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Conference

International investment agreements – balancing sustainable development and investment protection

<u>Investment protection and sustainable development: Concepts, issues and challenges</u>

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1. <u>Introductory remarks</u>

The subject matter of this Conference and of my address deals with a central issue of growing concern in the area of legal regulation of international investments, namely how to ensure through treaty making and treaty application that the promotion and protection of foreign (direct) investment be beneficial for the recipient host countries, especially developing countries, and indeed does not hamper their development efforts.

Seen form the point of view of those in charge of promoting development in "developing" host countries – the other side of the coin – the issue is how to ensure that those instruments effectively promote the contribution of foreign investment to the development goals of the recipient countries.

In this respect I would like to quote an eloquent statement that appears on the website of the IISD, the International Institute for Sustainable Development, an NGO based in Canada:

Without investment, sustainable development is impossible. Well planned, high quality foreign investment in developed and developing countries can help make current economic practices more sustainable. Inappropriate investment, however, can undermine communities and the environment, as well as domestic development strategies. IISD examines how the rules and institutions that govern international investment flows can be improved so as to help developing countries, in particular attract the sort of investment that promoted sustainable development."

This ambitious statement reflects a policy approach to the issue that call for the structuring of domestic institutions as well as of international policies that will maximise the contribution of foreign investment to the economic needs of developing economies. It goes thus much beyond a critical legal analysis can accomplish!

In fact, before going on into the subject matter a few basic points must be made. My exposé and analysis is a *legal* one: it is beyond my scope to address the economic policy issues concerning specific economic instruments (such as financial or tax incentive) that in a given situation or in respect to a given country may stimulate the flow of FDI in general or specifically according to certain policy choices. Thus, in order to promote investment in preferred sectors (such as mining or manufacturing), in certain part of the territory of that country, or in certain forms (such as joint-ventures), while possibly discouraging or prohibiting FDI which does not conform with those choices. Institutions such as UNCTAD and the World Bank have done great work in this area, studying the implication of such policies, which goes beyond my qualification.

Still this remark may be of some interest also for us lawyers pointing out to the limits that legal instruments and legal analysis inherently have when addressing policy issues. In this respect one could note that while the first term of my theme *"investment protection"* is essentially legal, the second term *"sustainable development"* is essentially economic or policy-based. I just put to the audience a reflection on the issue of "balancing" such diverse, somehow heterogeneous concepts: it seems to imply an equation where the greatest the protection, the lesser will be the development, and vice-versa, something that cannot be accepted *a priori*. The interrelation between *international* legal instruments of protection and the promotion of sustainable development in a host country should consider that such instruments, though potentially significant, have a limited role compared with more sophisticated domestic instruments and policies. Traditionally IIAs, especially BITs, have been rather restricted in scope and generic in content. As I will underline further on, they have not been conceived as policy instruments but rather as a framework of minimum standards expressing in general but at the same time generic terms a pro-investment liberalisation approach.

The time of a "one-size-fit-all" approach to drafting and concluding BITs seems to be by-gone, although not fully. This makes the issue set forth by the IISD more pressing, since more detailed investment agreements call for a more attentive "custom-made" approach to their drafting so to reflect better any development policy of the parties and in any case their right to structure such policies in the future. On the other hand the ability of policy makers to structure the normative framework for foreign investment so as to ensure its contribution to the attainment of a certain economic and social development objectives requires an approach that goes well beyond the legal sphere.

The next issue is to define the terms of the relationship: "sustainable development" on one side and "investment agreements" and the protection they afford to foreign investors on the other hand.

