Chapter 12

The Relationship between Foreign Direct Investment, the Right to Development and the UN Sustainable Development Goals

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Learning Objectives:

- To gain knowledge about the relationship between foreign direct investment, the right to development and sustainable development.
- To understand the mechanisms through which international economic law and dispute settlement can affect the amount and characteristics of foreign direct investment.
- To achieve understanding of how the right to development and sustainable development goals can be achieved through reforms of international investment law and domestic investment legislation

1. Introduction

How can foreign direct investment (FDI) contribute to fulfil the right to development (RtD) and realize some of the UN Sustainable Development Goals (SDGs)? We shall consider this question by focusing on the role of international law and intergovernmental institutions that deal with three aspects of FDI: the transboundary flows of investment, protection of foreign investors and their investment once established in another country, and the responsibility of foreign investors for harm caused by their investment. These three aspects of FDI are in general regulated by separate international rules and inter-state cooperation is carried out through different international institutions.

The WTO Agreement contains important multilateral rules that directly concern *transboundary flows of FDI*. These include rules on trade in services, in particular commitments concerning commercial presence in the context of market access and national treatment, and trade in goods under the Agreement on Trade-Related Investment Measures. In recent years, regional and bilateral free trade agreements as well as some bilateral and multilateral investment agreements have included provisions with the purpose of facilitating flows of FDI among treaty parties. Rules

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* Professor, Faculty of Law, Department of Public and International Law, University of Oslo. I am very grateful to the United Nations University for Peace for hosting me while conducting research for this chapter, Professor Mihir Kanade for inspiring discussions, and Maxim Usynin for comments on a draft. Research for this chapter has been funded by the Norwegian Research Council through project no. 276009 - Responses to the legitimacy crisis of international investment law.

that open countries to inflow of FDI are a fairly new post-colonial phenomenon in international law, going back three to four decades. On a slightly longer time-scale, the World Bank has played an operational role in terms of facilitating FDI through the promotion of investment legislation and funding of specific projects. How these rules and institutions relate to the RtD and SDGs shall be considered in section 3.

The main international obligations regarding *protection of FDI* are set out in bilateral and a few multilateral treaties. In recent years, it has become increasingly common for countries to integrate such protection rules in broader free trade and economic cooperation agreements. The extent to which these agreements offer effective protection of investors or investment depends extensively on investors' ability to bring cases to international tribunals in order to achieve economic compensation for treaty violation. Such arbitration proceedings are most often hosted by inter-state arbitration institutions, in particular the International Center for the Settlement of Investment Disputes (ICSID) and the Permanent Court of Arbitration, or non-governmental institutions, in particular the International Chamber of Commerce and the Stockholm Chamber of Commerce. How these rules and institutions relate to the RtD and SDGs shall be considered in section 4.

Mostly, *responsibility and liability of foreign investors* is implemented through decisions by national courts and commercial arbitration tribunals based on domestic legislation of host and home countries or on contracts. There are few rules and institutions in international law concerned with the responsibility and liability of foreign investors. In section 5, we shall discuss the role of international law and institutions in defining and harmonizing the criminal and civil responsibility and liability of foreign investors as a means to fulfil the RtD and achieve SDGs.

Before addressing these three topics, we need to explore the concept of FDI and the links between FDI, RtD and sustainable development more generally in section 2.

2. The relationship between FDI and sustainable development

At the core of the FDI concept are investment projects that involve all of the following four elements: contributions of assets or money originating from abroad, a certain duration of the project, an element of risk, and contribution to economic development in the host country.[1] Whether and to what extent the four elements must be fulfilled in order for an investment to qualify as FDI is context dependent and remains contested in some situations. One example is the distinction that is frequently drawn between "direct" investment and "portfolio" investment. Short term portfolio investment would not qualify according to the four criteria. Nevertheless, it is clear that such investment is covered by many treaties that protect FDI (see section 4).

[1] The four criteria were famously cornered by the tribunal in Salini Costruttori S.p.A. & Italstrade S.p.A. v. Kingdom of Morocco, ICSID Case No. ARB/00/4, Decision on Jurisdiction (21 July 2001) paras. 52 and 57, and have subsequently been subject to much attention in negotiations, international institutions and international judicial decisions.

FDI may cover investment from a broad range of investors, including public investors and inter-governmental institutions, e.g. state-owned enterprises, sovereign wealth funds, and international financial institutions. We shall focus on FDI originating from private parties – individuals and corporations – as well as from state-owned enterprises and sovereign wealth funds. Financial contributions to fund projects where public authorities or private entities of the host country become or are intended to become owners are not considered. The same applies to official development assistance or other forms of aid.[2] We will therefore not consider projects funded through loans to governments from multilateral financial institutions such as the World Bank, as well as issues concerning public debt resulting from such investment projects.

There is a long-standing claim and ambition in international investment law that treaties and customary law contribute to economic development in countries hosting investment. However, this claim remains controversial and is hotly debated among academics.[3] Our focus shall be on the concept of sustainable development, including intergenerational perspectives and social, economic and environmental development.[4]

The link between FDI and sustainable development has been subject to significant attention since the Brundtland Commission launched the concept in 1987.[5] During the period after the "Washington Consensus", which emerged towards the end of the 1980s, it was argued that a basic distinction could be drawn between (1) FDI in manufacturing and assembly, which would most likely be beneficial; and (2) FDI in natural resources and infrastructure, which would most likely be harmful.[6] In recent years, consensus seems to emerge that the relationship between FDI and sustainable development is more complex and context dependent. UNCTAD has taken the lead in establishing principles and guidelines for countries, inter-governmental organizations and stakeholders. A separate chapter on an "investment policy framework for sustainable development" was included in its 2012 World Investment Report (chapter IV), and further elaborated in UNCTAD's "Investment Policy Framework for Sustainable Development" (2015). Of particular

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[2] See http://www.oecd.org/dac/stats/type-aid.htm.

[3] See inter alia, R Echandi, Be Careful with What You Wish: Saving Developing Countries from Development and the Risk of Overlooking the Importance of a Multilateral Rule-Based System on Investment in the Twenty-First Century, in Bungenberg et al (eds) European Yearbook of International Economic Law, vol. 7 (2016) pp. 233-271. For the opposing view, see M Sornarajah: International Investment Law as Development Law: The Obsolescence of a Fraudulent System, in ibid. pp. 209-231.

[4] The adoption of the Rio Declaration on Environment and Development and Agenda 21 by the United Nations Conference on Environment and Development (UNCED) in Rio de Janeiro, 3-14 June 1992 forms a basic starting point, which has since been supplemented by the eight Millennium Development Goals (2000-2015) and seventeen Sustainable Development Goals (2015-2030).

[5] The World Commission on Environment and Development, Our Common Future (OUP 1987) pp. 85-87. The Commission paid little attention to the role of FDI beyond references to the objective of ensuring responsibility for FDI of transnational corporations. M Gehring & A Newcombe, An Introduction to Sustainable Development in World Investment Law, in M-C Cordonier Segger, M Gehring & A Newcombe (eds) Sustainable Development in Investment Law (Wolters Kluwer 2011) pp. 3-6 provides an overview of the follow-up in relevant international policy documents.

[6] See e.g., TH Moran, Harnessing Foreign Direct Investment for Development: Policies for Developed and Developing Countries (Brookings Institution Press 2006).

interest are the ten Core Principles for Investment Policy-Making elaborated by the UNCTAD Secretariat. Their starting point is the overarching objective to promote investment for inclusive growth and sustainable development. While these principles build on UNCTAD's decades of experience with providing investment policy advise to developing countries, they have not been endorsed by countries.

In 2015, as the deadline for fulfilling the Millennium Development Goals (MDGs) expired, the United Nations General Assembly adopted SDGs to be achieved by 2030.[7] While the MDGs did not specifically address FDI,[8] some of the targets of the SDGs are highly relevant. Target 17.5 calls for the adoption and implementation of investment promotion regimes for least developed countries (LDCs). Moreover, other targets concern the use of foreign investment as a means to end poverty and hunger, achieve food security and improved nutrition, promote sustainable agriculture, ensure access to affordable, reliable, sustainable and modern energy, and reduce inequality within and among countries.[9] Among the countries identified as being of particular concern, are "least developed countries, African countries, small island developing States and landlocked developing countries."[10] Particular attention should be paid also to "countries in situations of conflict and post-conflict countries."[11] While the Declaration mentions the potential role of multinational enterprises,[12] it generally pays very limited attention to their potential to contribute FDI. There is some mention of the role of FDI in indicators established to monitor the achievement of the SDGs.[13] In essence, the targets and indicators emphasize the positive role that FDI may play, and do not address the potential need to limit negative effects of FDI.

Of particular relevance to the implementation of SDGs, the Third International Conference on Financing for Development adopted the Addis Ababa Action Agenda which was subsequently endorsed by the UN General Assembly.[14] The Agenda points out important challenges regarding FDI: "Foreign direct investment is concentrated in a few sectors in many developing countries and often bypasses countries most in need, and international capital flows are often short-term oriented." It moves on to make clear that foreign investors' host and home countries as well as the Multilateral Investment Guarantee Agency have important tasks in ensuring that FDI contributes positively to sustainable development in a broader range of developing countries.[15]

The Declaration on the Right to Development addresses some issues of relevance to FDI. It underlines the right of peoples to exercise "full sovereignty over all their natural wealth and

[7] UNGA resolution A/RES/70/1, 25 September 2015 (without a vote). These goals build on the Millennium Development Goals which were to be reached by 2015.

[8] See Millennium Development Goal (MDG) 8 and the associated targets. None of the MDG indicators referred to FDI, see http://mdgs.un.org/unsd/mdg/Host.aspx?Content=Indicators/OfficialList.htm.

[9] UNGA resolution A/RES/70/1, targets 1.a, 1.b, 2.a, 7.a, 7.b, 10.b, and 17.3.

[10] Ibid. goal 10, para. 10.b.

[11] Ibid. para. 22.

[12] Ibid. paras. 41, 67.

[13] See indicators 7.b.1, 10.b.1, 17.3.1, and 17.5.1.

[14] UNGA resolution A/RES/69/313, 27 July 2015 (without a vote).

[15] Ibid paras. 35 and 45-46.

resources" (art. 1.2) and establishes that states shall ensure "equality of opportunity for all in their access to basic resources, education, health services, food, housing, employment and the fair distribution of income" (art. 8.2).[16] These are normative expectations regarding states' regulation of the activities of foreign investors, and set a framework for foreign investors' legitimate expectations. Recent initiatives to elaborate approaches to the RtD also contain statements regarding the relationship to FDI. In 2010, the High-Level Task Force on the Implementation of the Right to Development set out criteria and indicators to implement the RtD. These emphasize the need to secure stability of investment in order to reduce the risks of domestic financial crises, to ensure that trade rules regarding performance requirements and protection of intellectual property rights do not prevent developing countries from enjoying the benefits of science and technology, and to provide for fair sharing of the burdens of development by compensating for negative impacts of development investments and policies.[17] These three elements are of particular interest to the topics discussed in this chapter. However, the criteria and indicators exposed significant disagreement among states when considered by the Working Group on the Right to Development. The Working Group has so far (including its 20th session) been unable to conclude the process to revise the criteria.[18] There is disagreement regarding the status of the criteria, the relative roles of states, international institutions and private actors in taking measures to realize the RtD, and the substantive content of the criteria, including the elements mentioned above. An alternative approach to the challenge of progressing in the implementation of the RtD was launched in September 2018; a divided Human Rights Council decided to request the Working Group to "commence the discussion to elaborate a draft legally binding instrument on the right to development through a collaborative process of engagement, including on the content and scope of the future instrument."[19]

The evolving consensus among countries on goals for (sustainable) development stands in contrast to the significant disagreement among countries on how to approach the RtD. The diverging approach to issues concerning FDI may possibly be one explanatory factor for why progressing with the RtD has divided countries while the MDGs and SDGs have gathered consensus. In light

[16] UNGA resolution A/RES/41/128, 4 December 1986 (vote: 148 in favour, 1 against, 8 abstentions).

[17] See Report of the high-level task force on the implementation of the right to development on its sixth session, 8 March 2010, doc. A/HRC/15/WG.2/TF/2/Add.2, pp. 8-13, in particular criteria 1(b), 1(g) and 3(b). Relevant documents from the task force are available at https://www.ohchr.org/EN/Issues/Development/Pages/HighLevelTaskForce.aspx.

[18] The issue was a main issue on the agenda of the Working Group during its annual sessions since 2010, see annual reports available at: https://www.ohchr.org/EN/Issues/Development/Pages/WGRightToDevelopment.aspx. The stalemate of these discussions are in stark contrast to the work on indicators for SDG targets, which has been endorsed by the UNGA resolution A/RES/71/313, 6 July 2017 (without a vote) and is carried out under the auspices of the UN Statistical Commission, see https://unstats.un.org/sdgs/iaeg-sdgs/.

[19] Human Rights Council resolution 39/9, 27 September 2018 (vote: 30 in favour {Afghanistan, Angola, Brazil, Burundi, Chile, China, Côte d'Ivoire, Cuba, D.R. Congo, Ecuador, Egypt, Ethiopia, Iraq, Kenya, Kyrgyzstan, Mongolia, Nepal, Nigeria, Pakistan, Peru, Philippines, Qatar, Rwanda, Saudi Arabia, Senegal, South Africa, Togo, Tunisia, United Arab Emirates, Venezuela}. 12 against {Australia, Belgium, Croatia, Georgia, Germany, Hungary, Slovakia, Slovenia, Spain, Switzerland, Ukraine, United Kingdom}, 5 abstentions [Iceland, Japan, Mexico, Panama, Republic of Korea}).

of the lack of consensus among countries on how to proceed with criteria for the RtD, countries are likely to have diverging opinions on UNCTAD's Core Principles for Investment Policy-Making. Further clarification of the relationship between rules and institutions involved in the rights and duties of foreign investors may clarify the contexts in which the relationship between the SDGs, the RtD and FDI is synergistic or conflictual.

