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Ph.D. in Law

Rethinking international development: To what extent can the practical interaction of sustainable development and the field of international investment law be considered mutually beneficial in the light of modern advances?

By
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I hereby declare that I have read and understood the regulations governing the submission of the Ph.D., including those relating to length and plagiarism, as contained in the 'Regulations For The Degrees of MPHIL and PHD' Manual, and that this Thesis conforms to those Regulations.

Abstract

The concept of sustainable development has been given a mounting presence within the international legal ether. This presence has culminated in the proclamation of the United Nation's Sustainable Development Goals in 2015. Even with these increasing and further defining proclamations, the legal status of the concept remains unclear. With an equal degree of contemporary context, the regulation of the field of international investment law, and particularly that of the regulation of foreign direct investment, has been described both as continuous in regulation formation and as having a strong link to wider international developmental policy. Considering these features, the investigation into the translation of the concept of sustainable development within this field is deemed significant. Essentially therefore, this research comprehensively analyses the most modern understanding afforded to the concept alongside the regulatory parameters adopted by international investment law and importantly explores this meeting, continually assessing the question to what extent is the concept effectively translated.

To answer this question, a doctrinal methodology is employed. The manner in which the research is approached provides two substantial implications. Firstly, an extremely detailed review of both the concept of sustainable development and international investment law in their entirety, including theoretical analysis and sources. Secondly, current academics place most of their efforts upon individual translations of the concept within the field of law, this research confronts these traditional approaches and views the regulatory system employed by international investment law as an entire arena working together. The results of the research will highlight the extremely fragmented and varied translations of the concept of sustainable development. Although in general there is much scope for the encouraging view the concept has within the regulation of foreign direct investment, this view must be approached with a degree of caution.

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Part 1: Introducing the Premise and Background

Chapter 1: Introduction

Emily Charlotte Jameson

1. Introduction

> "Unless someone like you cares a whole awful lot, nothing is going to get better. It's not"[1].

Although this quote is neither well recited nor referenced in academic literature, the significance of the statement to this Thesis is no less altered. Written by Dr Seuss in the fictional book titled *The Lorax*, the author portrays a world lacking in sustainable foresight. Bodies of water are heavily polluted, uncontaminated air is pumped into the characters homes and naturally growing trees have been replaced with aesthetically superior manufactured counterparts. From this brief overview, a rather simplified notion of sustainable development could be deduced. The view of sustainable development that will be adopted will stem from the overarching vision that the concept requires the act of exploitation without disrupting the natural biological processes and in turn preventing negative environmental, economic, and anthropological effects.

Depicted also in the book are the ever-present industrial movements to harvest the remaining naturally growing trees. There is the constant reliance on industry and investment activity. The recognition is extremely important, as it is this 'meeting' that is the foundation of my argumentation. Although arguably there are many influential challenges that could further the positive expansion of the concept of sustainable development, the activity of international investment is at the head of the hierarchy of importance. In 2015, Radi recognized the degree of importance the field of international investment law holds regarding the advancement of the concept. The academic states "some regard IIL [international investment law] as a threat to development … while

[1] Dr Suess, *The Lorax* (1971).

others conceive of IIL as a tool to foster development"[2]. The specific exploration of the field of international investment law is given strength as it is continually recognized that the preventative measures to sustainable development "are driven by broad underlying economic, social, technological, demographic and environmental megatrends"[3].

With this prominent relationship in mind, this Thesis seeks to answer the question whether the current assertion of the concept of sustainable development has or could have an effective facilitation within the field of international investment law. Dernbach and Cheever provide that "[s]ustainability is not an academic concept or a marketing gimmick; it is a framework for making decisions that reflects abundant real-world experience … the primary challenge is to make better decisions"[4]. It is this basic inquiry that forms the direction of my intended legal research, touching predominantly on the concept of sustainable development and the field of international investment law. In a real sense this question attempts to determine "[t]he relationship between foreign investments and development"[5], answering Gehring's academic question of "how can … investment … law better support, and not frustrate, sustainable development goals?"[6].

2. Relevance and Purpose of this Research

2.1 The Concept of Sustainable Development

Sustainable development has been given a mounting prominence in today's regulatory environment, which has been no less reaffirmed in the 2021 United Nations Climate

[2] Yannick Radi, 'International Investment Law and Development: A History of Two Concepts' (2015) Grotius Centre Working Paper 2015/045 - IEL, 1.
[3] United Nations Department of Economic and Social Affairs, 'Economic and Social Survey 2013: Sustainable Development Challenges' (2013) E/2013/50 Rev. 1 ST/ESA/344, 2.
[4] Federico Cheever and John C. Dernbach, 'Sustainable Development and its Discontents' (2015) *Transnational Environmental Law*, Vol. 4, Issue 2, 251.
[5] Manjiao Chi, 'Sustainable Development and IIA' in Manjiao Chi (Eds) Integrating Sustainable Development in International Investment Law: Normative Incompatibility, System Integration and Governance Implications (2018) 16.
[6] Markus W. Gehring, 'Sustainable International Trade, Investment and Competition Law' in Marie Claire Cordonier Segger and Ashfaq Khalfan (Eds) *Sustainable Development Law: Principles, Practices & Prospects* (2004) 281.

Change Conference (Cop26)[7] and specifically in the text of the subsequent Glasgow Climate Pact[8]. The Preamble provides:

> "Recognizing the role of multilateralism and the Convention, including its processes and principles, and the importance of international cooperation in addressing climate change and its impacts, in the context of sustainable development …"[9].

Sustainable development has been described in one frequently utilized legal proclamation as the "development that meets the needs of the present without compromising the ability of future generations to meet their own needs"[10]. The consideration of these fundamental requirements can clearly be seen also within the explanatory notes and targets attached to the 2015 United Nations Sustainable Development Goals (SDGs)[11]. For example, it is provided that "the number of deaths attributed to natural disasters continues to rise, despite progress in implementing disaster risk reduction strategies. From 1990 to 2015, more than 1.6 million people died in internationally reported natural disasters"[12]. With such a large conceptual purview, there are numerous opportunities for importance to be attributed to the concept of sustainable development.

To structure logically an initial approach to the examination of the extremely broad and relatively undefined concept of sustainable development, a principal tripartite structure and investigation into the three foundational pillars attributed to concept will be subsequently demonstrated. If one were to dissect each of the 17 goals of the 2015 SDGs individually, which for the purposes of this Thesis will be considered the most recent understanding afforded to the concept and will be predominantly utilized as such later

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[7] United Nations Climate Change Conference (2021) Conference of the Parties, Glasgow.
[8] United Nations Climate Change Conference 2021, Glasgow Climate Pact (13/11/2021) UN Decision CP.26. Please see: Michael Jacobs, 'Reflections on COP26: International Diplomacy, Global Justice and the Greening of Capitalism' (2021) *The Political Quarterly*, found at < https://onlinelibrary.wiley.com/action/doSearch?AllField=Jacobs&SeriesKey=1467923x > accessed February 2022. In a related manner, see also: European Commission, The European Green Deal (2019) COM(2019) 640; Sebastiano Sabato and Boris Frontgeddu, '*A socially just transition through the European Green Deal?*' (2020) ETUI research Paper – Working Paper 2020.08
[9] Glasgow Climate Pact: *ibid* Preamble.
[10] G. Brundtland, 'Report of the World Commission on Environment and Development: *Our Common Future*' (Brundtland Report) (1987) United Nations General Assembly Document A/42/427, 43.
[11] United Nations General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development* (SDGs) (2015) A/RES/70/1.
[12] Global SDG Awards website, SDG 13-Climate Action, found at < https://globalsdgawards.com/13-climate-action/ > accessed November 2019.

within Chapter Two, the general and overall appreciation of the concept may be heavily diluted and somewhat confused. These 17 goals can be inherently grouped into the three pillars of environmental, economic and social development. This comprehension has been chosen because of the consistently similar manner in which both legal mechanisms and academics have generally approached this divergent concept of sustainable development, even before the important introduction of the SDGs.

As a general example, the International Tropical Timber Agreement[13] specifically identifies the interrelation between the three foundational pillars and states "the importance of the multiple economic, environmental and social benefits provided by forests, including timber and non-timber forest products and environmental serviced, in the context of sustainable forest management"[14], to which it could be argued that the subsequent Objectives found later in Article 1 could be defined and allotted to each of these pillars. From the perspective of international investment, a rather similar categorically divided approach can be found within the United States-Mexico-Canada Agreement (USMCA)[15], which states the recognition of the protection of "legitimate public welfare objectives, such as health, safety, environmental protection, conservation of living or non-living exhaustible natural resources, integrity and stability of the financial system, and public morals"[16]. This does again neatly encompass all three foundational pillars of the concept of sustainable development. Although only two multilateral treaties have been outlined, of which both are from differing international fields (i.e., environmental and investment), many more treaties do approach the concept in a similar manner[17]. What is essential to recognize is the central alignment in approach to the concept, thereby providing increased justification as to the approach adopted within this argumentation.

[13] International Tropical Timber Agreement (2006) (signed 27/01/2006, entered into force 07/12/2011) 2797 UNTS 75.
[14] International Tropical Timber Agreement: *ibid* Preamble.
[15] Agreement between the United States of America, the United Mexican States, and Canada (USMCA) (2018) (signed 30/11/2018).
[16] USMCA: *ibid* Preamble.
[17] Please see, for example: North American Free Trade Agreement (NAFTA) (1993) 32 ILM 289; Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTTP) (signed 08/03/2018, entered into force 30/12/2018); Energy Charter Treaty (ECT) (1995) 2080 UNTS 95; 34 ILM 360; Reciprocal Investment Promotion and Protection Agreement Between the Government of the Kingdom of Morocco and the Government of the Federal Republic of Nigeria (signed 03/12/2016).

Academia has also maintained an overarching comparable approach to the dissection of sustainable development. The crux of the issue in terms choice of approach has been succinctly described by Ciegis, Ramanauskiene and Martinkus, which states:

> "When trying to identify the essential features of sustainable development, which would allow to understand and provide the models of the management of sustainable development, their comparison and clarification of their processes, one faces a theoretical issue with the conceptual description and evaluation of sustainable development. Thus, when analyzing sustainable development and its management, the following questions arise: what does the concept sustainability actually mean? What is the content of this concept?"[18].

The initial usage and reliance upon the three fundamental pillars do provide a rather pragmatic response to such an ambiguous concept. Harris has observed since the deliverance of the general definition provided within Our Common Future[19], "there has generally been a recognition of three aspects of sustainable development"[20], later referring to the environmental, economic and social pillars. Klarin has continued to recognize and categorize such a preliminary approach and states "[i]n its evolution, the concept of sustainable development has been popularized as a concept based on the three dimensions or pillars of sustainability settled in balance: ecological, social and economic pillar of sustainability"[21], which takes into consideration the "various developmental phases since its introduction"[22]. Overall, it is this rather uncomplicated and beneficially coordinated approach to the broad concept that maintains presence.

[18] Remigijus Ciegis, Jolita Ramanauskiene, Bronislovas Martinkus, 'The Concept of Sustainable Development and its Use for Sustainability Scenarios' (2009) *Engineering Economics*, Vol. 2, 28.
[19] Brundtland Report: [n 10].
[20] Jonathan M. Harris, 'Basic Principles of Sustainable Development' (June 2000) Global Development and Environment Institute, Working Paper 00-04, 5.
[21] Tomislav Klarin, 'The Concept of Sustainable Development: From its Beginning to the Contemporary Issues' (2018) *Zagreb International Review of Economics & Business*, Vol. 21, No. 1, 84. A view also shared in Ben Purvis, Yong Mao & Darren Robinson, 'Three pillars of sustainability: in search of conceptual origins' (2019) *Sustainability Science*, Vol. 14, 681-695; Edward B. Barbier and Joanne C, Burgess, 'The Sustainable Development Goals and the systems approach to sustainability' (2017) *Economics: The Open Access*, Vol. 11, 1-22.
[22] T. Klarin: *ibid* 67.

2.2 Environmental Development

> "An environmentally sustainable system must maintain a stable resource base, avoiding over-exploitation of renewable resource systems or environmental sink functions, and depleting non-renewable resources only to the extent that investment is made in adequate substitute. This includes maintenance of biodiversity, atmospheric stability, and other ecosystem functions not ordinarily classed as economic resources"[23].

Harris's inclusive view of the environmental implication within the concept of sustainable development continues to demonstrate the current appreciation and important scope of this pillar[24]. This understanding has been affirmed by McNeills presentation[25] of Serageldin and Steers "ecological objectives"[26] of "ecosystem integrity, carrying capacity and biodiversity"[27]. From these perspectives, it can be derived a single principal implication of environmental development from within the boundaries of the concept of sustainable development, which simultaneously outlines the precise nature of the human relationship with the natural environment and subsequently within the development agenda. This implication is of protective utilization, or more commonly referred to "sustainable use"[28], which relates to the culminative aspects of environmental protection or conservation and ensuing use. This comprehension has been fundamentally derived from the analysis of both successive soft and hard-law sources which expound the concept.

The reference to the action of utilization, or "use"[29], suggests from the outset taking advantage of environmental capabilities or "natural capital"[30], however this action is not

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[23] J. M. Harris: [n 20] 6.
[24] Please see also: Tom Waas, Jean Huge, Ariel Verbruggen and Tarah Wright, 'Sustainable Development: A Bird's Eye View' (2011) *Sustainability*, Vol. 3, 1637-1661.
[25] Desmond McNeill, 'The Concept of Sustainable Development' in Johannes Dragsbaek Schmidt (Eds) *Development Studies and Political Ecology in a North South Perspective* (2004) Occasional Papers No. 5, 34.
[26] I. Serageldin and A. Steer, *Making Development Sustainable: from concepts to action* (Washington: World Bank), taken from Desmond McNeill, 'The Concept of Sustainable Development' in Johannes Dragsbaek Schmidt (Eds) *Development Studies and Political Ecology in a North South Perspective* (2004) Occasional Papers No. 5, 34.
[27] I. Serageldin and A. Steer: *ibid* 34.
[28] Cartagena Protocol on Biosafety to the Convention on Biological Diversity (2000) (signed 29 January 2000, entered into force 11 September 2003) 2226 UNTS 208, Article 1.
[29] Cartagena Protocol on Biosafety to the Convention on Biological Diversity: *ibid* Article 1.
[30] Robert Costanza and Herman E. Daly, 'Natural Capital and Sustainable Development' (1992) *Conservation Biology*, Vol. 6, Issue 1, 37.

unlimited due the addition of the phrase "sustainable"[31]. If the term 'use' was provided on its own without any sustainable context and interpretation, perhaps then 'use' could be considered unlimited. It has been stated that "[u]nlike economists, whose models provide no upper bound on economic growth, physical scientists and ecologists are accustomed to the idea of limits"[32]. The limits stem from the extent to which the natural environments and their functioning systems can withstand such an interference, thereby preventing "over-exploitation"[33] or actions going further than "ecosystem integrity … [and] carrying capacity"[34]. In this way, the concept of sustainable development can be seen to encompass a belief that the functioning of natural environment or environmental systems will not be adversely affected through the approach taken under the auspice of protective utilization and therefore will maintain the "ecological resilience"[35] of the environment.

Relatedly, the awareness of limitation also forwards the appreciation of future generations and the utilization of the natural environment for the benefit of these future generations in the maintenance of the natural functioning of the environment, thereby capping utilization in the present so that usage and subsequent benefits in the long term can be extended. This incites Bell and McGillivarys response that "global resources (including environmental resources) should be measured, with the objective of ensuring that they are not depleted over time"[36]. However, the academics do recall the fundamental problem with such an action, "how [does] one go … about measuring intangible global assets and whether it is permissible to substitute one type of asset for another"[37], which has also been forwarded by Kula and Evans[38]. Brennan has adequately summarized the situation:

> "How much do we care about people whose lives won't begin until long after our own have ended? How much *should* we care about them? These questions come up when we contemplate environmental projects that benefit people who are separated by many years or even by generations from those who pay the costs.

[31] Cartagena Protocol on Biosafety to the Convention on Biological Diversity: [n 28] Article 1.
[32] J. M. Harris: [n 20] 11.
[33] J. M. Harris: *ibid* 6.
[34] I. Serageldin and A. Steer: [n 26] 34.
[35] J. M. Harris: [n 20] 13.
[36] Stuart Bell and Donald McGillivary, *Environmental Law* (2008) 28.
[37] S. Bell and D. McGillivary: *ibid* 28.
[38] Erhun Kula and David Evans, 'Dual Discounting in Cost-Benefit Analysis for Environmental Impacts' (2011) *Environmental Impact Assessment Review,* Vol. 31, Issue 3, 180-186.

> Whether the interests of future generations will be at all significant in determining how much we should limit carbon emissions, preserve the ozone layer, or protect endangered species depends on whether a dollars' worth of future benefits is worth less than a dollar's worth of present costs – what economists mean by discounting"[39].

Again, in terms of recognizing another fundamental characteristic of environmental development and before consideration of the various translations of this pillar, it must be reiterated that "sustainable use"[40] can be immediately and significantly separated from the view that the environment will not be intruded upon or strict environmentalism. The protection of the environment is employed only to the extent that the utilization of the environment can continue, which can be heavily contrasted from the appreciation of environmental protection for protection's sake. The environment is seen to be placed for the benefit of human development agenda and maintained to the extent that the environment continues to benefit the human population, for example the preservation of tree populations that will produce economic and social development attainments, "thereby ensuring their continuance"[41] for this current and future generations. It is this idea of prolongation that equally ignites the pillar.

From the concept's early inception and deliverance into the international arena, this idea of protective utilization can be seen as far back as the Stockholm Declaration which was born out of the United Nations Conference on the Human Environment in 1972[42], whereby it is initially proclaimed that "[m]an is both creature and moulder of his environment, which gives him physical sustenance"[43], alongside the important recognition that:

> "The capacity of the earth to produce vital renewable resources must be maintained and, wherever practicable, restored or improved … [and] [t]he discharge of toxic substances or of other substances and the release of heat, in

[39] Timothy J. Brennan, 'Discounting the Future: Economic and Ethics' in Michael V. Russo (Eds) *Environmental Management: Readings and Cases* (2008) 93.
[40] Cartagena Protocol on Biosafety to the Convention on Biological Diversity: [n 28] Article 1.
[41] Ulrich Beyerlin and Thilo Marauhn, *International Environmental Law* (2011) 82.
[42] For a wider context, please see: Marc Pallemaerts, 'International Environmental Law from Stockholm to Rio: Back to the Future' in Philippe Sands (Eds) *Greening International Law* (2017).
[43] United Nations General Assembly, *Declaration of the UN Conference on the Human Environment* (*Stockholm Declaration*) (1972) U.N. Doc. A/Conf.48/14/Rev 1; 11 ILM 1416, Preamble.

such quantities or concentrations as to exceed the capacity of the environment to render them harmless, must be halted in order to ensure that serious or irreversible damage is not inflicted upon ecosystems"[44].

With a similar cautious manner, the Rio Declaration introduces the precautionary principle[45], "[w]here there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation"[46] and the environmental impact assessment (EIA)[47]. Later the Millennium Development Goals (MDGs) reaffirmed within Goal 7 that "[t]o integrate the principles of sustainable development into all nation's policies and programs, and also reverse the depletion of environmental resources"[48]. However, the Sustainable Development Goals (SDGs) detail much more of this precise relationship between limited utilization and the protection of the environment. Goal 7 provides to "[e]nsure access to affordable, reliable, sustainable and modern energy for all"[49]. Target 7.a dictates:

> "By 2030, enhance international cooperation to facilitate access to clean energy research and technology, including renewable energy, energy efficiency and advanced and cleaner fossil-fuel technology, and promote investment in energy infrastructure and clean energy technology"[50].

Although there is no direct referral to the prevention of the deterioration of the environment in utilization, there is continual reference to "clean energy"[51] which could induce such non-deteriorating actions. In contrast, SDG 14 and 15 both do specifically

[44] *Stockholm Declaration*: *ibid* Principle 3 and 6.
[45] Please see: Michael Grubb, Matthias Koch, Koy Thomson, Abby Munson and Francis Sullivan, *The 'Earth Summit' Agreements: A Guide and Assessment: An Analysis of the Rio '92 UN Conference on Environment and Development* (2020); Jorge E. Vinuales, 'The Rio Declaration on Environment and Development' in Jorge Vinuales (Eds) *The Rio Declaration on Environment and Development: A Commentary* (2015).
[46] United Nations Conference on Environment and Development, *Rio Declaration on Environment and Development* (1992) UN Doc. A/CONF. 151/26 (vol. 1): 31 ILM 874, Principle 15.
[47] *Rio Declaration*: *ibid* Principle 17.
[48] United Nations General Assembly, United Nations Millennium Declaration, Resolution Adopted by the General Assembly (MDGs) (2000) A/RES/55/2, Goal 7. Target 1.
[49] SDGs: [n 11] Goal 7.
[50] SDGs: *ibid* Target 7.a.
[51] SDGs: *ibid* Target 7.a

refer to "sustainable use"[52] when detailing marine and land-based biodiversity protection. There is therefore a direct link generated between 'conservation'[53] and utilization.

International treaties[54] do mirror this approach to utilization of the environment by the human population and the prevention of deterioration at the same time. Of note, the Convention on Biodiversity asserts "that conservation and sustainable use of biological diversity is of critical importance for meeting the food, health and other needs of the growing world population"[55], thereby directly placing utilization alongside conservation and protection. In fact, the Article on Objectives specifically acknowledges this relationship and states "[t]he objectives of this Convention … are the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources"[56], with Article 3 further stating that "States have …the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment"[57]. This outlining of 'General Measures for Conservation and Sustainable Use'[58] and 'Identification and Monitoring'[59] later in the Convention add to the forwarding of utilization alongside protection.

Considering the presence of environmental development from the perspective of protective utilization, the successive translations of the concept of sustainable development do highlight that the environment is to be exploited only to the extent that substantial deterioration of the natural environment will not occur. The translations of the concept do not allow for the complete non-usage of the environmental capabilities and "natural capital"[60]. This usage is also seen to be vital for the fulfillment of the entire development agenda, also bringing forward the other pillars of sustainable development. The United Nations Environment Programme has declared "[n]atural resources are the

[52] SDGs: *ibid* Goal 14 and 15
[53] SDGs: *ibid* Goal 14 and 15.
[54] Please also see: Cartagena Protocol on Biosafety to the Convention on Biological Diversity: [n 28]; ASEAN Agreement on the Conservation of Nature and Natural Resources (1985) (signed 09/07/1985) 24 I.L.M. 1142.
[55] Convention on Biological Diversity (CBD) (signed 05/06/1992, entered into force 29/12/1993) 1760 UNTS 79; 31 ILM 818, Preamble.
[56] CBD: *ibid* Article 1.
[57] CBD: *ibid* Article 3.
[58] CBD: *ibid* Article 6
[59] CBD: *ibid* Article 7.
[60] R. Costanza and H. E. Daly: [n 30] 37.

foundation of social and economic development"[61]. Ultimately therefore, this protective utilization does not assume no degradation or interference with the environment will occur, only that the significant risks should be mitigated. For example, Viriyo has explained that "an environmental impact assessment … can be described as a study of the adverse consequence, which a planned project may have on the environment … the findings of EIA can be seen as the report, which affects the decision whether the development projects should be implemented. It also suggests whether the projects should be modified to minimize the consequences on the environment"[62].

This crucial perspective of environmental development has predominantly stemmed from the overarching acknowledgement that unsustainable utilization has in the past attributed to much environmental deterioration and, in other words, "[t]he importance of the ecological perspective is increasingly evident, as more of the critical problems facing humanity arise from failures of ecological resilience"[63]. Therefore, reaffirming the purpose of environmental development to maintain the 'ecological resilience' and 'ecological integrity' or 'carrying capacity' of the natural environment as discussed previously. The term 'ecological resilience' has been defined as "the ability of an ecosystem to maintain its normal patterns of nutrient cycling and biomass production after being subjected to damage caused by an ecological disturbance"[64]. This has allowed a significant valuation of the natural environment to the extent that the natural processes are maintained, and effective utilization can continue to occur. Perrings consideration of "resilience and sustainability"[65] has maintained the importance of the maintenance of such an 'ecological resilience'.

Regarding these "failures of ecological resilience"[66], the Intergovernmental Panel on Climate Change (IPCC) in 2021 corresponds with such thoughts and provides that:

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[61] United Nations Environment Programme, 'Sustainable Natural Capital', found at < https://www.unep.org/regions/asia-and-pacific/regional-initiatives/supporting-resource-efficiency/sustainable-natural> accessed March 2021.
[62] Aggarin Viriyo, 'Principle of Sustainable Development in International Environmental Law' (2012) found at < http://dx.doi.org/10.2139/ssrn.2133771> accessed January 2022, 10.
[63] J. M. Harris: [n 20] 13.
[64] Britannica Online Dictionary, found at <https://www.britannica.com/science/ecological-resilience> accessed March 2021.
[65] Charles Perrings, 'Resilience and Sustainable Development' (2006) *Environment and Development Economics*, Vol. 11, Issue 4, 417- 427.
[66] J. M. Harris: [n 20] 13.

> "Each of the last four decades has been successively warmer than any decade that preceded it since 1850. Global surface temperature in the first two decades of the 21st century (2001-2020) was 0.99 [0.84- 1.10] °C higher than 1850-1900. Global surface temperature was 1.09 [0.95 to 1.20] °C higher in 2011– 2020 than 1850–1900, with larger increases over land (1.59 [1.34 to 1.83] °C) than over the ocean (0.88 [0.68 to 1.01] °C)"[67].

Equally, the United Nations Framework Convention on Climate Change (UNFCCC), as far back 1992, importantly acknowledged:

> "[T]hat human activities have been substantially increasing the atmospheric concentrations of greenhouse gases, that these increases enhance the natural greenhouse effect, and that this will result on average in an additional warming of the Earth's surface and atmosphere and may adversely affect natural ecosystems and humankind"[68].

The final point in discussion on environmental development is again forwarded by both Harris and the successive translations of the concept of sustainable development. This provides "[s]ustainability … is more than limits on population or restraint in consumption … [i]t means that in our choice or goods and technologies we must be oriented to the requirements of ecosystem integrity and species diversity"[69], thereby inducing an active obligation instead of merely showing restraint or protection. Indeed, many of the examples above have referred to the idea of a change in behavior that would provide beneficial environmental outputs. For example, the SDGs recognize the need to "expand infrastructure and upgrade technology for supplying modern and sustainable energy services for all"[70]. This obligation suggests continual research and development into cleaner technologies that affect the surrounding natural environment.

[67] IPCC, 2021: Summary for Policymakers. In: Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change [Masson-Delmotte, V., P. Zhai, A. Pirani, S. L. Connors, C. Péan, S. Berger, N. Caud, Y. Chen, L. Goldfarb, M. I. Gomis, M. Huang, K. Leitzell, E. Lonnoy, J.B.R. Matthews, T. K. Maycock, T. Waterfield, O. Yelekçi, R. Yu and B. Zhou (eds.)]. Cambridge University Press. In Press, 5.
[68] United Nations Framework Convention on Climate Change (signed 09/05/1992, entered into force 21/03/1994) 1771 UNTS 35, Preamble.
[69] J. M. Harris: [n 20] 14.
[70] SDGs: [n 11] Goal 7.

2.3 Economic Development

> "An economically sustainable system must be able to produce goods and services on a continuing basis, to maintain manageable levels of government and external debt, and to avoid extreme sectoral imbalances which damage agricultural or industrial production"[71].

From an initial observation of Harris's basic analysis of the perspective of economic development within the realm of sustainable development, it can be apprehended the foundational understanding of the pillar in relation to production, consumption and financial obligations. This reference also begins to differentiate between the term 'economic development', which has been defined "as a process that generate[s] economic and social, quantitative and, particularly, qualitative changes"[72] and 'economic growth', which can be seen to observe "an increase of the national income *per capita*"[73]. However, more importantly it becomes overwhelmingly apparent the relationship economic development maintains with the other two foundational pillars, that of environmental and social development, and perhaps to the extent that there is an inseparable connection. In this regard, the World Bank has elucidated in an even simpler manner the most approachable understanding of the interlinkage:

> "Sustainable development means basing developmental and environmental policies on a comparison of costs and benefits and on careful economic analysis that will strengthen environmental protection and lead to rising and sustainable levels of welfare"[74].

