⁸⁴ See among many others, Tarald Laudal Berge and Axel Berger (2021), “Do Investor-State Dispute Settlement Cases Influence Domestic Environmental Regulation? The Role of Respondent State Bureaucratic Capacity”, *Journal of International Dispute Settlement*, Volume 12, Issue 1, March 2021, Pages 1–41, <https://doi.org/10.1093/jnlids/idaa027>; and Caroline Herlofson (2022), *Suing the environment? : an analysis of Investor-State Dispute Settlements impact on achieving International Environmental Agreements*, <https://hdl.handle.net/11250/2995575>; and Matteo Fermeglia (2023), *Adjudicating Environmental Matters Before Investor-State Dispute Settlement Tribunals: A Question of Legitimacy*. In: Giovanni Antonelli, et al. *Environmental Law Before the Courts*. Springer, Cham. https://doi.org/10.1007/978-3-031-41527-2_13.

⁸⁵ See Ruben Zandvliet (2022). “International Investment Law and Labour”. In *Trade, Investment and Labour. Interactions in International Law*. Leiden Studies on the Frontiers of International Law, Volume: 9, Ch. 4, 142-221, Leiden, The Netherlands: Brill Nijhoff. https://doi.org/10.1163/9789004439863_005; and Valentina Cagnin (2017), “Investor-State Dispute Settlement (ISDS) from a Labour Law Perspective”, *European Labour Law Journal*, 8(3), 217-231. <https://doi.org/10.1177/2031952517716280>.

⁸⁶ *Lone Pine Resources Inc. v the Government of Canada*, ICSID Case No. UNCT/15/2, Final Award, 21 November 2022, §631.

regulatory framework at the time of the making of the investment and thus violated the Energy Charter Treaty (ECT) FET standard by thwarting the claimant's legitimate expectation of relative stability.⁸⁷

Sustainable development concerns could also serve as a basis for requesting participation in investor-State arbitration as a non-disputing party. For example, ICSID Arbitration Rule 67 stipulates that any person or entity that is not a party to the dispute may apply for permission to file a written submission in the proceeding. In determining whether to permit a non-disputing party submission, the Tribunal shall consider all relevant circumstances, including whether the non-disputing party has a "significant interest in the proceeding." Interpreting that provision, the tribunal in *Biwater Gauff v. Tanzania* Procedural Order noted that it is envisaged that the petitioners "**will address broad policy issues concerning sustainable development, environment, human rights and governmental policy.**"⁸⁸

⁸⁷ REENERGY S.à r.l. v. Kingdom of Spain, ICSID Case No. ARB/14/18, Award, 06 May 2022, §910-912.

⁸⁸ *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Procedural Order No. 5 on amicus curiae, 2 February 2007, §64.

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Annex A: Treaties analyzed in this legal report

- A. Comprehensive Economic and Trade Agreement (CETA)
- B. Other agreements concluded by the European Union (EU). We have considered as relevant EU investment treaty practice, all IIAs signed or concluded by the EU after CETA with investment chapters or sections, namely:
 - EU-Angola Sustainable Investment Facilitation Agreement (2022)⁸⁹
 - EU-Organisation of African, Caribbean, and Pacific States Partnership (OACPS) Agreement (2021)⁹⁰
 - China-EU Comprehensive Agreement on Investment (2021)⁹¹
 - EU-United Kingdom Trade and Cooperation Agreement (2020)
 - EU-Vietnam FTA and Investment Protection Agreement (2019)
 - EU-Singapore FTA and Investment Protection Agreement (2018)
 - EU-Japan Economic Partnership (2018)
 - Interim Trade Agreement Between the European Union and the Republic of Chile (2022)⁹²
 - EU-Chile Advanced Framework Agreement (2022)⁹³
 - Free Trade Agreement Between the European Union and New Zealand (2023)⁹⁴
 - EU Model BIT (2023)⁹⁵
- C. United States–Mexico–Canada Agreement (USMCA)
- D. Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)
- E. Canada’s Foreign Investment Promotion and Protection Agreement (FIPA) Model (2021)
- F. U.S. Model Bilateral Investment Treaty (2012)
- G. Netherlands Model Investment Agreement (2019),
- H. Japanese treaty practice. We have considered as relevant Japanese investment treaty practice, all IIAs signed or concluded by Japan in the past ten years, namely:

⁸⁹ Draft text made public on 18.11.2022, available at: <https://circabc.europa.eu/ui/group/09242a36-a438-40fd-a7af-fe32e36cbd0e/library/a17ccfe1-ce36-428f-bc7f-76bcb902c36a/details?download=true> (10.07.2023)

⁹⁰ Negotiated Agreement text initialled by EU OACPS chief negotiators (15.04.2021), made public on 15.04.2022, available at: https://international-partnerships.ec.europa.eu/system/files/2021-04/negotiated-agreement-text-initialled-by-eu-oacps-chief-negotiators-20210415_en.pdf (10.07.2023)

⁹¹ EU-China Agreement in principle, made public on 30 December 2020, available at: https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/china/eu-china-agreement/eu-china-agreement-principle_en (10.07.2023).

⁹² EU-Chile Interim Trade Agreement, concluded on 9 December 2022 (not signed yet), available at: https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/chile/eu-chile-agreement/text-agreement_en (10.07.2023).

⁹³ EU-Chile Advanced Framework Agreement, partially concluded on 9 December 2022 (not signed yet), available at: https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/chile/eu-chile-agreement/text-agreement_en (10.07.2023).

⁹⁴ EU-New Zealand: Text of the agreement, signed on 9 July 2023, available at: https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/new-zealand/eu-new-zealand-agreement/text-agreement_en (10.07.2023).

⁹⁵ Annotations to the Model Clauses for negotiation or re-negotiation of Member States’ Bilateral Investment Agreements with third countries, https://policy.trade.ec.europa.eu/help-exporters-and-importers/accessing-markets/investment_en

- Bahrain-Japan BIT (2022)
- Georgia-Japan BIT (2021)
- Regional Comprehensive Economic Partnership Agreement-RCEP (2020)
- Japan-United Kingdom CEPA (2020)
- Japan-Morocco BIT (2020)
- Argentina-Japan BIT (2018)
- Japan-Jordan BIT (2018)
- Japan-United Arab Emirates BIT (2018)
- Armenia-Japan BIT (2018)
- Israel-Japan BIT (2017)
- Japan-Kenya BIT (2016)
- Iran, Islamic Republic of-Japan BIT (2016)
- Trans-Pacific Partnership (TPP) (2016)
- Japan-Oman BIT (2015)
- Japan-Mongolia EPA (2015)
- Japan-Ukraine BIT (2015)
- Japan-Uruguay BIT (2015)
- Japan-Kazakhstan BIT (2014)
- Australia-Japan EPA (2014)
- Japan-Myanmar BIT (2013)
- Japan-Mozambique BIT (2013)
- Japan-Saudi Arabia BIT (2013)