2. <u>The terms of the question: (a) "sustainable development"</u>

As well known the concept of "sustainable development" (SD) stems from the *Bruntland Commission* Report "Our Common Heritage" of 1987 where it was defined as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs" [1]. The Rio Declaration on Environment and Development of 1992 and the Agenda 21 stemming therefrom heavily endorsed and elaborated the concept as a road map for a global development strategy. As stated clearly in Principle 4 of the RIO Declaration the concept aims at incorporating environmental concerns and protection into purely economic development strategies. Today "SD is broadly understood as a concept that is characterized by (1) the close linkage between policy goals od economic and social development and environmental protection; (2) the qualification of environmental protection as an integral part of any developmental measure, and vice-versa; and (3) the long-term perspective of both political goals, that is the State's inter-generational responsibility"[2].
The subsequent evolution of thinking in the area of developmental policies should be also taken into account. Other concepts have been added to economic development, in terms of GNP growth and other purely economic quantitative indicators,. Not just economic development and environmental protection but also social development in its multi-facet aspects. Broader "welfare" indicators are now considered, as reflected in the Human Development Index (HDI), a composite statistic of life expectancy, education, and income

[1] World Commission on Environment and Development, UNGA Res 42/87, 11 December 1987
[2] See U. Beyerlin, *Sustainable development,* MPEPIL (2009), para. 9.

indices developed by the UNDP since the 1990s to which in 2010 inequality measurement has been added (including gender inequality). Growth in extractive industries and manufacturing, building of large infrastructures, which used to be synonymous of development, where often foreign technological and capital contribution, and thus investment was crucial, have given the way to other priorities and agendas. Thus the rate of poverty reduction has become the focus of the UN Global Compact, following the Millennium Summit (2000), and of the policies of the World Bank and other development agencies, not to speak of criteria which are difficult to measure in quantitative terms, such as good governance and the rule of law. From respect and promotion of core labour standard to empowerment of indigenous populations the list of what is included here is quite substantial. Democratic representative government should be high in this list, but I am sorry to note that this is not often the case"
Finally, financial stability has recently become a predominant concern, an element that had been totally neglected until then.

The more ambitious the objectives and multi-faced the policies meant to attain them, the more difficult it is to pinpoint a univocal meaning for SD. Although centralized industrial policies have been abandoned, as well as those based on import-substitution in view of their poor results and the social cost often associated with them, liberal market-based policies of the type advocated in the 1990s by the "Washington Consensus" have also often failed. It is clear that countries pursue their development strategies in differentiated ways, as to institutional set up, priorities and strategies or mix of policies. While the progress of individual countries towards certain quantitative objectives can be measured, it is almost impossible to select in abstract as SD friendly or adverse a specific policy adopted by any given country. The failure to extend further the approach of the Kyoto Protocol as to the protection of the environment, the lack of consensus on the causes, responsibilities and policies to fight global warming, just to give an example, speak by themself. Within SD the need to balance various objectives and policies is unavoidable, considering the resources available: the different policies as to the use of nuclear power as a source of energy to meet the growing needs is also telling.
It is not a surprise that the impact of FDI on economic growth is debated among qualified economists. Surely FDI may be an important source of capital, managerial and technological know-how, employment, and improve the competitive environment in local closed markets.[3]
Moreover, the adoption of liberal market based economic models and the opening-up of markets worldwide have rendered industrial centralized industrial policies out of fashion; the instruments available to most countries to promote a definite model of (sustainable) development are limited and of dubious effectiveness. On the other hand, direct investment spreads throughout the world propelled by market opportunities, cost efficiency (such as outsourcing due to high labour costs in industrialized countries which in turn move to high-tech service industries), different levels of productivity and of rates of return, which individual host countries can hardly influence. On the contrary, uncoordinated, unilateral regulatory efforts by them fuel regulatory arbitrage from companies, thanks to the shifting the location of their investments and the structure of their commercial supply arrangements. Finally the development of industrial capabilities also in poor economies has allowed the development of transnational supply chains of production, where long-term contractual arrangements replace direct investment.[4]