This broadened appreciation of economic development with linkages to the environmental and social developmental agenda would closely correspond with Barbier and Markandya's definitional analysis of this pillar being interpretated as "a wider concept concerned with sustainable economic, ecological and social development"[75].

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[71] J. M. Harris: [n 20] 6. For a wider appreciation of sustainable economic development, please see: James Bacchus, *The Willing World: Shaping and Sharing a Sustainable Global Prosperity* (2018).
[72] Alina-Petronela Haller, 'Concepts of Economic Growth and Development; Challenges of Crisis and of Knowledge' (2012) *Economy Transdisciplinarity Cognition*, Vol. 15, Issue 1, 66.
[73] A. P. Haller: *ibid* 66.
[74] World Bank, *World Development Report 1992: Development and the Environment* (1992) 8.
[75] Edward B. Barbier and Anil Markangya, *The Conditions for Achieving Environmentally Sustainable Development* (1989) LEEC Paper DP 89-01, 1.

Stemming from this appreciation, to equate economic development and growth with only the generation of monetary or financial wealth and prosperity would be highly inaccurate, although the calculation of increase in financial wealth is an identifier. For example, Target 8.1 of the SDGs states, "[s]ustain per capita economic growth in accordance with national circumstances and, in particular, at least 7 per cent gross domestic product growth per annum in the least developed countries"[76]. Wealth instead, within the remit of sustainable economics, can additionally be considered extremely broadly from the perspective of decrease of population in poverty or the use of renewable resources, for instance, and furthermore begins to generate the rationale of the title of sustainable economics as opposed to just economics.

To now concentrate on the chief characteristics of sustainable economics, a rather more abstract discussion will now be compiled. Barbier has recognized "there has occurred a major revision in development thinking that is presenting a fundamental challenge to the conventional consensus on economic development"[77] and ultimately "sustainable economic development is a difficult one to grasp analytically"[78]. Toman, amongst others[79], would agree with this assertion as the academic refers to "inherent ambiguities"[80] in the presentation of economic development. Initially the remit of economic development will be observed considering both the appreciation of environmental and social parameters.

Primarily, in connection to environmental protection and within the bounds of sustainable economic development, it is fundamental to consider that "economic growth should be such that negative environmental impact is limited"[81]. This assertion recognizes the functioning of the extent of this pillar that the environment will not be substantially deteriorated and is related to the previously discussed understanding of "ecological

[76] SDGs: [n 11] Target 8.1.
[77] Edward B. Barbier, 'The Concept of Sustainable Economic Development' (1987) *Environmental Conservation*, Vol. 14, No. 2, 101.
[78] E. B. Barbier: *ibid* 101.
[79] Please see: Bob Giddings, Bill Hopwood and Geoff O'Brien, 'Environment, economy and society: fitting them together into sustainable development' (2002) *Sustainable Development*, Vol. 10, Issue 4, 187-196.
[80] Michael A. Toman, 'The Difficulty in Defining Sustainability' in Wallace E. Oates (Eds) *The RFF Reader in Environmental and Resource Policy* (2006) 247.
[81] Dan Cristian Duran, Luminita Maria Gogan, Alin Artene and Vasile Duran, 'The Components of Sustainable Development – A Possible Approach' (2015) *Procedia Economics and Finance* 26, 809.

resilience"[82] or "ecosystem integrity … [and] carrying capacity"[83]. This appreciation of the environmental limitation derives from the view that "[i]t is shown … rapid economic growth with obtaining maximum benefits … creates a heavy burden on the ability of the planet to support"[84].

The placing of limitations upon usage of environmental resources in connection with economics is reiterated within successive translations of the concept. Principle 11 of the Rio Declaration provides "[e]nvironmental standards, management objectives and priorities should reflect the environmental and developmental context to which the apply. Standards applied by some countries may be inappropriate and of unwarranted economic … cost to other countries"[85] and Principle 12 states that "[s]tates should cooperate to promote a supportive and open international economic system that would lead to economic growth and sustainable development in all countries, to better address the problems of environmental degradation"[86]. These references highlight the nature of the relationship between environmental protection and the role economic development. The Future Want Outcome Document equally reaffirms "[w]e recognize that … protecting and managing the natural resource base of economic and social development are the overarching objectives of and essential requirements for sustainable development"[87].

Secondly, alternatively in connection to social development, there is a repeated linkage to the relationship between economic development and growth and the fulfillment of the social development agenda, of which an expanded discussion will be found under the consequent sub-heading of social development, to the extent that economic development is limited by the attainment of such aspects and are ultimately not deteriorated but in fact bolstered or improved. In this sense, just like the consideration of environmental protection within the functioning of sustainable economics, the social development agenda places limitations upon economic development and growth. Harris refers to sustainable economics as "the maximization of welfare over time"[88]. 'Welfare' in this sense could denote the decrease in poverty or improvement in consumption patterns, for

[82] J. M. Harris: [n 20] 12.
[83] I. Serageldin and A. Steer: [n 26] 34.
[84] D. C. Duran *et al*: [n 81] 809.
[85] *Rio Declaration*: [n 46] Principle 11.
[86] *Rio Declaration*: *ibid* Principle 12.
[87] United Nations General Assembly, *The Future We Want*, Outcome Document of the United Nations Conference of Sustainable Development (2012) A/RES/66/288, Principle 4.
[88] J. M. Harris: [n 20] 7.

example. To underline this point, Principle 8 of the Stockholm Declaration provides "[e]conomic and social development is essential for ensuring a favorable living and working environment for man and for creating conditions on earth that are necessary for the improvement of the quality of life"[89], thereby concretely reaffirming this nature of the relationship between these two pillars and suggesting the limiting of the other for the benefit of the other. This limiting relationship can similarly be seen within the Rio Declaration[90] and the Johannesburg Declaration, which states:

> "We recognize that poverty eradication, changing consumption and production patterns, and protecting and managing the natural resource base for economic and social development are overarching objectives of, and essential requirements for sustainable development"[91].

This reference highlights again the range of interlinked aspects that economic and social development share and at the same time emphasizes that economic growth cannot occur without such recognition of the social aspects, in this way limiting the scope of sustainable economic policy application.

From the appreciation of the limitation of economic development considering both the environmental and social development agendas, it must now be accentuated that sustainable economic development and growth can be heavily contrasted theoretically from traditional economic theory as principally "sustainable development can be operationalized in terms of the conservation of natural capital"[92] alongside the preservation of social development aspects. Whereas traditionally "there is no special reason to conserve natural capital"[93]. This "represents a fundamental shift in the economic paradigm"[94] in mindset from maximum utilization of resources, in various forms, to sustainable utilization considering these protections. In this sense, Halpern has stated there is a "stretching [of] the theory to incorporate sustainability issues"[95]. Munda

[89] *Stockholm Declaration*: [n 43] Principle 8.
[90] *Rio Declaration*: [n 46] Principle 11.
[91] World Summit on Sustainable Development, Johannesburg Declaration on Sustainable Development and Plan of Implementation of the World Summit on Sustainable Development (*Johannesburg Declaration*) (2002) A/CONF.199/20, Principle 11.
[92] J. M. Harris: [n 20] 9.
[93] J. M. Harris: *ibid* 9.
[94] J. M. Harris: *ibid* 10.
[95] Ian Golding and L. Alan Winters, *The Economics of Sustainable Development* (1995) 1.

discusses both the application of neo-classical environmental economics[96] and ecological economics[97]. Due to this examination, the Academic has ultimately expressed:

> "In economic theory, three main conflictual values can be identified: allocation, distribution and scale. In an operational framework, this means that an exhaustive analysis has to take into consideration efficiency criteria, ethical criteria and ecological criteria, so a multidimensional paradigm is needed"[98].

This expanded theoretical position would accommodate Toman's "neo-classical market efficiency"[99] or "safe minimum standard"[100] approach to sustainable economics.

This particular theoretical perspective with the consideration of environmental and social developmental agenda also reinforces Dreo and Howarth's diagrammatic representation of the economic pillar of the concept of sustainable development, which is provided below.

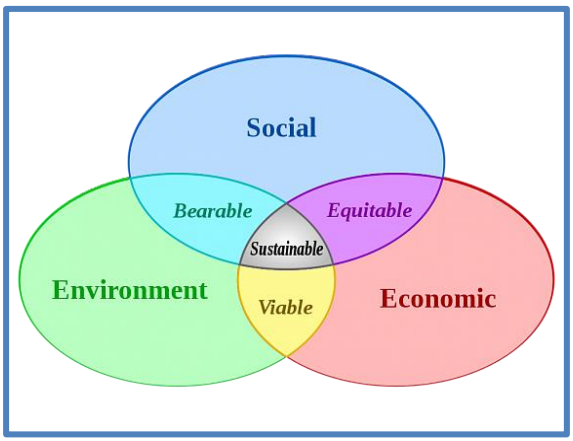

Figure 1: A diagram created by Johann Dreo and used by Richard B. Howarth[101].

The diagram identifies two specific relationships that economics has within the sustainable development agenda. Firstly, when environmental and economic policies share a joint perspective, viable environmental and economic outcomes are to be

[96] Giuseppe Munda, 'Environmental Economics, Ecological Economics and the Concept of Sustainable Development' (1997) *Environmental Values,* Vol. 6, No. 2, 216- 219.
[97] G. Munda: *ibid* 220-228.
[98] G. Munda: *ibid* 228.
[99] J. M. Harris: [n 20] 10.
[100] M. A. Toman: [n 80] 249-250.
[101] Richard B. Howarth, 'Sustainability, Well-Being, and Economic Growth' (2012) *Minding Nature,* Vol. 5. No, 2, 33.

produced. The term ‘viable’ has numerous contextually different but at heart similar meanings. The Oxford English Dictionary describes ‘viable’ as “capable of working successfully … or capable of surviving or living successfully”[102]. Represented in a multilateral treaty, the term ‘viable’ can be found in the CBD in Article 2:

> “"In-situ conservation" means the conservation of ecosystems and natural habitats and the maintenance and recovery of **viable** populations of species in their natural surroundings and, in the case of domesticated or cultivated species, in the surroundings where they have developed their distinctive properties”[103]. [Emphasis added]

Taking into consideration the context behind the CBD of the preservation of biological diversity, the term ‘viable’ could be argued to mean the effective conservation and maintenance of the “ecological resilience”[104] or “ecosystem integrity, carrying capacity and biodiversity”[105]. Therefore, the term ‘viable’ could be generally deemed to define a successful independent agent that could function without assistance over a continual temporal period. Indeed, the application of viability does encapsulate sustainable economic development in the appreciation of the immediate capping or limiting of maximum utilization to maintain continuous supply of resources to enhance production, consumption and financial streams for not only this generation, but for generations to come. In this sense, economic prosperity in the form of continual wealth generation can be seen to be paramount to the functioning of sustainable economics. Wealth generation, which has been previously discussed, can take on many forms of environmental and social aspects.

Secondly, closely associated to this degree of viability, is that of equity or equitable benefits produced. Whereas viability denotes longevity and continued maintenance of economic benefit, equitability suggests the distribution of the intra- and intergenerational economic benefit. The diagram demonstrates this aspect when the economic and social pillars are amalgamated. In numerous translations of the concept of sustainable development, reference to both intra- and intergenerational is repeatedly found. The Rio

[102] Catherine Soanes with Sarah Hawker, *Compact Oxford English Dictionary for Students* (2006) 1157.
[103] CBD: [n 55] Article 2.
[104] J. M. Harris: [n 20] 13.
[105] I. Serageldin and A. Steer: [n 26] 34.

Declaration refers to the "economic growth … in all countries"[106] and "present and future generations"[107], alongside "[t]he special situation and needs of developing countries"[108]. The SDGs equally recognize the intra- and intergenerational distribution of equity, for example Target 8.5 states "[b]y 2030, achieve full and productive employment and decent work for all women and men, including for young people and persons with disabilities, and equal pay for work of equal value"[109], which accommodates equity in present generations, beside the reference to, for example, "[a]chieve higher levels of economic productivity through diversification, technological upgrading and innovation"[110], which outlines a pathway for equity to future generations. Together however, it must be fundamentally recognized the extent of the distribution of the equitable benefits.

Considering these realizations therefore, to determine an overall description academics have continuously equated the functioning of sustainable economics with efficiency. Harris provides that "sustainability appears to mean nothing more than efficient resource allocation"[111] and similarly Duran *et al* overview this pillar is as "desired to produce a maximum flow of income in terms of rational use, resource efficiency, particularly scarce resources"[112]. The synchronization of economic development with environmental and social development agenda, as shown above, would affirm such a degree of efficiency. Target 8.4 of the SDGs prescribes "global resource efficiency in consumption and production and endeavor to decouple economic growth from environmental degradation"[113]. Efficiency has been demonstrated in the economic approach to environmental resources as well as social aspects, for example, in relation to the alleviation of poverty.

[106] *Rio Declaration*: [n 46] Principle 12.
[107] *Rio Declaration*: *ibid* Principle 3.
[108] *Rio Declaration*: *ibid* Principle 6.
[109] SDGs: [n 11] Target 8.5.
[110] SDGs: *ibid* Target 8.2.
[111] J. M. Harris: [n 20] 8.
[112] D. C. Duran *et al*: [n 81] 809.
[113] SDGs: [n 11] Target 8.4.

2.4 Social Development

> "A socially sustainable system must achieve distributional equity, adequate provision of social services including health and education, gender equity, and political accountability and participation"[114].

Again, Harris's basic description of the third pillar of the concept of sustainable development provides a suitable starting point for the discussion of the social development perspective[115]. Although the reference given above denotes rather broad and all-encompassing objectives, initially it must be observed the relationship between this pillar and the pillars of environmental and economic development, which also begins to identify the boundaries of understanding of social development. The implication of "distributional equity … health and education … gender equity … accountability and participation"[116] does forward aspects of environmental and economic development. For instance, Griffin and McKinley have recognized "[i]n the last two decades people have become increasingly aware of the social costs associated with production processes and consumption patterns that harm the environment and this has given rise to demands that henceforth growth should be sustainable"[117]. In an extremely similar manner, it has been continually repeated:

> "Clearly, the issue of environmental sustainability is intertwined with that of poverty and inequity. It has frequently been noted that the causative relationship runs both ways – increased poverty and loss of rural livelihoods accelerates environmental degradation as displaced people put greater pressure on forests, fisheries, and marginal lands"[118].

And that:

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[114] J. M. Harris: [n 20] 6.
[115] Please see also: Robert H. W. Boyer, Nicole D. Peterson, Poonam Arora and Kevin Caldwell, 'Five Approaches to Social Sustainability and Integrated Way Forward' (2016) *Sustainability,* Vol 8, No. 9, 878.
[116] J. M. Harris: [n 20] 6.
[117] Keith Griffin and Terry McKinley, 'Human Development and Sustainable Development' in K. Griffin *et al* (Eds) *Implementing a Human Development Strategy* (1994) 96.
[118] J. M. Harris: [n 20] 16.

> "Social equity, the fulfillment of basic health and educational needs, and participatory democracy are crucial elements of development, and are interrelated with environmental sustainability"[119].

From these linked assertions, it becomes clear the relationship between the social, environmental and economic pillars. Using these references, if environmental degradation occurs, this will lead to economic stress and subsequently social pressures. Likewise, if economic strain is present, environmental and social tension will be observed. The positive functioning of each pillar must be maintained to fulfill all the other developmental pillars.

Stemming from this appreciation, it is now necessary to determine more stringently the boundaries that are adopted by the pillar of social development. It has previously been demonstrated the relationship between this pillar and the others, but moving to within this pillar, significant detail has been somewhat lacking. Primarily, social development is concerned with the evolution of the human population. This can be compared to the view that environmental development concerns the relationship with the environment and appreciation of the "ecological resilience"[120] or how economic development concerns the making and distribution of wealth. Considering the human orientated nature of social development, this pillar has been referred to as "human development"[121] or "people-centered development"[122] or as the "human component"[123] of the sustainable development agenda. The focus and recipients of social development therefore is directly transferred to the human population with application of development suggesting some form of order and positive improvement.

To delve even deeper into the precise nature of the relationship the pillar of social development has with the human population, much difficulty in appreciation can be found, which is somewhat contrasting to that which is found within the environmental and economic pillars. Dempsey *et al* fundamentally outline the issue and state "while a social dimension to sustainability is widely accepted, exactly what this means has not

[119] Jonathan M. Harris and Neva R. Goodwin, *A Survey of Sustainable Development: Social and Economic Dimensions* (2009) XXXIII (xxxiii).
[120] J. M. Harris: [n 20] 13.
[121] Sabina Alkire, 'Dimensions of Human Development' (2002) *World Development*, Vol. 30, Issue 2, 181-205.
[122] Deborah Eade, *Capacity-Building: An Approach to People-Centred Development* (1997) 8.
[123] D. C. Duran *et al*: [n 81] 810.

been very clearly defined or agreed"[124]. In justifying such an observance, the academics have observed both that "surprisingly little attention has been given to the definition of social sustainability"[125] and that "[s]ocial sustainability is a wide-ranging multi-dimensional concept"[126]. This 'multi-dimensional' view is also shared by Alkire[127] and therefore generates an understanding of the potentially extremely broad and fluid nature of social development, which is not seen within the other pillars.

To start to clarify the extent of the broadness associated with the pillar of social development, it is now essential to analyze legal mechanisms that proclaim to perpetuate the definition of social development. The Stockholm Declaration refers to "a life of dignity and well-being"[128] of humans, "policies promoting or perpetuating apartheid, racial segregation, discrimination, colonial and other forms of oppression and foreign domination stand condemned and must be eliminated"[129] and "social development is essential for ensuring a favorable living and working environment for man and for creating conditions on earth that are necessary for the improvement of the quality of life"[130]. The level of generality lacking in specific detail is evident, but there is strong sense of enhancement of the 'quality of life'. Moving to later translations of the sustainable development agenda, a similar perspective can be found. From the start, the Rio Declaration provides that "[h]uman beings are at the center of concerns for sustainable development. They are entitled to a healthy and productive life"[131]. Principle 5 starts to further elucidate social development aspects, "[a]ll States and all people shall cooperate in the essential task of eradicating poverty as an indispensable requirement for sustainable development, in order to decrease the disparities in standards of living"[132]. Again, "higher quality of life for all people"[133] is referred to directly alongside the need

[124] Nicola Dempsey, Glen Bramley, Sinead Power and Caroline Brown, 'The Social Dimension of Sustainable Development: Defining Urban Social Sustainability' (2011) *Sustainable Development*, Vol. 19, Issue 5, 1.
[125] N. Dempsey *et al*: *ibid* 1.
[126] N. Dempsey *et al*: *ibid* 2.
[127] S. Alkire: [n 121] 181-205.
[128] *Stockholm Declaration*: [n 43] Principle 1.
[129] *Stockholm Declaration*: *ibid* Principle 1.
[130] *Stockholm Declaration*: *ibid* Principle 8.
[131] *Rio Declaration*: [n 46] Principle 1.
[132] *Rio Declaration*: *ibid* Principle 5.
[133] *Rio Declaration*: *ibid* Principle 8.

to "promote appropriate demographic policies"[134]. There is also an introduction to the recognition of specific participatory aspects;

> "Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes ... Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided"[135].

The succeeding 2002 Johannesburg Declaration on Sustainable Development (Johannesburg Declaration) once more refers to "the need for human dignity for all"[136] and "a world free of the indignity and indecency occasioned by poverty"[137]. Most importantly however, the Johannesburg Declaration also refers to "women's empowerment, emancipation and gender equality"[138] after dictating:

> "We reaffirm our pledge to place particular focus on … the fight against the worldwide conditions that pose severe threats to the sustainable development of our people, which include: chronic hunger; malnutrition; foreign occupation; armed conflict; illicit drug problems; organized crime; corruption; natural disasters; illicit arms trafficking; trafficking in persons; terrorism; intolerance and incitement to racial, ethnic, religious and other hatreds; xenophobia; and endemic, communicable and chronic diseases, in particular HIV/AIDS, malaria and tuberculosis"[139].

In great contrast to the preceding translations of social development, the SDGs represent an altogether more direct approach to this pillar of sustainable development. The Goals of "no poverty"[140], "zero hunger"[141], "good health and well-being"[142], "quality

[134] *Rio Declaration*: *ibid* Principle 8.
[135] *Rio Declaration*: *ibid* Principle 10.
[136] *Johannesburg Declaration*: [n 91] Principle 2.
[137] *Johannesburg Declaration*: *ibid* Principle 3.
[138] *Johannesburg Declaration*: *ibid* Principle 21.
[139] *Johannesburg Declaration*: *ibid* Principle 19.
[140] SDGs: [n 11] Goal 1.
[141] SDGs: *ibid* Goal 2.
[142] SDGs: *ibid* Goal 3.

education"[143], "gender equality"[144], "clean water and sanitation"[145], "affordable and clean energy"[146], "decent work"[147] and "reduced inequalities"[148] do represent substantially what is referred to in the Johannesburg Declaration previously analyzed. The level of detail is comparably much higher and the relationship between the human population and the sustainable development agenda is much more obvious, not just generally discussing 'dignity' or 'quality of life', for example.

Even though these soft-law Declarations have referred to multiple and increasing aspects of social development, until the deliverance of the SDGs, the degree of specific detail is low alongside a rather sporadic or scattered reference lacking in organizational logic. It may be significant to note at this point the differential legal status the soft-law declarations maintain as compared to their hard law counterparts[149]. Ahmed and Mustofa interestingly state such law "refers to international norms that are deliberately non-binding in character but still have legal relevance, located in the twilight between law and politics"[150], thereby potentially alluding to the nature of the content.

In terms of representation in multilateral treaties, a similar degree of coverage can be found. An example can be seen in USMCA[151] which raised numerous suggestions of social development agenda practices. The Preamble provides references to "employment, community development, youth engagement and innovation"[152] and the protection of "legitimate public welfare objectives, such as health, safety … of labour rights, the improvement of working conditions"[153]. There is much cohesion in detail between the statement of social development practices within USMCA and those forwarded within the SDGs. Likewise, the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus

[143] SDGs: *ibid* Goal 4.
[144] SDGs: *ibid* Goal 5.
[145] SDGs: *ibid* Goal 6.
[146] SDGs: *ibid* Goal 7.
[147] SDGs: *ibid* Goal 8.
[148] SDGs: *ibid* Goal 10.
[149] Alan Boyle, 'The Choice of a Treaty: hard law versus soft law' in Simon Chesterman, David M. Malone and Santiago Villalpando (Eds) *The Oxford Handbook of United Nations Treaties* (2019).
[150] Arif Ahmed and Md. Jahid Mustofa, 'Role of Soft Law in Environmental Protection: An Overview' (2016) *Global Journal of Politics and Law Research,* Vol. 4, No. 2, 2.
[151] USMCA: [n 15].
[152] USMCA: *ibid* Preamble.
[153] USMCA: *ibid* Preamble.

Convention)[154] acknowledges "that every person has the right to live in an environment adequate to his or her health and well-being"[155] and that "citizens must have access to information, be entitled to participate in decision-making and have access to justice"[156].

Ultimately however, these successive translations have led to a rather mixed, confused and unfocused approach to the understanding of social development, which is also predominantly guided by context within multilateral treaties. The numerous aspects observed attributed to social development do somewhat refine and at the same time expand the definition. Due to this broad representation and to perhaps make more sense of the pillar of social development, academia has generated helpful categorizations that can aid in understanding and application of the development agenda. The principal categorization is that provided within the 1999 World Bank's Comprehensive Development Framework (CDF)[157] that strived to adopt "a long-term, holistic and strategic approach where all the component parts are brought together"[158] due to the acceptance that both "world poverty has increased and growth prospects have dimmed for developing countries during the 1980s and 90s"[159] and "development constraints are structural, and social, and cannot be overcome through economic stabilization"[160] alone, which could therefore expose the social development perspective. The CFD generated "a matrix as a management tool"[161], which annunciates importantly in terms of clarification, four categories of approach to the understanding. These categorizations are as such:

- "*Structural*: good governance and clean government, an effective legal and judicial system, a well-organized and supervised financial system, and social safety net and social programs.
- *Human*: education and knowledge transfer, health and population issues.

[154] Access to Information, Public Participation and Access to Justice in Environmental Matters (Aarhus Convention) (signed 25/06/1998, entered into force 30/10/2001) 2161 UNTS 447; 38 ILM 517.
[155] Aarhus Convention: *ibid* Preamble
[156] Aarhus Convention: *ibid* Preamble
[157] James D. Wolfensohn, *The Comprehensive Development Framework* (1999) The World Bank.
[158] J. D. Wolfensohn: *ibid* 17.
[159] Nagy Hanna, *Implementation Challenges and Promising Approaches for the Comprehensive Development Framework* (2000) OED Working Paper Series, No. 13, VII (vii).
[160] James Fox, *Applying the Comprehensive Development Framework to USAID Experiences* (2000) OED Working Paper Series, No. 15, VII (vii).
[161] CDF Secretariat, *Comprehensive Development Framework: Questions and Answers Update* (1999) World Bank Headquarters, 4.

- *Physical*: water and sewerage, energy, roads, transport and telecommunications, and environmental and cultural issues.
- *Specific strategies*: for rural, urban, and private sector development"[162].

The way in which CFD consolidated the general perception of development into smaller, linked and specific categories has been beneficial in terms of understanding of social development. Indeed, all representations shown above do neatly fit into these four categorizations. For example, the "*Structural*"[163] categorization could include the governance systems proclaimed with both the Rio Declaration[164] and the Aarhus Convention[165]. Additionally, the "*Human*"[166] categorization could encompass Johannesburg Declarations "fight against … communicable and chronic diseases"[167]. It must also be stated that with the repeated requirement for the fulfillment of 'quality of life' and 'dignity' being the foundation of social development, all four categorizations could accommodate such demand.

2.5 International Investment Law and the Importance of Foreign Direct Investment (FDI)

International investment continues to be an extremely relevant action and the field of international investment law "is best described as a field of public international law which deals with the laws governing the commercial activities of multinational enterprises that are undertaken in foreign states"[168]. Morgan and Katsikeas assertion remains fundamentally correct, "[a]t it's most basic, economic exchange across national boundaries"[169]. International investment law does include the regulation of FDI. FDI is a

[162] CDF Secretariat: *ibid* 4.
[163] CDF Secretariat: *ibid* 4.
[164] *Rio Declaration*: [n 46] Principle 10.
[165] Aarhus Convention: [n 154] Preamble.
[166] CDF Secretariat: [n 161] 4.
[167] *Johannesburg Declaration*: [n 91] Principle 19.
[168] David Collins, *An Introduction to International Investment Law* (2017), 1. Please see also: M. Sornarajah, *The International Law on Foreign Investment* (2017); Rudolf Dolzer, Ursula Kriebaum and Christoph Schreuer, *Principles of International Investment Law* (2022).
[169] Robert E. Morgan and Constantine S. Katsikeas, 'Theories of International Trade, Foreign Direct Investment and Firm Internationalization: a critique' (1997) *Management Decision*, Vol. 35, Issue 1, 68.

narrower and less generalized component of the field of international investment law. Collins has described FDI as such:

> "International investment law primarily covers the international laws which control Foreign Direct Investment (FDI). The phrase 'direct' investment is important because this is meant to exclude investment activities for which the extra-territorial component of the enterprise is too small for it to genuinely be considered foreign … direct investment means that the foreign firm has a sufficient stake in the firm that it exercises meaningful management or control"[170].