3. Rules and institutions associated with the flow of FDI

3.1 Promotion of FDI – the relative roles of developing and developed countries

According to SDG target 17.5, countries should "adopt and implement investment promotion regimes for least developed countries." The indicator for this target is the number of countries that have adopted investment promotion regimes, and the role of following up the target has been assigned to UNCTAD.[20] In its 2014 report on investment in SDGs, UNCTAD estimated that given the current level of investment in SDG-relevant sectors, "developing countries alone face an annual gap of $2.5 trillion" and that the "role of private sector investment will be indispensable" to fill the gap.[21] However, rather than focusing on the extent to which developed countries promote investment into developing countries' SDG-relevant sectors, UNCTAD has focused on the extent to which LDCs establish mechanisms to attract FDI. For example, in 2016 UNCTAD noted that 81 per cent of LDCs had established an investment facilitation agency.[22] Moreover, when we look closer at the specific SDG targets associated with SDG-relevant sectors, we find that their focus is on official development assistance and that almost no attention is paid to the role of FDI.[23]

The approaches chosen when implementing the SDGs illustrate a significant dilemma regarding investment in SDG-relevant sectors. On the one hand, developing countries in general and LDCs in particular have very significant funding gaps in these sectors, and FDI is sorely needed to fill the gaps. On the other hand, most SDG-relevant sectors are sensitive in the sense that public authorities need to ensure fair distribution of benefits among their population groups. Consequently, public authorities need to retain significant flexibility to adopt relevant policy measures within such sectors. The dilemma occurs as a result of placing the task of promoting FDI into these sectors solely with host countries, i.e. LDCs and developing countries. Due to lack of funding, the main way in which these countries can attract such FDI is by offering favourable conditions to the investors, including high return on the investment and low political risk. The

[20] See Work Plan for Tier III Indicators, https://unstats.un.org/sdgs/tierIII-indicators/ and https://unstats.un.org/sdgs/tierIII-indicators/files/Tier3-17-05-01.pdf.
[21] UNCTAD, World Investment Report 2014. Investing in the SDGs: An Action Plan, 2014, p. xi.
[22] See UNCTAD, Development and Globalization: Facts and Figures, 2016, pp. 165-166. UNCTAD identifies "four broad categories: investment facilitation; 'investment incentives'; special economic zones (SEZ) and other."
[23] See UNGA resolution A/RES/71/313, indicators 2.a.2, 3.b.2, 4.b.1, 6.a.1, 9.a.1, 10.b.1, 15.a.1, 15.b.1, 17.2.1, and 17.3.1.

latter, which can be achieved through investment treaties and legislation,[24] limits public authorities' ability to take policy measures if they find that benefits are not achieved or unfairly distributed.[25]

The right to self-determination of states and peoples has been a corner-stone of modern international law.[26] The sovereignty of states over natural resources and SDG-relevant infrastructure and services is a key component of this right.[27] UNCTAD's Core Principles for Investment Policy-Making are of interest in this context.[28] They underline that:

- Host countries have "the sovereign right to establish entry … conditions for foreign investment, subject to international commitments, in the interest of the public good and to minimize potential negative effects" (principle 5),
- "[I]nvestment promotion and facilitation should be aligned with sustainable development goals and designed to minimize the risk of harmful competition for investment" (principle 8), and
- "The international community should cooperate to address shared investment-for-development policy challenges, particularly in least developed countries" (principle 10).

But, at the same time, they state that:

- "In line with each country's development strategy, investment policy should establish open, stable and predictable entry conditions for investment" (principle 6), and
- "Collective efforts should also be made to avoid investment protectionism" (principle 10).

In sum, while underlining the right and duty of developing countries to apply policy measures to investment, the general framework for promoting FDI into SDG-relevant sectors relies heavily on limiting developing countries' policy space.[29] Countries can choose among a broad range of

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[24] See, e.g., T Betz and A Kerner, The influence of interest: Real US interest rates and bilateral investment treaties, 11(4) Review of International Organizations (2016) pp. 419-448.

[25] The trade-off between international commitments and loss of policy space was acknowledged in UNGA resolution A/65/RES/1, 22 September 2010 (without a vote), para. 37. On the evolving view on the benefits of such commitments in UNGA resolutions, see HM Haugen, Trade and investment agreements. What role for economic, social, and cultural rights in international economic law? In E Riedel, G Giacca and C Golay (eds.), Economic, Social, and Cultural Rights in International Law (OUP 2014) pp. 234-236.

[26] See, e.g., articles 1.2, 2.1 and 55 of the UN Charter. See also N Schrijver, Self-determination of peoples and sovereignty over natural wealth and resources, in Office for the High Commissioner for Human Rights, Realizing the Right to Development: Essays in Commemoration of 25 Years of the United Nations Declaration on the Right to Development, 2013, pp. 95-102.

[27] See articles 1 of the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights, UNGA resolutions 1803(XVII), Permanent sovereignty over natural resources, 14 December 1962 (vote: 87 in favour, 2 against, 12 abstentions) and 3281(XXIX), Charter of Economic Rights and Duties of States, 12 December 1974 (vote: 115 in favour, 6 against, 10 abstentions), and principle 2 of the Rio Declaration, endorsed in UNGA resolution A/RES/47/190, 22 December 1992 (without a vote).

[28] UNCTAD, Investment Policy Framework for Sustainable Development, 2015, pp. 27 ff.

[29] For a thorough discussion of policy space and associated concepts and their relationship to the RtD, see M Kanade, The Multilateral Trading System and Human Rights: A Governance Space Theory on Linkages, Routledge, 2018. On such issues as related to international investment law, see T Broude, YZ Haftel and A Thompson, The Trans-Pacific Partnership and regulatory space: A comparison of treaty texts, 20(2) Journal of International Economic Law (2017),

strategies to attract FDI, including regulatory measures, economic incentives and institutional reforms. Regulatory measures differ in terms of their characteristics (treaties, legislation, contracts, concessions and insurance), and typically vary according to three levels of scope of application:

1. Measures of general applicability will essentially include treaties, generally applicable domestic investment legislation and standard contracts,
2. Measures focusing on key sectors for development will essentially include sector specific international commitments, investment laws, standard contracts and concessions, and
3. Measures targeting specific investors will essentially include individual contracts, concessions and insurance.

While contracts, concessions and insurance are very important means to promote FDI into developing countries, there is no room for dealing with such instruments here.[30] In the following, we shall study the role of treaties and national legislation. Among countries, we shall focus in on the situation of countries with the most significant development needs – the LDCs. We shall first explore the extent to which two distinct international law regimes, the WTO and international investment agreements (IIAs), limit developing countries' policy space. Thereafter, we shall provide a brief discussion of the corresponding effects of the World Bank's initiatives to promote investment legislation in developing countries.

3.2 The WTO and flows of FDI

There are multiple links between FDI and trade in goods and services. The most direct link is where FDI is a condition for trade to occur. In many service sectors, delivery is to varying degrees dependent on some form of commercial presence in the importing country. This includes services in SDG-relevant sectors such as health, education, water and sanitation, energy, and construction and engineering. The general trend does, however indicate that more and more services can be provided across borders with very limited dependence on such presence.

Most of the LDCs (36 of 47) are members of the WTO. The extent to which these have undertaken commitments in SDG-relevant services sectors is relatively low and varies significantly (see table 1). Some of these LDCs have committed to provide market access and national treatment for commercial presence in these sectors (see articles XVI and XVII of GATS). A significant majority of these have accepted broad commitments, i.e. not listed limitations in their schedules of commitment, for example in terms of access to public funding or share of foreign ownership. Afghanistan, Cambodia and Laos are examples of LDCs with extensive commitments. The

pp. 397-402, and T Broude, YZ Haftel and A Thompson, Who cares about regulatory space in BITs? A comparative international approach, in A Roberts et al. (eds.), Comparative international law (OUP 2018), pp. 535-540.

[30] Studies of such practices are generally done on a country-by-country basis by inter-governmental institutions (e.g. UNCTAD and the World Bank) and non-governmental institutions (e.g. the Colombia Center for Sustainable Investment).

commitments made by LDCs mean that they have opened the sectors to FDI and limited their ability to take policy measures.

Table 1: LDCs – Commercial presence commitments in selected SDG-relevant services sectors[31]

Main services sector	Sub-sector	No. of LDCs w/commitments	No. of LDCs w/ limitations
Health services	Hospital services	12	4
	Other health services	6	1
Education services	Primary education	6	2
	Secondary education	5	2
	Higher education	9	4
Environmental services	Sanitation and similar services	12	2
	Sewage services	11	2
Business services	Energy distribution	3	1
Construction and engineering	Buildings	13	1
	Civil engineering	14	2

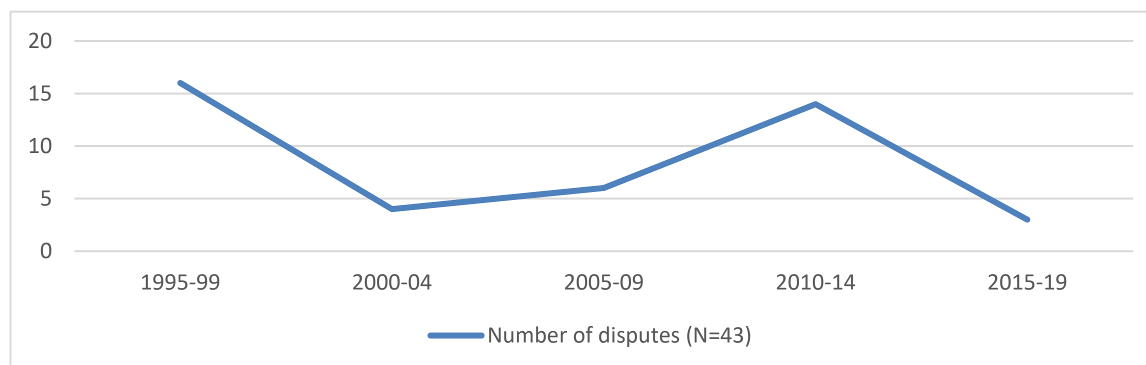
In the field of trade in goods, the most significant rules in terms of investment can be found in the Agreement on Trade-Related Investment Measures (TRIMs). Such measures are frequently referred to as "performance requirements" or "local content requirements", and have to a significant degree been used by countries as part of their development strategies.[32] Article 2 of the Agreement prohibits the use of measures as a basis for quantitative restrictions on imports and discrimination between domestic and foreign products. The annex to the Agreement contains an illustrative list of measures that are unlawful, including requirements that an enterprise buys "products of domestic origin or from any domestic source" and restrictions on an enterprise's use of imported products. As an acknowledgement that developing countries might need to resort to such measures as part of their development strategies, art. 4 of the Agreement allows such members to "deviate temporarily" from art. 2. Moreover, art. 5 provides for a flexible transition period for developing and least developed members.

One proxy for the effectiveness and impact of the TRIMS Agreement is the extent to which countries bring cases to the WTO Dispute Settlement Mechanism in which they rely on the Agreement. Less than five per cent of the cases formally registered with the WTO DSM mention the Agreement, and the number of cases has varied significantly, and might seem to follow a downward trend (see figure 1). Consequently, we may question whether the TRIMS Agreement so far in practice has represented any significant restriction on developing countries' policy space or is likely to do so in the future.

[31] Data gathered from the WTO Services Database, http://i-tip.wto.org/services/Search.aspx.

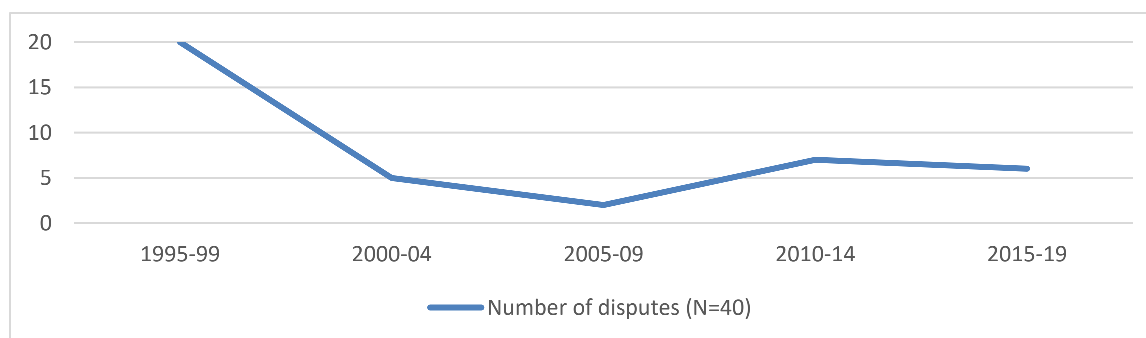
[32] The Columbia Center for Sustainable Investment has conducted a survey of the local content frameworks of a number of countries within the mining and petroleum sectors, the results of which is made available on a country-by-country basis, see http://ccsi.columbia.edu/work/projects/local-content-laws-contractual-provisions/. LDCs that have been surveyed include Angola, Tanzania, Uganda and Zambia.