[3] See E.Borennsztein, J. De Gregorio, J. Lee, *How does Foreign Direct Investment Affect Economic Growth,* J. Int. Economics, 45, 1998, p 115-135; T.H. Moran, E.M. Graham, M. Blomstrom, (eds.) *Does Foreign Direct Investment Promote Development?*, IIE, Washington 2005; L. Resmini, *Il ruolo degli investimenti esteri*, Le nuove forme di sostegno allo sviluppo nella prospettiva del diritto internazionale (G. Venturini ed.), Giappichelli, Torino, 2009, p.67-80;
[4] The effect of this change can be seen looking at the disastrous collapse in Bangladesh on 13 May 2013 of a building hosting textile factories, the deadliest garment-factory accident in history, with a toll of more than 1000 clothing workers, mostly women, due to poor labour conditions and inexistent health, building and environmental controls, in patent breach of any SD policy. No foreign investor was directly and legally implicated although most of those

Finally, is SD a concept essentially applicable only to "developing countries", assuming that this concept still reflects reality and is of a conceptual usefulness? In this respect, one must note, speaking in the heart of the European Union, that there are doubts whether there is a single concept of SD applicable throughout countries with diverse levels of development. In Europe we rarely hear about this concept in the political and economic debate. Sustainability is rather declined with debt or pensions and linked to growth, stability, unemployment.

In our countries it is taken for granted that any (economic) development – and hence public and private decision making - must respect other priorities and values, including the respect of fundamental individual rights, both civil and social. Our complex political democratic systems, the elaborate formation of our administrative decisions, the multiple rights of recourse granted to those potentially affected to national and European courts for redress are meant to ensure this balance.

No surprise that there are conflicting views among legal authors as to the normative content of SD and its binding scope, although one can agree that, in general terms, SD has won international recognition as a broad legal principle, beyond being a policy principle.[5] But what about its specific content and effects on the interpretation and application of norms and obligations? The ICJ has been cautious in the *Gabcicovo-Nagymaros* decison as to the consequences that can be derived from the "concept of sustainable development" as a recognized basis for the "need to reconcile economic development with protection of the environment". The Court just concluded that "the parties should look afresh at the effects on the environment of the operation of the Gabcicovo plant"[6]

The most elaborate legal reflection is found in the ILA New Dehli Declaration of 2002 on "Principles of International Law relating to Sustainable Development" which lists seven principles, each articulated in more detailed sub-principles:

1. The duty of States to ensure sustainable use of natural resources
2. The principle of equity and eradication of poverty
3. The principle of common but differentiated responsibilities
4. The principle of the precautionary approach to human health, natural resources and ecosystems
5. The principle of public participation and access to information and justice
6. The principle of good governance
7. The principle of integration and interrelationship, in particular in relation to human rights and social, economic and environmental objectives.

The absence of some specific principle on the right to regulate foreign investment and the responsibility of investors strikes![7]

Against this background and evolution, it should not come as a surprise that when concerns are voiced as to the possible interference of legal commitments stemming out of IIAs, especially directly in favour of foreign investors, with the right and ability of host States to pursue policies aimed at promoting or safeguarding SD, this right and ability is often understood in the broadest sense, protecting the use of a State "policy space" for a almost indefinite range of reasons and ends. But whatever measures (notably changes of policy) a State considers appropriate in order to pursue SD, or intends to pursue under the cover of SD, it cannot ignore existing multilateral or bilateral international commitments. Also the respect of positive rights under

factories worked under exclusive contracts for international brands. The result was a voluntary "Accord on Factories and Buildings Safety in Bangladesh", signed by a number of foreign buyers (but refused by Walmart).

[5] See P. Sands, *Principles of International Environmental Law*, (2nd ed) CUP 2003, at 254.

[6] ICJ, *Gabcicovo-Nagymaros* case (Hungary-Slovakia), 1997, at para.140.

[7] See the text as an Appendix to the volume discussing the various issues raised (and beyond) *International Law and Sustainable Development, Principles and Practice*, N. Schrijver and F. Weiss (eds.), M. Nijhoff Leiden/Boston, 2004.

domestic law has to be considered, up to a certain point, when constitutional protection, human rights conventions or customary principles recognize them.