The precise appreciation of the regulation and ultimately protection of the investments of foreign investors is a crucial underpinning. Muchlinski has observed that "it is fair to say that the persistent disagreement between states over the precise form and content of customary law standards relating to the treatment of aliens and their property has ensured that the major source of norms in this field will be found in international treaties and other forms of binding and non-binding instrument"[171]. Therefore, the inconsistency in the use of the variable application of customary international law to guarantee certain rights, duties, and protections must be recognized as an important foundation to the act of FDI.

Although the rudimental rationale behind the regulation of FDI is outlined above, the actual act itself deserves some attention in terms of scale also. The statistical analysis simply adds to the level of the significance that FDI maintains within the international arena. A report in 2016 observed that "[i]n 2015, global FDI flows increased by 25% to USD 1.7 trillion, reaching their highest level since the global financial crisis began in 2007"[172], with Johnson asserting the overall picture that "[d]uring the last 20 to 25 years, there has been a tremendous growth in global foreign direct investment"[173]. However, a brief regard must be given to the effect that the Coronavirus Pandemic has had upon FDI. The OECD in 2020 announced that "FDI flows are expected to fall by more than 30% in

[170] D. Collins: [n 168] 1.
[171] Peter Muchlinski, 'Chapter 1: Policy Issues' in Peter Muchlinski, Federico Ortino and Christoph Schreuer (Eds) *The Oxford Handbook of International Investment Law* (2008) 16.
[172] OECD, 'FDI in Figures' (April 2016), found at < http://www.oecd.org/corporate/FDI-in-Figures-April-2016.pdf > accessed November 2019, 1.
[173] Andreas Johnson, *Host Country Effects of Foreign Direct Investment: The Case of Developing and Transition Economies* (JIBS Dissertation Series No. 031, 2005), 1.

2020 even under the most optimistic scenario"[174] and this has been caused by governments "task[ing] stringent public health measures to limit the spread of the COVID-19 pandemic"[175].

In addition to the statistical presentation of the weight of FDI, when dealing with the question of the importance of FDI, the answer can be provided from a joint domestic and host state "perspective"[176] also, which is somewhat again linked to this previously referred developmental capability. The domestic perspective pertains to the benefits attributed to the investor or investing state and therefore to describe the investment as 'foreign', the investor must be international and must not be located within the state in which the investment is located, whereas the host state perspective relates to the advantages given to state in which the investment is located. As a brief overview, all the interests detailed below are based on the premise that "[a] country's most competent and successful firms tend to export and to invest in production abroad, and the same is generally true of the most successful industries"[177].

The primary benefit that FDI provides is the ability of the domestic state to take advantage of a host states' operating environment. The location in which the investment functions is important as it could determine the success of the investment. If for example, especially for a particularly labor-intensive industry, a state maintains lower labor costs or even that there is more abundant labor with the requisite skills, then business practice could be described as improved in relocating to that state. Money could be saved in not moving staff internationally and not providing training for employees to gain the necessary skills. Equal benefit could also be provided in relation to the presence of natural resources and the prevention of the costs related to the movement of these natural resources away from the source. Bukari states that "[i]nvestors from foreign countries take advantage of the natural resources available in abundance in another geographical location, other than

[174] OECD, 'Tackling Coronavirus (COVID-19): Contributing to a Global Effort', found at < https://www.oecd.org/coronavirus> accessed January 2021, 1.
[175] OECD, 'Tackling Coronavirus (COVID-19): Contributing to a Global Effort': *ibid* 1. Additionally, see: OECD, FDI in Figures (2021), found at < https://www.oecd.org/investment/FDI-in-Figures-April-2021.pdf > accessed February 2022.
[176] R. Dolzer, U. Kriebaum and C. Schreuer: [n 168] 27-29.
[177] Robert E. Lipsey, 'Home and Host-Country Effects of Foreign Direct Investment' in Robert E. Baldwin and L. Alan Winters (Eds) *Challenges to Globalization: Analyzing the Economics'* (2002) 337. Please see also: Aaron X. Fellmeth, *Introduction to International Business Transactions* (2020) Chapter 7.

theirs and at cheaper prices in some cases"[178]. An OECD Report affirmed that "[t]he main factors motivating FDI into Africa in recent decades appear to have been the availability of natural resources in the host countries (e.g., investment in the oil industries of Nigeria and Angola)"[179].

From a somewhat reversed perspective, another geographical benefit FDI could provide is that of the increase in employment of staff at the locations of the investment. Additionally, Loungani and Razin recognize that "[r]ecipients of FDI often gain employee training in the course of operating the new businesses, which contributes to human capital development in the host country"[180]. If economic development is then considered and the view that "FDI as a source of … income growth and employment"[181], the employment of citizens upon location could provide many streams of financial movement. Weight is added when it is considered that "most empirical studies conclude that FDI contributes to both factor productivity and income growth in host countries, beyond what domestic investment would normally trigger"[182]. Though it must be remembered that there could be employment from the local community, the extent would be relative to the operation involved. However, even if the investors bring further staff from the investment headquarters, the movement of staff could also add to this stream of capital being returned to the local area.

Strongly related to the geographical benefits are the benefits of the natural transference of business practices. Ricupero determines that FDI induces "the transfer of technology, organizational and managerial practices and skills"[183]. If the investor diversified into new international locations, then much learning could occur as there are many differences in these skills from state to state and therefore acknowledgement of these skills could occur

[178] Portia Alimatu Bukari, 'Foreign Direct Investment: How Beneficial Is It?', found at < http://dl.icdst.org/pdfs/files/5c6f239e5690cc12484f1ca593ab67b3.pdf> accessed November 2019.
[179] OECD, 'Foreign Direct Investment for Development: Maximizing Benefits, Minimizing Costs' (2002), found at < https://www.oecd.org/investment/investment for development/1959815.pdf > accessed November 2019, 8. A similar acknowledgement can be seen in Janeth Theonest Kalokora Prof. Qianto Fan, 'The Impacts of Foreign Direct Investment on Economic Growth in Tanzania from 1998 to 2018' (2020) *Journal of Business & Economic Policy*, Vol. 7. No. 3, 26-31.
[180] Prakash Loungani and Assaf Razin, 'How Beneficial Is Foreign Direct Investment for Developing Countries?' (2001) *Finance & Development*, Vol. 38, No. 2.
[181] OECD, 'Foreign Direct Investment for Development: Maximizing Benefits, Minimizing Costs': [n 179] 5.
[182] OECD, 'Foreign Direct Investment for Development: Maximizing Benefits, Minimizing Costs': *ibid* 9.
[183] UNCTAD, 'Tax Incentives and Foreign Direct Investment: A Global Survey' (2000) ASIT Advisory Studies, No. 16, UN Symbol: UNCTAD/ITE/IPC/Misc, 3.

and changes within the domestic company could come into force. These "knowledge spillovers"[184] potentially contain the overall best practices and Johnson argues, "the possibility of technology spillover is one of the major reasons host country governments try to attract FDI inflows"[185].

A final important benefit that the act of FDI forwards concerns the constructive stimulation of the operating environment in terms of the regulatory incentives generated by states. Nourbakhshian, Hosseini, Aghapour and Gheshmi forward that "policymakers in a large number of countries are engaged in creating all kind of incentives (e.g., export processing zones and tax incentives) to attract FDI"[186]. The reasoning given is clear, "it is proposed to affect local economic development positively"[187]. Apart from 'export processing zones and tax incentives', states can also use "preferential treatment of long-term capital gains … deductions for qualifying expenses… [and] … zero or reduced tariffs"[188]. Indeed, UNCTAD believes that "most Governments … have increasingly adopted measures …to facilitate the entry of foreign direct investment"[189]. Therefore, FDI can ultimately encourage a "favorable and enabling climate"[190].

2.6 Why then a cohesion of the Concept of Sustainable Development and International Investment Law?

Although Robbins has stated that international investment law "has … been transformed into a dynamic and evolving area of the law that is beginning to foster into the global strategies"[191], Miles still continues to question "the exact nature of the relationship between environmental protection and foreign investment protection"[192], which could be

[184] Mohammad Reza Nourbakhshian, Sepehur Hosseini, Ali Haj Aghapour and Reza Gheshmi 'The Contribution of Foreign Direct Investment into Home Country's Development' (2012) *International Journal of Business and Social Science* Vol. 3, Issue 2 (Special Issue), 278.
[185] A. Johnson: [n 173] 26.
[186] M. R. Nourbakhshian *et al*: [n 184] 278.
[187] M. R. Nourbakhshian *et al*: *ibid* 278.
[188] UNCTAD, 'Tax Incentives and Foreign Direct Investment: A Global Survey': [n 183] 21-22.
[189] UNCTAD, 'Tax Incentives and Foreign Direct Investment: A Global Survey': *ibid* 11.
[190] UNCTAD, 'Tax Incentives and Foreign Direct Investment: A Global Survey': *ibid* 3.
[191] Joshua Robbins, 'The Emergence of Positive Obligations in Bilateral Investment Treaties' (2006) *University of Miami International & Comparative Law Review*, Vol. 13, 404.
[192] Kate Miles, 'International investment law and the environment: introduction' in Kate Miles (Eds) *Research Handbook on Environment and Investment Law* (2019) 1.

extended to the broader concept of sustainable development also[193]. Indeed, there are many examples of international investment regulations that have adopted a rather modern foresight of inclusion of these global strategies, including that of labor rights, human rights and sustainable development itself[194].

To reinforce the dominance of the concept of sustainable development, Barral has stated that "sustainable development has become an unavoidable paradigm that should … underpin most, if not all, human actions"[195], therefore it could easily be suggested that decisions concerning international investment agreements should always be 'underpinned' partly by reasons of sustainable development. For this changing view given to the concept, to be fully immersed into the relevant legal culture, it is imperative for the current natures of the independent legal mechanisms to be analyzed. For a system lacking in the relevant effectiveness and a certain degree of facilitation will be unable to achieve any possibility of the required translation. The importance of this research is given considerable strength when sustainable development has been continually described to be internationally "problematic"[196] in implementation and "pos[ing] some of the most interesting challenges to international law making"[197].

3. Methodological Foundation: Fundamental Understandings

A strict doctrinal analysis will be the predominant methodology utilized. The research will therefore provide analysis solely on the substantive translation of the concept of sustainable development within the facilitative mechanisms utilized by the field of international investment law.

To both fully further understand the methodological approach employed within this Thesis and to address the substantial implications signposted in the above paragraph, it is necessary at this stage to develop an in-depth awareness of the key terminology

[193] A sentiment also shared in Marie-Claire Cordonier Segger, *Crafting Trade and Investment Accordes for Sustainable Development: Athena's Treaties* (2021).
[194] Examples include: USMCA: [n 15]; NAFTA: [n 17]; ECT: [n 17].
[195] Virginie Barral, 'Sustainable Development in International Law: Nature and Application of an Evolutive Legal Norm' (2012) *European Journal of International Law*, Vol.23, Issue 2, 377.
[196] Stuart Bell and Donald McGillivray, *Environmental Law* (2008) 57.
[197] Alan Boyle and David Freestone, *International Law and Sustainable Development* (2001) 1.

continually employed as well as the mechanisms used as yardsticks for comparison. The primary terminology that is required to be discussed concerns that of the term 'facilitative mechanism'. This term can be simply initially analyzed and simultaneously specifically contextualized as the method through which aspects or understandings of the concept of sustainable development can potentially be incorporated into legal promulgations commonly adopted by the field of international investment law pertaining to the regulation of FDI. At the term's most basic comprehension and using the Oxford Dictionary of English, the word 'facilitate' is defined, of which 'facilitative' is a derivative, as to "make (an action or process) easy or easier"[198]. Providing an equal investigation into the word 'mechanism', it can be described as "a natural or established process by which something takes place or is brought about"[199]. Together these definitions do generate an introductory perception that the term 'facilitative mechanism' is the method which enables the incorporation of the concept within the international investment regulatory processes.

This definition and usage of the term has been validated through differing legal contextualization's. For example, Berasconi and Prystowsky in an Issue Brief for the Center for International Investment Law refer continually to the term "facilitative mechanism"[200] when discussing the regulation of non-tariff measures within WTO parameters. Although the surrounding information of the Issue Brief is interesting, for the purposes of this discussion, the context in which the actual term 'facilitative mechanism' is applied is of greater relevance. The authors refer to "the creation of a new "facilitative mechanism" in the WTO to address all types of NTMs (*non-tariff measures*) across the board, arguably covering any measure affecting trade that is not a tariff"[201] and later referring to these mechanisms as "add[ding] a new process"[202]. Essentially highlighting the ability of facilitative mechanisms to incorporate new ideologies and processes into regulation.

[198] Catherine Soanes and Angus Stevenson, *Oxford Dictionary of English* (2005) 618.
[199] C. Soanes and A. Stevenson: *ibid* 1090.
[200] Nathalie Bernasconi-Osterwalder and Prystowsky, 'A New Facilitative Mechanism at the WTO to Address Non-tariff Measures: Issues for Consideration' (August 2006) Center for International Environmental Law, Issue Brief, 1-2.
[201] N. Bernasconi-Osterwalder and Prystowsky: *ibid* 1.
[202] N. Bernasconi-Osterwalder and Prystowsky: *ibid* 2.

It must also be remembered, for the purpose of this Thesis, that the term 'facilitative mechanism' does cover all forms of regulatory mechanisms, be it that of compliance[203], financial[204] or even those of a dispute-settlement nature[205]. The field of international investment law does combine these forms to produce the regulatory environment. More importantly however, what is extremely visible within these diverse forms is the ability to transpose ideologies and processes into the regulation. As stated by Nikiema:

> "Foreign direct investment (FDI) can play an important role in the development of the host countries; however, the positive impacts of FDI do not occur automatically, because the commercial interests of companies do not always coincide with states' development goals. Specific policies are needed to create an environment that encourages the positive impacts of (and best practices for) FDI, while strengthening their contribution to sustainable development"[206].

It is this significant opportunity for the field of international investment law to be able to engage with the concept of sustainable development that fully encapsulates the term 'facilitative mechanism'.

In this Thesis, as will be most predominantly shown in Chapter Four[207], only hard and soft-law textual sources of regulation pertaining to FDI will be considered as a means of 'facilitative mechanism'. Even though case law, customary international law and other secondary sources of law do form another category of regulation utilized by international investment law and can also forward the concept of sustainable development, which is not in dispute[208], the reasoning as to why this method has been chosen is clear. To analyze

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[203] Please see: Nils Goeteyn and Frank Maes, 'Compliance Mechanisms in Multilateral Environmental Agreements: An Effective Way to Improve Compliance?' (2011) *Chinese Journal of International Law*, Vol. 10, Issue 4, 791-826; Suzy H. Nikiema, *Performance Requirements in Investment Treaties Best Practices Series* (December 2014).
[204] Nele Matz, 'Environmental Financing: Function and Coherence of Financial Mechanisms in International Environmental Agreements' (2002) *Max Planck Yearbook of United Nations Law*, Vol. 6, 473-534.
[205] Please see: Anais Kedgley Laidlaw and Shaun Kang, 'The Dispute Settlement Mechanisms in Major Multilateral Treaties' (October 2018) Centre for International Law Working Paper 18/02; Rainer Geiger, 'The Compliance of Investment Protection Mechanisms in Free Trade Agreements with EU Law' in Christophe Geiger (Eds) *Research Handbook on Intellectual Property and Investment Law* (2016).
[206] S. H. Nikiema: [n 203] 1.
[207] Chapter Four of this Thesis.
[208] Please see: *Case Concerning the Gabcikovo-Nagymaros Project (Hungary/Slovakia)* (1997) ICJ Rep 7, Separate Opinion of Vice-President Judge Weeramantry; World Trade Organization, 'United States – Import Prohibition of Certain Shrimp and Shrimp Products' (*The US-Shrimp Case*) (1998) WTO Doc. WT/DS58/AB/R Appellate Body Report; Centre for International Development Law, 'What is

the ‘translation’ of the concept, a term that will be discussed subsequently, it is first necessary to ascertain and approve a process in which will be observed this particular action of translation. The preferable choice of textual, or written, sources of international investment regulation over that afforded by, for example, case law is initially obvious for the purposes of this Thesis given the observable certain and constant textual availability present in these forms of regulation, which is not so obtainable within other sources of international investment law. Although, it must be briefly stated that in Chapter Four of this Thesis, textual analysis will be convened in relation to treaty articles that govern the important investor state dispute settlement regime and therefore aspects pertaining to case law will be discussed.

The comparison in the primary textual forms of regulation does enable a less prescriptive approach to translation, for example, not dependent on the circumstances of a specific investor state dispute or a particular treaty article and thus subsequently allows for a more uniform and thus linguistic comparative operation to occur. Also, when it is considered that case law and secondary sources of law are heavily derived from these primary textual sources, importance of these sources over any other becomes ever the more apparent. Importantly Besson, when discussing the sources of general international law, distinguishes “between formal and material sources of international law; the later refer to all the moral or social processes by which the content of international law is developed (e.g., power play, cultural conflicts, ideological tensions), as opposed to the formal processes by which that content is then identified and usually modified to become law (e.g., legislative enactment)”[209].

If time and word limitations were to be fully removed, then an alternative approach to regulation identification, including that of case law and customary international law, would be a further methodological route and as such could be considered as an option for future research. Also, as will be shown in Chapter Two of this Thesis, the concept of sustainable development has had internationally a relatively short period of

Sustainable Development Law?’ (2005) Montreal CISDL Concept Paper; Laurence Boisson de Chazournes, ‘Plurality in the Fabric of International Courts and Tribunals: The Threads of a Managerial Approach’ (2017) *European Journal of International Law* Vol. 28, Issue 1, 13-72; Stefanie Schacherer, *International Investment Law and Sustainable Development: Key Cases from the 2010s* (October 2018) The International Institute for Sustainable Development.

[209] Samantha Besson, ‘Chapter 7: Theorizing the Sources of International Law’ in Samantha Besson and John Tasioulas (Eds) *The Philosophy of International Law* (2010), 170. Please see also: Samantha Besson and Jean d’Aspremont, *The Oxford Handbook of the Sources of International Law* (2017).

acknowledgement and therefore to determine the translation within textual sources begins to demonstrate the actual extent of translation within the entire field of international investment law. If this Thesis only analyzed case law and secondary sources of law, for example, a somewhat more misleading picture of extent of translation would occur because these sources of law do have their pulse on innovative concepts, of which sustainable development could be considered one of these, and do have the ability to interject these concepts, however, inclusion within primary textual sources highlights the overall extent of saturation and intention to translate. As Allot differentiates:

> "Customary law is a form of law which arises out of the ideal and real self-constituting of a society as a particular kind of residue of the past, rather than through a formal law-making process in the present"[210].

In this Thesis therefore, the "formal law making process"[211] or textual analysis will the sole methodology adopted.

At this point in the discussion, it is necessary to bolster the argumentation for and choice of the inclusion of many references to the preamble of international treaties. By way of definition Gardiner prescribes that, "the preamble … usually consists of a set of recitals. These recitals commonly include motivation, aims, and considerations which are stated as having played a part in drawing up the treaty"[212]. In terms of justification for the inclusion of such provisions and the extent of these provisions accountability, Article 31(1) of the VCLT, in relation to interpretation, provides:

> "1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
>
> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes..."[213].

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[210] Philip Allott, 'The Concept of International Law' (1999) *European Journal of International Law*, Vol. 10, 38. Please see for further commentary: Bing Bing Jia, 'The Relations between Treaties and Custom' (2010) *Chinese Journal of International Law*, Vol 9, Issue 1 81-109.
[211] P. Allott: *ibid* 38.
[212] Richard K. Gardiner, *Treaty Interpretation* (2015) 205.
[213] Vienna Convention on the Law of Treaties (VCLT) (1980) 1155 UNTS 331; 8 I.L.M. 679, Article 31.

The primary purpose therefore of a preamble can be likened to an outline of intention behind the creation of that specific regulation, which can then later aid in the interpretation of the subsequent substantive articles. Indeed, in this regard, Dixon, McCorquodale and Williams recognize the importance of this interpretative obligation, stating, "[t]he way in which an international tribunal interprets the terms of a treaty can have a significant impact on the extent of the rights and obligations of the parties to that treaty"[214], thereby integrating the concept directly into the substantive provisions of the text. A degree of comparison can be given to that of soft sources of law in their sole ability to be utilized as an interpretative tool for the following substantive provisions with the actual content of the preambular provisions themselves holding no legal accountability.

However, considering this acknowledgement and the methodological approach to be taken, it is fundamental to remember the preamble does form an integral part of the textual treaty, whether considered hard or soft-law, and are ultimately capable of being employed in the comparative textual analysis operation of the regulation pertaining to FDI, as described above in relation to the delamination of what is considered a 'facilitative mechanism'. Importantly, the presence of certain and constant textual availability initially allows for the textual translation of the concept of sustainable development and secondly emphasizes the presence of the concept within any later substantive provisions that are of the same conceptual persuasion. The preambular provisions must be distinguished from secondary sources of law, such as customary international law and general principles of international law, because ultimately the preambular provisions, when present, are part of a treaty and therefore can be utilized in the textual analysis adjoining a specific text. Unlike the form adopted by case law or secondary sources of law, which interject external references, preambular provisions do introduce internal standards.

As a result of the self-limitation to only the analysis of textual sources of law of the regulation pertaining to FDI, an initial impact this will have on the findings is already stated and must be further emphasized, there will be little exploration of alternative sources of international investment law. There is envisaged to be only passing reference

[214] Martin Dixon, Robert McCorquodale and Sarah Williams, *Cases and Materials on International Law* (2011) 81. For an exemplary understanding of the effect of such provisions, please see: Rafael Leal-Arcas, *Commentary on the Energy Charter Treaty* (2018) 6-12.

to case law, customary international law or even other forms of secondary sources of law within this Thesis. This does not mean that these non-textual sources of law have little consequence for the translation of a concept. It is only that the textual analysis enables a uniform visual and equally interpretative comparison to be made.

Directly related to this appreciation of a purely textual analysis is the understanding that the interpretation will in effect apply the most modern advances of the concept of sustainable development upon the textual forms of facilitative mechanisms utilized by FDI. If it is recognized that the textual sources maintain a rather stationary presence, i.e., the text of treaties do not change and is immovable, except in cases of amendments for example, the findings will necessarily apply the most modern advances upon potentially temporally older documents. In other words, the methodology will apply the most modern standards on non-modern textual regulations. This is essential to discover because the research question in effect determines the extent of translation and in a legal system which heavily relies upon textual sources of law of varying ages, this is a significant investigation.

To further expand upon the conscious limitations adopted in the methodological approach employed, which are extremely closely linked to the analysis and appreciation of the textual sources of law, a quantitative process of analysis or the "mapping of IIA"[215] content will not occur, with preference given instead to the varying degrees of content and therefore interpretative ability within. Later in this Section, regarding the discussion upon others academic approaches to the translation of the concept of sustainable development within the field of international investment law, a rather negative portrayal is induced. With the textual sources of law analyzed, focus within this Thesis will be on the quality of the content and not on the quantity of the content. The adoption of uniform interpretation techniques alongside a formula for the determination of the degree of effectiveness, as will be discussed below, does lend itself to a more qualitative view.

Another important decision made in relation to the consideration of the analysis of the textual sources of law is the remit given to the extent and variance of written sources of law chosen to be explored. Initially it must be remembered that this Thesis will solely

[215] UNCTAD Website, Investment Policy Hub, *Mapping of IIA Content, International Investment Agreements Navigator*, found at < https://investmentpolicy.unctad.org/international-investment-agreements> accessed January 2021.

concentrate upon the regulations used to govern FDI and therefore the question then becomes to what extent will all these textual sources, for example BITs or multilateral treaties, be included within the discussion. I believe to both address the regulation of FDI and to determine the saturation of the concept of sustainable development, an all-encompassing approach to the textual sources of law must be employed. The opposing view to the choice of source of law explored could alternatively focus only upon one source of law, for example BITs, which is also discussed later in this Section. Instead of focusing all efforts upon one individual textual source of law, the decision has been made to focus efforts on all sources to gain an overall determination of effectiveness and not just from one perspective of one source.

In an equally broad manner, the choice of textual sources of hard and soft-law necessitates a similar early decision to be made in relation to the cross section of sectoral or regional economies of FDI flows to be considered. Some academics have chosen to concentrate efforts upon these delimitations[216]. However, this Thesis will focus upon all sectoral and regional economies as the research question denotes analysis into the extent of saturation upon the entire regime of FDI regulation and, more crucially, to analyze the most recent forms of textual regulation utilized, it is fundamental to remove any barrier or narrow focus that would prevent such an action. Additionally, the choice to not focus on a particular section of FDI allows less for a discussion of the international political view, instead turning focus more upon the textual interpretation as the word limitation prevents an in-depth political analysis.

After determining the term 'facilitative mechanism' and a full discussion on the choice and effects of such a textual analysis employed, it now becomes essential to define what is meant by the also frequently relied upon term 'translation' within this Thesis, which will be commonly succeeded by a determination of the degree of such an action and equally open to forms of interpretation. The term 'translation' will be adopted from the viewpoint, in the most basic understanding, as the presence of the concept of sustainable

[216] Please see: Magnus Blostrom, Ari Kokko and Steven Globerman, 'Regional Economic Integration and Foreign Direct Investment: The North American Experience' (1998) Working Paper Series in Economics and Finance No. 269; Dorothee J. Feils and Manzur Rahman, 'Regional Economic Integration and Foreign Direct Investment: The Case of NAFTA' (2008) *Management International Review* , Vol. 48, 147-163; Hooshang Amirahmadi and Weiping Wu, 'Foreign Direct Investment in Developing Countries' (1994) *The Journal of Developing Areas*, Vol. 28, No. 2, 167-190; Tam Bang Vu and Ilan Noy, 'Sectoral Analysis of Foreign Direct Investment and Growth in the Developed Countries' (2009) *Journal of International Financial Markets, Institutions and Money*, Vol. 19, Issue 2, 402-413.

development within the regulation. Importantly the term 'translation' must be differentiated from the term 'incorporation', as the former term refers to the presence and substance (through interpretative techniques) of the concept, whereas the later term does denote the inclusion of accountability and being in line with the determination of effectiveness in light of the consideration of a source, which will be discussed later. With this elucidation therefore, it importantly remains to be discussed two further implications that this term produces. The first being what approach will I take in considering what can be determined as a translation and subsequently an interpretation of the concept of sustainable development, and the second implication being that of where in the regulation is the translation found. The second implication is far less theoretical than the first and will be substantially debated within the definition of the term 'accountability'.

Initially however, if one would seek an instant definition of the term 'translation', the thought of a simple translation of a piece of text from one language to another may be the prevailing thought, and the approach that will be taken within this Thesis will not be that dissimilar an operation to an extent. El Ghazi and Bnini state simply that "[t]ranslation is considered a gateway for understanding"[217]. To build upon this foundational statement, As-Safi recognizes in their in-depth discussion on the definition of the term 'translation' appreciates the broadness and diversity such a term encapsulates and recognizes immediately that it is "a definition which is not confined to the mere transference of meaning"[218]. Nida and Taber additionally state that "[t]ranslation consists in reproducing in the receptor language the closest natural equivalent of the source language message, first in terms of meaning and secondly in terms of style"[219]. Many academics agree with such an assertion and numerous examples have been provided by As-Safi[220]. From the perspective I will attempt to adopt, much credence will be given to not only the text itself provided in relation to the concept of sustainable development, but also to any underlying or indirect message provided within the text with the simple acknowledgement that the language employed solely within the realm of sustainable development or international

[217] Omar El Ghazi and Chakib Bnini, 'Major Translation Methods Used in Legal Documents: Translation of a Marriage Contract from Arabic into English' (2019) *AWEJ for Translation & Literary Studies*, Vol. 3, No. 2, 123.
[218] A. B. As-Safi, 'Translation Theories, Strategies and Basic Theoretical Issues', found at < www.academia.edu/6395785/Translation_Theories_Strategies_And_Basic_Theoretical_Issues> accessed January 2021.
[219] Eugene A. Nida and Charles R. Taber, *The Theory and Practice of Translation* (1982), 12; also cited in A. B. As-Safi: *ibid.*
[220] A. B. As-Safi: *ibid* Chapter 1.

environmental regulation may have to be adapted for texts within international investment regulation.