Figure 1: Number of cases invoking provisions of the TRIMS Agreement[33]



Finally, the WTO has become a significant factor to consider in the context of developing countries' access to technology and know-how, a topic addressed by SDG targets 17.6 to 17.8. In particular, the Agreement on Trade-Related Intellectual Property Rights (TRIPS) contains detailed minimum requirements concerning protection of patents (articles 27-34). The Agreement acknowledges the need to take measures to "protect the public interest in sectors of vital importance to their socio-economic and technological development" and to prevent the abuse of intellectual property rights in ways that "adversely affect the international transfer of technology", but it states that such measures have to be in compliance with the requirements of the Agreement (art. 8). The initial flexibilities admitted to developing countries have expired (art. 65). Making FDI conditional on transfer of technology and providing local producers with opportunities to learn from and copy foreign investors have traditionally played important roles in countries' development strategies. However, while the early years of the WTO saw a large number of disputes invoking the TRIPS Agreement, the number of such disputes seem to have stabilized on a low number (figure 2), and remain at less than five per cent of the cases brought to the WTO DSM. This indicates that restrictions on developing countries' policy space flowing from the TRIPS Agreement has been limited in practice.

Figure 2: Number of cases invoking provisions of the TRIPS Agreement[34]



[33] https://www.wto.org/english/tratop_e/dispu_e/dispu_agreements_index_e.htm?id=A25#selected_agreement.
[34] https://www.wto.org/english/tratop_e/dispu_e/dispu_agreements_index_e.htm?id=A26#selected_agreement.

Under the TRIPS Agreement, developing countries' access to medicines has been particularly controversial. At the Ministerial Conference in Doha in 2001, WTO members agreed that the Agreement "does not and should not prevent members from taking measures to protect public health." Of particular importance are statements regarding the interpretation of articles 31 (compulsory licenses) and 73 (security exceptions). The Declaration states that members have "the right to grant compulsory licences and the freedom to determine the grounds upon which such licences are granted" and "the right to determine what constitutes a national emergency or other circumstances of extreme urgency, it being understood that public health crises … can represent a national emergency or other circumstances of extreme urgency."[35] However, this decision did not address the problem that many developing countries would be unable to benefit from compulsory licenses and emergency measures due to lack of technological ability. Therefore, in 2003 the WTO General Council adopted a waiver that allowed countries to export pharmaceutical products that had been subject to compulsory licensing.[36] Continuing discussions of this issue resulted in the addition to the TRIPS Agreement of a provision allowing the exportation of pharmaceutical products that have been subject to compulsory licensing to LDCs and other countries having notified the WTO (art. 31 bis and annex). The amendment was adopted in 2005, and did finally enter into force in 2017. It is remarkable that developed country WTO members were the first to accept the amendment and that the majority of WTO's LDC members had still not accepted it by the end of 2018.[37] Moreover, fifteen years after the adoption of the waiver, there had been only one case in which the new export opportunity had been notified – a case involving export of AIDS medicines from Canada to Rwanda.[38] The carefully circumscribed mechanism established by the waiver and made permanent through the TRIPS amendment therefore seems to be an example of extensive diplomatic efforts and negotiations resulting in reforms of very limited value to the most vulnerable countries and populations.

Other issues regarding access to and transfer of technology have received much less attention under the TRIPS Agreement. According to art. 66.2, developed countries undertake to "provide incentives to enterprises and institutions in their territories for the purpose of promoting and encouraging technology transfer to least-developed country Members in order to enable them to create a sound and viable technological base." As a follow-up to this provision, the Council for TRIPS decided to require developed countries to report annually on their implementation of art. 66.2.[39] However, also this initiative seems to have been unsuccessful from the perspective of LDCs.

[35] WTO Ministerial Council, Doha, 20 November 2001, Declaration on the TRIPS agreement and public health, WTO doc. WT/MIN(01)/DEC/2, paras. 4 and 5.
[36] Ibid. para. 6 and WTO doc. WT/L/540 and Corr.1.
[37] For a listing of acceptance, see https://www.wto.org/english/tratop_e/trips_e/amendment_e.htm. By the end of 2018, only 17 of 36 LDC WTO members had accepted the amendment.
[38] See WTO doc. IP/N/9/RWA/1 and WTO, WIPO and WHO, Promoting Access to Medical Technologies and Innovation: Intersections between public health, intellectual property and trade, 2012, pp. 177-180.
[39] See WTO doc. IP/C/28 of 20 February 2003.

As justification for a proposal to revisit the effectiveness of art. 66.2, Cambodia made the following statement on behalf of the LDCs in 2018:

> Notwithstanding mechanisms and processes introduced in the TRIPS Council, LDCs have observed the continued lack of clarity in notifications on the nature of incentives and whether such incentives sufficiently result in technology transfer to LDCs, that foster the creation of a sound and viable technological base for least-developed countries. Many notifications continue to demonstrate that incentive programmes identify recipients that are not LDCs and where LDCs are identified, incentives do not result in transfer of technology. Some developed Members claim that it is difficult for governments to ensure technology transfer because technology is the subject of private contracts and rights.[40]

In sum, WTO rules of relevance to FDI could potentially affect the policy space of developing countries in terms of designing policies to ensure that FDI contributes to fulfilling the RtD and achieving the SDGs. So far, this does not seem to have been any important limiting factor in practice. Nevertheless, the longer term and indirect effects are harder to trace and may be of importance.

3.3 International investment agreements

For a long period, researchers from several disciplines have been debating whether there is empirical evidence that IIAs in practice have generated increased flows of FDI. The studies that have been carried out to trace the extent to which IIAs affect flows of FDI show somewhat varying results. While evidence seems to indicate that IIAs can lead to increased FDI flows, the extent to which and conditions under which they do so remains disputed. A main distinction can be drawn between studies that focus on dyadic relationships – exploring whether IIAs influence the flow of FDI among the parties to specific treaties,[41] and studies on the impact that the signature and ratification of IIAs have for the flow of FDI into countries.[42] Studies also focus on the differences between ratified and non-ratified IIAs.[43] Many of the studies concern the flow of FDI into

[40] See WTO doc. IP/C/W/640 of 16 February 2018.
[41] See P Egger & V Merlo, The Impact of Bilateral Investment Treaties on FDI Dynamics, 30(10) The World Economy (2007) pp. 1536-1549.
[42] See D Swenson, Why do Developing Countries Sign MITs?, 12 UC Davis Journal of International Law & Policy (2005) pp. 131-155; T Büthe & HV Milner, Bilateral Investment Treaties and Foreign Direct Investment: A Political Analysis, in K Sauvant & L Sachs (eds) The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows (OUP 2009) pp. 171-224.
[43] P Egger & M Pfaffermayr, The Impact of Bilateral Investment Treaties on Foreign Direct Investment, 32(4) Journal of Comparative Economics (2004) pp. 788-804; YZ Haftel, Ratification Counts: US Investment Treaties and FDI Flows into Developing Countries, 17(2) Review of International Political Economy (2010) pp. 348-377.

developing countries generally,[44] into certain regions[45] or into certain sectors.[46] There also exist studies of how subsequent investment treaty arbitration affects FDI.[47] To what extent and in which ways such studies control for other factors that may influence FDI flows differ significantly,[48] and replication of previous studies may produce significantly differing results.[49]

One interesting study suggests classifying FDI according to the motivations of investors, distinguishing between "four types of FDI: resource-seeking FDI, market-seeking FDI, efficiency-seeking FDI, and asset-seeking FDI".[50] Among these, resource-seeking FDI is particularly relevant in the context of achieving SDGs. The study proposes to distinguish between "three main types of resource-seeking FDI: FDI seeking physical resources, FDI seeking unskilled or semi-skilled labour, and FDI to firms seeking technological capabilities, management of marketing expertise, and organizational skills".[51] These distinctions could be helpful when analyzing the potential role of IIAs in promoting FDI that contribute to achieving the SDGs.

According to one study, unilateral offers to submit disputes to a neutral arbitral forum have "become a common legislative practice of African states and the transition economies of Europe that seek to attract foreign investment."[52] The number of LDCs that have undertaken such commitments through legislation is significant, comprising approximately half of these

[44] E Neumayer & L Spess, Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing Countries? in Sauvant & Sachs (n 42) pp. 225-252; JL Tobin & S Rose-Ackerman, When Bits Have Some Bite: The Political-Economic Environment for Bilateral Investment Treaties, 6(1) The Review of International Organization (2011) pp. 1-32. For a literature review, see UNCTAD, The Role of International Investment Agreements in Attracting Foreign Direct Investment to Developing Countries (UNCTAD 2009).

[45] R Grosse & LJ Trevino, New Institutional Economics and FDI Location in Central and Eastern Europe, in Sauvant & Sachs (n 42) pp. 273-294; J Dixon & PA Haslam, Does the Quality of Investment Protection Affect FDI Flows to Developing Countries? Evidence from Latin America, 39(8) The World Economy (2016) pp. 1080-1108.

[46] L Colen, D Persyn & A Guariso, Bilateral Investment Treaties and FDI: Does the Sector Matter? 83 World Development (2016) pp. 193-206.

[47] T Allee & C Peinhardt, Contingent Credibility: The Impact of Investment Treaty Violations on Foreign Direct Investment, 65(3) International Organization (2011) pp. 401-432.

[48] See e.g., Z Elkins, A Guzman & B Simmons, Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960-2000, 60(4) International Organization (2006) pp. 811-846; A Kerner, Why Should I Believe You? The Costs and Consequences of Bilateral Investment Treaties, 53(1) International Studies Quarterly (2009) pp. 73-102; M Busse, J Königer & P Nunnenkamp, FDI Promotion through Bilateral Investment Treaties: More Than a Bit? 146(1) Review of World Economics (2010) pp. 147-177; E Aisbett, Bilateral Investment Treaties and Foreign Direct Investment: Correlation Versus Causation, in Sauvant & Sachs (n 42) pp. 395-435; A Berger et al, Do Trade and Investment Agreements Lead to more FDI? Accounting for Key Provisions inside the Black Box, 10(2) International Economics and Economic Policy (2013) pp. 247-275.

[49] J Yackee, Do BITs Really Work? Revisiting the Empirical Link between Investment Treaties and Foreign Direct Investment, in Sauvant & Sachs (n 42) pp. 379-394.

[50] E Bierman & H Bezuidenhout, FDI in the Economic Transformation of the Post-civil war Economies of Angola and Mozambique, in V Ibokwe, N Turner & O Aginam (eds) Foreign Direct Investment in Post Conflict Countries: Opportunities and Challenges (Adonis & Abbey Publishers 2010) pp. 229-268.

[51] Ibid. p. 246.

[52] VC Igbokwe, ICSID Jurisdiction and the Legal Security of Foreign Investment in Post-Conflict Countries, in Ibokwe, Turner and Aginam (n 50) p. 120.

countries.[53] This supports the view that access to independent dispute settlement mechanisms is perceived by many countries to be essential to attract FDI. However, it also shows that access to such mechanisms is not limited to treaty- and legislation-based arbitration, but could also include arbitration based on contracts or concessions.

From a more theoretical perspective, we may distinguish between two ways in which IIAs may promote FDI: (1) they may directly promote the flow of investment by including provisions relevant to the right of establishment of foreign investors or limit countries' opportunities to restrict flows of FDI, and (2) the protection they afford to stocks of FDI may indirectly provide an incentive to increased flow of FDI. As to the first, UNCTAD's mapping of the content of IIAs shows that approximately 14 per cent of IIAs contain provisions that call for investment promotion activities.[54] Some IIAs also contain operational clauses that protect the rights of investors to establish in the contracting parties. According to data from UNCTAD, approximately 8 per cent of IIAs include provisions that prohibit discrimination in the pre-establishment phase.[55] These numbers indicate that IIAs only to a limited extent have been perceived as instruments to operationalize investors' rights to establish in other countries, despite some significant reform efforts.[56]

As to the indirect incentives that IIAs may provide through protection of FDI, such effects would inter alia depend on the level of protection afforded (see section 4.2) and potential investors' knowledge about the protection. If we assume that all IIAs afford similar protection to FDI and that knowledge regarding the existence of such protection among potential investors is equally distributed, a determining factor for the effects of IIAs would be the extent to which relevant countries are parties to IIAs. As we can see from table 2, countries classified as low income economies by the World Bank have on average a low level of participation in IIAs that provide consent to ISDS, ranging from a saturation level of only 7.6 per cent with upper middle income countries to 15.3 per cent among low income counties. The highest level of saturation can be found among high income countries, with almost 40 per cent, and between high income and upper middle income countries, with 28.5 per cent. These are presumably countries with a low need for incentives to attract FDI to achieve their SDGs. Against this background, it is relatively clear that

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[53] TL Berge & T St John, Translating International Templates into Domestic Laws: The World Bank and National Investment Laws with Arbitration. Paper presented at the 60th Annual meeting of the International Studies Association, Toronto, March 2019.

[54] Data from UNCTAD's IIA Mapping Project. For relevant coding, see p. 17 of the Project's Codebook http://investmentpolicyhub.unctad.org/Upload/Documents/Mapping%20Project%20Description%20and%20Methodology.pdf. Of the 2673 IIAs in force at the end of 2017, the mapping project had coded 2045. Among these 284 were found to include relevant provisions.

[55] Ibid. pp. 9-10. Among the coded treaties (N=2045), 126 of the IIAs had both national treatment (NT) and most favoured nation (MFN) clauses that cover pre-establishment, an additional 26 IIAs had only MFN clauses and 12 had only NT clauses, bringing the total IIAs containing such clauses to 164.

[56] See, inter alia, H Mann, K von Moltke, L E Peterson & A Cosbey, IISD Model International Agreement on Investment for Sustainable Development (International Institute for Sustainable Development 2005), and J A VanDuzer, P Simons & G Mayeda, Integrating Sustainable Development into International Investment Agreements: A Guide for Developing Countries (Commonwealth Secretariat 2012).

the current structure of IIAs is unlikely to provide significant incentives to increased flows of FDI into countries with significant need of FDI to fulfil the RtD and supplement their funding of SDGs.