3. <u>The terms of the question: (b) "foreign investment [international] protection [and regulation"]</u>

Let me turn know to the second term namely "investment protection", which I limit to "international legal protection", thus under international instruments.

Two categories of instruments have to be considered here, self-standing treaties, essentially bilateral investment treaties (BITs), but also most recently regional investment treaties, and investment chapters of treaties covering also trade ("Partnership Agreements"), be they bilateral (the FTAs which the EU is currently negotiating with Canada, Singapore and the TTIP with the USA), or among several parties (NAFTA, recent ones in South-East Asia and the TTP).

Looking first at BITs, as the typical form – initiated by Germany at the end of the 1950s - , and as they have been traditionally framed and still mostly are, they are rather short and general: the provisions specify synthetically the coverage (definitions) and the substantive rights granted, without going into many details. The terms used must be interpreted in the light of the international customary concepts and/or national law. I would point out to the following features they present, which are relevant for our purpose here:

1. The stated *purpose* of these BITs is to promote and protect foreign (direct) investment, but their content, the object of their provisions that is the legal obligation they create, are general and specific levels / standards/duties of *protection* for the investments and investors who are nationals of the other party. Promotional provisions, such as incentives, including (conditioned) tax advantages by the host country are extraneous to the structure of such BITs (as of most other models as well): they are "static", they are not dynamic policy instrument meant to promote economic cooperation between the parties.[8]
2. As to *definitions*, investments are broadly defined, usually including existing investments, through a non-exclusive long list of any kind of assets that can represent an investment, made by investors (also broadly defined: natural and legal persons, private and public) of one party in the territory of the other party. Nationality is usually defined through formal links (such as place of incorporation), making the nationality of shareholders and the origin of the capital transferred immaterial, and thus allowing treaty-shopping.
3. The treaties are *reciprocal*; they contain *only obligations on the parties* not on the investors. This can be considered "reasonable" in such types of BITs, because investments made are generally subject, so-to-say in their daily operations, to the law of the host State, thus including any requirement and obligations laid down therein upon the investor and generally on the kind of business operations it pursues. The treaty provisions intervene only, as a guarantee, when those internal provisions and requirements fall below what the treaty requires, as a kind of "safety net". [9]
4. BITs do not usually include among the obligations listed the right to make an investment, that is "market access" (trade law terminology) or "pre-establishment" rights (investment law terminology). Those BITs that do include this right (the US approach) contain long "negative" lists, specific to each signatory, setting forth the sectors excluded
5. As to <u>substantive rights</u> granted one should distinguish:

[8] This is usually true also for the home country. However separate domestic investment support facilities (such as foreign investment public insurance) may be subject to the condition that a BIT exists in the host country of the investment concerned.

[9] See G. Sacerdoti, *Bilateral Treaties and Multilateral Instruments on Investment Protection*, RC vol. 269, 1997, pp. 255-460, at 368 ff.

a) *Contingent standards*, that is rights whose content depends on how the host State treats other similarly situated investors: MFM and National treatment.
b) *Absolute standards:* such as "fair and equitable treatment"(sometimes "in conformity with international law" or with "the minimum standard provided by international law"), "full protection and security". In (a) and (b) "standard" indicates that the content of the obligation is rather vague and that its application in a given situation requires an analysis of what is generally practiced and is considered lawful or due under different yardstick (customary international law, practice based on a comparative law evaluation, general principles of law).
c) Absolute rights: first of all the right, of *general application* to compensation (full, effective) for direct expropriation (transfer of property to public entities for public purposes), as well as for indirect takings / act equivalent to expropriation.
d) Absolute specific rights, which focus on the specific needs of carrying out meaningful foreign investments, such as the right to repatriate dividends, profits, royalties and fees, and the proceeds of divesting; the right to obtain certain permits and visa for key foreign personnel.