If no such subsequent interpretative recognition exists, the approach that would be taken could be considered rather heavy handed and narrow. With a simple literal translation, based on only the words present and as opposed to interpretative translation, there would not be the scope to be able to discuss the minutiae of detail available in translation. Beneficially, adopting an approach that recognizes both direct, i.e., blatant and most observable, as well as indirect, rather more subtle, attempts at translation, a wide metaphorical net is cast when employing the definition of translation. Without such recognition, the limited definition afforded to translation may only allow the most obvious translations of the concept of sustainable development within the text of international investment regulation. It may be otherwise decided that, for example, only the inclusion of the term 'sustainable development' within the text would count as a translation, instead of all three foundational pillars being represented without the referral to the title of sustainable development.

The approach that I have chosen to adopt within this Thesis is given academic acceptance as Stolze states:

> "[w]e cannot translate 'law' as such. What we can do at first is to compare legal systems. Comparative law is an important field of research today and it focuses on the differences in the legal concepts. At first sight, the human values seem to be the same for all peoples in the world … However, the respective ideas are not identical everywhere, and their legal treatment is different, according to the cultural and political background. The difference between existing legal systems is mainly visible in the central concepts regarding those values"[221].

It is the appreciation of this difference in treatment of the concept of sustainable development that is essential because it must be recognized early on in discussion that the purpose of the Thesis is to determine the extent of the translation of sustainable development within the field of international investment law, and not for example, within the field of sustainable development law. It must be acknowledged that each field of law

[221] Radegundis Stolze, 'The Legal Translator's Approach to Texts' (2013) *Humanities*, Vol. 2, Issue 1, 59.

maintains different goals and objectives, and as such must be approached differently. The predominant theories of translation, as discussed by Firdaus[222], will have a position within the assessment of the translation.

Closely linked to these theoretical definitions of 'translation' are the issues forwarded by 'interpretation' and ultimately what consistent interpretative approach will then be employed within this Thesis. Whereas the act of translation can be viewed as the fundamental acknowledgement of the observance of the concept, the act of interpretation can be viewed as the extent of this observance. As stated by Barak:

> "Legal interpretation is a rational activity that gives meaning to a legal text. The requirement of rationality is key – a coin toss is not interpretative activity. Interpretation is an intellectual activity, concerned with determining the normative message that arises from the text. What the text is and whether it is valid are questions related to interpretation, but they are distinct from it"[223].

The specific question remains still therefore, what are the most relevant and appropriate methods of interpretation to be applied within this Thesis. Baude and Sachs bluntly refer to this crux, "[h]ow should we interpret legal instruments? How do we identify the law they create?"[224]. In equal measure, Sunstein and Vermeule forward this pressing question, going further and trying to provide elucidation as to the most beneficial method of interpretation, "[t]he central question is not 'how, in principle, should a text be interpreted?' [t]he question instead is 'how should certain institutions, with their distinct abilities and limitations, interpret certain texts?'"[225]. This reference is interesting as the interpretation method applied will ultimately necessitate a great appreciation placed upon the field of law the translation will occur.

To concentrate more precisely on the competing theoretical foundations associated with the act of interpretation, there are two predominant and opposing underlying theoretical

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[222] Sonia Firdaus, 'Evolution of Translation Theories & Practice' (2012) *The Dialogue*, Vol. VII No. 3, 277-294. Please see also: Despoina Panou, 'Equivalence in Translation Theories: A Critical Evaluation' (January 2013) *Theory and Practice in Language Studies*, Vol. 3, No. 1, 1-6.
[223] Ahron Barak, *Purposive Interpretation in Law* (2007) 3.
[224] William Baude and Stephen E. Sachs, 'The Law of Interpretation' (2017) *Harvard Law Review*, Vol. 130, No. 4, 1081.
[225] Cass R. Sunstein and Adrian Vermeule, 'Interpretation and Institutions' (2002) John M. Olin Program in Law and Economics Working Paper No. 156, 2.

propositions that need to be considered. These have been easily and succinctly summarized as such:

> "The standard picture of interpretation is focused on language, using various linguistic conventions to discover a document's meaning or a drafter's intent. Those who see language as less determinate take a more skeptical view, urging judges to make interpretive choices on policy grounds"[226].

To consider the first proposition, dependence upon the textual language deployed is pivotal to the interpretive exercise. Within this approach to interpretation, the text exploited remains of paramount importance, "emphasizing text over any unstated purpose"[227]. For example, "[a]n ordinary deed to land might be expressed in perfectly ordinary language with a perfectly ordinary meaning. At the same time, it represents a complex set of normative propositions"[228]. Such an action has been described as "both simple and attractive as a matter of theory … [t]he philosophy of language is capacious enough to handle key elements of legal practice"[229]. To be applied to the precise content of the Thesis, due to the complex and not detrimentally uncertain nature of the concept of sustainable development, to take a rather fluid and expansive approach to interpretation could be considered helpful when the initial subject content has been demonstrably difficult to determine.

However, the alternative theory commonly applied to the act of interpretation, understands that "there are serious cracks" in the previously discussed theory that must be appreciated. Fallon describes that there is "an astonishing diversity"[230] in the interpretative linguistic discretion applied in the previous theory, dependent on the interpreter and their background thereby taking on a much more constructive interpretative persona. Whereas this theory advocates for more than just a linguistic interpretation, instead favoring a policy that does somewhat advantageously and simultaneously limit the interpretative approach in a more targeted manner. This theory

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[226] William Baude and Stephen E. Sachs, 'The Law of Interpretation' (2017) *Harvard Law Review*, Vol. 130, No. 4, 1081.
[227] Valerie C. Brannon, 'Statutory Interpretation: Theories, Tools and Trends' (2018) Congressional Research Service Report, 13.
[228] W. Baude and S. E. Sachs: [n 226] 1086.
[229] W. Baude and S. E. Sachs: *ibid* 1086.
[230] Richard H. Fallon, 'The Meaning of Legal 'Meaning' and Its Implications for Theories of Legal Interpretation' (2015) *The University of Chicago Law Review*, Vol. 82, 1239.

can also be known as "purposivism"[231] and ultimately "purposivists maintain that courts should first ask what problem Congress was trying to solve, and then ask whether the suggested interpretation fits into that purpose"[232]. For example, "[i]f a sales contract lacks a quantity term, the Uniform Commercial Code may mark it zero and hold that no sale occurs"[233], thereby taking account of the wider legal environment in which this specific contract finds itself.

After considering the two predominant differing theories in approach to the act of interpretation, for the purposes of this Thesis, I will derive a method from which both theories will be utilized and as a result "will often employ some elements from each theory"[234]. The nature of the concept of sustainable development, both in terms of broad and complex definition and equally manner of fulfillment, does require a two-fold approach to interpretation, with "[a] due appreciation of the interpretive challenge – which frequently requires a choice among the literal, contextually framed and limited, real conceptual, intended, reasonable"[235], which is also forwarded by Soames[236]. The concept within the field of international investment law and FDI regulation does necessitate both a linguistic interpretation because the incorporation of language associated with sustainable development is new and can be considered broad in some instances, and a reflection upon the current legal principles of both legal fields because this would additionally provide an alternative layer of discussion that can be added to the degree of translation.

To adopt a reverse position momentarily, after understanding the methodology applied when determining both the act of translation and the subsequent interpretation, it is essential to understand as early as possible what will be the rule for what is initially considered the translation and interpretation of the concept. As will be shown in Chapter Two predominantly, the actual concept of sustainable development induces a strong degree of vagueness as to a definitive clarification and is heavily dependent on the context in which the concept is delivered, instead sustainable development will be considered

[231] V. C. Brannon: [n 227] 11.
[232] V. C. Brannon: *ibid* 12.
[233] W. Baude and S. E. Sachs: [n 226] 1094.
[234] V. C. Brannon: [n 227] 16.
[235] R. H. Fallon: [n 230] 1235.
[236] Scott Soames, 'Deferentialism: A Post-Originalist Theory of Legal Interpretation' (2013-2014) *Fordham Law Review*, Vol. 82, Issue 2.

from a point a view that the concept necessitates a series of ideals, derived from the inherent characteristics and principles, that are required to be achieved. In light of this early acknowledgement, for the purposes of this methodology, although the actual content of the concept is debated, there must be reference within the textual facilitative mechanisms to the three foundational pillars, i.e., economic, social and environmental, to constitute a reference to sustainable development. With this appreciation, reference to the term 'sustainable development' would constitute reference to these three pillars. It must also be recognized that a weaker translation of the concept would not go beyond this basic reference in detail.

Secondly, rather unrelatedly and regarding the precise location of the translation and interpretative ability, from the outset it is asserted that there must be a physical written translation within the text, be it in either hard or soft sources of law, and subsequently location, for example, solely within the title of the agreement will not suffice as translation for the purposes of this Thesis. This debate is closely linked to that debate of 'accountability', which will be discussed next. Chapter Four will show regulations pertaining to the governance of FDI that contain translations of the concept of sustainable development in these differing locations.

Alongside the awareness of interpretation, the definition of the term 'accountability' must be given an equal amount of attention to fully comprehend the deliverance of this Thesis. The term 'accountability' has a wide variety of meaning and can be dependent upon the context applied. In the most general sense, if one where to consider the most basic definition of the term 'accountable', "required or expected to justify actions or decisions"[237] or "responsible"[238], then an immediate of image of authority and control is forwarded. Otegbeye has also alluded to the generalist ideals of the term, stating "[i]n ethics and governance, accountability is answerability, blameworthiness, liability and the expectation of account-giving"[239]. Although it has been simultaneously noted by Kasuya and Takahashi "[c]urrently, there is little consensus about what accountability means as scholars have adopted varying definitions"[240]. Devoid of an applicable context therefore,

[237] C. Soanes and A. Stevenson: [n 198] 11.
[238] C. Soanes and A. Stevenson: *ibid* 11.
[239] Peter O. Otegbeye, 'Accountability: A Corrective Mechanism in Resolving Organisational Challenges' (2016), found at <http://dx.doi.org/10.2139/ssrn.2738419> accessed June 2021, 2.
[240] Yuko Kasuya and Yuriko Takahashi, 'Streamlining Accountability: Concepts, Subtypes, and Empirical Analyses' (2013) *Political Science*, 2.

this definition remains rather hollow in understanding. From a purely political and democratic viewpoint for example, Smyth has argued that "for many accountability is an expression of holding those in power to account"[241].

If the context in which the term 'accountability' will be applied within this Thesis is now importantly explored, then an extremely precise implementation of the term will be employed. Accountability will be considered from the viewpoint of the textual location of the translation of the concept of sustainable development. Within an international investment regulation consisting of text, there are differing levels of accountable treatment afforded to the individual sections of such a text. This varied application of the degree of accountability is given substance when Article 31 of the Vienna Convention on the Law of Treaties (VCLT) provides "[t]he context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes"[242], thereby perhaps highlighting a discrete distinction between the main body of text and the preamble, or the preambular provisions. A further distinction can be applied to the accountability variance between hard and soft sources of law[243], and this is another important consideration because both sources will be referred to in this Thesis as the field of international investment law does make heavy utilization of such sources of law and therefore to not incorporate these in the discussion parameters would to substantially underestimate the extent of translation of the concept of sustainable development.

The central issue therefore regarding the appreciation of the term 'accountability' in the context of this Thesis rests upon the differing levels of accountability placed upon the specific textual (i.e., written) terms within these international agreements. To consider hard sources of law, i.e., international agreements, first and the differential sections of texts included therein. These primary sources of law are "the creation of written agreements whereby the states participating bind themselves legally to act in a particular way or to set up particular relations between themselves"[244] and within contain two primary sections of written texts (excluding annexes), that of the main body and the

[241] Stewart Smyth, 'Rediscovering democratic accountability: The History of an Awful Idea' (July 2013) CMS Conference (Manchester), 2.
[242] VCLT: [n 213] Article 31.
[243] A. Boyle: [n 149].
[244] Malcom N. Shaw, *International Law* (2021) 79.

preambular provisions. However, it is the extent of the degree of binding nature, and ultimately of the accountability, afforded to these differing terms, that is essential.

The main body of the text or the substantive articles (and provisions) contain "a series of propositions which are the regarded as binding upon the parties"[245]. From the viewpoint of these determined article's, accountability can be deduced in the degree of obligation these place upon the Parties to the Agreement. As previously discussed, academics refer to the generalized ideals of accountability being along the lines of liability"[246] and given accountability has also been described as "secur[ing] the responsiveness from the representatives"[247], the legal authority or requirement that these terms be acted upon is directly related to the degree of accountability.

In this light, Barral has given much confidence in the applicability of differentiation in accountability within the textual locations. Degree of accountability equals that of degree of legal bindingness. From the outset, Barral does make important distinction into "the location of the proposition relating to sustainable development … [and] what is particularly significant about the inclusion of sustainable development in conventional law is the location of this inclusion"[248]. This consideration will be the approach adopted within this Thesis. The academic also provides:

> "A common impression among international lawyers is that even though sustainable development receives recognition in a great number of treaties, this recognition is of little legal significance since such references are mainly confined to the preamble, which is not binding"[249].

Thereby bluntly indicating that the main body text, or "operative part"[250], has a binding nature, and that the preamble lacks this binding nature. The preamble only enjoys an influential relevance as opposed to the comparative "operative"[251] relevance. This distinction is also recognized by Bodansky, who states, "[u]nder the principle of *pacta sunt servanda* … treaties are binding on the parties … but this does not mean that every

[245] M. N. Shaw: *ibid* 95.
[246] P. O. Otegbeye: [n 239] 2.
[247] Y. Kasuya and Y. Takahashi: [n 240] 1.
[248] V. Barral: [n 195] 377-400.
[249] V. Barral: *ibid* 377-400.
[250] V. Barral: *ibid* 377-400.
[251] V. Barral: *ibid* 377-400.

provision of a treaty creates a legal obligation, the breach of which entails non-compliance"[252]. The academic also forwards issues pertaining to language, which may influence accountability and binding nature, "whether it is phrased as a 'shall' or a 'should'"[253], which are substantively covered in the approach previously discussed in relation to aspects of interpretation.

Again, regarding soft sources of law, relegation to only an influential power and a non-binding ability is summoned, much like that afforded to the accountability of preambular provisions. Abbott and Snidal simply state that soft law "initiates a process and a discourse that may involve learning and other changes over time"[254] and Christians provide, "[t]he international law literature frames soft-law as a norm that are not thought of as law *per se*, but compel a law-like sense of obligation in states"[255]. Nonetheless, it has been noted that soft-law can be classed as an important "means of governance"[256]. Once again, it must be remembered that the term 'accountability' in this context refers to the degree of legal bindingness and ultimately, chiefly due to the complex nature of the concept of sustainable development and the regulation afforded to FDI, failing a binding nature, an influential nature will also be considered.

Given now that it has been explored the meaning of facilitative mechanism, translation with the subsequent interpretative ability, accountability and the following approach that will be given to each of these terms in the Thesis, it is now appropriate therefore to discuss the term 'effectiveness' and will again fundamentally address further the reasoning for this choice of methodology. Effectiveness and the degree thereof will have a continual presence of determination within Chapter Four[257] and will ultimately depict the extent of the translation, alongside legal accountability, the concept of sustainable development with regulation pertaining to FDI.

[252] Daniel Bodansky, 'Legally Binding Versus Non-Legally Binding Instruments' in Scott Barrett, Carlo Carraro and Jaime de Melo (Eds), *Towards a Workable and Effective Climate Regime* (2015) 158.
[253] D. Bodansky: *ibid* 158.
[254] Kenneth W. Abbott and Duncan Snidal, 'Hard and Soft Law in International Governance' (2000) *International Organization,* Vol. 54, 423.
[255] Allison Christians, 'Hard Law & Soft Law in International Taxation' (2007) *Wisconsin International Law Journal,* Vol. 25, No. 2, 7.
[256] Matthias Goldmann, 'We Need to Cut Off the Head of the King: Past, Present, and Future Approaches to International Soft Law' (2012) *Leiden Journal of International Law,* Vol. 25, Issue 2, 335.
[257] Chapter Four.

The primary issue to arise in the discussion of the term 'effective' pertains to the core understanding. From a non-legal and everyday context, the term refers to "successful in producing a desired or intended result"[258]. Directly deriving from this definition is the necessary appreciation of the specific context. For example, as in this Thesis, the term 'effectiveness' will be applied to that of the international concept of sustainable development and not, for instance, purely to ideals of international employment or human trafficking law. This basic definition therefore initially relies fully upon the context and without such appreciation, the determination of effectiveness will not be able to be determined.

From a legal perspective then, the definition of 'effectiveness' could be described as quite similar. In relation to the governance of international organizations, Peters aligns the term with "efficient operations"[259] and asserts that "[e]ffectiveness deficits stem not only from waste or mismanagement, but also from legal design"[260]. Another example arrives from the regulation of foreign bribery and Cuervo-Cazurra aligns the definition of effectiveness with issues of "implement[ation] and coordinat[ion]"[261]. Together both insights do forward images of directed action beneficial to the context applied.

Considering the overall and somewhat general meaning of effectiveness, it is now essential to determine what specific meaning will be applied to the term within this Thesis. From the discussions above, the term 'effectiveness' will require a continual two-pronged approach to determination and will only be decided by a comparative degree, not simply if it is effective or not effective. However, as a brief aside, if no translation occurs, it could be stated there the concept has no degree of effectiveness within a particular piece of legislation.

The first consideration (or step) when determining effectiveness will be made in relation to the actual content, if present, of the translation of the concept of sustainable development. This will take in account the language deployed and the extent of the conceptualization of sustainable development. The chief motivation behind the research

[258] C. Soanes and A. Stevenson: [n 198] 555.
[259] Anne Peters, *International Organizations: Effectiveness and Accountability* (2016) Max Planck Institute Law, Research Paper No. 2016-01, 1.
[260] A. Peters: *ibid* 4.
[261] Alvaro Cuervo-Cazurra, 'The Effectiveness of Laws Against Bribery Abroad' (2008) *Journal of International Business Studies*, Vol. 39, No. 4, 635.

will be the application of the most modern understanding afforded to the concept, therefore the more the coordination between the translations (with subsequent interpretation) and these specific traits, a greater responsiveness to sustainable development will be determined within these textual sources. After this appreciation has been examined, the second consideration then becomes scrutinized, that of the location of the translation within the textual source. In light of Chapter Four, I have generated a simple formula to be continually deployed in making an assessment of the effectiveness:

$$\frac{Facilitative\ Mechanism}{Translation(including\ interpretation) + Accountability\ of\ Location} = Degree\ of\ Effectiveness$$

With this precise formula, consideration on its own of either translation or degree of accountability will not suffice for the purpose of analyzing the degree of effectiveness. This decision has been made early within the research. Although translation and degree of accountability will be shown to overlap, for example with authoritative language deployed, both must be considered to constitute a full analysis of degree of effectiveness. Also, it must be stated that continual reference and usage of this formula needs to made in order to produce comparative results.

To aid in the application of this uniform approach to analysis, there are four categorical perspectives that are required to be reviewed in the first instance to provide hierarchical degree of effectiveness scenarios, which are shown beneath. These perspectives are detailed in such a manner as to prescribe an increasing consideration of effectiveness, starting from the weakest and moving towards the strongest. The degree of content alongside accountability afforded in location will be determinative feature.

1. The primary degree of effectiveness could rest upon the attribution of both a basic presence in terms of content afforded in the translation and the least amount of accountability accompanying this content. For example, if one were to consider an international investment treaty, if the only reference to the concept of sustainable development can be found in the preambular provisions and the

translation only provided the affirmation of the foundational pillars of sustainable development, then this would consequently deduce the weakest form of effectiveness. It is important that the degree of content as well as the degree of accountability attained are examined together.

2. The second degree of effectiveness could be found in the recognition of a more detailed translation to the concept of sustainable development, however the same amount of accountability remains. A more detailed response to sustainable development through the translation could involve reference to specific societal development issues or focus on environmental protections. Even though the level of detail afforded to the concept of sustainable development has significantly increased, the weakness in lack of accountability is still present, for example, the content is still to be found in the preamble only.

3. The third degree of effectiveness could be sought in the lack of translation that is considered to be more than rudimentary, i.e., remaining to the outline of the three foundational pillars of sustainable development, though the translation could be deemed to have more accountability attached, suggesting, for example, that the translation could be found in the main body of the agreement text as opposed to location of translation in the preambular objectives only. It is within this degree of effectiveness that a significant increase in the accountability is generated and thus this encourages a higher degree of effectiveness.

4. The fourth and final degree of effectiveness could be deemed the most idealistic, generating the highest degree of effectiveness that could be obtained in the translation of the concept of sustainable development. This degree of effectiveness naturally insights the most detailed response of the concept in terms of content attributed and equally is provided with the highest level of accountability within the regulatory facilitative mechanism. The content given alongside the level of accountability afforded together would provide the most advantageous translation into international investment law and if one was to posit that the concept of sustainable development had the ultimate translation and representation in international investment law, then it is this degree of effectiveness that would be found.

In defining the degrees of effectiveness, it must be remembered the categories will be used as aids to determine the extent of effectiveness and the categorical limits placed upon the four definitions are not determinative.

Academics[262] have long accepted and provided validity to this method of determination of effectiveness in relation to law, and not precisely regarding this specific research question. Backstrand proposes there are "three 'deficits' of global environmental politics"[263], of which the concept of sustainable development could be included within this remit. These are of "the governance deficit, implementation deficit and participation deficit"[264]. It is this "implementation deficit"[265] that will be considered in the determination of effectiveness of the translation generated. Victor in a similar understanding states, in regard to the global warming regime, "collective management often requires formal commitments as well as mechanism for enforcing compliance"[266], though the same sentiment can be provided to the translation of the concept of sustainable development.

However, other academics have approached this specific subject area of the research question in varying ways, producing contrasting methodologies that do provide only a partial or incomplete picture of the research question I am seeking to answer. The alternative approaches to the research question rest predominantly into two fields, either that of the action similar to the "mapping of IIA content"[267] as broadly highlighted by the UNCTAD Investment Policy Hub or through the analysis of the individual intrusion of the concept of sustainable development into specific regulation pertaining to international investment and FDI from particular viewpoints. Both alternative approaches do, in my opinion, fail to adequately determine the overall extent of the relationship between

[262] Please see: Michael G. Faure, 'Effectiveness of Environmental Law: What Does the Evidence Tell Us?' (2012) *William & Mary Environmental Law & Policy Review*, Vol. 36, No. 2, 293-336; Alexander Orakhelashvili, 'The Interpretation of Acts and Rules in Public International Law' (2009) *European Journal of International Law*, Vol. 20, Issue 4, 1282-1286.
[263] Karin Backstrand, 'Multi-Stakeholder Partnerships for Sustainable Development: Rethinking Legitimacy, Accountability and Effectiveness' (2006) *European Environment* Vol. 16, Issue 5, 291.
[264] K. Backstrand: *ibid* 291.
[265] K. Backstrand: *ibid* 291.
[266] David G. Victor, 'Enforcing International Law: Implications for an Effective Global Warming Regime' (1999-2000) *Duke Environmental Law and Policy Forum*, Vol. 10, 147.
[267] UNCTAD, *Mapping of IIA Content*: [n 215].

international investment and sustainable development as they could be considered quite narrow comparably in approach.

The primary "mapping of IIA content"[268] approach has been continually utilized however[269]. The weakest of this approach has been demonstrated, for example, by Peterson when it is stated that "examining more than 150 treaties – including majority of those concluded by Switzerland, the United States, Canada and the United Kingdom, and a smattering of other treaties – suggests that references to development are exceedingly rare in treaties"[270]. From this reference, several issues start to arise which are fundamentally considered in this Thesis. Chiefly, what definition of 'development' is the academic considering, whereabouts in the treaty are these references (i.e., preamble or substantive provisions) and what types of treaties or regulations are considered. From a critical viewpoint therefore, only generalist information can be deduced. Another example can be made in light Chi's more in-depth "panoramic study of the SDPs [sustainable development provisions]"[271]. The academics statistical analysis provides generally that, in relation to the sample of model BITs, "it seems safe to conclude that … the sample IIAs appear development-oriented, as all of them contain at least one SDP"[272]. Although a clear statistical argument has been formulated, Chi, in my opinion, fails to relate specific provisions that are of a sustainable development nature to the degree of effectiveness. Individual provisions are not discussed and accountability in terms of location within the text is also lacking. Also, the academic only refers to model BITs and again this is a narrow viewpoint to be taken when considering the field of international investment law.

Regarding the other alternative approach adopted when considering this specific research question, that of the analysis of the intrusion of the concept of sustainable development into specific forms of facilitative mechanism or consideration from a particular aspect of

[268] UNCTAD, *Mapping of IIA Content*: *ibid*.
[269] Please see: K. Gordon, J. Pohl and M. Bouchard, 'Investment Treaty Law, Sustainable Development and Responsible Business Conduct: A Fact Finding Survey' (2014) OECD Working Papers on International Investment, 2014/01.
[270] Luke Eric Peterson, *Bilateral Investment Treaties and Development Policy-Making* (2004) International Institute for Sustainable Development, 4.
[271] Manjiao Chi, *Sustainable Development Provisions in Investment Treaties* (2018) United Nations Economic and Social Commission for Asia and the Pacific, 26.
[272] M. Chi: *ibid* 27.

the concept, much academic literature is equally available[273]. A prime example of this restrictive yet informative approach is presented by Schacherer[274] and wholly acknowledges that:

> "[I]nvestment arbitrators are still important actors in defining and articulating the relationship between international investment law and sustainable development ... They decide to what extent IIAs limit states' right to regulate and their ability to adopt and maintain policies to promote sustainable development"[275].

Focus solely upon case law and the translation of sustainable development, instead of numerous forms of facilitative mechanisms, does incite a rather limited appreciation of the regulatory field of FDI and therefore only provides a partial picture.

4. Conclusion

This introductory Chapter has generated an appropriate foundation upon which the succeeding Chapters will rest. To carefully prepare, initially a broad appreciation of both the concept of sustainable of sustainable development and the field of international investment law, through which the regulation of FDI can be found, was given. This culminated in a brief debate of the coalition. After, it was discussed in great depth the operational foregrounding in which it was decided the methodological approaches chosen that would structure the central argumentation. This included, the definition of facilitative mechanisms, the all-encompassing approaches to translation and interpretation, examination of accountability and ultimately the determination of effectiveness.

[273] Please see: Giorgio Sacerdoti, 'Investment Protection and Sustainable Development' in Steffen Hindelang and Markus Krajewski Eds, *Shifting Paradigms in International Investment Law: More Balanced, Less Isolated, Increasingly Diversified* (2016); J. Anthony VanDuzer, 'Sustainable Development Provisions in International Trade Treaties: What Lessons for International Investment Agreements?' in Steffen Hindelang and Markus Krajewski (Eds) *Shifting Paradigms in International Investment Law: More Balanced, Less Isolated, Increasingly Diversified* (2016); Federico Ortino, 'Investment Treaties, Sustainable Development and Reasonableness Review: A Case Against Strict Proportionality Balancing' (2017) *Leiden Journal of International Law*, Vol. 30, Issue 1; J. Robert Basedow, 'The European Union's New International Investment Policy and the United Nation's Sustainable Development Goals' in Cosimo Beverelli, Jurgen Kurtz and Damian Raess Eds, *International Trade, Investment, and the Sustainable Development Goals: world Trade Forum* (2020).
[274] S. Schacherer: [n 208].
[275] S. Schacherer: *ibid* 1.

To prescribe as early as possible both the methodological approaches and subsequent obvious limitations enables a definitive strategy to answer the research question. For if these methodological issues were not settled, confusion in logical argumentation may occur and significant digression could follow. For example, to have decided to focus on textual sources of international investment law as opposed to international case law structures the approach taken later regarding the investigation in the sources of law analyzed. In equal measure, to have outlined a formula to determine effectiveness with a recognition of both content and accountability enables the ability to uniformly analyze the concept of sustainable development within investment parameters. Without such early and important foregrounding, the structure of the Thesis would be detrimentally affected.