Table 2: IIA relationships according to World Bank income groups[57]

	High income	Upper middle income	Lower middle income	Low income
High income	706 (1770) *19.3% (39.9)*	1009 (3540) *27.7% (28.5)*	593 (2820) *16.3% (21.0)*	216 (1860) *5.9% (11.6)*
Upper middle income		292 (1711) *8% (17.1)*	327 (2773) *9% (11.8)*	139 (1829) *3.8% (7.6)*
Lower middle income			129 (1081) *3.5% (11.9)*	167 (1457) *4.6% (11.5)*
Low income				71 (465) *1.9% (15.3)*
Number and % of parties[58]	3230 *(44.3%)*	2059 *(28.2%)*	1345 *(18.4%)*	664 *(9.1%)*

In sum, there is little empirical evidence that IIAs have been instrumental in promoting FDI of importance to developing countries fulfilment of the RtD or attainment of sustainable development. The current design of IIAs and their geographical distribution indicate that they are unlikely to perform such functions in the relatively near future.

3.4 Promotion of FDI through investment legislation

As explained in section 3.1, the role of IIAs in promoting FDI cannot be fully explored without taking into account the extent to which countries may shift among alternative measures to attract FDI. In particular, countries may increase or decrease their reliance on IIAs relative to legislation, concessions, contracts and insurance. Given the limited participation of LDCs in IIAs, we may assume that investment legislation has a particularly important role to play in promoting investment for this group of countries. The World Bank has had a key function in this respect through its focus on national legislation and policies in its long-term program to improve the "investment climate" of developing countries. In particular, the World Bank has provided country-by-country advice through its Facility for Investment Climate Advisory Services (former Foreign Investment Advisory Service) since 1985.[59] As part of this program, the World Bank issued

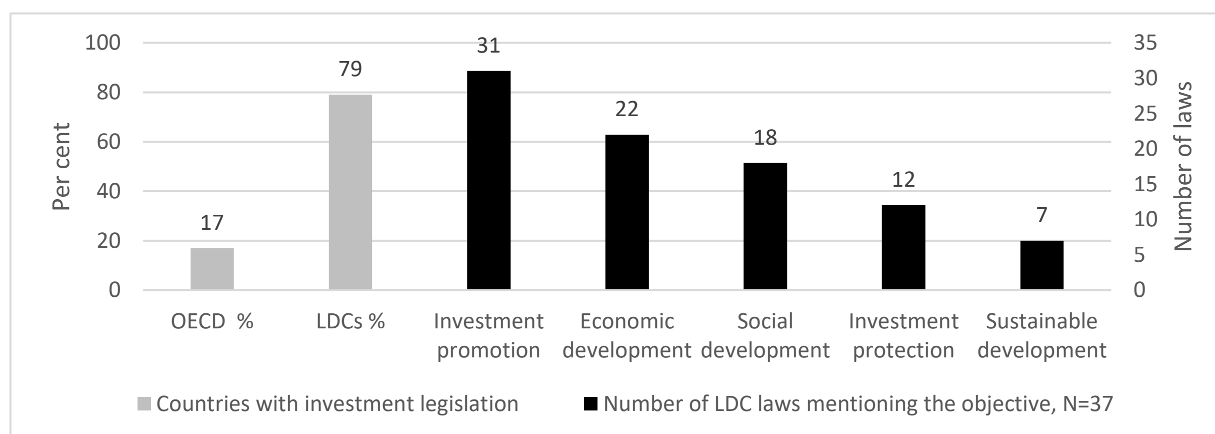
[57] Data regarding BITs are in essence based on UNCTAD's International Investment Agreements Navigator (ibid.), updated until the end of 2018. Where there is overlap between agreements, ISDS relationships are counted only once. All multilateral IIAs have been mapped according to the bilateral ISDS relationships they establish. There was 3649 unique ISDS relationships out of a theoretical number of 19 306 such relationships (based on the number of potential countries being 197). Each entry in the table contains the following information: number of ISDS relationships, potential number of ISDS relationships (within parentheses), percentage of total ISDS relationships, and saturation of ISDS relationships – 100 being complete saturation (within parentheses). An earlier version of this table has been produced in collaboration with Tarald Laudal Berge.
[58] The total number of treaty parties is 7298.
[59] The World Bank Group, 2015 Annual Review: FIAS Celebrating 30 Years of Partnership (World Bank 2016) p. 6.

guidelines 1992 and a handbook in 2010.[60] Given the lack of focus on FDI in the MDGs, it is perhaps not surprising that the 2010 handbook does not contain any references to the MDGs. However, the handbook hardly mentions the concept of sustainable development, and is primarily focused on improving the investment climate from the perspective of foreign investors.

One fundamental question is why developing countries should adopt general investment legislation. In his introduction to the handbook, Joseph Battat, the former Manager of the World Bank's Investment Climate Advisory Services, answers this question by emphasizing that investment laws contribute to "the quality and characteristics of the investment climate" and "provide in one place a succinct coverage of much of the investment policy of a country and its legal underpinning, as well as a signal that the government is welcoming investment."[61]

Very few OECD countries have general investment laws; such legislation is a phenomenon mainly found in developing countries and in particular in the LDCs (figure 3).[62] Moreover, sustainable development is the least frequently mentioned objective in the investment legislation of LDCs (figure 3).

Figure 3: Frequency of investment legislation within OECD and LDCs, and stated objectives in LDCs investment laws[63]



There are generally few conditions or restrictions on FDI in the investment legislation of LDCs. According to data from UNCTAD, none of these laws contains performance requirements or

[60] I Shihata, Legal Treatment of Foreign Investment: 'The World Bank Guidelines' (Martinus Nijhoff 1993); The World Bank Investment Climate Advisory Services, Investment Law Reform: A Handbook for Development Practitioners (World Bank 2010).

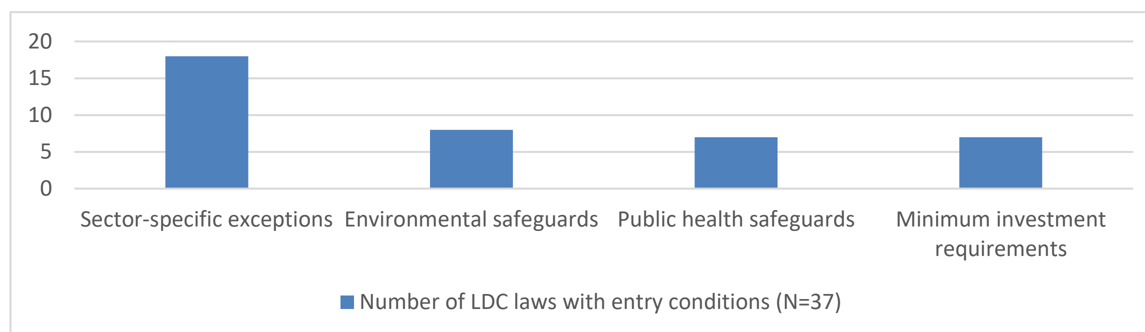
[61] The World Bank Investment Climate Advisory Services, Investment Law Reform: A Handbook for Development Practitioners (World Bank 2010), p. ix.

[62] According to UNCTAD's Investment Laws Navigator (https://investmentpolicyhub.unctad.org/InvestmentLaws), which provides information on investment laws of 109 countries (as of March 2019), only 6 of 36 OECD countries have general investment laws (Chile, Iceland, Lithuania, Mexico, Spain and Turkey), and 37 of 47 LDCs have such legislation.

[63] UNCTAD's Investment Laws Navigator (https://investmentpolicyhub.unctad.org/InvestmentLaws), which provides information on investment laws of 109 countries (as of March 2019).

restrictions on ownership of land, and only a few contain other conditions or restrictions (figure 4).

Figure 4: Entry conditions for FDI in LDCs laws[64]



One particularly salient feature of many investment laws is that they provide consent to ISDS. In contrast to such consent in IIAs, investment laws provide a unilateral consent that is relatively easy to withdraw. However, withdrawal might not be available, for example because it cannot apply retroactively in relation to established investments or disputes that have already emerged. Table 3 shows that the current unilateral consent through investment laws implies a fundamental shift in the exposure to ISDS among groups of countries from the exposure identified in table 2. Low income countries have a much higher exposure to ISDS than any other group of countries with a saturation level of above 55 per cent, and their investors have the lowest access to ISDS. The contrast is particularly striking in relation to high income countries, where low income countries provide consent to ISDS in almost 57 per cent of all bilateral relationships, and the low income country investors have access to ISDS in less than 12 per cent of the bilateral relationships. It seems likely that the practice of providing unilateral consent to ISDS undermines the opportunity to achieve reciprocal consent to ISDS through IIAs.

Table 3: Bilateral and unilateral consent to ISDS according to World Bank income groups[65]

	Countries consenting to ISDS				
Benefiting countries	High income	Upper middle income	Lower middle income	Low income	No & % of beneficiaries
High income	1412 (3540) *11.4% (39.9)*	1169 (3540) *9.4% (33.0)*	1059 (2820) *8.5% (37.9)*	1068 (1860) *8.7% (56.9)*	4708 *(37.9%)*
Upper middle income	1009 (3540) *8.1% (28.5)*	801 (3422) *6.4% (23.4)*	854 (2773) *6.9% (30.8)*	1007 (1829) *8.1% (55.1)*	3671 *(29.6%)*
Lower middle income	593 (2820) *4.8% (21.0)*	530 (2773) *4.3% (19.1)*	671 (2162) *5.4% (31.0)*	807 (1457) *6.5% (55.4)*	2601 *(20.9%)*

[64] Ibid.

[65] For data regarding IIAs, see n 57. Data regarding consent to ISDS in investment legislation is based on data from T L Berge & T St John, Translating International Templates into Domestic Laws: The World Bank and National Investment Laws with Arbitration. Paper presented at the 60th Annual meeting of the International Studies Association (March 2019, Toronto).

Low income	216 (1860) *1.7% (11.6)*	279 (1829) *2.2% (15.3)*	426 (1457) *3.4% (29.2)*	519 (930) *4.2% (55.8)*	1440 *(11.6%)*
No & % of consents	3230 *(26.0%)*	2779 *(22.4%)*	3010 *(24.2%)*	3402 *(27.4%)*	12421 (38612) (32.2)

In recent years, as exemplified by its data collection and work on investment policies and sustainable development, UNCTAD has focused more extensively on domestic investment legislation. UNCTAD has also provided country-by-country advice *inter alia* through its Investment Policy Review program established in 1999.[66] To date, 17 LDCs have gone through the review process.[67] However, the above data does not indicate that the review process has had significant impact on the incidence of sustainable development related clauses or frequency of unilateral consent to ISDS in the legislation of LDCs or low income countries.

3.5 Concluding remarks

On a general level, we have found that international rules governing trade and investment for the promotion of FDI do not address the responsibility of source countries to prevent FDI that would undermine or promote FDI that would contribute to fulfill the RtD and achieve SDGs in LDCs. To the contrary, we find that such rules limit host countries' policy space, including the policy space needed to fulfill the RtD and achieve SDGs. We will explore the latter aspects of the rules protecting FDI in more detail in section 4.

The current status of the Doha round of multilateral trade negotiations indicates that WTO reforms are unlikely to provide any significant means to increase the SDG-relevant FDI to LDCs. Current debates concerning the legitimacy of IIAs and associated negotiations in UNCITRAL[68] and UNTAD initiatives[69] might be a stepping stone for reforms so that IIAs may better serve such purposes. However, the UNCITRAL reform process focuses on procedural aspects and is unlikely to lead to significant reforms of substantive provisions in IIAs.

Investment legislation is widespread among LDCs and is therefore likely to have significant impact on host countries' policy space. Countries have significant freedom to amend their investment legislation, and the impact may therefore be more short-term than international commitments. The lack of focus on issues concerning RtD and SDGs as well as on unilateral consent to ISDS in investment legislation of LDCs, shows that further reform initiatives are needed to bring such legislation in line with the RtD and SDGs.

Recent changes in the sources of FDI underline the importance of the above issues. One such change is the emergence of China and Chinese investors as major sources of FDI, in particular for

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[66] See UNCTAD, The investment policy reviews: Shaping investment policies around the world (2012).
[67] See overview of countries covered to date: https://unctad.org/en/Pages/DIAE/Investment%20Policy%20Reviews/Investment-Policy-Reviews.aspx, visited 25 September 2019.
[68] See http://www.uncitral.org/uncitral/en/commission/working_groups/3Investor_State.html.
[69] See UNCTAD, Investment Policy Framework for Sustainable Development, 2015.

investment into LDCs. Another is the increasing role of a broad variety of institutional investors, in particular sovereign wealth funds. Significant changes in FDI actors and flows represent both challenges and opportunities for reforms of the regulatory regimes.

4. Protection of FDI

4.1 Protection of FDI – a balancing exercise

International and national law to protect FDI have traditionally focused on investment protection, the former more so than the latter. There are two competing interests associated with the level of investment protection; investors' interest in low levels of risk and host countries interest in political flexibility. This tension comes out clearly in UNCTAD's Core Principles for investment policymaking. On the one hand, principles emphasize investor interests:

- Principle 2: Investment policies should be "embedded in an institutional framework based on the rule of law that adheres to high standards of public governance and ensures predictable, efficient and transparent procedures for investors"
- Principle 7: "Investment policies should provide adequate protection to established investors. The treatment of established investors should be non-discriminatory."

On the other hand, principles emphasize countries the importance of policy space:

- Principle 5: Host countries have "the sovereign right to establish … operational conditions for foreign investment, subject to international commitments, in the interest of the public good and to minimize potential negative effects."