6. As to <u>procedural</u> rights (settlement of disputes) the key, innovative feature of the BITs has been of course the availability of direct arbitration by any aggrieved foreign investor covered by the treaty against the host State for breach of the investor's rights stemming from the BIT. Another key feature is that the institutional setting of the arbitration is such as to allow proceedings to take place and a binding decision to be issued, unimpeded by any obstruction of the host State, without need to exhaust previously its domestic remedies.

This has been the basic model which has obtained incredible success, in view of the hundreds of such BITs concluded irrespective of the actual or potential flow of investments between the signatories, their level of development, any complementary of their economies, geographical proximity, and political relations. The very existence of so many similar treaties has reduced their individual value as instruments to promote investment flows, rather rendering them an almost normal feature of the existing levelled playing field applicable to international investments in the global economy worldwide.

This success cannot be understood without considering two key factors, which after so many years are often forgotten: *first* that BITs are "static" and "light". At least on their face, they do not appear to entail substantive obligations that may really tie the hands to domestic political makers.[10] It must be stressed moreover that in case of breach the host State is liable to pay monetary compensation to the investor affected in accordance with the principles of State responsibility as determined in direct arbitration. By contrast, breach of WTO obligations in the area of trade entail no compensation for past wrongful damages but the more constraining obligation to withdraw the objectionable measure, and/or in any case to modify a domestic regulation found "as such" to be in breach of WTO provisions.

Well-run States recognize in theory and practice in their domestic system the rights listed in the BITs, mostly to both domestic and foreign investors irrespective of their nationality and origin. The small numbers of disputes for several decades, the very few brought against industrialized market economies (which are also those where the rule of law and non-discrimination is best observed) is evidence thereof. As to developing

[10] This can explain the lack of safeguard / exception clauses in BITs such as could be patterned after Art. XX GATT. The US model clause safeguarding "essential security interest" reflects rather the military concerns of a world power (cf. Art. XXI GATT) although it could and has been invoked in case of economic emergency, notably by Argentina under the BIT with the US.

countries with weak public institutions, adopting internationally recognized best-practices may improve and lock-in connected improvements in governance for the benefit also of their domestic enterprises.[11]

The *second* reason is that BITs were and are meant to supplement customary principles as to the protection of economic rights of foreigners that communist regimes' nationalizations and the promotion of the New International Economic Order by decolonized developing countries had badly shaken in the 1950s-60s. In addition, direct arbitration was mean to avoid the pitfalls of diplomatic protection, the politicization of investment disputes, the risk of resort to political pressure and even subversion by powerful nations against small countries for economic reasons. The World Bank origination of the ICSID Convention as an optional procedural framework in 1965 to allow such mechanism when freely chosen (be it in contracts, in domestic investment statutes and ultimately especially by home and host countries for any investment of their nationals covered by the treaty) certifies this element.

Things have in part changed because of several reasons.

First, a few industrialized countries (the US and Canada) have realized, in the light of the growing number of disputes brought by investors, that they have to view themselves also as host countries. They have accordingly moved to amend their models BIT in order to prevent interpretation by tribunals especially of the most flexible standards (fair and equitable and compensation for indirect expropriation) that would be more restrictive than under their domestic case law, or limit their ability to legislate in the general interest.[12]

In countries which are mostly the source of investment to other signatories and had negotiated on the basis of this assumption different positions have emerged as to the purpose of BITs in non-business circles. The possibility to pursue through them non-economic values in the other signatory, such as respect of core labour standards has been considered. On the other hand, the awareness has spread that the protection that BITs grant may interfere in both signatories with the pursue of non-economic values (such as the protection of the environment and health), subjecting new more restrictive regulation to the obligation to pay compensation. These concerns have surfaced in the European Parliament, when discussing the future investment treaty policy of the EU after Lisbon and have been expressed by US trade unions.[13]

This approach hints at more complex and lengthy BITs, where more detailed and numerous obligations have to be accurately evaluated beforehand as to their effects. Issues emerge concerning the mutual interaction of the various clauses, their effect on the regulatory powers of the parties and their effectiveness of protecting national investors abroad.