Chapter 2: The Concept of Sustainable Development and The Field of International Investment Law

Emily Charlotte Jameson

1. Introduction

> "NOTING that sustainable development is now widely accepted as a global objective and that the concept has been amply recognized in various international and national legal instruments … EMPHASIZING that sustainable development is a matter of common concern … it should be integrated into all relevant fields of policy in order to realize the goals of environmental protection, development and respect for human rights"[1].

The concept of sustainable development could be outlined by reference to this exert from the ILA New Delhi Declaration of Principles of International Law Relating to Sustainable Development (ILA New Delhi Principles)[2]. The legal status, however, of such a concept of international law could be less easily described. It must be fundamentally recognized that there is lacking any comprehensive and internationally binding document which projects definitive content afforded to the concept. Instead, the current legal status could be described as piecemeal. There is an irregular pattern of presence of the concept within hard sources of law. Conversely however, there is a substantial presence within soft-law documentation.

Brus does go some way to provide reasoning for the precise legal status that sustainable development finds itself. The academic states that "[g]overning world affairs is a difficult business. Due to the lack of a central authority with decision-making powers, agreements on how to save our common interests can only be reached through debate and the

[1] International Law Association, *New Delhi Declaration of Principles of International Law Relating to Sustainable Development* (*ILA New Delhi Principles*) (2002) A/Conf.199/8, Preamble.
[2] *ILA New Delhi Principles*: *ibid.*

development of a broad consensus"[3]. Thereby highlighting the attractiveness of the soft-law representation. The analysis of the ILA New Delhi Principles could be seen as unequivocally essential to utilize throughout this Chapter as the Document has been noted to be "instrumental"[4] in drawing together the most notable understandings afforded to the concept from an extremely wide set of legal sources[5]. Schrijver significantly comments that:

> "Since 1992 steady progress can be noted in the evolution of international environmental law and human rights law, while little progress has been made with respect to international law in the field of development. The Seven Principles of the New Delhi Declaration seek to integrate these three chapters of international law in order to make international law more effective in the pursuance of sustainable development"[6].

With this basic conceptual understanding in mind, it now becomes necessary to discuss the foundational observances of the field of international investment law. Subedi recognizes "[i]nternational investment law is a rapidly developing and fast changing area of international law"[7]. International investment is not a new achievement and is certainly not without criticism[8]. This field of law provides the regulatory framework for this specific action and in particular the act of foreign direct investment [FDI]. Under this basis, the alien, i.e. the person of non-domestic origin, and the alien's property are afforded a certain degree of protection[9], in turn "help[ing to] promote and protect foreign investment"[10]. Within the regulation of FDI, it will be shown the constant conflict

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[3] Marcel Brus, 'Soft Law in Public International Law: A Pragmatic or a Principled Choice? Comparing the Sustainable Development Goals and the Paris Agreement' (2017), found at < http://dx.doi.org/10.2139/ssrn.2945942 > accessed November 2019, 1.
[4] Angela Williams, 'Sustainable development and international law – a contemporary examination' (2005) *Environmental Liability: Law, Policy and Practice*, Vol. 13, Issue 6, 181.
[5] Nico Schrijver, 'International Law in the Field of Sustainable Development – Evolution, Meaning and Status', UN Audiovisual (12 September 2008), found at: < http://legal.un.org/avl/ls/Schrijver_D.html > accessed January 2019.
[6] Nico Schrijver, 'ILA New Delhi Declaration of Principles of International Law Relating to Sustainable Development' (2002) *Netherlands International Law Review*, Vol. 49, Issue 2, 299.
[7] Surya P. Subedi, *International Investment Law: Reconciling Policy and Principle* (2020) Preface to 4th Edition.
[8] Ahmad Ghouri, 'What Next for International Investment Law and Policy? A Review of the UNCTAD Global Action Menu for Investment Facilitation' (2018) *Manchester Journal of International Economic Law*, Vol. 15, Issue 2, 190.
[9] Krista Nadakavuken Schefer, *International Investment Law: Text, Cases and Materials* (2016) 2.
[10] Barnali Choudhury, 'International Investment Law and Non-Economic Issues' (2019), found at < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3366388 > accessed November 2019.

between the protectionist and free market economic policy dialogues that international investment law presents. Protectionism is established through the limitation of non-domestic competition and described by Fouda as:

> "[A]n economic policy of restraining trade between nations, through methods such as tariffs on imported goods, restrictive quotas, and a variety of other restrictive government regulations is designed to discourage imports, and prevent foreign take-over of local markets and companies"[11].

Contrastingly, free market regulation (laissez-faire capitalism) removes barriers to trade and investment and can be described as "a system in which the trade of goods and services between or within countries flows unhindered by government-imposed restrictions and interventions"[12]. Ultimately both forms of regulation do strive importantly for the attainment of economic growth and development.

Considering jointly these initial observances, this Chapter is endowed with the duty to both explore the concept of sustainable development and the field of international investment law. Since this research predominantly concerns the concept of sustainable development and the sources of law adopted by the regulation of FDI at the foundation, it therefore becomes necessary to identify as early as possible these crucial understandings as continual reference to the findings in this Chapter will be made throughout the subsequent Chapters.

2. Principles in Practice: Exploration of Sources

2.1 The Concept of Sustainable Development

For the concept of sustainable development to have presence within the international ether, the concept must have some sort of manifestation within international legal proclamations. Elder considers the relationship between a concept and the role of

[11] Regine Adele Ngono Fouda, 'Protectionism and Free Trade: A Country's Glory or Doom' (2012) *International Journal of Trade, Economics and Finance*, Vol. 3, No. 5, 351.
[12] R. A. N. Fouda: *ibid* 351.

international law. The academic considers "how law can contribute to sustainability"[13] and quickly decides, "law is largely a goal implementing … set of techniques"[14]. The legal translation could be described as now positively reactive. Two decades ago, it was stated that "[t]he concept of sustainable development has spread throughout the United Nations system, and is now meant to underpin the future development of all nations"[15], which highlights the level of saturation the concept has had within the relevant legal settings and I believe that this view could still be considered today.

However, it can also be stated that certainty in relation to the concepts significance within the international ether is somewhat lacking. Boyle and Freestone declared in 1999 that there is "no easy answer [that] can be given to the question whether international law now requires that all development should be sustainable"[16]. Later, Sachs examination alludes to a similar situation, "[s]ustainable development is … a normative outlook on the world, meaning that it recommends a set of goals to which the world should aspire"[17]. Regardless, Barral does highlight that "this emblematic 'concept' has found its way into an ever-increasing number of legal instruments"[18]. Consequentially, it is essential to determine where the concept of sustainable development is to be found, i.e., the sources, and subsequently then it is the significance within these sources that will therefore determine the exact degree of the concepts standing. This chosen process is given much gravitas as French unarguably states that:

> "International law is … an instrumental tool through which the international community can promote such an objective and, with sufficient political will, can be used to provide the international community with both substantive rule to direct

[13] P. S. Elder, 'Sustainability' (1990 - 1991) *McGill Law Journal*, Vol. 36, 838.
[14] P. S. Elder: *ibid* 832.
[15] UK Parliament, 'Sustainable Development – Theory and Practice' (January 1997) Parliamentary Office of Science and Technology, Note 91.
[16] Alan Boyle and David Freestone, 'Introduction' in Alan Boyle and David Freestone (Eds) *International Law and Sustainable Development: Past Achievements and Future Challenges* (1999) 16.
[17] Jeffrey D. Sachs, *The Age of Sustainable Development* (2015) 3.
[18] Virginie Barral, 'Sustainable Development in International Law: Nature and Operation of an Evolutive Legal Norm' (2012) *European Journal of International Law*, Vol. 23, Issue 2, 377. Including that of: United Nations General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development* (SDGs) (2015) A/RES/70/1; Comprehensive Economic and Trade Agreement Between Canada, of the one part, and The European Union and Its Member States, of the other part (CETA) (2017) OJL 11; United Nations Climate Change Conference 2021, Glasgow Climate Pact (13/11/2021) UN Decision CP.26.

and guide State action and establish a framework for implementation and compliance"[19].

One of the most identifiable international sources of the concept of sustainable development is that derived from the so-termed 'soft-law' proclamations. These would include the significant developmental documents such as the Stockholm Declaration[20], Rio Declaration[21], the ILA New Delhi Principles, The Future We Want[22], MDGs[23] and the most recent SDGs[24]. These sources of law have helped to develop the understanding afforded to sustainable development, from the basic acknowledgement of the vague meaning of sustainable development as outlined by the Stockholm Declaration to the creation of the more specific goal-orientated annunciation of the concept found in the SDGs which consists of 17 Goals[25]. Indeed, as predominantly highlighted within the next Section[26], the role of such Documents in codifying and concentrating rules of international law is important[27].

To continue with the soft-law approach taken to the deliverance of sustainable development, there are also many international voluntary guidelines found in the international regulatory sphere[28]. As previously acknowledged, these international soft-

[19] Duncan French, *International Law and the policy of Sustainable Development* (2005) 35. Also, an accepted process in V. Barral: *ibid* 383.
[20] United Nations, Declaration of the UN Conference on the Human Environment (*Stockholm Declaration*) (1972) U.N. Doc. A/Conf.48/14/Rev 1.
[21] United Nations Conference on Environment and Development, Rio Declaration on Environment and Development (*Rio Declaration*) (1992) UN Doc. A/CONF. 151/26 (vol. 1): 31 ILM 874
[22] United Nations General Assembly, *The Future We Want*, Outcome Document of the United Nations Conference of Sustainable Development (2012) A/RES/66/288.
[23] United Nations General Assembly, United Nations Millennium Declaration, Resolution Adopted by the General Assembly (MDGs) (2000) A/RES/55/2.
[24] SDGs: [n 18].
[25] Frank Biermann, Norichika Kanie and Rakhyun E. Kim, 'Global governance by goal-setting: the novel approach of the UN Sustainable Development Goals' (2017) *Current Opinion in Environmental Sustainability*, Vol. 26-27, 26-31; Casey Stevens and Norichika Kanie, 'The transformative potential of the Sustainable Development Goals (SDGs)' (2016) *International Environmental Agreements: Politics, Law and Economics*, Vol. 16, Issue 3, 393-396.
[26] Chapter Two, Section Three.
[27] Please see also: Marie-Claire Cordonier Segger with H. E. Judge C. G. Weeramantry, *Sustainable Development Principles in the Decisions of International Courts and Tribunals 1992-2012* (2019); Leslie Anne Duvic Paoli, 'From Aspirational Politics to Soft Law? Exploring the International Legal Effects of Sustainable Development Goal 7 on Affordable and Clean Energy' (2021) *Melbourne Journal of International Law*, Vol. 22, No. 1, 1-23.
[28] These include: Food and Agriculture Organization of the United Nations, *Voluntary Guidelines on Securing Sustainable Small-Scale Fisheries in the Context of Food Security and Poverty Eradication* (2014) TC-SSF/2014/2; World Trade Organization, *Doha WTO Ministerial Declaration* (2002) WT/MIN(01)/DEC/1; 41 ILM 746; International Chamber of Commerce, *Guidelines for International Investment* (2012), found at < https://iccwbo.org/publication/2012-icc-guidelines-for-international-investment/ > accessed December 2019.

law proclamations have primarily aided in the definitional development of the concept itself and does naturally represent a continued non-legal commitment for action. Even in light of this evolutionary attribution provided to the concept, it is essential to remember that these forms of proclamation contain considerable detrimental differences as compared to their 'hard-law' counterparts. Most significantly it must be remembered that these documents are ultimately non-binding in nature, thereby limiting significance to influence only. Fundamentally, Mose states that:

> "The very existence of soft law is contentious. Traditional sources of international law, summarized by the Statute of the International Court of Justice, seem to exclude soft law. Opponents of soft law argue that if a text is not hard, it is not law"[29].

And Padilla also damagingly recognizes:

> "Soft law can be therefore defined as all those instruments that are not endowed, *prima facie*, of a true binding nature, but which in practice are incorporated into the traditional system of sources of law with a regulatory vocation and relevant repercussions in hermeneutics terms"[30].

These views could be seen therefore as a weakness and a proverbial 'blow' to the legal significance and effectiveness of the concept's translation[31].

However, the soft-law orientation of these documentations do maintain a certain degree of strength. There is a great capacity for these to generate influence upon actions of the international legal community. Unsurprisingly there are many hard-law counterparts that contain important reference to such versions of sustainable development within soft-law

[29] Ted Moya Mose,'Toward a harmonized framework for international regulation of renewable energy' (2018) *Uniform Law Review*, Vol. 23, Issue 2, 394.
[30] Carmen Montesinos Padilla, 'Protecting Human Rights Against Globalized Business Activity. Renewed Challenges to the Legal Taxonomy' (2018) University of Oslo Faculty of Law Research Paper No. 2018-24, 6.
[31] An additional weakness can be seen in the creation of such soft-law documentation. Please see: David G. Victor, 'Recovering Sustainable Development' (2006) *Foreign Affairs*, Vol. 85, Issue 1, 91-103; Elli Louka, *International Environmental Law: Fairness, Effectiveness and World Order* (2006) 21; Stuart Bell and Donald McGillivray, *Environmental Law* (2008) 79.

declarations, such as the 1994 Convention to Combat Desertification and Drought[32] in the Preamble "[r]ecogniz[es] the validity and relevance of decisions adopted at the United Nations Conference on Environment and Development, particularly of Agenda 21 and its chapter 12, which provide a basis for combating desertification"[33]. Another example can be found in the Cartagena Protocol on Biosafety[34], whereby it is referred "the precautionary approach contained in Principle 15 of the Rio Declaration on Environment and Development"[35]. These soft-law translations create consequence as it changes a mere suggestion to act into an actual action, which most definitely can be judged. Therefore, the influence can turn the suggested into the accurate and acted upon.

A resolve to induce more "serious policy making"[36] may be found in the hard-law counterparts and the inclusion of the concept of sustainable development. There are many alternatives shown in the form of international treaties, conventions or agreements. These legally binding documents are created, to which states are subject, in response to a particular threat or thematic area, such as climate change or biodiversity loss, and are more directed to further the concept as opposed to the rather abstract nature of sustainable development given through the soft-law proclamations. The specificity generated by these international agreements highlights the aptness to the situation. Examples include the Cartagena Protocol on Biosafety[37], UN Framework Convention on Climate Change (UNFCCC)[38] and the Kyoto Protocol[39], International Treaty on Plant Genetic Resources for Food and Agriculture[40], and the Straddling Fish Stocks Agreement[41]. While the examples provided do stem from environmental concerns, there are also those that stem

[32] United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, particularly in Africa (signed 17/06/1994, entered into force 26/12/1996) 1954 UNTS 3.
[33] Convention to Combat Desertification: *ibid* Preamble.
[34] Cartagena Protocol on Biosafety to the Convention on Biological Diversity (2000) (signed 29/01/2000, entered into force 11/09/2003) 2226 UNTS 208.
[35] Cartagena Protocol on Biosafety: *ibid* Preamble.
[36] D. G. Victor: [n 31] 95.
[37] Cartagena Protocol on Biosafety: [n 34].
[38] United Nations Framework Convention on Climate Change (UNFCCC) (signed 09/05/1992, entered into force 21/03/1994) 1771 UNTS 35.
[39] Kyoto Protocol to the United Nations Framework Convention on Climate Change (signed 11/12/1997, entered into force 16/02/2005) 2303 UNTS 162.
[40] International Treaty on Plant Genetic Resources for Food and Agriculture (signed 03/11/2001, entered into force 29/06/2004) 2400 UNTS 303.
[41] Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (signed 04/08/1995, entered into force 11/12/2001) 982 UNTS 92/B.

from other concerns such as trading and investment[42]. Together this evidence does provide a strong view of the popularization the concept has within legal agreement formation.

To expand upon a further example is the Energy Charter Treaty (ECT)[43]. This multilateral agreement "is designed to promote energy security through the operation of more open and competitive energy markets, while respecting the principles of sustainable development and sovereignty over energy resources"[44]. The aim is clear, "for mutually beneficial cooperation … in the energy sector"[45]. The provisions do aspire to achieve this objective[46]. However, importantly in relation to the concept of sustainable development, primarily in the Preamble, attention is given to "internationally-agreed objectives and criteria"[47], which could be construed as a silent nod towards sustainable development and the action thereof. Within the later substantive provisions, a much more blatant referral can be found;

> "In pursuit of sustainable development … each Contracting Party shall strive to minimize in an economically efficient manner harmful environmental impacts occurring either within or outside its area ... taking proper account of safety … each Contracting Party shall strive to take precautionary measures …"[48].

This Article demonstrates characteristics of environmental protection, economic development and social development, which are inherently related to the concept of sustainable development, within the extremely specific parameters of the energy sector.

Nevertheless, warning must be formed due to the exact location of the reference to the concept within a hard-law proclamation. If the statement is found in the preamble only, this weakens the concepts significance as compared to that found within a substantive

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[42] Wolfgang Alschner and Elisabeth Tuerk, 'The Role of International Investment Agreements in Fostering Sustainable Development' in F. Beatens (Eds) *Investment Law Within International Law: Integrationist Perspectives* (2013).
[43] Energy Charter Treaty (ECT) (1995) 2080 UNTS 95; 34 ILM 360.
[44] Helle Tegner Anker, Birgitte Egelund Olsen and Anita Ronne, *Legal Systems and Wind Energy: A Comparative Perspective* (2008) 250.
[45] Energy Charter Secretariat, 'The Energy Charter Treaty and Related Documents: A Legal Framework for International Energy Cooperation' (2004) Report No. ECS-D-2004-7850-5, 13.
[46] Rafael Leal-Arcas, 'Commentary on the Energy Charter Treaty (Introduction)' in Rafael Leal-Arcas (Eds) *Commentary on the Energy Charter Treaty* (2018).
[47] Energy Charter Treaty: [n 43] Preamble.
[48] Energy Charter Treaty: *ibid* Article 19.

provision in the main text. Located within the preamble only, the concept will not be included within the accountable provisions, though will be present within general interpretation of the agreement. There is little accountability that can be offered to the concept in this instance. If, however, the concept of sustainable development is found within the substantive provisions, then accountability could be generated, and this is the foundational difference.

2.2 The Field of International Investment Law

To concentrate now upon the mechanisms extensively employed by international investment law in the regulation of FDI, comparatively the predominantly utilized regulation can be found in primary textual sources of law or hard-law. Considering this recognition, the subsequent analysis will initially concern the determination of the various types of approaches to the regulation of FDI and secondly, due to the similarity of provisions contained through the observation of these facilitative mechanisms, the precise treatment of investment and the extent of host state obligations will be additionally enlightened. Furthermore, it will be briefly demonstrated the presence of international investment contracts and domestic foreign investment statutes, however these will not be included within the analysis generated in Chapter Four due to the contract's rather sporadic interjection within the overall international investment regime and that domestic legislation is beyond the parameters adopted by this Thesis.

Before a substantial discussion on the sources of law can be made, it is fundamental to recognise international investment laws relationship within the broader remit of public international law or "the law among nations"[49] alongside the acknowledgment of the effect this has upon the facilitative mechanisms of FDI employed. As the examination of international investment law predominately concerns the introduction of a concept into the facilitative mechanisms as opposed to the determination of a concept itself, rendered is the immediate appreciation of international investment law as a source of law. To achieve this, a broad analysis of "how international law is made"[50] is initially required.

[49] Gerhard von Glahn and James Larry Taulbee, *Law Among Nations: An Introduction to Public International Law* (2013) 3.
[50] Alan Boyle and Christine Chinkin, *The Making of International Law* (2007) 1.1.

Unlike domestic law making, international law-making is predicated by way of agreement between nation states (i.e., state-state) and that "the international world lack[s] … a general legislative body"[51]. Although the theory underpinning sovereignty in relation to state practice can be considered rather complex[52], the implication of state sovereignty, in relation to external relations[53], chiefly allows for "states [to] have ultimate and independent authority to govern themselves and those within their territory"[54] even in spite of the recognition that "states now routinely make legal promises that are perceived to lie in direct conflict with this conception of sovereignty, including delegating to international institutions authority that has traditionally been held exclusively by states"[55].

This appreciation of external sovereignty subsequently forwards two important aspects regarding the international investment regime, the first being the ability (or freedom) of the state to engage in relationships with other states in the form of treaties (i.e., agreements) and the second being the choice of the nature of the relationship in terms of the precise provisions chosen due to the previous negotiation made. Brand has stated that:

> "It is trite doctrine that international law is built on the notion of consent. No state can be held bound to a rule of international law … unless that state has consented to the rule, either in a treaty or in the recognition of a customary norm through public pronouncements and state conduct"[56].

The creation of numerous multilateral investment treaties and bilateral investment treaties (BITs), which will be discussed later, is symptomatic of such an effect of international law and sovereignty in the absence of any centralisation. External sovereignty subsequently allows for the creation of agreements between states, and importantly the

[51] Martti Koskenniemi, 'Fragmentation of International Law: Difficulties Arising from The Diversification and Expansion of International Law' (2006) Report of the Study Group of the International Law Commission A/CN.4/L.682, 10.
[52] Please see: Thomas J. Biersteker, 'State, Sovereignty, and Territory' in Walter Carlsnaes, Thomas Risse and Beth A. Simmons (Eds) *Handbook of International Relations* (2013) Chapter 10; Abram Chayes and Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreement* (1995) Chapter 1.
[53] Dieter Grimm, 'External Sovereignty' in Dieter Grimm (Eds) *Sovereignty: The Origin and Future of a Political and Legal Concept* (2015).
[54] Oona A. Hathaway, 'International Delegation and State Sovereignty' (2008) *Law & Contemporary Problems*, Vol. 71, 115.
[55] O. A. Hathaway: *ibid* 115.
[56] Ronald A. Brand, 'External Sovereignty and International Law' (1994-1995) *Fordham International Law Journal*, Vol. 18, 1685.

terms of the provisions contained therein. An example of such an occurrence can be seen in relation to the number of BITs conducted by the state of Belarus, which has agreed upon 66 BITs, of which 56 are currently in force[57]. When it is considered the basic purpose of such an agreement to provide reciprocal obligations and standards of protections of foreign investors and their investments in host states, the choice of state the relationship is made with is a conscious and active decision and not one that is necessarily open to all sovereign parties. However, there are also present in the investment regime multilateral treaties, for example the International Convention for the Settlement of Investment Disputes (ICSID)[58], a Convention with 163 Member States[59], which in difference to BITs, generates comparatively narrow provisions for the "effective procedures for impartial settlement of disputes"[60]. Though the fundamental issue is that states must actively ratify the agreement to be bound by the provisions.

Consequentially this ability through sovereignty has led to a fragmentation of international investment law with the creation of numerous investment treaties that generate a series of standards of protection and obligations. Additionally, it has been observed that "[w]hereas international trade in goods and services is mainly governed by the WTO Agreement and its Annexes, there is no international legal equivalent for the governance of international investment"[61]. So therefore, there is not only a lack of central law-making body within international law, but there is also no centre of authority within the international investment regime also, further fragmenting the regulations. Whilst the presence of such fragmentation is important to recognise, this degree of fragmentation can lead to issues of "incompatibility"[62] and the "frustrat[ion of] the goals of another treaty without there being any strict incompatibility between their provisions"[63]. The International Law Commission's 'Fragmentation of International Law' has noted that with such fragmentation "[t]he result is conflicts between rules or rule-systems, deviating

[57] UNCTAD Website, Investment Policy Hub, *Mapping of IIA Content, International Investment Agreements Navigator*, found at < https://investmentpolicy.unctad.org/international-investment-agreements> accessed March 2021.
[58] Convention on the Settlement of Investment Dispute Between States and Nationals of Other States (ICSID) (1965) 17 UST 1270, TIAS 6090, 575 UNTS 159.
[59] ICSID, World Bank Group Website, 'Database of ICSID Member States', found at < https://icsid.worldbank.org/about/member-states/database-of-member-states> accessed March 2021.
[60] Elihu Lauterpacht, 'Forward' in Christoph H. Schreuer, Loretta Malintoppi, August Reinisch and Anthony Sinclair (Eds) *The ICSID Convention: A Commentary* (2009) ix.
[61] Anne van Aaken, 'Fragmentation of International Law: The Case of International Investment Protection' (2008) Law and Economics Research Paper Series, Working Paper No. 2008-1, 4.
[62] A. V. Aaken: *ibid* 2.
[63] A. V. Aaken: *ibid* 2.

institutional practices and, possibly, the loss of an overall perspective on the law"[64]. However, even considering the heavily fragmented nature of the international investment regime, Van Aaken's suggestion "for preserving the unity of international law could be through integrative interpretation of substantive provisions of protective norms within the investment law or … through application of non-investment law"[65]. Similarly, Johnstone and Trebilcock have recognised the use of the most-favoured-nation clause can somewhat stabilise this fragmented regime[66].

In terms of a fully multilateral and comprehensive investment treaty, as already suggested, success can be described as lacking. Indeed, as Sornarajah pronounces, "there are … no relevant treaties among a large number of States which furnish a comprehensive codified law on foreign investment"[67]. Although, there have been historic efforts to produce such a form of comprehensive regulation. Academics[68] consistently refer to the Abs-Shawcross Draft Convention. The OECD's effort to create a Multilateral Agreement on Investment (MAI)[69] is exemplary of another failed attempt to produce a comprehensive regulatory response.

Forere acknowledges certain hesitations behind such a creation of a treaty. The academic states:

> "Those who argued that it was … not yet time for the MIT *[multilateral investment treaty]* pointed out that the economic divide between the developed and least developed countries (LDCs) … was so big that the MIT would entrench poverty in the LDCs. The contention was that in any event there is no evidence that the MIT would improve capital flows, which rendered it unnecessary"[70]. *[Emphasis added]*

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[64] M. Koskenniemi: [n 51] 11.
[65] A. V. Aaken: [n 61] 36.
[66] Adrian M. Johnston and Michael J. Trebilcock, 'Fragmentation in International Trade Law: Insights from The Global Investment Regime' (2013) *World Trade Review,* Vol. 12, Issue 2, 621-652.
[67] M. Sornarajah, *The International Law on Foreign Investment* (2021) 103.
[68] M. Sornarajah: *ibid* 90; Christopher Schreuer, 'Investment, International Protection', Max Planck Encyclopaedias of International Law (2013), found at < www.univie.ac.at/intlaw/wordpress/pdf/investments_Int_Protection.pdf > accessed November 2019, 3.
[69] Organization for Economic Co-operation and Development (OECD), Negotiating Group on the Multilateral Agreement in Investment (MAI), The Multilateral Agreement on Investment: Draft Consolidated Text (22 April 1998) DAFFE/MAI (98)7/REV1.
[70] Malebakeng Agnes Forere, 'New Developments in International Investment Law: A Need for a Multilateral Investment Treaty?' (2018) *Potchefstroom Electronic Law Journal,* Vol. 21, No. 1, 5.

And that:

> "The other argument was the current system of IIAs worked well to facilitated FDI flows, and that there is therefore no need for the conclusion of an MIT"[71].

From the observance of current treaty relations, it is obvious of the preference for free market economic policies afforded to only an extremely limited number of states, thereby implying the presentation of investment freedoms to a protected and defined environment. The preference to continually engage in much narrower sectoral, regional, or bilateral treaties simply justifies this assertion. Certainly, if the draft MAI is compared provision by provision to, for example, the Convention on the Settlement of Investment Dispute between States and Nationals of other States (ICSID)[72], then significantly wide-ranging protective terms would be found within the MAI as opposed to those of ICSID.

ICSID came into force in 1966 and is an early yet still current example of one of the most effective sectoral multilateral investment treaty within the international investment law regime. ICSID could be described as "procedural"[73] in nature as it outlines the structure for the completion of a dispute settlement mechanism between states and investors. Akinkugbe has observed that "[n]ow in its fifty-second year, in 2018, 57 new cases were registered and ICSID administered 279"[74]. It is unsurprising that Salacuse has attributed much praise to ICSID in that there has been a "heightened assurance that arbitration agreements and awards can be enforced"[75].