The balancing exercise to be carried out is fleshed out on principle 4, which merely states the obvious: "Investment policies should be balanced in setting out rights and obligations of States and investors in the interest of development for all."

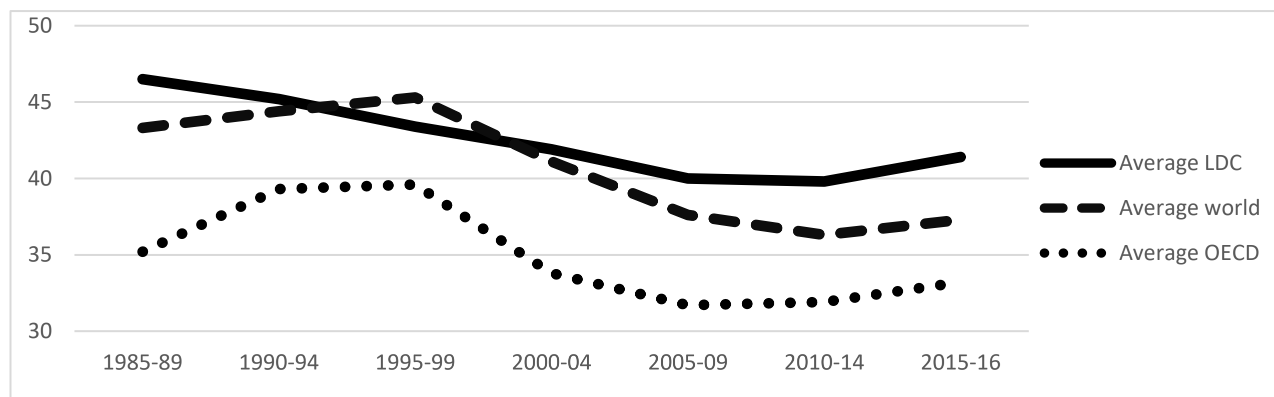
The crux of the issue is how to balance the interests of investors and various interests in the host country. As the relevant interests within host countries vary significantly from country to country and between sectors within a country, it is challenging to establish general rules that balance such interests. However, this is exactly what international and many domestic rules to protect FDI seek to do.

Arguably, balancing the interests of foreign investors against interests within host countries increases in complexity the more significant variation there is in living conditions between different groups of the population in host countries. The main reason for this assumption is that significant inequalities necessitate that authorities have the opportunity to tailor policy measures according to the challenges of the various stakeholder groups. The particular issue of inequality is addressed in SDG 10: "Reduce inequality within and among countries". The associated targets include a broad range of policy measures, many of which may significantly affect foreign

investors.[70] The formulation of these targets demonstrates support the hypothesis that countries need significant policy space vis-à-vis the interests of foreign investors.

One way of measuring the degree of economic inequality within a country is through the Gini coefficient, which measures the extent to which the distribution of income among individuals or households within an economy deviates from a perfectly equal distribution.[71] A Gini coefficient of 0 represents perfect equality, while a coefficient of 100 implies perfect inequality.[72] Due to lack of data and inaccuracies in how data is gathered, it is challenging to use the Gini coefficient to measure inequality on a country level.[73] Nevertheless, the Gini coefficient may provide some guidance on the extent of inequality within certain groups of countries and for some countries over time. In general, the Gini coefficient indicates that the level of inequality is markedly higher in LDCs than in the world as a whole and much higher than in OECD countries.[74] Figure 5 indicates that the difference between LDCs and the world as a whole increases. These data support the hypothesis that the variation in living conditions among different groups of a country's population is likely to decrease with higher level of development.

Figure 5: Gini coefficients 1985-2016 for LDCs, the world and OECD countries (0=equal, 100=inequal)[75]



[70] See targets 10.1 and 10.4 regarding wages and social protection, 10.5 concerning regulation of financial markets, 10.7 regarding mobility of persons, and 10.b on the role of FDI.

[71] The Gini coefficient is not mentioned among the indicators for SDG 10, see UNGA res. 71/313.

[72] See https://data.worldbank.org/indicator/SI.POV.GINI.

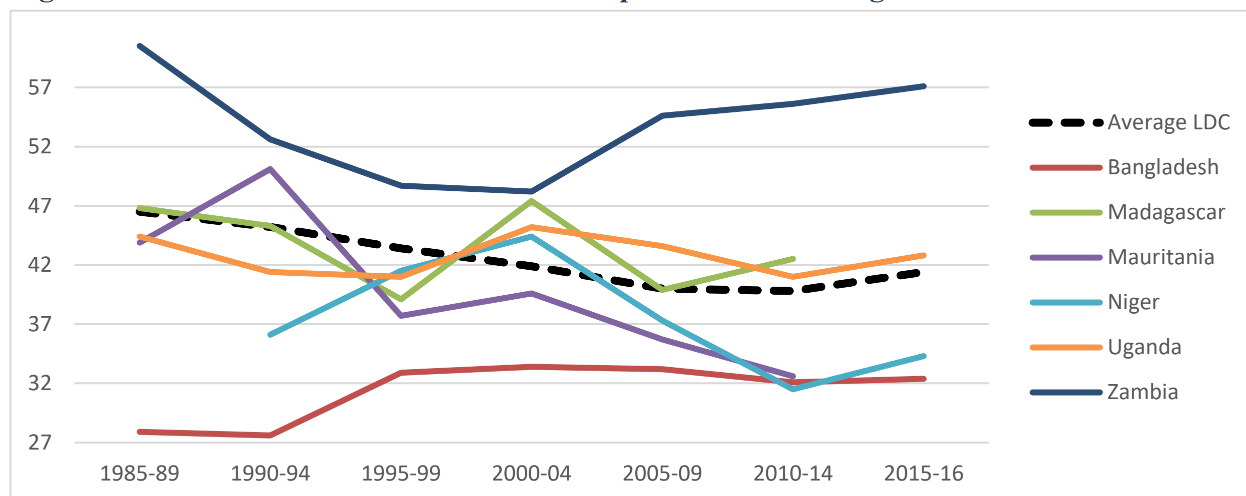
[73] For example, among LDCs, there is no data for 4 countries (Afghanistan, Cambodia, Eritrea and Somalia), and only data for one year for 7 countries (Haiti, Kiribati, Myanmar, South Sudan, Sudan, Tuvalu and Vanuatu) and two years for 8 countries (Angola, Chad, Comoros, DRC, Liberia, Sao Tome and Principe, Sierra Leone and Solomon Islands). For all LDCs, there are only 132 datapoints available between 1980 and 2016 (9.6 %). The failure of collecting data for LDCs stand in stark contrast to the increasing efforts at collecting such data for OECD countries, see http://www.oecd.org/els/soc/income-distribution-database.htm.

[74] The average measured Gini coefficient for the world in the period 1980-2016 is 39.4, while the average for LDCs is sligthly higher at 41.5 and for OECD is significantly lower at 32.8.

[75] Data from the World Bank, https://data.worldbank.org/indicator/SI.POV.GINI. details on how the data has been used available upon request.

If we take a closer look at data for the six LDCs for which the most extensive data is available,[76] we see significant variation among the LDCs in terms of both level of inequality and development trajectories (figure 6). While the Gini coefficients indicate that currently some LDCs have inequality levels that are close to the average of OECD countries (Bangladesh, Mauretania and Niger), levels of inequality seem to be much higher in other LDCs (Madagascar, Uganda and Zambia). Ten more LDCs have had particularly high levels of inequality in recent years according to their Gini coefficients.[77] If a high level of inequality reduces a host country's ability to establish general rules that balance the interests of foreign investors against other interests, the LDCs with a high Gini coefficient should avoid accepting IIAs or adopt general legislation that protect FDI.

Figure 6: Gini coefficients for six LDCs compared to the average coefficient for LDCs



Against this background, we shall proceed to assess the level of protection offered to foreign investors by IIAs and investment legislation. Based on our findings in this regard, we shall discuss the extent to which the respective levels of protection represent a challenge to countries' policy space needed to fulfil the RtD and achieve SDGs.

4.2 Protection through international investment agreements

Prior to the IIAs we have today, there has been a long history of treaty based protection of FDI. Johnson and Gomblett point out that the "notion of State responsibility for injuries to aliens began to emerge" in the middle of the eighteenth century.[78] During this early period, FDI was protected to a large extent through colonial legal systems. Where the host countries were not colonized, which was the situation for many Asian and Latin American countries, FDI was protected through "a blend of diplomacy and force" and eventually through "treaties resulting from the use of

[76] These are the LDCs for which between six and nine datapoints are available between 1980 and 2016.

[77] Benin, Chad, Comoros, Djibouti, Guinea-Bissau, Lesotho, Malawi, Mozambique, Rwanda and Togo had their most recent Gini coefficients above 43.

[78] OT Johnson & J Gimblett, From Gunboats to BITs: The Evolution of Modern International Investment Law, in K Sauvant (ed) Yearbook on International Investment Law &Policy 2010-2011 (OUP 2012) p. 649.

force,"[79] often referred to as "unequal treaties."[80] Friendship, commerce and navigation (FCN) treaties, which were primarily negotiated by the US with its trading partners dating back to the eighteenth century, eventually included some protections of property rights. After the First World War, such treaties expanded to protect "the rights of companies abroad and also set out to strengthen the protection of private property."[81]

The current regime of IIAs was negotiated during the periods of decolonization and the emergence of new countries and economies in Eastern Europe and Asia. After a long period during which these treaties almost exclusively focused on protection of the interests of foreign investors, countries have adjusted their content in recent years to reflect the need to promote the sustainable development within host countries.[82] So far, the main effort has been to avoid negative effects of IIAs for sustainable development. To some extent, one has also started to explore how IIAs can contribute to sustainable development.[83] Approximately nine per cent of IIAs include statements in their preambles to this effect.[84] One relevant example is the IIA between Tanzania and Canada (2013) which states that the countries desire "to intensify economic co-operation and promote sustainable development for the mutual benefit of both countries." Even more IIAs, approximately twelve per cent, include substantive provisions on issues of relevance to sustainable development.[85] These provisions are a recent phenomenon in IIAs.[86] In general, they are exceptions, recommendations and political commitments, and as such, they do not introduce legally binding obligations on states or investors to contribute to sustainable development. Nevertheless, they are likely to provide countries greater flexibility to design policies to support sustainable FDI and limit unsustainable effects of FDI projects.

[79] M Sornarajah, The International Law on Foreign Investment, Fourth Edition (CUP 2017) p. 24.
[80] MR Auslin, Negotiating with Imperialism: The Unequal Treaties and the Culture of Japanese Diplomacy (Harvard University Press 2004).
[81] W Alschner, Americanization of the BIT Universe: The Influence of Friendship, Commerce and Navigation (FCN) Treaties on Modern Investment Treaty Law, 5(2) Göttingen Journal of International Law (2013) p. 462.
[82] For an exhaustive survey, see JA VanDuzer, P Simons & G Mayeda, Integrating Sustainable Development into International Investment Agreements: A Guide for Developing Countries (Commonwealth Secretariat 2012).
[83] See M Gehring, S Stephenson & M-C Cordonier Segger, Sustainability Impact Assessments as Inputs and as Interpretative Aids in International Investment Law, 18(1) The Journal of World Investment & Trade (2017) pp. 163-199.
[84] Data from UNCTAD's IIA Mapping Project as of the end of 2017. For relevant coding, see p. 4 of the Project's Codebook (n 54). Of the 2045 IIAs in force, 49 referred to sustainable development, 102 to environment and 165 to social investment aspects such as human rights, labor, health, corporate social responsibility and poverty reduction. A total of 192 IIAs contained one or more of these clauses (N=2045).
[85] Ibid. p. 16. Of the 2045 IIAs in force, 247 included substantive provisions on one or more of the following subjects: 210 referred to environment and health, 70 to labor standards, 89 to the right to regulate, 17 to corporate social responsibility, 31 to corruption, and 75 to not lowering standards. An example of an IIA containing all these elements is chapter 10 of the Protocolo Adicional al Acuerdo Marco de la Alianza del Pacífico (2014) between Chile, Colombia, Mexico and Peru.
[86] K Gordon, J Pohl and M Bouchard, Investment Treaty Law, Sustainable Development and Responsible Business Conduct: A Fact Finding Survey, OECD Working Papers on International Investment, 2014/01, http://dx.doi.org/10.1787/5jz0xvgx1zlt-en.

The extent to which IIAs provide protection regardless of whether the relevant FDI contributes to sustainable development has been a controversial issue closely related to the interaction between the concepts of "investment" under IIAs and under the ICSID Convention. The general approach has been to adopt broad definitions of "investment" in IIAs. Only less than three per cent of IIAs exclude portfolio investments or include specific requirements to qualify as investment under the IIAs (e.g. duration or contribution to development).[87] More importantly, almost 64 per cent of IIAs allow countries to adopt national legislation that limit the scope of investments covered (i.e. requirements that investments must be made in accordance with the host state's legislation).[88]

For IIAs that refer to the ICSID Convention, the jurisprudence of investment tribunals has been divided on whether broad definitions of investment in IIAs can be set aside in individual cases based on a narrower investment concept in Article 25(1) of the ICSID Convention.[89] This jurisprudence has considered four criteria for qualifying as an "investment" under the ICSID Convention: contributions in assets or money, a certain duration, an element of risk, and contribution to economic development. The latter has been the most controversial.[90] Tribunals have referred to the reference to "economic development" in the ICSID Convention preamble to justify development as a relevant criterion.[91]

There is an extensive literature on the extent to which IIAs may limit countries ability to take measures to achieve sustainable development.[92] The main substantive obligations in IIAs have traditionally been broadly phrased, in particular the provisions on fair and equitable treatment, full protection and security, non-discrimination, indirect expropriation, compliance with contractual obligations and transfer of funds. Generally, such provisions may seem to leave broad discretion to host countries. With the increasing inclusion of consent to ISDS in IIAs and resort to ISDS by foreign investors, the discretion rests increasingly with arbitration tribunals. Hence, the protection of FDI does extensively depend on the extent to which IIAs provide unconditional consent to ISDS. About 96 per cent of IIAs provide unconditional consent to ISDS and 87 per cent do not contain any limitations on the scope of ISDS.[93]

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[87] Data from UNCTAD's IIA Mapping Project as of the end of 2017. For relevant coding, see pp. 5-6 of the Project's Codebook (n 54). Of the 2045 IIAs in force, only 9 exclude portfolio investment and 52 include specific requirements.