Secondly, especially in the context of investment chapters of bilateral or regional treaties establishment free trade areas or economic partnerships, investment provisions are meant to go beyond minimal, static protection. They are meant to stimulate mutual investment flows, just as is the case for trade and other forms of economic cooperation under the other chapters. The transformation of traditional "protection treaties" into a different species is however not easy, as negotiations currently under way show. This implies, first of all, granting the right of making investment, just as market access is provided to products and services, possibly in the form of progressive liberalization. As to domestic regulation, issues concerning investment in regulated sectors are more difficult to be tackled through harmonization of standards as is the case in respect of products.

[11] See A.T Guzman, *Why LDCs sign treaties that hurt them: explaining the popularity of BITs*, Virginia JIL 38 (1998) 639-688.

[12] See the well-known clause in the US 2004 and 2012 Model BIT stating that "except in rare circumstances" non-discriminatory regulatory action to protect legitimate public welfare objectives (health, safety, environment) do not constitute indirect expropriation.

[13] See A. De Luca, *Integrating non-trade objectives in the oncoming EU Investment Policy: what policy options for the EU?* CLEER Working Papers 2013/14; A. Perfetti, *Ensuring the consistency of the EU Investment Policy within the EU External Action: The relevance of non-trade values,* General Interests of Host States in International Investment Law (G. Sacerdoti Ed.), Cambridge Un. Press (forthcoming).

Protective clause (safeguards, exceptions) which are rarely found in traditional BITs become appropriate, such as Art. XX GATT-type clauses included in recent agreements in South-East Asia, to parallel similar clauses concerning trade.[14] Under these provisions the host State may exclude from coverage measures taken for certain public purposes or in certain sectors or circumstances; a caveat here is that these clauses have not been tested yet in respect to investments, and they might deprive existing investment from any protection in face of discriminatory measures, if not well calibrated.
Within FTA's further instruments are available to make the investment provisions more responsive to the specific development and other needs of the signatories. This is the case of the institutional setting normally provided therein to monitor the application of the agreement, such as mixed Commission, which can address and resolve issues at an early stage, and control (or even "rectify") the interpretation given to any provision by arbitral tribunals.[15]

Finally, direct arbitration has become an issue in view of the relatively high number of cases brought by investors under BITs. Host States, especially developing countries are faced with real challenges from an evolution they had not really anticipated (number of disputes to handle, costs, financial implications in case of loss, political reactions against what is perceived outside the business community as a preferential treatment for foreign investors that can opt-out from domestic jurisdiction, etc.). The number of decisions rendered brings to the forefront the inconsistency of interpretation of similar provisions by different tribunals, which adds an element of unpredictability for legislators and business. In the current setting this is inevitable, in view of the (intentional!) vagueness of many key terms and the entrusting of resolving individual disputes to hoc tribunals, composed of a variety of arbitrators chosen mostly by the parties themselves, not subject to an obligation to follow previous decisions, nor controlled by some appeal mechanism able to develop consistent case law.

On the other hand the availability of judicial remedies in the hand of investors is a key element of the protection that IIAs intend to provide to investors. Return to diplomatic protection or to State-to-State arbitration or a system of panels such as in the WTO, would subject the effectiveness of the substantive standards of protection of BITs to political choices and pressures. It would probably undermine their usefulness even in the face of blatant opportunistic and arbitrary action by host States authorities against foreign investors in respect of which in many countries recourse to local courts is ineffective.
There is definitely a conundrum here, as many commentators have pointed out, although in my opinion its seriousness is sometime over emphasized in academia, pro-bono NGO circles and some development agencies, considering that most BITs parties' authorities appear to take it much easier. No prompt and shared solution exists. Opting-out of BITs is a radical choice that is not appealing to most countries. Elimination of direct investors-State disputes settlement would undermine substantially investors protection and entangle again States in investment disputes. Replacement or amendments to existing BITs is of course the preferred avenue for States which consider their existing treaties inappropriate. This is or would be a slow and cumbersome process in view of the massive number of existing BITs and the diversity of views on the advisable changes. Also changes suggested to the current dispute settlement mechanism (a permanent tribunal, appeal, different selection methods of the arbitrators) do not command widespread support and are difficult to enact.