Ultimately much substantive positivity has been provided to the international investment arena as ICSID recognizes that the act of international investment could bring forth much scope for dispute and therefore provides adequate relief opportunities in view of this recognition. Provisions include that of jurisdiction[76], conciliation[77] and arbitration[78]. In

[71] M.A. Forere: *ibid* 5.
[72] ICSID: [n 58].
[73] Rudolf Dolzer, Ursula Kriebaum and Christoph Schreuer, *Principles of International Investment Law* (2020) 16.
[74] Olabisi D. Akinkugbe, 'Reverse Contributors? African State Parties, ICSID, and the Development of International Investment Law' (2020) *ICSID Review - Foreign Investment Law Journal*, Vol. 34, Issue 2, 435.
[75] Jeswald W. Salacuse, *The Three Laws of International Investment: National, Contractual, and International Frameworks for Foreign Capital* (2013) 152.
[76] ICSID: [n 58] Articles 25-27.
[77] ICSID: *ibid* Article 28-35.
[78] ICSID: *ibid* Articles 36-55.

comparison to the provisions of the MIA, there is a clear difference in that the ICSID provisions forward assertions of procedural necessity as opposed to, for instance, a direct level of protection. For example, regarding the Constitution of Tribunal, it is given that:

> "(1) The Conciliation Commission (hereinafter called the Commission) shall be constituted as soon as possible after registration of a request pursuant to Article 28.
>
> (2) (a) The Commission shall consist of a sole conciliator or any uneven number of conciliators appointed as the parties shall agree"[79].

The language and tone employed is much more procedural and as such less ambiguous than that presented within the protectionary provisions of the MIA.

It must also be recognized that the Convention provides a degree of clarity in a manner that is respectful of the theoretical background to which international investment is reliant. For example, through having Panels filled with "persons of high moral character and recognized competences in the fields of law"[80], it is to a great extent assured that the investment disputes are determined with both impartiality and expert knowledge which in turn encourages the act of FDI through the creation of a protective legal environment. Although, Article 14 in its entirety does generate a degree of ambiguity because ICSID does not further elucidate on the type of experience necessary to be suitable for such placing on a Panel.

Another important example of a sectoral approach taken is that of the ECT[81], which "widely recognize[s] that multilateral rules can provide a more balanced and efficient framework for international cooperation"[82] in relation to the energy market sector[83]. The Treaty is signed by multiple States, which ultimately covers a wide geographical area and is not regional in nature. The ECT provides corresponding rights and protections to

[79] ICSID: *ibid* Article 29.
[80] ICSID: *ibid* Article 14(1).
[81] ECT: [n 43].
[82] International Energy Charter Website, 'The Energy Charter Process', found at < https://www.energycharter.org/process/overview/ > accessed December 2019.
[83] Although in recent years, there have been calls for reform. Please see: Nathalie Bernasconi-Osterwalder and Martin Dietrich Brauch, 'Redesigning the Energy Charter Treaty to Advance the Low-Carbon Transition' in Transnational Dispute Management (Eds) *Modernization of the Energy Charter Treaty (ECT)* (2019).

investors in order "to ensure the creation of a 'level playing field' for energy sector investments throughout the Charter's constituency"[84]. The Preamble provides:

> "Resolved to promote a new model for energy co-operation in the long term in Europe and globally within the framework of a market economy and based on mutual assistance and the principle of non-discrimination …
>
> Convinced of the importance of promoting free movement of energy products and of developing an efficient international energy infrastructure in order to facilitate the development of market based trade in energy"[85].

Essentially the above reference significantly highlights both the sectoral approach taken to the equal encouragement and protection of energy related investments as well as importantly the constant interplay between the free market and protectionist theoretical underpinnings that are foundational to the regulation of international investment and subsequently FDI. In terms of the substantive provisions, in a similar manner to which ICSID's provisions are directed to the pursuit of the dispute settlement procedure, the ECT provisions are directed to the pursuit of the "long-term cooperation in the energy field"[86]. As another dissimilarity to ICSID and as a more direct alignment to the provisions of BITs, the ECT essentially outlines a protective environment for the investments within the energy sector. Article 10 is exemplary"[87]. There are also subsequent provisions concerning expropriation[88] and compensation[89]. Again, the vague nature of the language employed can be observed and is starting to be revealed as a characteristic of this field of law.

The general discussion on the sectoral multilateral treaties would not be complete without the recognition of the World Trade Organization (WTO) and the accompanying treaties which contain international investment related provisions. Sutherland *et al* have described the functioning of the WTO as "the most important tool of global economic management

[84] Energy Charter Secretariat: [n 45] 14.
[85] ECT: [n 43] Preamble.
[86] ECT: *ibid* Article 2.
[87] ECT: *ibid* Article 10.
[88] ECT: *ibid* Article 13.
[89] ECT: *ibid* Article 12.

and development we possess"[90]. The Agreement Establishing the World Trade Organization provides:

> "Recognizing that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development"[91].

Van den Bossche and Zdouc have stated that "it is clear from the Preamble … the need for the preservation of the environment and the needs of developing countries. The Preamble stresses the importance of sustainable economic development, i.e., economic development taking account of environmental as well as social concerns"[92]. Although, as the name would suggest, the WTO is principally concerned "with the rules of trade between nations … to ensure that trade flows as smoothly, predictably and freely as possible"[93], there can be found much significance for the regulation of foreign investment.

As it has already been identified previously that "[u]nlike WTO law, the system of international investment law has no central treaty or institution"[94], there is within the WTO a predominant centralization of agreement making with the creation of the General Agreement on Tariffs and Trade (GATT)[95], of which the succeeding General Agreement

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[90] Peter Sutherland, J. Sewell and D. Weiner, 'Challenges Facing the WTO and Policies to Address Global Governance' in G. Sampson (Eds) *The Role of the World Trade Organization in Global Governance (*2001) 81.
[91] Agreement Establishing the World Trade Organization with the Understanding on Rules and Procedures Governing the Settlement of Disputes (1994) 1869 U.N.T.S. 401, 33 I.L.M. 1226, Preamble.
[92] Peter Van den Bossche and Werner Zdouc, *The Law and Policy of the World Trade Organization* (2013) 83.
[93] World Trade Organization Website, 'The WTO', found at < https://www.wto.org/english/thewto_e.htm> accessed March 2021.
[94] WHO Framework Convention on Tobacco Control Website, 'Why is International Investment Law Relevant to WHO FCTC Implementation?', found at < https://untobaccocontrol.org/kh/legal-challenges/investment/international-investment-law-relevant-fctc-implementation/> accessed March 2021.
[95] General Agreement on Tariffs and Trade (GATT) (1994) Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187, 33 I.L.M. 1153.

on Trade in Services (GATS)[96] and Agreement on Trade-Related Investment Measures (TRIMs)[97] requires further attention with a focus upon foreign investment. GATS entered into force in 1995 and "establish[es] a multilateral framework of principles and rules for trade in services with a view to the expansion of such trade under conditions of transparency and progressive liberalisation"[98]. In relation to the regulation international investment by way of FDI, it is provided that "'services' includes any service in any sector except services supplied in the exercise of governmental authority"[99] and the "'supply of a service' includes the production, distribution, marketing, sale and delivery of a service"[100], which does encompass FDI and ultimately "addresses foreign investment in services as one of four modes of supply of services"[101]. Adlung asserts that "investments in service account for close to two-thirds of the world investment stock"[102]. In terms of provisions therefore, a continued degree of commonalty can be found. GATS contains provision pertaining to both the rights and duties of host (Member) states as well as standards of protections, including most-favoured-nation treatment[103], national treatment[104], general exceptions[105] and security exceptions[106]. Another important provision pertains to the denial of benefits[107], which provides:

> "A Member may deny the benefits of this Agreement:
>
> (a) to the supply of a service, if it establishes that the service is supplied from or in the territory of a non-Member or of a Member to which the denying Member does not apply the WTO Agreement …

[96] General Agreement on Trade in Services (GATS) (1994) Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 U.N.T.S. 183, 33 I.L.M. 1167.
[97] Agreement on Trade-Related Investment Measures (TRIMS) (1994) Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 186.
[98] GATS: [n 96] Preamble
[99] GATS: *ibid* Article 3(b).
[100] GATS: *ibid* Article XXVIII (b)
[101] World Trade Organization, 'Trade and Investment', found at < https://www.wto.org/english/tratop_e/invest_e/invest_e.htm > accessed March 2021.
[102] Rudolf Adlung, 'International Rules Governing Foreign Direct Investment in Services: Investment Treaties versus the GATS' (2016) *The Journal of World Investment & Trade*, Vol. 17, Issue 1, 47.
[103] GATS: [n 96] Article II.
[104] GATS: *ibid* Article XVII.
[105] GATS: *ibid* Article XIV
[106] GATS: *ibid* Article XIV *bis*.
[107] GATS: *ibid* Article XXVII.

(c) to a service supplier that is a juridical person, if it establishes that it is not a service supplier of another Member, or that it is a service supplier of a Member to which the denying Member does not apply the WTO Agreement"[108].

As well as a provision concerning dispute settlement and enforcement[109], which gives:

> "1. If any Member should consider that any other Member fails to carry out its obligations or specific commitments under this Agreement, it may with a view to reaching a mutually satisfactory resolution of the matter have recourse to the DSU.
>
> 2. If the DSB considers that the circumstances are serious enough to justify such action, it may authorize a Member or Members to suspend the application to any other Member or Members of obligations and specific commitments in accordance with Article 22 of the DSU"[110].

Together these highlighted provisions again continue to demonstrate the precise treatment of FDI from the perspective of the WTO Member States and the trade in services and begin to further examine the provisions that are held widely within BITs, which will be discussed subsequently.

Comparatively however, the 1995 TRIMs "applies to investment measures related to trade in goods only"[111], therefore unlike GATS, there is no relationship to trade in services. Additionally, TRIMs supplies a regime in which it is "recogniz[ed] that certain investment measures can cause trade-restrictive and distorting effects"[112] and consequently "is not concerned with the regulation of foreign investment"[113] in the way in which GATS treats foreign investment, for example through the application of standards of protections. Instead, TRIMs provides "protections against host country

[108] GATS: *ibid* Article XXVII.
[109] GATS: *ibid* Article XXIII.
[110] GATS: *ibid* Article XXIII.
[111] TRIMs: [n 97] Article 1.
[112] TRIMs: *ibid* Preamble.
[113] World Trade Organization Website, 'Agreement on Trade Related Investment Measures', found at < https://www.wto.org/english/tratop_e/invest_e/invest_info_e.htm > accessed March 2021.

restraints in FDI"[114] and "recognises …[f]or example, local content requirements mean that imports are treated less favourably that domestic inputs, violating the national treatment principle of the GATT"[115] . To achieve such aim, in relation to the precise provisions, there is reference to national treatment and quantitative restrictions. It is given that:

> "1. Without prejudice to other rights and obligations under GATT 1994, no Member shall apply any TRIM that is inconsistent with the provisions of Article III or Article XI of GATT 1994.
>
> 2. An illustrative list of TRIMs that are inconsistent with the obligation of national treatment provided for in paragraph 4 of Article III of GATT 1994 and the obligation of general elimination of quantitative restrictions provided for in paragraph 1 of Article XI of GATT 1994 is contained in the Annex to this Agreement"[116].

The illustrative list[117] referred includes, for example, "the purchase or use by an enterprise of products of domestic origin or from any domestic source, whether specified in terms of particular products, in terms of volume or value of products, or in terms of a proportion of volume or value of its local production"[118] and "the importation by an enterprise of products used in or related to its local production, generally or to an amount related to the volume or value of local production that it exports"[119]. There are also provisions of exceptions[120] and consultation and dispute settlement[121], which both cite GATT. The provisions highlighted do seem to coordinate the directed approach to "prohibit … trade-distorting investment measures"[122].

An important derivative of this WTO regime is the characterization and subsequent influential practice of general exceptions, which have led to "the inclusion of general

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[114] Paul Civello. 'The TRIMs Agreement: A Failed Attempt at Investment Liberalization' (1999) *Minneapolis Journal of Global Trade*, Vol. 8, 97.
[115] Douglas H. Brooks, Emma Xiaoqin Fan and Lea R. Sumulong, 'Foreign Direct Investment: Trends, TRIMs, and WTO Negotiation' (2003) *Asian Development Review*, Vol. 20, No. 1, 14.
[116] TRIMs: [n 97] Article 2.
[117] TRIMs: *ibid* Annex.
[118] TRIMs: *ibid* Annex, 1(a).
[119] TRIMs: *ibid* Annex, 1(a).
[120] TRIMs: *ibid* Article 3.
[121] TRIMs: *ibid* Article 8.
[122] D. H. Brooks, E. X. Fan and L. R. Sumulong: [n 115] 18.

exception to [International Investment Agreements] IIA obligations modelled on Art. XX GATT or Art. XIV GATS"[123], including that in numerous BITs. In relation to this observation, Mitchell *et al* have stated "States have in recent years incorporated policy space in their IIAs in various ways"[124]. However, Newcombe at the same time appreciates that "treaty practice in this area is embryonic… [and] inconsistent"[125] at best. To first understand the influence, it is necessary to detail both WTO provisions. Article XX of GATT states:

> "Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail … nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:
>
> (a) necessary to protect public morals;
>
> (b) necessary to protect human, animal or plant life or health;
>
> (c) relating to the importations or exportations of gold or silver;
>
> (d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement …
>
> (e) relating to the products of prison labour;
>
> (f) imposed for the protection of national treasures of artistic, historic or archaeological value;

[123] Andrew Newcombe, 'General Exceptions in International Investment Agreements' (2008) Draft Discussion Paper, Prepared for BIICL Eighth Annual WTO Conference 13th and 14th May 2008, London, 2.
[124] Andrew D. Mitchell, James Munro and Tania Voon, 'Importing WTO General Exceptions into International Investment Agreements: Proportionality, Myths and Risks' (2016-2017) *Yearbook on International Investment Law & Policy*, 38.
[125] A. Newcombe: [n 123] 2.

(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption …"[126].

Article XIV of GATS comparatively states:

"Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail … nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures:

(a) necessary to protect public morals or to maintain public order;

(b) necessary to protect human, animal or plant life or health;

(c) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement including those relating to:

(i) the prevention of deceptive and fraudulent practices or to deal with the effects of a default on services contracts;

(ii) the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts;

(iii) safety …"[127].

The general exceptions provided within GATS are much narrower than those provided in GATT. For instance, in relation to environmental matters, GATS refers to only the protection of "human, animal or plant life or health"[128], whereas GATT cites additionally "the conservation of exhaustible natural resources if such measures are made effective in

[126] GATT: [n 95] Article XX.
[127] GATS: [n 96] Article XIV.
[128] GATS: *ibid* Article XIV (b).

conjunction with restrictions on domestic production or consumption"[129], which broadens the scope of environmental consideration.

In terms of the influence in BITs, which forms a section of the IIA regime as will be discussed below, for example, much influence and similarity can be found. The Agreement between the Government of the Republic of Latvia and the Government of the Republic of Armenia for the Promotion and Reciprocal Protections of Investments provides:

> "Provided that such measures are not applied in an arbitrary or unjustifiable manner … nothing in this Agreement shall be construed to prevent a Contracting Party from adopting or maintaining measures, including environmental measures:
>
> (a) necessary for the maintenance of public order;
>
> (b) necessary to protect human, animal or plant life or health"[130].

The language employed is similar to that of both GATT and GATS, although the level of detail is somewhat diminished in correspondence. A heavily alternative approach can be found in the Agreement Between Canada and The Federal Republic of Nigeria for the Promotion and Protection of Investments[131]. It is given not only reference "to protect human, animal or plant life or health … for the conservation of living or non-living exhaustible natural resources"[132], but also recognizes that the "Agreement does not prevent a Party from adopting or maintaining reasonable measures for prudential reasons, such as: (a) protecting investors, depositors, financial market participants, policy-holders, policy-claimants, or persons to whom a fiduciary duty is owed by a financial institution; (b) maintaining the safety, soundness, integrity or financial responsibility of financial institutions; and (c) ensuring the integrity and stability of a Party's financial system"[133].

[129] GATT: [n 95] Article XX (g).
[130] Agreement Between the Government of the Republic of Latvia and the Government of the Republic of Armenia for the Promotion and Reciprocal Protections of Investments (signed 07/10/2005, entered into force 21/04/2007) Article 13(2).
[131] Agreement Between Canada and The Federal Republic of Nigeria for the Promotion and Protection of Investments (Canada – Nigeria BIT) (signed 06/05/2014).
[132] Canada – Nigeria BIT: *ibid* Article 18.
[133] Canada – Nigeria BIT: *ibid* Article 18.

A contrasting yet relevant multilateral approach taken to investment treaties can be found in treaties of a regional nature, typically covering a limited geographical area through the number of participating states but at the same time covering a wide range of duties and protections. The North American Free Trade Agreement (NAFTA) is representative of this nature, which creates "a comprehensive agreement that sets the rules for international trade and investment between Canada, the United States, and Mexico"[134]. Due to only three participating States, when compared against ICSID that has 163 signatories, NAFTA is observably a relationship between fewer States[135]. NAFTA recognizes the need for "special bonds of friendship and cooperation … secure market … reduc[tion in the] distortions to trade … establish[ing] clear and mutually advantageous rules governing their trade"[136].

Due to the broadness of regulations provided within NAFTA, the Agreement is divided into Chapters[137] and the specific regulation of FDI is located within Chapter Eleven. The provisions within this Chapter are chiefly concerned with the general protection of all activities that constitute the definition of an 'investment'[138]. The protections of national treatment[139], most-favored-nation treatment[140] and minimum standard of treatment[141] are included. The provision on expropriation and compensation states:

> "1. No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment ("expropriation"), except:
>
> (a) for a public purpose;

[134] North American Free Trade Agreement Website, 'North American Free Trade Agreement', found at < http://www.naftanow.org/agreement/default_en.asp > accessed November 2019.
[135] M. Angeles Villarreal and Ian F. Fergusson, 'The North American Free Trade Agreement (NAFTA)' (2017) Congressional Research Service Report, found at < https://fas.org/sgp/crs/row/R42965.pdf > accessed November 2019.
[136] North American Free Trade Agreement (NAFTA) (1993) 32 ILM 289, 605, Preamble; Isidro Morales, 'NAFTA in a Comparative Perspective: A Debate on Trade Diplomacy, Economic Policy, and Regionalism' (2018) *Oxford Research Encyclopedia*, found at < https://oxfordre.com/politics/politics/view/10.1093/acrefore/9780190228637.001.0001/acrefore-9780190228637-e-259 > accessed November 2019.
[137] NAFTA: *ibid* Chapters 1-22.
[138] NAFTA: *ibid* 1137.
[139] NAFTA: *ibid* Article 1102.
[140] NAFTA: *ibid* 1103.
[141] NAFTA: *ibid* 1105.

(b) on a non-discriminatory basis;

(c) in accordance with due process of law and Article 1105(1); and

(d) on payment of compensation in accordance with paragraphs 2 through 6"[142].

This provision is symptomatic of the general and vague language employed in the protections. In fact, as another similarity to BITs, Chapter Eleven does in many respects precisely mirror a general perception of a BIT in the extent of the provisions provided.

An alternative example of a regional investment treaty includes that of the Comprehensive Economic and Trade Agreement (CETA), which is a regional investment agreement between Canada and the member states of the European Union. CETA contains general provisions within Chapter Eight[143] pertaining to national treatment[144], most-favored-nation treatment[145], expropriation[146], compensation for losses[147] and dispute settlement clauses[148] and furthermore represents another comprehensive yet narrow in application approach to the FDI regime in which the language employed continues to be characteristically vague.

A more recent example of a comprehensive regional treaty can be found in the EU and Japan's Economic Partnership Agreement (EU-Japan EPA) which came into force in 2019. The European Commission has described the purpose of such an Agreement in "remov[ing] tariffs and other trade barriers … creates a platform to cooperate in order to prevent obstacles … sends a powerful signal that two of the world's biggest economies reject protectionism"[149]. Thereby acknowledging the nature of such an Agreement in providing free market polices within strict parameters of protectionism. Although the contained provisions afford the common standards of treatment to investment activities,

[142] NAFTA: *ibid* 1110.
[143] CETA: [n 18] Chapter 8.
[144] CETA: *ibid* Chapter 8.6; Agreement Between the United States of America, the United Mexican States, and Canada (USMCA) (signed 30/11/2018), Chapter 14.4.
[145] CETA: *ibid* Chapter 8.7; USMCA: *ibid* Chapter 14.5.
[146] CETA: *ibid* Chapter 8.12; USMCA: *ibid* Chapter 14.8.
[147] CETA: *ibid* Chapter 8.11; USMCA: *ibid* Chapter 14.8.
[148] CETA: *ibid* Chapter 8 (F) and Chapter 29; USMCA: *ibid* Chapter 31.
[149] European Commission Website, 'In Focus: EU – Japan Economic Partnership Agreement European', found at < https://ec.europa.eu/trade/policy/in-focus/eu-japan-economuc-partnership-agreement/ > accessed February 2021.

a distinctive language is deployed in the deliverance. Article 8.8 on National Treatment states:

> "Each Party shall accord to **entrepreneurs** of the other Party and to covered **enterprises** treatment no less favorable than that it accords, in like situations, to its own entrepreneurs and to their enterprises, with respect to establishment in its territory"[150]. [Emphasis added]

The reference to the term 'entrepreneur' or 'enterprise' does break away from the traditional usage of the term 'investor' or 'investment' and applying a literal interpretation, the term could constitute a broader definition than that afforded by reference to 'investor' or 'investment'. Although the relevant Chapter[151] does provide important definitions of these terms, "'enterprise' means a juridical person or branch or representative office … 'entrepreneur of a Party' means a natural or juridical person of a Party that seeks to establish, is establishing or has established an enterprise in accordance with subparagraph (i), in the territory of the other Party"[152], these definitions are extremely vague and unlike that of NAFTA, for example, are significantly lacking in outlining detail and ultimately cannot be equated with each other.

Despite the expansion in the use of both regional and sectoral treaties for the regulation of FDI, still an even higher degree of success can be attributed in the proliferation of BITs within the international investment regime. BITs can be classified as separate from the above referred sectoral and regional treaties in that BITs are treaties between two sovereign states and pertain only to the regulation of FDI. These treaties are not overall contained within a broader trade regime, like that of NAFTA, and are not of a sectoral nature either, like that of the ECT. The introduction of BITs came through the increase in international investment practices alongside a shared understanding there was a sense of great unease with the methods in place used to regulate such action[153]. In 1959 the first BIT was signed between Germany and Pakistan[154]. Today, there are 2884[155] signed, with

[150] Agreement Between the European Union and Japan for Economic Partnership (EU – Japan EPA) (2018) ST/7965/2018/INIT, Article 8.8.
[151] EU-Japan EPA: *ibid* Chapter 8.
[152] EU-Japan EPA: *ibid* Article 8.2 (g) and (h).
[153] R. Dolzer, U. Kriebaum and C Schreuer: [n 73] Chapter 1.
[154] Treaty for the Promotion and Protection of Investments, Germany and Pakistan (signed 25/11/1959, entered into force 28/11/1962).
[155] UNCTAD, *Mapping of IIA Content*: [n 57] accessed July 2021.

2290[156] of these BITs in force. These figures represent the creation of BIT's not only between developed-developed states but also BIT relationships between developed-developing states and developing-developing states as well.

Turning to issues of substance, essentially a BIT is a contract containing a series of appropriate duties and protections of both the investor and host state and in this sense could be classed as comprehensive. These duties and protections have been previously amplified in relation to the discussion of sectoral and regional treaties which contain similar provisions. Due the vast quantity of such a specific international treaty, it is extremely unsurprising that the treaties are "similar in structure"[157] and contain similar substantive provisions, notably these are the chief standards of protections that the host state afford to the foreign investments. Vandevelde asserts that:

> "A provision of an investment agreement may relate to investment in any of four ways. Such a provision may *protect* investment, such as where it guarantees compensation for expropriation; it may *liberalize* investment, such as where it grants foreign investors a right to establish investment; it may *promote* investment, such as where it provides investment insurance; or it may *regulate* investment, such as where it prohibits corrupt payments by investors … [n]early all of the provisions of a typical BIT protect investment"[158].

To a great extent, the substantive provisions will highlight and agree with this organization, even in the discussion of the security and exception provisions of the BITs which could be argued to "regulate investment"[159]. Also, the discussion of the BITs will additionally generate a deeper investigation into the extent of obligations between the host state and investment or investor. The previous discussion highlighted the basic presence of such provisions within sectoral and regional treaties, this subsequent examination will now ascertain the extent of the obligations of such provisions.

Initially the BIT usually contains a series of preambular provisions that outline the intentions of the parties involved and the purpose of such a relationship. A typical

[156] UNCTAD, *Mapping of IIA Content*: *ibid*.
[157] M. Sornarajah: [n 67] 81.
[158] Kenneth J. Vandevelde, *Bilateral Investment Treaties: History, Policy and Interpretation* (2010) Chapter 1 (1,2).
[159] K. J. Vandevelde: *ibid* Chapter 1 (1,2).

example can be found in the Agreement between Hungary and the Republic of Tajikistan for the Promotion and Reciprocal Protection of Investments[160].These provisions can be described as interpretative aids of the treaty as opposed to the substantive provisions.

To move to the substantive provisions within the BITs, it must be stated that other than those of a procedural or administrative nature (i.e., those concerning dispute settlement mechanisms, entry into force, duration, termination, and amendments[161]), the provisions can be placed into two categories, those of the obligations of the host state in the protection of foreign investments and those regulatory areas retained by the host state. As will be discussed later in this Chapter[162], there is a consensus of understanding that there is an asymmetry in the balance of duty of protection[163], and it must be recognised that there are many more obligations upon host states for protection than on the foreign investors or investments themselves. It has been suggested that "many investment treaties owe their origin to power asymmetries among negotiating parties"[164] and this asymmetry can principally be seen through the protection standards of fair and equitable treatment, expropriation and compensation, most-favored-nation and national treatment.

The primary standard of fair and equitable treatment, with the commonly adjoined recognition full protection and security, is located within the substantive provisions of all BITs and requires a level of treatment to be afforded to foreign investments[165]. A representative example of this provision provides:

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[160] Agreement Between Hungary and the Republic of Tajikistan for the Promotion and Reciprocal Protection of Investments (Hungary – Tajikistan BIT) (signed 18/09/2017, entered into force 04/11/2018) Preamble.

[161] Please see, for example: Hungary – Tajikistan BIT: *ibid* Articles 8, 9 and 14; Agreement Between the Government of the Republic of Belarus and the Government of Georgia on the Promotion and Reciprocal Protection of Investments (signed 01/03/2017, entered into force 01/12/2017), Articles 8, 9 and 15; Agreement Between the Government of the Republic of Guatemala and the Government of the Russian Federation on the Promotion and Reciprocal Protection of Investments (signed 27/11/2013), Articles 8, 9 and 12.

[162] Chapter Two, Section Three.

[163] Frank J. Garcia, Lindita Ciko, Apury Gaurav and Kirrin Hough, 'Reforming the International Investment Regime: Lessons from International Trade Law' (2015) *Journal of International Economic Law*, Vol. 18, Issue 4, 861-892.

[164] Emma Aisbett, Bernali Choudhury, Olivier de Schutter, Frank Garcia, James Herrision, Song Hong, Lise Johnson, Mouhamadou Kane, Santiago Pena, Matthew Porterfield, Susan Sell, Stephen E. Shay, and Louis T. Wells, *Rethinking International Investment Governance: Principles for the 21st Century* (2018) 25.

[165] For a broader exploration of this provision, please see: Fulvio Maria Palombino, *Fair and Equitable Treatment and the Fabric of General Principles* (2018); Rumana Islam, *The Fair and Equitable Treatment Standard in International Investment Arbitration: Developing Countries in Context (*2019).