[88] Ibid. p. 6. Of the 2045 IIAs in force, 1303 IIAs included reservations regarding domestic legislation.

[89] See e.g., RC de Figueiredo, The Investment Requirement of the ICSID Convention and the Role of Investment Treaties, 26(3) The American Review of International Arbitration (2015) pp. 453-482.

[90] See e.g., OE García-Bolívar, Economic Development at the Core of the International Investment Regime, in C Brown & K Miles (eds) Evolution in Investment Treaty Law and Arbitration (CUP 2011) pp. 586-605; LJE Timmer, The Meaning of 'Investment' as a Requirement for Jurisdiction Ratione Materiae of the ICSID Centre, 29 Journal of International Arbitration (2012), p. 367.

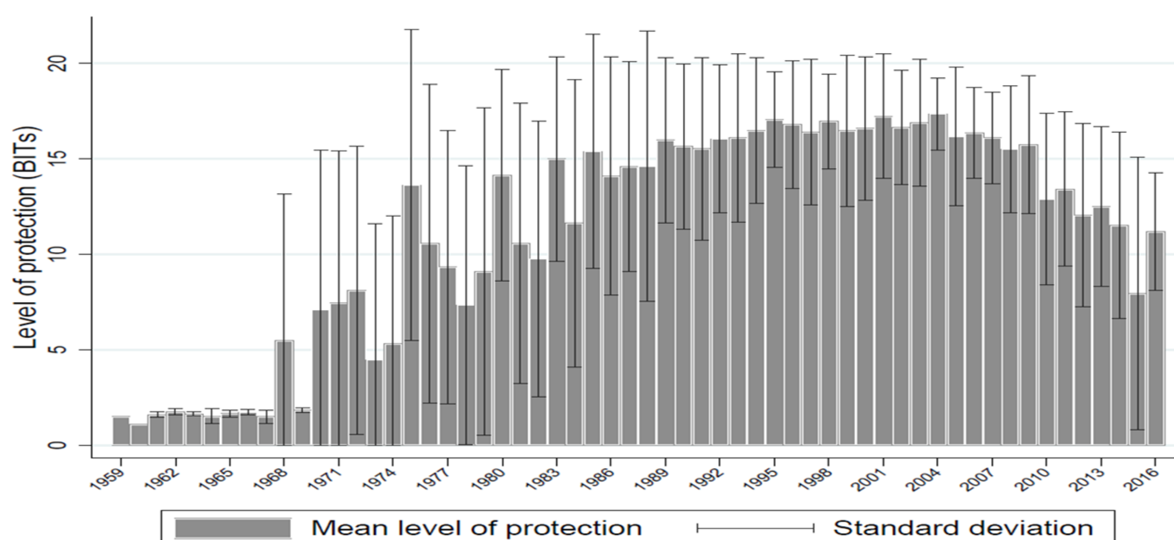
[91] Salini Costruttori S.p.A. & Italstrade S.p.A. v. Kingdom of Morocco, ICSID Case No. ARB/00/4, Decision on Jurisdiction (21 July 2001) paras. 52, 57.

[92] See for example M-C Cordonier Segger, M Gehring & A Newcombe (eds) Sustainable Development in Investment Law (Wolters Kluwer 2011).

[93] Data from UNCTAD's IIA Mapping Project as of the end of 2017. For relevant coding, see page 19 of the Project's Codebook (n 54). Of the 2045 IIAs in force, 85 contained no consent to arbitration, and a further 184 contain limitations regarding which clauses of the IIAs could be subject to ISDS or exclude policy areas.

Countries have become increasingly concerned that policy reforms might have to be defended before arbitration tribunals and that they may have to pay compensation to foreign investors. This has led many countries to reform their IIAs in order to more clearly define the substantive protections and expand exceptions. As shown in figure 7, this is a relatively recent phenomenon, dating back to around 2009.[94] The extent to which IIAs actually have a chilling effect on countries' policies to promote sustainable development is hard to research and preliminary findings are fraught with uncertainty. It seems clear that regulatory chill would essentially depend on the availability of ISDS under the IIA in question.[95] While the level of protection in IIAs has varied over time, the period during which protection levels were highest and had least variation (from 1988 to 2008) corresponds with the period during which countries signed the highest number of IIAs that are currently in force (83 per cent).

Figure 7: Level of protection under BITs[96]



If we zoom in on the IIAs of LDCs, figure 8 shows that these countries have a slightly higher than average share of IIAs that includes sustainable development relevant language. Moreover, a lower than average share of IIAs in force for LDCs were signed during the period of high levels of protection (68 per cent) and a significantly higher share of LDCs' IIAs do not consent to ISDS (15 per cent). While these factors indicate that the IIAs of LDCs have a significantly lower than

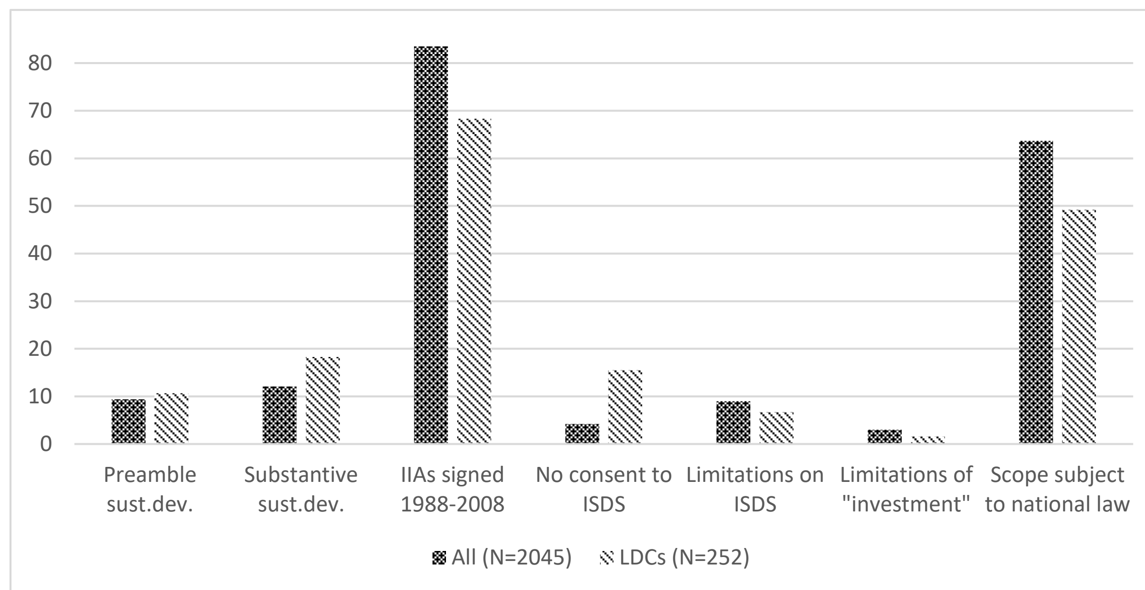
[94] See e.g., A. Keene, The Incorporation and Interpretation of WTO-Style Environmental Exceptions in International Investment Agreements, 18(1) Journal of World Investment & Trade (2017) pp. 62-99.

[95] K Tienhaara, Regulatory Chill and the Threat of Arbitration: A View from Political Science, in Brown & Miles (n 90) pp. 606-627.

[96] Figure 7 has been produced in collaboration with Tarald Laudal Berge based on data from UNCTAD's IIA Mapping Project as of mid-2017 (see n 54), covering coded BITs in force (BLEU treaties counted twice as they are trilateral treaties, N=2385). The BITs are allocated to year of signature. We have taken into account seven categories of protection clauses with weighted positive values, three flexibility clauses with weighted negative values, and adjusted the results depending on availability of ISDS. Coding details are available upon request.

average level of protection, one factor points towards higher levels of protection within such IIAs; a significantly lower share of LDCs IIAs excludes or allows countries to exclude certain categories of FDI.

Figure 8: Percentage of IIAs containing sustainable development relevant clauses[97]



In sum, there has been a general willingness and interest in including sustainable development relevant language in IIAs with LDCs. Moreover, such IIAs seem to allow LDCs broader than average policy space to implement policy measures to fulfil the RtD and achieve SDGs. However, the general differences that exist between the IIAs of LDCs and IIAs in general are small and may not be important in practice. The limited diffusion of IIAs among LDCs (table 2) further strengthen this point of view.

4.3 Protection through investment laws

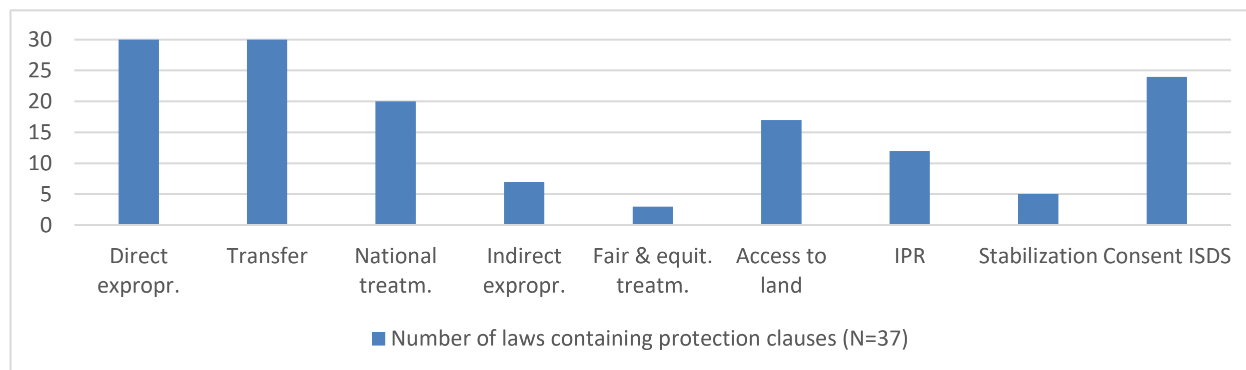
Almost four out of five LDCs have adopted investment laws. The scope of such legislation is similar to that of IIAs in terms of investment covered. However, the scope in terms of foreign investors covered is much broader since the legislation normally applies to all foreign investors regardless of country of origin (see table 3). Since LDCs in general have few IIAs with other countries, investment legislation therefore has the potential to provide much more extensive protection to foreign investors when adopted by LDCs than when adopted by other countries.

As to the level of protection offered by LDCs investment laws, we find that they contain some of the same protections as IIAs. As shown in figure 9, the most frequent protections are against direct expropriation, restrictions on transfer of assets, and discrimination against foreign investors. However, two of the most frequently occurring protections in IIAs – against indirect expropriation

[97] Based on data from UNCTAD's IIA Mapping Project as of the end of 2017 (n 54). The number of IIAs for LDCs is higher than the number of IIAs for low income countries (compare table 2) since the two groups do not correspond.

and unfair and inequitable treatment – occur only in few LDCs investment laws. Hence, some protections normally offered in IIAs are rare or completely absent in investment laws. On the other hand, such laws contain other protections that frequently are absent in IIAs, in particular the right of access to land, protection of intellectual property rights and stabilization clauses. One important factor that significantly reduces the protections offered by many investment laws is that a significant number (13 of 37) does not include consent to international arbitration.

Figure 9: Protection clauses in LDCs investment laws (N=37)[98]



4.4 Concluding remarks

The protection of FDI through IIAs and investment laws shows that investment tribunals have extensive discretionary power. Consequently, the level of protection of FDI in practice and the associated limitations on host countries' policy space depend significantly on the availability of ISDS. Among low income countries, the high level of consent to ISDS in investment laws seems to more than compensate their relatively low participation in IIAs and investment treaty arbitration (see tables 2 and 3). Hence, LDCs are more likely than other countries to be subject to significant limitations on their policy space through treaties and legislation that protect FDI.

At first glance, it might seem that investment laws limit the policy space of LDCs more than do IIAs. However, it is generally easier for host countries to amend legislation than IIAs, and LDCs may consequently expand their policy space more easily by amending investment laws than by renegotiating or withdrawing from IIAs. Nevertheless, the pressure that might exist from investors, other countries and international institutions to maintain a high level of protection of FDI in investment laws should not be underestimated. Moreover, the existing legislation may prevent host countries from limiting the protection of FDI at the time of investment.

The significant differences between investment laws and IIAs mean that protections under one instrument in most cases would not correspond to the protections under the other. Hence, from the perspective of foreign investors, the existence of protections under IIAs would not necessarily make protections under investment laws redundant, and vice versa. It would therefore be in the

[98] UNCTAD's Investment Laws Navigator (n 63).

interest of foreign investors to benefit from the protection of both IIAs and general investment laws.

In addition, IIAs and investment laws most likely increase the bargaining power of foreign investors when negotiating contracts and concessions with host countries. Such negotiations frequently involve provisions to reduce the political risks associated with FDI, for example "stabilization clauses". These clauses are generally confidential, and it is therefore difficult to research the effects of IIAs and investment laws on the extent of protection afforded by contracts and concessions. Nevertheless, we may assume that such effects are significant and that they should be taken into account when assessing the needs for reform of IIAs and investment laws.