[14] See B. Legum and I. Petculescu, *GATT Art. XX and international investment law,* Improving International Investment Agreements (A de Mestral and C. Levesque eds.), Routledge 2013,p. 340-362.
[15] The well-known initiatives of the NAFTA tripartite Commission in respect of the interpretation of the NAFTA by arbitral tribunals (as to the "minimum" standard of international law, transparency and against the carrying-over to the investment chapter of principles found in other chapters) show a clear pro-host State approach / bias shared by the three countries, in favour of reducing the scope of their obligations towards investors, to the detriment of the latter protection.

Thus, working on the interpretation of existing texts, in the abstract and within specific disputes, while calibrating the drafting of new treaty texts, be they self-standing BITs or FTA's comprising investment and trade chapters, remains fundamental. But isn't the balancing / reconciliation of different texts, approaches, values and interests the daily task, indeed the challenge of us international lawyers, of diplomats, policy makers and officials of international organisations in the global multi-facet international society of our times?

In the subject matter dealt with here, the case law of both the European Court of Justice and the European Court of Human Rights in balancing according to proportionality criteria the pursue of public policies with the safeguard of property rights, including that of carrying out legitimate business activities, should be considered also beyond the member States of the EU and the Council of Europe.

4. <u>The international regulation (protection) of foreign investment and sustainable development: interference and support - Some final reflections</u>

Having been entrusted with making the opening address to this Conference my task is not to draw conclusions or make proposals, but rather to map the issues (as I have tried to make) and to point to a road-map.[16]

1. The balancing of investment protection and sustainable development does not imply the existence of a conflict in principle. It rather points to the need to reconcile possible areas of interference or friction in order to make the contribution of foreign investment supportive of the efforts of host developing countries to pursue sustainable development policies.[17]
2. International cooperation, multilateral, regional and bilateral instruments and provisions (such as within FTAs and other types of partnerships) appear essential in order to promote investments which conform to these objectives, something that traditional BITs are not meant to, nor capable of ensuring.
3. Protection provisions in BITs should not be viewed and interpreted in isolation but rather, in context, in the light of other instruments binding upon the signatories or to which they have broadly subscribed (such as relevant non-binding acts), as well "as any relevant rules of international law applicable in the relations between the parties" (Art. 31.3.c of the VCLT)
4. When it comes to reconciling the right of host States to regulate the economy in the pursue of general interests with the right of foreign investors to protection under an applicable BIT, principles found in the sources mentioned under (2) can be an appropriate yardstick, considering the object and purpose of the various instruments in a broad perspective, including resort to an evolutionary interpretation.
5. While "legitimate expectations" of foreign investors cannot ignore the competence and duty of States to resort "reasonably" to their regulatory powers, indemnification of losses suffered by foreign investors, when substantially affected in their operations or specifically singled out, must be anticipated by host States when planning substantial changes of policies, not just in the observance of their obligations under BITs but in conformity with a good-governance approach to the carrying out of their activity.

[16] For further reflection see A. Van Aaken and T.A. Lehmann, *Sustainable development and international investment law: a harmonious view from economists*, Prospects in International Investment Law and Policy (R. Echandi and P. Sauvé eds.), Cambridge 2013, p.317-339; M.W. Gehring and A. Kent, *Sustainable development and IIAs: from objective to practice*, Improving International Investment Agreements (A de Mestral and C. Levesque eds.), Routledge 2013, 284-302.

[17] See *ICC Guidelines for International Investment*, 2012, chapter I, Investment Policies.