> "Each Contracting Party shall in its Area accord to investments of investors of the other Contracting Party treatment in accordance with international law, including fair and equitable treatment and full protection and security …"[166].

As has been seen in the analysis of the other protection provisions, the amount of detail provided is vague and minimalist. Thereby when interpreting such a provision, "many tribunals have interpreted them broadly to include a variety of specific requirements including a State's obligation to act consistently, transparently, reasonably, without ambiguity, arbitrariness or discrimination, in an even-handed manner, to ensure due process in decision-making and respect investors' legitimate expectations"[167]. There are fewer examples of provisions which do provide more detail as to the extent of the protection, such as that provided by the Agreement between the Swiss Confederation and Georgia on the Promotion and Reciprocal Protection of Investments, which states:

> "Investments of investors of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party. Neither Contracting Party shall in any way impair by **unreasonable or discriminatory measures the management, maintenance, use, enjoyment, extension, or disposal of such investments**"[168]. [Emphasis added]

The text highlighted in bold differentiates the level of detail than that provided in the Japan – Myanmar BIT. Though it must also be recognised that although there is a more defined set of criteria, there is still a broad degree of interpretation involved in any consequential dispute of the fair and equitable treatment provision.

Another prominent and repeated standard of treatment given to foreign investments within BITs is that in relation to the acts of expropriation and the subsequent compensation[169]. Expropriation can be defined as either direct or indirect and concerns

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[166] Agreement Between the Government of Japan and the Government of the Republic of the Union of Myanmar for the Liberalization, Promotion and Protection of Investment (signed 15/12/2013, entered into force 07/08/2014) Article 4.
[167] United Nations Conference on Trade and Development, 'Fair and Equitable Treatment: UNCTAD Series on Issues in International Investment Agreements II' (2012) UNCTAD/DIAE/IA/2011/5, xiii.
[168] Agreement Between the Swiss Confederation and Georgia on The Promotion and Reciprocal Protection of Investments (signed 03/06/2014, entered into force 17/04/2015) Article 4.
[169] For a further understanding of expropriation, please refer to: Federico Ortino, *The Origin and Evolution of Investment Treaty Standards: Stability, Value and Reasonableness* (2019); August Reinisch

"a well-recognised rule in international law that the property of aliens cannot be taken, whether for public purposes or not, without adequate compensation"[170]. A common formulation of this provision can be viewed as:

> "Neither Contracting Party shall expropriate, nationalize or take any other measure, the effects of which would be equivalent to expropriation or nationalization against the investments of the investors of the other Contracting Party in its territory (hereinafter referred to as expropriation), unless the expropriation meets all of the following conditions:
>
> (a) it was in the public interest;
>
> (b) it was in accordance with domestic legal procedure and relevant due process;
>
> (c) it was non-discriminatory;
>
> (d) compensation was given. "Other measures, the effects of which would be equivalent to expropriation or nationalization" means indirect expropriation …
>
> The determination of whether a measure or a series of measures of one Contracting Party constitutes indirect expropriation in Paragraph 1 **requires a case-by-case, fact-based inquiry** …"[171]. [Emphasis added]

Again, within this provision a high degree of vagueness in detail is given and reasoning for such lack of precision is also provided within the provision itself. Reference to "a case-by-case, fact-based inquiry"[172] suggests the dependence upon the facts of the disputes and to provide a high level of detail may curtail such a unique investigation. It

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and Christoph Schreuer, *International Protection of Investments: The Substantive Standards* (2020); Jorg Kammerhofer, *International Investment Law and Legal Theory: Expropriation and the Fragmentation of Sources* (2021).

[170] OECD, ''Indirect Expropriation' and the 'Right to Regulate' in International Investment Law' (2004) OECD Working Papers on International Investment, 2004/04, OECD, 2.

[171] Agreement Between the Government of the People's Republic of China and the Government of the United Republic of Tanzania Concerning the Promotion and Reciprocal Protection of Investments (China – Tanzania BIT) (signed 24/03/2013, entered into force 17/04/2014) Article 6.

[172] China – Tanzania BIT: *ibid* Article 6(2).

should also be noted that combined with the fair and equitable treatment standard, the broad level of protection this could provide for the foreign investor alongside the high-level duty of care placed upon host states.

From a different perspective in terms of the type of protection of the foreign investment, there is also a sub-category of provision that create the obligations of host states to actively maintain equality and avoid degrees of discrimination. The first of which is the provision of the most-favoured-nation treatment and dictates that investors from one state should receive no less favourable treatment than it affords to third party states. Within BITs, the Agreement between the Government of the United Arab Emirates and the Government of the People's Republic of Bangladesh for the Promotion and Reciprocal Protection of Investment clearly outlines this protection:

> "Investment made by investors of either Contracting Party in the territory of the other Contracting Party shall receive treatment which is fair and equitable, and not less favourable than that accorded to investments made by own investors or investors of any third State, whichever is the most favourable.
>
> Each Party shall accord to the investment treatment no less favourable than it accords to investments in its territory of investors of any non-party with respect to the establishment, expansion, acquisition, transfers, management, conduct, operation, and sale or other disposition of investments"[173].

It must be observed that the definitional vagueness in terms of the outline is not present in the same way as there is much more clarity in the generation of equality as opposed to determining a threshold, like that seen in the fair and equitable treatment and expropriation provisions.

Another provision concerned with the maintenance of equality in the treatment afforded to foreign investors is the protection afforded by national treatment. It is extremely closely related to the most-favoured-nation in that the provision requires a corresponding treatment comparative to the investors from the host state. Similarly, the language used

[173] Agreement Between the Government of the United Arab Emirates and the Government of the People's Republic of Bangladesh for the Promotion and Reciprocal Protection of Investment (signed 17/01/2011) Article 4.

to dictate this provision is close to that which is afforded by the most-favoured-nation provision. The Agreement between the Government of Georgia and the Government of the State of Kuwait for the Promotion and Reciprocal Protection of Investments provides:

> "With respect to the establishment, use, management, conduct, operation, expansion and sale or other disposition of investments made in its state territory by investors of the other Contracting Party, each Contracting Party shall accord treatment no less favourable than that it accords, in like situations, to investments of its own investors … whichever is the most favourable"[174].

A strong degree of parallelism is found to the most-favoured-nation provision in the language deployed, with the only difference between the other investments of the host state and not those of a third party.

After outlining the provisions within the BIT regime that generate obligations upon the host state, i.e., one of the contracting parties, and at the same time create protections for the foreign investments, it would be easy to assume that the obligations are only one way in nature for the sole purpose of the protection of the investment. However, there are provisions common to BITs that grant host states jurisdiction in certain areas, thereby outlining the second category of BIT provision. There are present provisions pertaining to general exceptions and national security interests of the host states, which essentially overrides the protection of foreign investments in certain circumstances. An example can be found in the Agreement between the Czech Republic and the Republic of Yemen for the Promotion and Reciprocal Protection of Investments in which it is provided:

> "1. Nothing in this Agreement shall be construed to prevent any Contracting Party from taking any actions that it considers necessary for the prevention of its essential security interests,
>
> (a) relating to criminal or penal offences;
>
> (b) relating to traffic in arms, ammunition and implements of war and transactions in other goods, materials, services and technology

[174] The Government of Georgia and the Government of the State of Kuwait for the Promotion and Reciprocal Protection of Investments (signed 13/10/2009, entered into force 30/05/2013) Article 3.

undertaken directly or indirectly for the purpose of supplying a military or other security establishment;

(c) taken in time of war or other emergency in international relations, or

(d) relating to the implementation of national policies or international agreements respecting the non-proliferation of nuclear weapons or other nuclear explosive devices or

(e) in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security"[175].

The provision does allow for the justified interference of a foreign investment on specific grounds, which is very different to the nature of the standards of protection afforded by fair and equitable treatment or most-favoured-nation in that this provision actively allows an interference of a foreign investment which would not constitute a breach. Although the grounds contain profound circumstances in which an interference would be considered justified, the language employed again suffers from a great degree of vagueness and therefore ultimately open to forms of interpretation. Nonetheless, this provision fundamentally allows the legal interference of foreign investments, thereby in turn allowing the host state to retain a degree of sovereignty within the FDI regime. Also, this provision could provide benefits for the host state in other areas of domestic legislation alongside the protection of the foreign investors or investments themselves.

Another important common provision within BITs which demonstrates a similar categorisation of the right of the host state is that of the denial of benefit provisions, which has the aim generally "to ensure the reciprocity of the concerned treaty by excluding those companies from the scope of protection which are owned or controlled by nationals of a third country and/or which do not undertake substantial business activity in the host state"[176]. A typical formulation is as such:

[175] Agreement Between the Czech Republic and the Republic of Yemen for the Promotion and Reciprocal Protection of Investments (signed 20/05/2008, entered into force 04/09/2009) Article 11.
[176] Anne K. Hoffmann, 'Denial of Benefits' in Marc Bungenberg, Jorn Griebel, Stephan Hobe, August Reinisch (Eds) *International Investment Law* (2015) 598.

> "Following notification, a Contracting Party may deny the benefits of this Agreement to:
>
> 1. an investor of the other Contracting Party that is a juridical person of such Contracting Party and to an investment of such investor if the juridical person is owned or controlled directly or indirectly by investors of a Third State and the denying Contracting Party does not maintain diplomatic relations with the Third State;
>
> 2. an investor of the other Contracting Party that is a juridical person of such Contracting Party and to investments of that investor, if an investor of a Third State owns or controls directly or indirectly the juridical person and the juridical person has no substantive business operations in the territory of the other Contracting Party"[177].

In comparison to the vagueness of the previously discussed provisions, although the language deployed is again of a broad nature, the purpose of such a provision is not so ambiguous.

However, these above identifications of multilateral investment treaties and BITs do not include international investment or state contracts, which are considered another "mode of entry for foreign direct investment"[178]. In the most basic terms, these contracts are made "on the basis of agreements between the investor and the host State or one of its instrumentalities"[179]. Cotula states that these contracts "set the terms and conditions for an investment project in the territory of that State"[180]. The rationale for this relationship is summarized by Dolzer, Kriebaum and Schreuer in that these contracts adequately reform "the general legal regime of the host country to the project-specific needs and

[177] The Reciprocal Promotion and Protection of Investments Between the Argentine Republic and the State of Qatar (signed 06/11/2016) Article 9. Please also see: Agreement for the Promotion and Reciprocal Protection of Investments between Canada and the Republic of Guinea (signed 27/05/2009, entered into force 27/03/2017) Article 19.
[178] UNCTAD, 'State Contracts: UNCTAD Series on Issues in International Investment Agreement' (2004) UNCTAD/ITE/IIT/2004/11, 1.
[179] Christoph Schreuer, 'Investment, International Protection' (2013) *Max Planck Encyclopedias of International Law*, found at < www.univie.ac.at/intlaw/wordpress/pdf/investments_Int_Protection.pdf > accessed November 2019, 5.
[180] Lorenzo Cotula, 'Briefing 4: Foreign Investment Contracts' in International Institute for Environment and Development (Eds) *Strengthening Citizens' Oversight of Foreign Investment: Investment Law and Sustainable Development* (2007) 1.

preferences of both sides"[181]. In contrast to the previously identified BITs and multilateral investment treaties therefore, a more specific approach to obligations and protections is generated in the outlining of a particular investment project instead of applying the broad remit of 'investment'[182] and the wide range of activities that this may encompass. Though, an important comparison can be maintained in the similar relationship these contracts have with the concept of sustainable development and their ability to either encourage "or undermine"[183] the sustainable development agenda[184], for example through provision "to develop national infrastructure"[185].

Dumberry predominantly forwards two intriguing aspects of such contracts, which again generates a degree of difference to that of the general functioning of BITs and multilateral investment treaties. The first being "[o]ne of the fundamental characteristics of these contracts is the 'double role' played by the State; it is not only a party to the contract, but it is also the sovereign State where the investment is made"[186]. This is a different perspective than that provided within BITs, for instance, where the foreign investment activity is located within the host state and not within the domestic state (i.e., home state of the investment activity), and consequently the protections are only afforded to the foreign investment from the host state and not from the domestic state itself to the foreign investment[187]. Therefore, there is an expansion in terms of the functioning of the obligations and protection afforded. The second unique and potentially problematic feature concerns "their interaction with other sources of international law, such as the law of the host State, customary international law and treaties"[188] and the question as to "how international investment agreements treat State contracts … [and] the extent to which IIA provisions can regulate the behaviour of countries, in their use and operation of State

[181] R. Dolzer, U. Kriebaum and C. Schreuer: [n 73] 28.
[182] Please see, for example: ECT: [n 43] Article 1(6).
[183] Lorenzo Cotula, 'Investment Contracts and Sustainable Development: How to make contracts for fairer and more sustainable natural resource investments' (2010) Natural Resource Issues No. 20, IIED, London, v.
[184] Please see also: Lorenzo Cotula and Kyla Tienhaara, 'Reconfiguring Investment Contracts to Promote Sustainable Development' (2013) *Yearbook on International Investment Law & Policy 2011 - 2012*, Chapter 6, 281-310.
[185] L. Cotula: [n 183] 42.
[186] Patrick Dumberry, 'International Investment Contracts` in Tarcisio Gazzini and Eric De Brabandere (Eds) *International Investment Law: The Sources of Rights and Obligations* (2012) 215-216.
[187] Evert-jan Quak, 'The Impact of State-Investor Contracts on Development' (2018) Institute of Development Studies, 3
[188] P. Dumberry: [n 186] 216.

contracts, is a major concern"[189]. Overall, it has been stated that "a combination of national law and international rules as applicable law has been negotiated as a compromise"[190].

An example of this type of contract is The Channel Fixed Link Agreement (1986)[191] between the UK and France, and The Channel Tunnel Group Limited and France-Manche S.A. This Agreement concerns the building of the railway link between the two States, which "has been envisaged since the beginning of the nineteenth century but it never came close to reality until the 1960s"[192]. Clause 2 outlines the clear objective of the Agreement:

> "Concessionaires shall jointly and severally have the right and the obligation to carry out the development, financing, construction and operation during the Concession Period of a Fixed Link under the English Channel between the Department of the Pas-de-Calais in France and the County of Kent in England … they shall do this at their own risk, without recourse to government funds or to government guarantees of a financial or commercial nature and regardless of whatever hazards may be encountered …"[193].

The subsequent provisions included within the Agreement do confirm a rather direct approach to the specific process of creating such a Fixed Link. There are clauses that concern the 'Acquisition of Land and Ownership of the Fixed Link'[194], 'Sharing of Costs and Revenues'[195] and 'Insurance Obligations'[196]. Although there is some similarity with BITs and multilateral treaties in provisions, for example, those in relation to

[189] UNCTAD, 'State Contracts: UNCTAD Series on Issues in International Investment Agreement': [n 178] 3.
[190] Rudolf Dolzer and Christoph Schreuer, *Principle of International Investment Law* (2012) 81.
[191] The Channel Fixed Link: The Secretary of State for Transport in the Government of the United Kingdom of Great Britain and Northern Ireland and Le Ministre de I'Urbanisme, du Logement et des Transports representing the French State of the one part, and The Channel Tunnel Group Limited and France-Manche S.A. of the other part (French -UK Concession Agreement, Cmnd. 9769) 14th March 1986.
[192] Christophe Dupont, 'The Channel Tunnel Negotiations, 1984-1986: Some Aspects of the Process and Its Outcome' (1990) *Negotiation Journal* Vol. 6, Issue 1, 71. Please also see: E. I. Walker-Arnott, 'The Channel Tunnel Concession' (1996) *International Business Lawyer*, Vol. 24, Issue 12, 12.
[193] French-UK Concession Agreement: [n 191] Clause 2.
[194] French-UK Concession Agreement: *ibid* Clause 4.
[195] French-UK Concession Agreement: *ibid* Clause 19.
[196] French-UK Concession Agreement: *ibid* Clause 22.

interpretation[197], providing for the settlement of disputes[198] and 'Applicable Law'[199], many of the Clauses implement distinct obligations to the specific creation of the Fixed Link and the adjoining relationship required. Exemplary is Clause 10 titled 'Timetable'[200], which gives dates for the accomplishment of the various phrases of the project.

Another mode of regulation of FDI can be increasingly seen in domestic foreign investment statutes. Hepburn has stated that these "offer many of the same substantive protections as investment treaties"[201] and ultimately forms "part of the overall policy framework of host countries and not the only instrument to deal with investment"[202]. UNCTAD recognises, as of March 2021, 186 statutes of this type[203]. The statutes themselves repeatedly forward[204] the purpose for their creation, "[t]o provide for the legislative protection of investors and the protection and promotion of investment; to achieve a balance of rights and obligations that apply to all investors"[205]. Although international treaties are created between states, domestic statutes are of application within a state. Furthermore, Scharaw examines the broader picture in recognizing that "every foreign investment is primarily governed by the domestic laws of the host country concerned, subject to their compatibility with relevant (treaty) obligations"[206] and that as consequence, "[a]rbitral tribunals constituted under international investment treaties also consider rules of domestic law"[207], which therefore could enhance an encouraging investment environment that would subsequently attract FDI.

[197] French-UK Concession Agreement: *ibid* Clause 1.
[198] French-UK Concession Agreement: *ibid* Clause 4.
[199] French-UK Concession Agreement: *ibid* Clause 41.
[200] French-UK Concession Agreement: *ibid* Clause 10.
[201] Jarrod Hepburn, 'Domestic Investment Statutes in International Law' (2018) *The American Journal of International Law*, Vol. 112, Issue 4, 658.
[202] UNCTAD, 'Investment Laws: A Widespread Tool for the Promotion and Regulation of Foreign Investment' (2016) Special Issue: Investment Policy Monitor, 1.
[203]UNCTAD, *Mapping of IIA Content*: [n 57].
[204] Please see also: Law on Investment (2003) Kazakhstan, Law No. 373-11, Preamble; Investment Law (2008) Madagascar, Law No. 2007-036, Preamble; Federal Law on Foreign Investments (1999) Russian Federation, Law No. N 160-FZ, Preamble.
[205] Protection of Investment Act (2015) South Africa, Act No. 22 of 2015, Vol. 606, No. 39514, Preamble.
[206] Bajar Scharaw, 'Domestic Investment Law' in Bajar Scharaw (Eds) *The Protection of Foreign Investments in Mongolia* (2018) 143.
[207] B. Scharaw: *ibid* 143.

After acknowledging the purpose of such statute, it is now important to concentrate upon the specific provisions contained within. Again UNCTAD[208] has endorsed that there is alignment in provisions between the previously discussed international investment treaties or BITs and these domestic statutes. An approach to coordination can be seen within the Foreign Investment Law of the People's Republic of China (2019)[209]. The domestic statute does provide the definition of 'foreign investment'[210]. Regarding investment protection obligations, the statute does reaffirm the protection of national treatment[211] and from expropriation[212]. Article 20 gives:

> "The State will not expropriate the investment of foreign investors. Under special circumstances, the State may, for the public interest, expropriate or requisition the investment of foreign investors in accordance with the provisions of law. Expropriations and requisitions shall be conducted in accordance with legally prescribed procedure and promptly give fair and reasonable compensation"[213].

This provision can be compared to those provisions on expropriation that can be found within numerous BITs. For example, the Agreement between the Government of Hungary and the Government of the Kyrgyz Republic for the Promotion and Reciprocal Protection of Investments (Hungary-Kyrgyzstan BIT)[214].

Whilst similarity can be deduced regarding the refrainment of expropriation of foreign investments and to the acknowledgement this can be breached considering the 'public purpose' alongside the obligation for compensation if expropriation does occur, the extent of similarity beyond these recognitions falls rather short. There is no reference to indirect expropriation or the method to determine such an acquisition, for example, as there is provided within the Hungary-Kyrgyzstan BIT[215]. Zhou, when analysing the definition of 'foreign investment', states "[d]espite the important innovations in this article, many

[208] UNCTAD, 'Investment Laws: A Widespread Tool for the Promotion and Regulation of Foreign Investment': [n 202] 2.
[209] Foreign Investment Law of the People's Republic of China (2019) (signed 15/03/2019, entered into force 01/01/2020).
[210] Foreign Investment Law of the People's Republic of China: *ibid* Article 2
[211] Foreign Investment Law of the People's Republic of China: *ibid* Article 4.
[212] Foreign Investment Law of the People's Republic of China: *ibid* Article 20.
[213] Foreign Investment Law of the People's Republic of China: *ibid* Article 20.
[214] Agreement Between the Government of Hungary and the Government of The Kyrgyz Republic for the Promotion and Reciprocal Protection of Investments (Hungary-Kyrgyzstan BIT) (signed 29/09/2020) Article 6.
[215] Hungary-Kyrgyzstan BIT: *ibid* Article 6.2.

questions remain unsolved"[216], however this sentiment can be applied to other investment provisions, including that of expropriation. Though it must be remembered overall that "a country's investment policy framework cannot be assessed exclusively on the basis of its investment law. For instance, if an investment law does not include specific provisions on investment promotion or contains only rudimentary rules in this area, this does not exclude that the country has investment promotion provisions in other parts of its policy framework"[217]. From a more positive perspective, this Statute has been noted to "introduce … a complaint system and the Implementation Regulation further details the complaint mechanism and the authority responsible for handling complaints"[218], which does allow for the enhancement of a positive investment environment.

An additional source of law is provided by voluntary guidelines. These guidelines can be described as "[n]on-binding standards"[219] and could be stated as being extensive in the regulation of international investment. An example includes the 1992 World Bank's Guidelines on the Treatment of Foreign Direct Investment[220], which details many protective standards in relation to the treatment of investments, expropriation, unilateral alterations, termination of contracts and the settlement of disputes. Interestingly, these standards are reflected in many BITs. Although the content of these guidelines is extremely beneficial in the protections outlined, it is crucial to remember that these sources do have two significant limitations. This chief limitation is that these guidelines are not binding, which means that there is no primary obligation upon states to pursue these guidelines, and also these guidelines can be extremely vague. Referring to the example just given of the 1992 World Bank's Guidelines, the Preamble provides:

> "[C]alls the attention of member countries to the following Guidelines as useful parameters in the admission and treatment of private foreign investment in their territories, without prejudice to the binding rules of international law at this stage

[216] Qian Zhou, 'How to Read China's New Law on Foreign Investment' (2019) China Briefing Website, found at < https://www.china-briefing.com/news/read-chinas-new-law-foreign-investment/> accessed March 2021.
[217] UNCTAD, 'Investment Laws: A Widespread Tool for the Promotion and Regulation of Foreign Investment': [n 202] 2.
[218] PWC, 'China Welcomes Investors with New Foreign Investment Law' (2020) found at < https://www.pwccn.com/en/tax/publications/china-foreign-investment-law-feb2020-en.pdf> accessed March 2021, 5.
[219] C. Schreuer: [n 68] 5.
[220] The World Bank, *World Bank Guidelines on the Treatment of Foreign Direct Investment* (1992) found at < https://www.italaw.com/documents/WorldBank.pdf > accessed November 2019.

of its development"[221].

The use of the phrase "useful parameters*"*[222] could be seen to cause concern as the phrase not only denotes great uncertainty in application, however with a higher degree of pessimism, the phrase could possibly denote the ability to abuse these guidelines. Though in a much more positive light, these guidelines can have influential power.

To move away from the textual sources of law which would seem to dominate the FDI regime with many common provisions, an alternative perspective of this field of international investment can be found in the use of wider sources of international investment law. Outside textual sources, investor-state arbitration (i.e., through tribunals) or the investor-state dispute settlement mechanisms (ISDS) maintain consequence and particularly much implication for the aforementioned provisions within investment treaties. The nature of foreign investment can mean that "foreign investors usually face serious obstacles to obtaining redress in host country's courts"[223], which resort to specific investor-state arbitration or ISDS would limit. The regime under ICSID has been described as "the closest thing to a founding treaty for investor-state arbitration"[224].

Turning to the precise significance of such a source of law, the general use of investor-state arbitration or ISDS has an important place within the international investment regime as its role is to continually "defin[e] the obligations of host states toward foreign investors and creating procedures for resolving disputes in connection with those obligations"[225]. From this analysis, there are two fundamental purposes of such a regime that can be distilled, of which the first maintains the protections afforded within the treaties and the second generating norms that can be reapplied. Initially Hufbauer states "[t]he value of ISDS assurance lies in its role as a restraint against unjustified expropriation or unfair treatment when governments change political direction"[226].

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[221] *World Bank Guidelines on the Treatment of Foreign Direct Investment*: *ibid* Preamble.
[222] *World Bank Guidelines on the Treatment of Foreign Direct Investment*: *ibid* Preamble.
[223] Christopher F. Dugan, Don Wallaca, Jr., Noah D. Rubins and Borzu Sabahi, *Investor-State Arbitration* (2008) 13. Please also see: David Gaukrodger and Kathryn Gordon, 'Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community' (2012) OECD Working Papers on International Investment, No. 2012/3, 9; R. Dolzer, U. Kriebaum and C. Schreuer: [n 73] 334-340.
[224] Taylor St John, *The Rise of Investor-State Arbitration: Politics, Law and Unintended Consequences* (2018) 8.
[225] C. F. Dugan *et al*: [n 223] 2.
[226] Gary Clyde Hufbauer, 'Investor-State Dispute Settlement' in Cathleen Cimino-Isaacs and Jeffrey J. Schott (Eds) *Trans-Pacific Partnership: An Assessment* (2016) 197.

Indeed, tribunals have shown to interpret and provide basic elucidation to the relatively "broad and vague provisions"[227] of the relevant investment treaties. For example, in *Goetz v. Burundi*[228], it was given in relation to expropriation that:

> "[T]he revocation of the Minister for Industry and Commerce of the free zone certificate forced them to halt all activities … which deprived their investments of all utility and deprived the claimant investors of the benefit which they could have expected from their investments, the disputed decision can be regarded as a 'measure having similar effect' to a measure depriving of or restricting property within the meaning of Article 4 of the Investment Treaty"[229].

The tribunal held that an act tantamount to expropriation had occurred, which expanded the definition of expropriation given within the applicable Belgium-Luxembourg Economic Union-Burundi BIT[230]. Again, exemplary is *S.D. Myers, Inc. v. Canada*[231], which was a tribunal constituted comparatively under the UNCITRAL arbitration rules, in relation to the clarification of the national treatment standard of protection, and provided:

> "The Tribunal considers that the interpretation of the phrase 'like circumstances' in Article 1102 must take into account the general principles that emerge from the legal context of the NAFTA, including both its concern with the environment and the need to avoid trade distortions that are not justified by environmental concerns. The assessment of 'like circumstances' must also take into account circumstances that would justify governmental regulations that treat them differently in order to protect the public interests"[232].

Both arbitral decisions highlight the ability to illuminate and crucially resolve disputes in

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[227] Uche Ewelukwa Ofodile, 'African States, Investor-State Arbitration and the ICSID Dispute Resolution System: Continuities, Changes and Challenges' (2019) *ICSID Review – Foreign Investment Law Journal*, Vol. 34, Issue 2, 296.
[228] *Antoine Goetz and others v. Republic of Burundi* (*Goetz v Burundi*) (ICSID Case No. ARB/95/3), Award, 10 February 1999.
[229] *Goetz v Burundi*: *ibid* para 124.
[230] Convention Between the Belgo-Luxembourg Economic Union and the Republic of Burundi Concerning the Reciprocal Promotion and Protection of Investments (BLEU (Belgium-Luxembourg Economic Union) – Burundi BIT) (signed 13/04/1989, entered into force 12/09/1993).
[231] *S.D. Myers, Inc. v Canada*, (UNCITRAL) First Partial Award, 13 November 2000, 40 ILM 1408.
[232] *S.D. Myers, Inc. v Canada*: ibid para 250.

the interpretation of the investment provisions.