In sum, the level of protection in IIAs and investment lasw is likely to have the effect of significantly restricting the ability of developing countries in general and LDCs in particular to fulfil the RtD and achieving their SDGs. Such effects are probably most serious for developing countries with high levels of internal inequality.

5. Responsibility of foreign investors

5.1 Engaging investors' home countries and the international community

We can approach the issue of holding foreign investors responsible for activities that undermine the RtD and SDGs from two main perspectives. First, from the perspective of a host country, the question is how host country authorities can ensure that the foreign investor repair damage and compensate victims. Such questions would typically become urgent when the investor has caused serious harm and has transferred or abandoned the investment. The extent to which such situations seriously affect a host country's ability to fulfil the RtD and achieve SDGs depends on the ability of the host country to undertake compensatory measures. For particularly vulnerable countries, including some LDCs, such situations may affect their long-term ability to fulfil the RtD and achieve SDGs. Secondly, from the perspective of foreign investors a key issue regarding their responsibility for harmful activities is their vulnerability to abuse of power by local, regional or national public authorities. Investors can claim that such abuse of power is the real reason why the harm occurred. Investors would be particularly vulnerable to abuse of power when FDI is long-term, capital intensive and difficult to transfer. Section 4 discussed rules in IIAs and investment laws that serve to protect investors in such situations, and we shall not explore these rules here.

IIAs generally do not impose duties on investors or their home countries. Indeed, countries have only recently accepted that corporations can incur responsibility under international law, essentially in the form of criminal responsibility.[99] The general argument is that it is for host countries to establish and enforce rules regarding the activities of foreign investors within their territories. However, with the increasing protection of the interests of corporations under international law, we see more and more examples that they may lose such protection because of

[99] OK Fauchald & J Stigen, Corporate Responsibility before International Institutions, 40(4) George Washington International Law Review (2009) pp. 1033–51.

undesired conduct.[100] The inclusion of provisions in IIAs concerning duties of investors is likely to be more controversial than initiatives to engage the responsibility of home countries to ensure that their investors repair and compensate harm done in host countries. However, so far there are few signs that IIAs include such mechanisms.

Nevertheless, there are some trends in international norms and institutions towards acknowledging responsibility and liability of foreign investors and their home countries.[101] These developments build on a reckoning that host countries may not be able or willing to enforce responsibility or liability of foreign investors for harm caused to third party interests. In the following, we shall look closer at three fields in which significant initiatives have been taken; treaties to combat corruption, the OECD Guidelines for Multinational Enterprises, and the construction of a regime to address human rights abuses in a transnational context.

5.2 Combating corruption

Corruption and bribery must be "substantially reduced" in order to meet SDG 16 (SDG target 16.5). While the Declaration on the Right to Development does not contain any references to corruption, the UN General Assembly's resolution on the RtD of 2017 emphasizes "the urgent need to take concrete and effective measures to prevent, combat and criminalize all forms of corruption at all levels."[102] Hence, efforts to address the responsibility of foreign investors and their home countries for corruption and bribery in developing countries remains important from the perspectives of sustainable development and the RtD. Some countries have taken significant initiatives to ensure that investors do not engage in corruption in other countries.[103]

The UN Convention against Corruption (2003) has almost universal adherence.[104] It sets out rules of particular interest to FDI regarding bribery of foreign officials (art. 16), liability of legal persons (art. 26), extent of national jurisdiction (art. 42), international cooperation during prosecution of crimes (part IV), and recovery of assets that have been lost due to corruption (part V). In this context, it should be noted that the UN General Assembly has identified the rules on asset recovery as particularly important in relation to the RtD.[105] This is a recognition that foreign investors' home countries have a duty to ensure that benefits achieved by their investors in other countries through corruption or bribery are returned to such countries. Such a duty is of particular importance in relation to those countries that have limited means to combat corruption.

[100] Ibid. pp. 1051–64.
[101] See, inter alia, UNGA resolution A/RES/72/167 19 December 2017 (vote 140 in favour, 10 against, 38 abstentions) para. 20.
[102] Ibid. para. 41. See also Report of the high-level task force on the implementation of the right to development, HRC doc. A/HRC/15/WG.2/TF/2/Add.2, criteria 2(e), p. 14.
[103] See, in particular, the USA Foreign Corrupt Practices Act of 1977, as amended, 15 U.S.C. §§ 78dd-1, et seq.
[104] As of March 2019, the Convention has 186 parties. Non-parties include Andorra, Barbados, Eritrea, Monaco, North Korea, Saint Kitts and Nevis, Saint Vincent and the Grenadines, San Marino, Somalia, Suriname, Syria and Tonga.
[105] UNGA resolution A/RES/72/167 para. 41.

The OECD and the Council of Europe have elaborated conventions of particular interest in terms of home country responsibilities in corruption cases. Article 1 of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1997) states that:

> Each Party shall take such measures as may be necessary to establish that it is a criminal offence under its law for any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business.

With important reservations, this duty extends to "legal persons" (art. 2). Under this Convention, data is collected on the extent to which the parties (all OECD countries and eight other countries) prosecute cases of bribery of foreign public officials. By the end of 2017, almost half of the parties had not reported any relevant cases. Germany and the USA alone had prosecuted approximately 74 per cent of the 560 individuals and 184 legal persons that reportedly had received criminal sanctions for foreign bribery.[106] Moreover, two other countries, Belgium and Finland, have a surprisingly high share of acquittals.[107] These are clear signs that the implementation of the Convention varies significantly among parties despite the fact that it has been in force for two decades.

The Council of Europe has adopted several convention relating to transborder corruption, including in particular the Criminal Law Convention on Corruption (1999) with an Additional Protocol and the Civil Law Convention on Corruption (1999). Based on these two conventions, members of the Council of Europe have formed a Group of States against Corruption (GRECO) with 49 member states.[108] Not all members of GRECO have ratified the two conventions.[109] While the Criminal Law Convention overlaps significantly with the OECD Convention, the Civil Law Convention was the first to address issues concerning countries' duties to adopt legislation concerning civil liability for corruption.

A key question is whether the development of international rules and institutions in the field of corruption has had significant effects for the level of corruption in vulnerable countries. Based on corruption indexes established as part of Varieties of Democracy (V-Dem),[110] we can trace how corruption has evolved in groups of countries over time. The most aggregate of these indexes is

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[106] Germany had criminal sanctions against 316 individuals and 11 legal persons, while the corresponding numbers for the USA were 99 and 125, see OECD, 2017 Enforcement of the Anti-Bribery Convention, November 2018, pp, 5-6.

[107] Belgium and Finland had 42.5 per cent of the acquittals of individuals, and 75 per cent of the acquittals of legal persons.

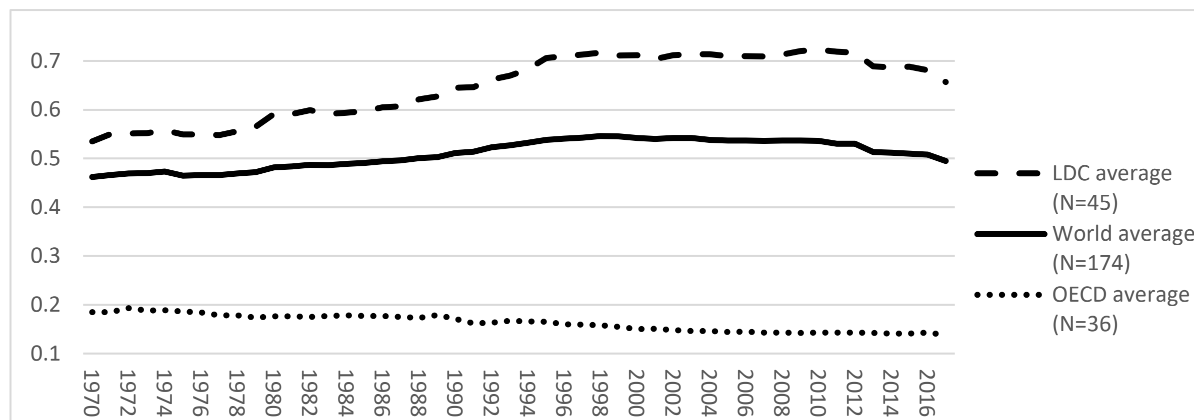
[108] See https://www.coe.int/en/web/greco/home.

[109] As of March 2019, 48 countries had ratified the Criminal Law Convention and only 35 countries had ratified the Civil Law Convention.

[110] See https://www.v-dem.net/en/.

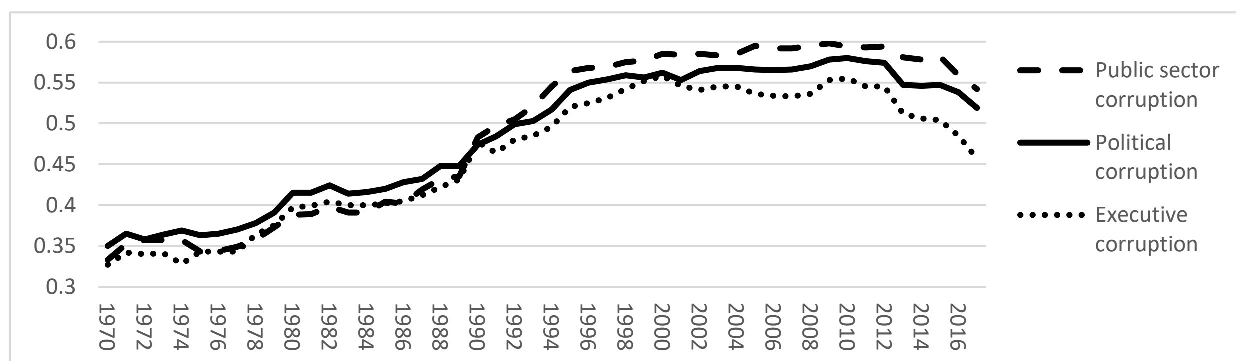
the Political Corruption Index. In figure 10, we can see the trajectory of the level of corruption in two groups of countries, LDCs and OECD members, since 1970. The data indicate that corruption in LDCs increased until the mid-1990s, and thereafter stabilized, and has fallen significantly since 2012. Corruption in OECD countries has seen a gradual decrease throughout the period despite starting from a much lower level.

Figure 10: V-Dem Political Corruption Index, 1970-2017[111]



The two V-Dem indexes for corruption in the executive branch and in the public public sector follow very similar patterns. Figure 11 shows that the differences between the level of corruption in LDCs and OECD countries within all three categories of corruption have increased significantly during the period. Even if the differences between LDCs and OECD countries became smaller in recent years, in particular for the executive sector, corruption remains a much more severe problem for LDCs when compared to OECD countries than during the 1970s.

Figure 11: Difference in level of corruption between LDCs and OECD countries based on V-Dem indexes for political, executive and public sector corruption, 1970-2017[112]



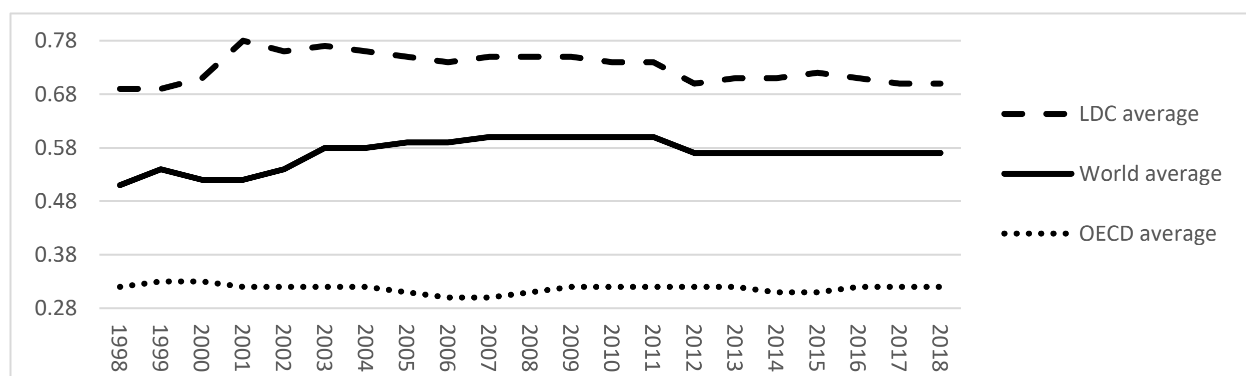
[111] McMann et al. (2016, V-Dem Working Paper Series 2016:23); V-Dem Codebook section 4.0.19: "The corruption index includes measures of six distinct types of corruption that cover both different areas and levels of the polity realm, distinguishing between executive, legislative and judicial corruption."

[112] Ibid. and ibid. sections 4.0.23 (executive corruption): «How routinely do members of the executive, or their agents grant favors in exchange for bribes, kickbacks, or other material inducements, and how often do they steal, embezzle,

These findings support the hypothesis that the corruption treaties and their associated institutional framework, which emerged from the late 1990s, have contributed to gradually reducing the level of corruption in OECD countries from a level that already was much lower than for other countries. For LDCs, however, the data indicates that the international regime has been relatively ineffective in reducing corruption from historically high levels until around 2010. It also indicates that in recent years the international regime has been more effective in combating corruption in the executive sector than in other public sectors of LDCs.

Another corruption index, which contains sufficiently long time series to be of interest here, is Transparency International's perception of corruption index. It has better data for OECD countries than for LDCs,[113] but the data for recent years covers a broad range of LDCs. This index differs from the V-Dem indexes in the sense that it more directly aims at ranking countries relative to other countries and that it focuses more directly on perceptions among key market actors, including foreign investors. Figure 12 indicates that in recent years the perception of the level of corruption in LDCs has been remarkably stable when compared to the V-Dem indexes and when compared to the perception of corruption in OECD countries. These findings seem to contradict the above findings that levels of corruption in LDCs have improved significantly since 2010. We may therefore question whether the recent reduction in LDCs corruption levels in the V-Dem indexes is indicative of any fundamental change in the levels of corruption in these countries.

Figure 12: Transparency International's perception of corruption index, 1998-2018[114]



or misappropriate public funds or other state resources for personal or family use?» and 4.0.33 (public sector corruption): «To what extent do public sector employees grant favors in exchange for bribes, kickbacks, or other material inducements, and how often do they steal, embezzle, or misappropriate public funds or other state resources for personal or family use?».

[113] See https://www.transparency.org/. While LDCs have 15 data points on average for 46 countries, OECD countries have 23 data points. There were 24 possible data points between 1995 and 2018.

[114] Coded based on data from Transparency International. Transparency International used a scale from 0 to 10 where 10 is least corrupt from 1995 to 2011. Initially, the index was based on "how international businessmen and financial journalists perceive corruption." By 2011 the index had become based on "different assessments and business opinion surveys carried out by independent and reputable institutions." There was a major reform of the index in 2012. The scale was changed to 0-100 where 100 is the least corrupt, and the index has become "a composite index, a combination of surveys and assessments of corruption, collected by a variety of reputable institutions." Figure 12 is based on recoding the data from Transparency International's indexes into a scale from 0 to 1 where 1

In sum, international cooperation to control and reduce corruption seems to have been effective in assisting LDCs to prevent corruption in recent years. However, foreign actors do not seem to perceive that there has been any significant decline in corruption levels in LDCs. Developed home countries assistance to LDCs when foreign investors have been involved in corruption does so far seem to be limited to criminal prosecution. Moreover, significant challenges seem to remain in terms of coherent implementation of treaty obligations. The ability of these treaty regimes in terms of contributing to resolving specific instances of harm associated with corruption remain limited.

5.3 OECD Guidelines for Multinational Enterprises

The main general mechanism to engage with the responsibility of foreign investors in specific cases is the OECD Guidelines for Multinational Enterprises with their associated National Contact Points for Responsible Business Conduct.[115] The Guidelines date back to 1976 and cover 48 countries. Very few IIAs refer to the Guidelines despite the close links that have existed between the Guidelines and the proliferation of IIAs.[116] The Guidelines make clear that their observance by enterprises is "voluntary and not legally enforceable." Home countries undertake to "encourage" their enterprises "to observe the Guidelines wherever they operate, while taking into account the particular circumstances of each host country." The OECD Investment Committee, which has the task of following up the implementation of the Guidelines, "shall not reach conclusions on the conduct of individual enterprises."[117] The National Contact Points are to "act as a forum for discussion of all matters relating to the Guidelines."[118] The Guidelines thereby establish a country-by-country follow-up mechanism that potentially can function as a third party assessment of enterprises' compliance with the Guidelines. The extent to which National Contact Points in reality fulfil such a function varies significantly.[119]

The OECD has established a Database on Specific Instances, which lists 429 cases initiated before National Contact Points during the period from 2000 to 2018.[120] Some of these (16 per cent)

is the most corrupt. Figure 12 does not include data from 1995-1997 since few countries were covered and the data indicated low reliability.

[115] See http://mneguidelines.oecd.org/.

[116] Pohl and Bouchard (n 86) p. 9. The 1998 draft of the OECD Multilateral Agreement on Investment included a proposal to annex the Guidelines to the Agreement, see OECD doc. DAFFE/MAI(98)7/REV1 pp. 95-96. The BIT between the Netherlands and the United Arab Emirates (2013) includes a reference to the Guidelines in art. 2.3: "Each Contracting Party shall promote as far as possible and in accordance with their domestic laws the application of the OECD Guidelines for Multinational Enterprises to the extent that is not contrary to their domestic laws." Interestingly, this text is located in the provision on "investment promotion."

[117] OECD Investment Committee, Amendment of the Decision of the Council on the OECD Guidelines for Multinational Enterprises, 2011, section II, para. 4. See also Procedural Guidance, section I.C, para. 3(c).

[118] OECD Guidelines for Multinational Enterprises: Recommendations for responsible business conduct in a global context, 2011, section I, paras. 1, 2 and 11.

[119] R Saner, Increasing the relevance and global reach of the OECD Guidelines for Multinational Enterprises, in N Bonucci and C Kessedjian (eds.), 40 Years of the OECD Guidelines for Multinational Enterprises (A. Pedone 2018) p. 161.

[120] See http://mneguidelines.oecd.org/database/.

involve a small group of LDCs.[121] The most important sectors addressed in these cases are mining and quarrying, manufacturing, and wholesale and retail trade – sectors that are important from the perspective of the RtD and SDGs.[122] Nevertheless, the practical contribution of the Guidelines to assist LDCs in achieving the RtD and SDGs seems to be limited due to the low number of LDC-related cases and the limited range of LDCs involved in the cases.

The Guidelines could have contributed significantly to home countries' engagement with the responsibility of foreign investors in cases involving harm to LDCs and other developing countries. So far, developed countries' willingness to enhance the impact of the Guidelines through references in IIAs and investment laws has been close to non-existent. Current debates concerning the legitimacy of international investment law and associated negotiations in UNCITRAL[123] and UNTAD initiatives[124] might provide a window of opportunity to enhance the status and effect of the Guidelines as a means to support the RtD and SDGs.

5.4 Transnational corporations and human rights

The UN Human Rights Council and the High Commissioner for Human Rights have initiated three tracks of particular interest to issues of responsibility of foreign investors based on the Guiding Principles on Business and Human Rights.[125] These initiatives refer to the International Bill of Human Rights[126] as well as the eight ILO core conventions as set out in the Declaration on Fundamental Principles and Rights at Work (Guiding Principle no. 12). They are thereby highly relevant to the RtD and a broad range of SDGs.

The first track is the follow-up of the Guiding Principles by the Working Group on the issue of human rights and transnational corporations and other business enterprises, established in 2011.[127] One tasks of particular relevance to FDI is to "explore options and make recommendations at the national, regional and international levels for enhancing access to effective remedies available to those whose human rights are affected by corporate activities."[128] The Guiding Principles are weak in terms of specific obligations to ensure effective access to remedies for harm caused through activities funded through FDI (see principles 26, 27 and 31). When renewing the mandate of the Working Group in 2014 and 2017, the Human Rights Council expressed concern about the "legal

[121] Ibid. 67 cases involved one or more of 14 LDCs. The Democratic Republic of Congo was involved in most cases (30), followed by Bangladesh (8) and Myanmar (6).
[122] On sustainable development related issues concerning extraction and consumption of natural resources, see International Resources Panel, Global Resources Outlook 2019: Natural Resources for the Future We Want (UNEP 2019).
[123] See http://www.uncitral.org/uncitral/en/commission/working_groups/3Investor_State.html.
[124] See UNCTAD, Investment Policy Framework for Sustainable Development, 2015.
[125] See HRC docs. A/HRC/RES/17/4 and A/HRC/17/31.
[126] Including the Universal Declaration of Human Rights (1948), the International Covenant on Civil and Political Rights (1966), and the International Covenant on Economic, Social and Cultural Rights (1966).
[127] See HRC docs. A/HRC/RES/17/4, A/HRC/RES/26/22, and A/HRC/RES/35/7.
[128] HRC doc. A/HRC/RES/17/4, para. 6(e).

and practical barriers to remedies for business-related human rights abuses, which may leave those aggrieved without opportunity for effective remedy, including through judicial and non-judicial avenues, and recognizing that it may be further considered whether relevant legal frameworks would provide more effective avenues of remedy for affected individuals and communities." The Working Group's follow-up regarding access to effective remedies became a central topic in resolutions of the Human Rights Council and has increasingly focused on "cross-border cases."[129] However, the Working Group initiatives have so far had limited results in terms of improved access to remedies in cases involving FDI.

The second track started in 2014 with the establishment of an "open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights" whose task is to elaborate an "international legally binding instrument on transnational corporations and other business enterprises with respect to human rights."[130] At its fourth session in 2018, the working group carried out its first reading of a draft instrument.[131] Article 10 of the draft proposes rules on "legal liability" and establishes the following starting point:

> State Parties shall ensure through their domestic law that natural and legal persons may be held criminally, civil or administratively liable for violations of human rights undertaken in the context of business activities of transnational character. Such liability shall be subject to effective, proportionate, and dissuasive criminal and non-criminal sanctions, including monetary sanctions. Liability of legal persons shall be without prejudice to the liability of natural persons.

In addition, article 11 proposes elaborate rules on "mutual legal assistance" in individual cases. The draft proposes to establish an "International Fund for Victims" (art. 8.7). It includes an optional protocol that would establish "National Implementation Mechanisms", similar to the National Contact Points of the OECD Guidelines, and allow the committee established by the main instrument to receive and consider communications in specific cases. The draft instrument and protocol are still, more than four years after the establishment of the Working Group, in an early phase of development.

The third track, the Accountability and Remedy Project, was initiated by the High Commissioner for Human Rights in 2014.[132] This track seeks to provide countries with practical advice on how to design and implement accountability mechanisms in the domestic context. Its first phase aims at enhancing effectiveness of judicial mechanisms in cases of business-related human rights abuses.

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[129] HRC doc. A/HRC/RES/26/22, preamble and paras. 5, 7 and 9, and A/HRC/RES/35/7, preamble (almost identical wording) and paras. 6, 10. See also A/HRC/RES/32/10 on improving accountability and access to remedy. See also relevant reports: HRC doc. A/HRC/35/33 and UNGA doc. A/72/162.

[130] HRC doc. A/HRC/RES/26/9, see https://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Pages/IGWGOnTNC.aspx.

[131] Draft "Legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises" of 16 July 2018, see HRC doc. A/HRC/40/48.

[132] See https://www.ohchr.org/EN/Issues/Business/Pages/OHCHRaccountabilityandremedyproject.aspx.

A main report to this effect was submitted to the Human Rights Council in 2016, and this phase remains ongoing.[133] Phases two and three of the project consider other relevant mechanisms.[134] The information and recommendations flowing from this project are essential as support to the first and second tracks.

These three tracks demonstrates significantly increased attention within key UN human rights institutions to the availability of judicial remedies to address human rights violations in the context of FDI. This is a sign that we may see new mechanisms emerging at the national and international level that increase the responsibility of home countries for remedying harm caused by their corporations when investing abroad. However, the extent to which important home states will accept and respect the decisions of such mechanisms remains to be seen. Mechanisms need to be established to avoid "free-riding" by countries benefitting from welcoming corporations that seek to avoid responsibility. The cumbersome and long-term efforts to prevent countries from acting as "tax havens" and providing "flags of convenience" demonstrate the complexity of resolving issues concerning responsibility for foreign investors for human rights violations.

6. Conclusions

While there seems to be broad agreement that FDI is important to realize the RtD and achieve SDGs, there are many unresolved questions regarding how to achieve this. This chapter has looked closer at how to approach these questions from the perspectives of international and national law. It emphasizes the need to take a law-in-context perspective. It is important for the representatives of countries and international institutions to engage with how the regulatory and institutional regimes work in practice as a basis for determining what we realistically can achieve through regulatory and institutional reforms.

This contribution suggests that efforts should focus more on engaging the responsibility of investors' home countries. Such initiatives can build on achievements so far through the limited use of environmental and sustainability impact assessments and reforms of IIAs. Reforms of dispute settlement mechanisms that engages with the responsibility of foreign investors' home states is another potential approach. Home countries have taken some initiatives to deal with corruption of their enterprises abroad, but data indicate that home countries have been slow to develop and implement appropriate measures and that such measures have had limited success so far.

There seem to be important opportunities for improving investment legislation in developing countries. There seems to be support for the view that countries should avoid investment legislation that does not distinguish between categories of investment based on their relationship to the RtD

[133] See HRC doc. A/HRC/RES/32/10.

[134] See HRC docs. A/HRC/RES/32/10 (state-based mechanisms, initiated in 2016) and A/HRC/RES/38/13 (non-state-based mechanisms, initiated in 2018).

and SDGs. Moreover, there are strong arguments that host countries, in particular LDCs, need to consider closely whether it is in their interest to consent unilaterally to ISDS in investment laws.

There are strong arguments that more attention should be paid to the role of the level of inequality within countries when designing policies to promote and protect FDI. We have found some support for the hypothesis that countries with high levels of inequality need significant policy space in order to ensure that FDI will contribute to fulfil the RtD and contribute to SDGs. However, there is limited data on the level of inequality within many developing countries and need for more research in order to determine whether this hypothesis is sufficiently strong to form the basis for significant policy reforms.

The most promising way forward may seem to be the UNCITRAL reform processes associated with IIAs taken together with UNCTAD's initiatives to promote sustainable development-oriented reforms of IIAs and investment laws. These initiatives provide an important "window of opportunity." However, significant uncertainty remains regarding how to approach issues concerning contracts and concessions established between host countries and foreign investors, as well as how to deal with home countries that may choose a strategy of "free-riding" by offering protection to investors through their IIAs without taking measures to prevent such investors' misconduct.

The negotiations of a legally binding instrument on the RtD might contribute to support and refocus existing processes under the auspices of the UN Human Rights Council and the High Commissioner for Human Rights based on the Guiding Principles on Business and Human Rights. One example is support of judicial remedies to address human rights violations in the context of FDI. The RtD negotiations may also be relevant for the reform processes of IIAs and investment laws, for example by supporting the establishment of safeguard mechanisms so that host countries have sufficient policy space to fulfil their development obligations.