Furthermore, in regard to the second fundamental purpose, these arbitral decisions can generate recognised "standards for State conduct vis-à-vis foreign investors"[233], even when considering the lack of precedent in these tribunals. Kolse-Patil would agree with this assertion, "[w]hile admittedly there is no rule of *stare decisis* (binding precedent) in international law or investor state arbitration, increasing number of tribunals refer to 'precedents'"[234]. Although Dolzer, Kriebaum and Schreuer have listed tribunals which "did not follow earlier decisions"[235] and Kurtz has stated that "significant parts of the emerging jurisprudence have been marked by inconsistencies and, at times, even incoherence"[236], within case law there is present some degree of precedents with the recognition of similarity within other decisions. An obvious example can be seen in the role of investor's legitimate expectation within the understanding of indirect expropriation. The arbitral decision of *Thunderbird v. Mexico*[237] provided:

> "Having considered recent investment case law and the good faith principle of international customary law, the concept of 'legitimate expectations' relates … to a situation where a Contracting Party's conduct creates reasonable and justifiable expectations on the part of an investor (or investment) to act in reliance on said conduct, such that a failure by the NAFTA Party to honour those expectations could cause the investor (or investment) to suffer damage"[238].

The preceding cases of *Methanex v. United States*[239], *Revere Copper v. OPIC*[240],

[233] Benedict Kingsbury and Stephan Schill, 'Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law' (2009) Public Law & Legal Theory Research Paper Series, Working Paper No. 09-46, 1.
[234] Akshay Kolse-Patil, 'Precedents in Investor State Arbitration' (2010) *Indian Journal of International Economic Law*, Vol. 3, Issue 1, 37. A view also shared by W. Mark C. Weidemaier, 'Toward a Theory of Precedent in Arbitration' (2009-2010) *William & Mary Law Review*, Vol. 51, Issue 5.
[235] R. Dolzer, U. Kriebaum and C. Schreuer: [n 73] 47.
[236] Jurgen Kurtz, 'The Use and Abuse of WTO law in Investor-State Arbitration: Competition and its Discontents' (2009) *The European Journal of International Law*, Vol. 20, No. 3, 750.
[237] *International Thunderbird Gaming Corporation v. The United Mexican States* (*Thunderbird v. Mexico*) (UNCITRAL) Award, 26 January 2006.
[238] *Thunderbird v. Mexico*: *ibid* para 147.
[239] *Methanex Corporation v. United States of America* (UNCITRAL) Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005.
[240] *Revere Copper & Brass, Inc v. Overseas Private Investment Corporation (OPIC)* (American Arbitration Association Case No. 1610013776) Award, 24 August 1978.

Metalclad v. Mexico[241] and *Tecmed v. Mexico*[242] serve to justify the methodology applied in determining the existence of legitimate expectations of the investor[243]. The rather ambiguous provisions regarding indirect expropriation within treaties allows for such an interpretation by the tribunals.

Another example can be found in the tribunal's constant recognition of the characteristics afforded to the meaning of the term 'investment' and the decisions of *Fedax v. Venezuela*[244], *Salini v. Morocco*[245] and *Malaysian Historical Salvors v. Malaysia*[246] , as will be shown later in this Chapter. Again, the vagueness of the term 'investment' within treaties is rather ambiguously defined and these cases highlight the ability of the tribunal to relate to other tribunals, in turn advancing a methodology for determining what is meant by the term 'investment'.

Stemming from the use of investor-state arbitration and ISDS, customary international law can be interjected within the international investment regime[247]. Customary law is not formally written, like that of BITs or multilateral treaties. While the defining elements of custom are notable[248], it is the significance of such a source of law that is the primary concern of this argument. To the precise applicability of custom, it must be remembered that "in the cases of a [legal] *lacuna*, investment treaty rules are supplemented by rules of customary law"[249], to which Schefer has confirmed this ability, "it remains of particular importance where the old becomes out of date or where there are gaps in treaty-made law"[250]. This capacity becomes increasingly relevant when it is considered that there are no comprehensive multilateral treaties and therefore could be gaps present in the

[241] *Metalclad Corporation v. The United Mexican States* (ICSID Case No. ARB (AF)/97/1) Award, 30 August 2000.
[242] *Tecnicas Medioambientales Tecmed, S.A. v. The United Mexican States* (ICSID Case No. ARB (AF)/00/2) Award, 29 May 2003.
[243] R. Dolzer and C. Schreuer: [n 190] 115-117.
[244] *Fedax N.V. v. The Republic of Venezuela* (*Fedax v. Venezuela*) (ICSID Case No. ARB/96/3) Decision on Jurisdiction, 11 July 1997.
[245] *Salini Costtruttori S.p.A, and Italstrade S.p.A. v. Kingdom of Morocco* (*Salini v. Morocco*) (ICSID Case No. ARB/0/4) Decision on Jurisdiction, 31 July 2001.
[246] *Malaysian Historical Salvors, SDN, BHD v. The Government of Malaysia* (*Malaysian Historical Salvors v Malaysia*) (ICSID Case No. ARB/05/10) Award, 17 May 2007.
[247] R. Dolzer, U. Kriebaum and C. Schreuer: [n 73] 22. Please see also: Moshe Hirsch, 'Sources of International Investment Law' (2011) submitted to the International Law Association Study Group on the Role of Soft Law Instruments in International Investment Law, Research Paper No. 05-11, 7-13.
[248] Malcolm N. Shaw, *International Law* (2021) Chapter 3.
[249] M. Hirsch: [n 247] 8.
[250] Krista Nadakavukaren Schefer, *International Investment Law: Text, Cases and Materials* (2020) Section 2.2.2 (b).

fragmented regime alongside the recognition that many provisions are of a vague nature and are ultimately open to broad methods of interpretation. The fundamental linkage can be observed in *Phoenix v The Czech Republic*[251], whereby it was stated:

> "It is not disputed that the interpretation of the ICSID Convention and of the BIT is governed by international law, including the customary principles … It is evident to the Tribunal that the same holds true in international investment law and that the ICSID Convention's jurisdictional requirements – as well as those of the BIT – cannot be read and interpreted in isolation from public international law"[252].

Thus, highlighting the inseparable power custom has over the interpretation of investment provisions. For example, this degree of vagueness that can be seen in relation to the provision of national treatment or most favoured nation treatment within EU-Japan EPA[253].

To further enlighten the extent and exact nature of the significance of custom within the international investment regime, the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts (ILC Articles)[254] are of note as it represents the codification of relevant customary international law[255]. Although the common standards of protection (i.e., expropriation or fair and equitable treatment) are not referred to within these ILC Articles, the relevancy for international investment law is found in the determination of an international wrongful act of a state alongside the justifications for and consequences of such an action. In terms of precise content of the ILC Articles, the codification contains important provisions, including that of Existence of a breach of an international obligation[256], Consent[257], Self-defence[258], Force

[251] *Phoenix Action, Ltd. v. The Czech Republic* (*Phoenix v. Czech Republic*) (ICSID Case No. ARB/06/5) Award, 15 April 2009.
[252] *Phoenix v. Czech Republic*: *ibid* para 75 – 78.
[253] EU-Japan EPA: [n 150] Articles 8.8 and 8.9.
[254] International Law Commission, Responsibility of States for Internationally Wrongful Acts (ILC Articles) (2001) *Yearbook of the International Law Commission*, Vol. 2, Part 2.
[255] Due to word limitation, please refer to these for further analysis of the role of the ILC Articles: James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (2002); Kiran Nasir Gore and Gloria M. Alvarez, 'The 2001 ILC Articles on State Responsibility – An Annotated Bibliography' (2021) *ICSID Review – Foreign Investment Law Journal*, Special Issue.
[256] ILC Articles: [n 254] Article 12.
[257] ILC Articles: *ibid* Article 20.
[258] ILC Articles: *ibid* Article 21.

majeure[259], Distress[260] and Necessity[261]. Caron has stated that "[t]he Articles already have had, and will continue to have, a tremendous effect on legal thinking, arbitral decisions and perhaps state practice"[262]. However, Crawford has described the situation as such:

> "[W]e encounter a slight paradox in the way that certain investment treaty tribunals have tended to refer to the ILC Articles. They have done so a bit like a drowning man might grab a stick at sea in the hope of having certainty. But the rules themselves are predicted upon a process of integration into practice, which is inherently uncertain"[263].

Indeed, arbitration has shown to generate alternative approaches to the interpretation of the ILC Articles. For instance, Article 36 on Compensation states:

> "1. The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage in not made good by restitution.
>
> 2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established"[264].

There are obvious links of the application of this Article and the relationship to the standard of protection of expropriation and the subsequent compensation required, for example. A typical formulation of the expropriation reads as "[i]nvestments shall not be expropriated …directly or indirectly … except for the public purpose, in a non-discriminatory manner, upon payment of prompt, adequate and effective compensation"[265]. The determination for the providing of compensation is not further elaborated and therefore the expansion of the definition of compensation within the ILC

[259] ILC Articles: *ibid* Article 23.
[260] ILC Articles: *ibid* Article 24.
[261] ILC Articles: *ibid* Article 25.
[262] David D. Caron, 'The ILC Articles on State Responsibility: The Paradoxical Relationship Between Form and Authority' (2002) UC Berkeley School of Law Public Law and Legal Theory Research Paper No. 97, 2.
[263] James Crawford S.C., 'Investment Arbitration and the ILC Articles on State Responsibility' (2010) *ICSID Review – Foreign Investment Law Journal*, Vol. 25, Issue 1, 128.
[264] ILC Articles: [n 254] Article 36.
[265] Agreement Between the Government of the Republic of Turkey and the Government of Burkina Faso Concerning the Reciprocal Promotion and Protection of Investments (signed 11/04/2019) Article 6.

Articles could enhance such an interpretation.

Though in general, the application of compensation with the appreciation of Article 36 has been adopted in varying ways[266]. In *CME Czech Republic B.V. v. Czech Republic*[267] it was understood that:

> "International Law requires that compensation eliminates the consequences of the wrongful act. The Articles … provide for the 'obligation to compensate for the damage caused' and specify that that compensation 'shall cover any financially assessable damage including loss of profits…' Compensation reflecting the capital value of property taken or destroyed as the result an internationally wrongful act is generally assessed on the basic of the 'fair market value' of the property lost"[268].

After such a declaration, *CME Czech Republic B.V. v. Czech Republic* lists cases which also determine "compensation on the basis of the 'fair market value'"[269], including that of *Compania del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica*[270]. Comparatively, *CMS Gas Transmission Company v. Argentine Republic*[271] again refers to Article 36 of the ILC Articles and assesses that "[t]he loss suffered by the claimant is the general standard commonly used in international law in respect of injury to property, including often capital value, loss of profits and expenses"[272] and in *Siemens A.G. v, Argentine Republic*[273] it was stated that "[u]nder customary international law, Siemens is entitled not just to the value of its enterprise as of May 18, 2001, the date of expropriation, but also to any greater value that enterprise has gained up to the date of this Award, plus an consequential damages"[274]. These decisions cumulatively demonstrate the different approaches to the customary international law of compensation as outlined within Article

[266] J. Crawford S.C.: [n 263] 190-193.
[267] *CME Czech Republic B.V. v. The Czech Republic* (*CME Czech Republic B.V. v. Czech Republic*) (UNCITRAL) Final Award, 14 March 2003.
[268] *CME Czech Republic B.V. v. Czech Republic*: *ibid* para 501.
[269] *CME Czech Republic B.V. v. Czech Republic*: *ibid* para 502.
[270] *Compania del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica* (Case No. ARB/96/1) Award of the Tribunal, 17th February 2000.
[271] *CMS Gas Transmission Company v. The Argentine Republic* (*CMS Gas Transmission Company v. Argentine Republic*) (ICSID Case No. ARB/01/8), Award, 12th May 2005.
[272] *CMS Gas Transmission Company v. Argentine Republic*: *ibid* para 402.
[273] *Siemens A.G. v. The Argentine Republic* (*Siemens A.G. v. Argentine Republic*) (ICSID Case No. ARB/02/8), Award, 6th February 2007.
[274] *Siemens A.G. v. Argentine Republic*: *ibid* para 352.

36 of the ILC Articles, affirming Crawford's view[275].

3. Theories, Principles and Subsequent Characteristics Derived from Sources

3.1 The Concept of Sustainable Development

The basic essence of the concept has been made repeatedly apparent since the concept's birth in the Stockholm Declaration[276]. The concept, as recognized today, is divergently not dominated individually by environmental protection or economic prosperity or even social development[277]. It is given through the succeeding international proclamations that all three pillars or "chapters of international law"[278] are necessary for the advancement of each other, however the nature of the precise interrelationship remains substantially unclear, leading to a rather complex understanding of the functioning of the concept. Succinctly summarized by Victor as "[a] healthy environment … provides the economy with essential natural resources. A thriving economy, in turn, allows society to invest in environmental protection and avoid injustices such as extreme poverty"[279].

To delve deeper into the theoretical understanding of sustainable development to achieve an enhanced recognition of the practical functioning of the concept, it must be initially

[275] J. Crawford S.C.: [n 263] 128.
[276] United Nations General Assembly, United Nations Conference on the Human Environment (Stockholm Conference) (15 December 1972) A/RES/2994; *Stockholm Declaration*: [n 20]. Please also see, regarding the successive translation of the concept of sustainable development: G. Brundtland, 'Report of the World Commission on Environment and Development' (*Our Common Future*) (Brundtland Report) (1987) United Nations General Assembly Document A/42/427; *Rio Declaration*: [n 21]; World Summit on Sustainable Development, Johannesburg Declaration on Sustainable Development and Plan of Implementation of the World Summit on Sustainable Development (Johannesburg Declaration) (2002) A/CONF.199/20; *ILA New Delhi Principles*: [n 1]; *The Future We Want*: [n 22]; MDGs: [n 23]; SDGs: [n 18]; Andronico O. Adede, 'The Treaty System from Stockholm (1972) to Rio de Janeiro (1992)' (1995) *Pace Environmental Law Review*, Vol. 13, Issue 1, 33-48; Andrea Ross, 'Modern Interpretations of Sustainable Development' (2009) *Journal of Law and Society*, Vol. 36, Issue 1, 32-54; Emily Barritt, 'Global Values, Transnational Expression: From Aarhus to Escazu' forthcoming in Veerle Heyveart and Lesie-Anne Duvic-Paoli (Eds) *Research Handbook on Transnational Environmental Law* (2019); Sanjay G. Reddy and Ingrid Harvold Kvangraven, 'Global Development Goals: If at All, Why, When and How?' (2015) 1-31, found at < http://dx.doi.org/10.2139/ssrn.2666321 > accessed November 2019; Dr Nikhill Seth, *Contributions of International Law to the Future UN Sustainable Development Goals: An International Research, Law & Governance Seminar*, University of Cambridge (30/04/2015).
[277] Please see, for example: Glasgow Climate Pact: [n 18].
[278] N. Schrijver: [n 6] 299.
[279] D. G. Victor: [n 31] 91.

emphasized the theory that underpins sustainable development cannot be easily categorized. Just as the term "sustainability is a dynamic concept"[280], equally is the theoretical background upon which the entire concept is rested. Klarin confirms this multi-faceted underpinning:

> "The concept of sustainable development is based on the concept of development (socio-economic development in line with ecological constraints), the concept of needs (redistribution of resources to ensure the quality of life for all) and the concept of future generations (the possibility of long-term usage of resources to ensure the necessary quality of life for future generations)"[281].

If international environmental conventions are considered which are declared to have a foundation in the concept of sustainable development, then it becomes evident of the difficulty faced in identifying a single and overriding theory. For example, the UNFCCC[282] recognizes a theory based in all economic, environmental and social groundings[283]. Similarly, the Preamble of the Convention on Biological Diversity[284] repeat the three already identified theoretical bases. If international economic treaties are considered, then the same difficulty in lack of specificity is encountered. To take the World Trade Organization's Doha Declaration[285], sustainable development particularly from an economic perspective is found. Nevertheless, it is clearly shown that there is much emphasis both on producing both an optimum economic environment and a prime natural environment. Within these it is shown that there are mixed and competing theoretical backgrounds, and this is ultimately dependent on the purpose of the legal instrument itself.

[280] Hartmut Bossel, 'Indicators for Sustainable Development: Theory, Method, Applications: A Report to the Balaton Group' (1999) International Institute for Sustainable Development, 4.
[281] Tomislav Klarin, 'The Concept of Sustainable Development: From its Beginning to the Contemporary Issues' (2018) *Zagreb International Review of Economics & Business*, Vol. 21, No. 1, 68.
[282] UNFCCC: [n 38].
[283] Jennifer Huang, 'The 2015 Climate Agreement: Key Lessons Learned and Legal Issues on the Road to Paris' (2016), found at < http://dx.doi.org/10.2139/ssrn.2724109 > accessed November 2019.
[284] Convention on Biological Diversity (CBD) (signed 05/06/1992, entered into force 29/12/1993) 1760 UNTS 79; 31 ILM 818.
[285] *Doha WTO Ministerial Declaration*: [n 28].

Subsequently therefore, academic literature is equally saturated with this view on the conflicted nature and characteristics of the concept of sustainable development. Strange and Bayley circumscribe that the nature of:

> "[s]ustainable development is about integration: developing in a way that benefits the widest possible range of sectors, across boarders and even between generations. In other words, our decisions should take into consideration potential impact on society, the environment and the economy, while keeping in mind that: our actions will have impacts elsewhere and our actions will have an impact on the future"[286].

Indeed, if similar lines of uncertainty are followed, both Aviles's view that "sustainable development has eluded concrete definition since its interpretation"[287] and Harris's view that the concept is "difficult to pin down analytically"[288] simply adds to the picture of uncertainty found in the theoretical groundings under the concept of sustainable development.

This uncertainty and continual vagueness in the subject content does generate inherent negative and complicated thoughts in the practical observance and application of the concept of sustainable development. Lowe states:

> "Sustainable development … is clearly entitled to a place in the Pantheon of concepts that are not to be questioned in polite company, along with democracy, human rights and the sovereign equality of states … it is rooted in theoretical obscurity and confusion, and it suffers from the same reluctance to test theoretical principles for their practical utility that impedes the development of many other areas of international law"[289].

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[286] Tracey Strange and Anne Bayley, 'Sustainable Development: Linking Economy, Society, Environment' (2008) OECD Report, 24.
[287] Luis A. Aviles, 'Sustainable Development and the legal Protection of the Environment in Europe' (2012) *Sustainable Development Law & Policy*, Vol. 12, Issue 3, 29.
[288] Jonathan M. Harris, 'Sustainability and Sustainable Development' (2003) *International Society for Ecological Economics*, 2.
[289] Vaughan Lowe, 'Sustainable Development and Unsustainable Arguments' in A. Boyle and D. Freestone (Eds) *International Law and Sustainable Development: Past Achievements and Future Challenges* (1999) 30-31.

However, this degree of uncertainty could equally afford great positivity in terms of action determined and essentially could afford an advanced and expansive practical utility of the concept, importantly adding to the degree of significance. Due to the acknowledged wide-ranging theoretical characteristics and principal bases (or ideals), as described below, much more flexibility and less rigidity in action chosen to fulfill the concept could occur. Although the concept has many accepted general characteristics and principals, determinative and concrete definitions are somewhat lacking, which is pivotal to understand early on due to the level of contextuality the concept's initiation demands. There are no documents detailing the certain and definitive parameters given to the understanding of sustainable development, however what is available are overarching ideals of what the concept is trying to achieve. If the concept was given strict parameters, the success of the concept may be somewhat decreased as the concept is slowly becoming introduced into many contextual environments and as such requires this flexibility and context demands an appreciation of differential action. It must also be remembered that the concept is a continual attainment and not an attainment that can ever be fulfilled. Adaptation in the application is therefore essential.

In academia, much concurrence in thought has been discussed. Elder succinctly alludes to the beneficial attributes of the vagueness and complexity in application, "clearly sustainable development is a flag under which many armies are marching"[290] and that the concept, as Estes states, "unites … widely divergent theoretical and ideological perspectives into a single conceptual framework"[291]. Estes also recognizes the "competing visions of sustainable development"[292], which could encapsulate again the varying theoretical characteristic and principal bases identified as foundational to the concept. The uncertain and vague foundational nature of the concept could therefore lend itself much easier to the subject acted upon.

The vagueness attributed to the fulfillment of the concept of sustainable development can also create a situation where, for instance, one of the pillars of the concept is much more focused upon than the others and potentially included to the detriment of the others and as such far less developmental objectives of other developmental pillars are featured. This

[290] P.S. Elder, 'Sustainability' (1990 – 1991) *McGill Law Journal*, Vol. 36, No. 4, 834.
[291] Richard J. Estes, 'Toward Sustainable Development: From Theory to Praxis' (1993) *Social Development Issues*, Vol. 15, Issue 3, 1.
[292] R. J. Estes: *ibid* 7.

could be seen in the World Trade Organization's Doha Declaration[293] in relation to economic development for example, yet still briefly alluding to the other pillars of social and environmental development. If it is again understood the level of contextuality provided in the application of the concept, this does not mean that the overall aim of sustainable development is weakened, it is just in terms of developmental priority, one pillar is placed above the others in that context. Understandably, instruments of an economic persuasion, like those utilized by the field of international investment law and specifically those in relation to the regulation of FDI, do inherently focus upon economic development in the precise detailing of the regulatory environment in which economic relations occur, for example in BITs and the list of protections afforded therein.

Crucially therefore, as the concept has been identified as being a legal norm that is rather vague in its delimitations and in facilitative mechanisms of all denominations as being open to focus upon inherent pillars, the identification of the overall theoretical characteristics and principal ideals are required now to be importantly explored. It is through these individual understandings that the overall aim of the concept can further be understood as well as significantly providing a subsequent ability to identify translations of the concept into facilitative mechanisms, which will be deliberated later in this Thesis. The appreciation of these understandings will also allow for a comparative discussion of the extent of translation and interpretation. Crawford recognizes and supports this specific view of the concept of sustainable development:

> "Although emerging as a distinct field of scholarship, the existence of sustainable development as a distinct legal concept, that is, one which gives rise to or defines actionable rights, is controversial. Given the breadth of the concept, which includes trade, investment and social concerns, it can be argued that sustainable development is better understood as a collection, or collocation, of different legal categories, and as a 'general guideline'"[294].

With the appreciation of the vagueness attributed to the theoretical nature of the concept alongside Crawford's view[295] of sustainable development, the identification of the inherent characteristics and principal ideals are essential to determine early in the Thesis

[293] *Doha WTO Ministerial Declaration*: [n 28].
[294] James Crawford, *Brownlie's Principles of Public International Law* (2019) 342.
[295] J. Crawford: *ibid* 342.

as these ideals are what will be considered a translation within the facilitative mechanisms adopted in the regulation of FDI under international investment law. Without such assertion, which is also accepted by other academics[296], to determine whether a translation occurred will be an extremely difficult objective.

Additionally, to be able to recognize the ideals will generate an increased and much broader depth of investigation into translation and investigation as reliance on the limited recognition of precise vocabulary, for example the term 'environmental protection' or 'social development', will be prevented in the wider recognition of the ideals that could be translated in alternative language. It must also be recognized that the identification of the ideals and the sole dependence upon specific language, for example the term 'sustainable development', does fundamentally advance the degree of analysis compared to that forwarded in "the mapping of IIA"[297] content and the other qualitative approaches as discussed in Chapter One regarding the limitations of the alternative approaches to the research question. This methodology therefore allows a more precise and contextual appreciation of the translation.

a. *Anthropocentrism: as represented by the ILA New Delhi Principle No. 2 on The principle of equity and the eradication of poverty, No. 5 on The principle of public participation and access to information and justice and No. 6 on The Principle of Good Governance.*

The primary and arguably most obvious base that the concept of sustainable development relies is a foundation on the anthropocentric principle or the degree of anthropocentrism involved[298], which can be subsequently divided into two categories, that of the substantive theoretical bases and those of a procedural nature. To discuss the primary categorization first, anthropocentrism could be considered key to sustainable development. As considered by Jenkins[299], there is a strong view that human action and behavior dictates the necessary direction in which the concept is administered. Even as far back as the

[296] Please see: Thomas M. Parris and Robert W. Kates, 'Characterizing and Measuring Sustainable Development' (2003) *Annual Review of Environment and Resources*, Vol. 28, 559-586; H. Bossel: [n 280].
[297] UNCTAD, *Mapping of IIA Content*: [n 57].
[298] Anna Grear, 'Deconstructing Anthropos: A Critical Legal Reflection on 'Anthropocentric' Law and Anthropocene 'Humanity'' (2015) *Law and Critique*, Vol. 26, Issue 3, 225-249.
[299] Willis Jenkins, 'Sustainability Theory' in Willis Jenkins *et al* (Eds) *Berkshire Encyclopedia of Sustainability: The Spirit of Sustainability* (2010) 380.

Stockholm Declaration, the first line of Principle One states that "man is both creature and molder of his environment"[300]. Later in the Rio Declaration, it is again shown an "anthropocentric approach to environmental and developmental issues"[301]. The Rio Declaration provides that "human beings are at the center of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature"[302]. Thereby directly dictating that humans are both the catalysts and conductors for action taken under the auspice of sustainable development. The ILA New Delhi Principles do maintain this anthropomorphic dominance. Principle Two clearly refers to "the rights of the peoples"[303]. Similarly, within the Rio+20 The Future We Want, the principle of anthropocentrism is again forwarded[304]. The fact that the phrase 'we' is constantly used to initiate action reinforces this dominance. Essentially therefore, human action that is positive, as opposed to negative and inaction, underlines the concept of sustainable development.

Related to the overtly present sense of anthropocentrism that sustainable development displays, Jenkins refers to the "political model"[305] that underpins the theory of sustainable development also. The academic states that "[p]olitical models propose to sustain social systems that realize human dignity"[306], thus again placing human beings at the center of the developmental sphere. The relationship is quite clear today as, for example both the SDGs and ILA New Delhi Principles, include Goals and Principles that are dedicated to the reduction of human suffering in various guises. In equal measure, the Rio+20 exudes the current suffering of the human population. Thus, it could be stated that while a sustainable form of development is forwarded, it is done so with an extremely prominent emphasis upon the eradication of human suffering and ultimately lack of dignity. In other words, negativity in human experience is placed in the metaphorical furnace that fuels the fire of sustainable development.

In line with this thought, the anthropocentricism can be linked to the theory of human centered development, which subsequently produces much influence upon the outcrops

[300] *Stockholm Declaration*: [n 20] Principle 1.
[301] Philippe Sands and Jacqueline Peel, *Principles of International Environmental Law* (2012) 42.
[302] *Rio Declaration*: [n 21] Principle 1.
[303] *ILA New Delhi Principles*: [n 1] Principle 2.
[304] *The Future We Want*: [n 22] Para 6.
[305] W. Jenkins: [n 299] 383.
[306] W. Jenkins: *ibid* 383.

of the concept. The meaning of 'development' must be explored as another identified foundational principle of the concept. In a similar manner to which the meaning given to the term 'sustainability' is extremely vague, which will be discussed later, the definition of development could be given equal description. From an international perspective, using the example of the informative yet non-binding approach of the United Nations Declaration on the Right to Development[307], development is defined to mean "every human person and all peoples are entitled to participate in, and enjoy economic, social, cultural and political development"[308]. Although there is an obvious rights-based approach to development, development form this perspective includes the expansion somewhat of the economic, social, cultural and political environments.

If the Rio Declaration is considered, it could be determined that development is the point at which people live "a healthy and productive life"[309]. Also, if the SDGs were considered, the use of language such as 'end' and 'ensure' would highlight this change in behavior. Again, reference can be made to development's obvious relationship to the environmental, economic and social needs and the improvements that need to be made to combat the recognized societal detriments. It becomes obvious that a second theory and principle of sustainable development is that of the improvement of policy, turning the unhealthy into the healthy, in relation to environmental, social and economic needs. Whereas the aspect of sustainability concerns a temporal factor and the long-term need for action, development specifically provides much enlightenment on how the action should be completed to provide the sought after "environmental protection, economic well-being and social justice"[310].

The broad level of ambiguity and scope behind this characteristic of sustainable development may generate many positive benefits to the practical application of the concept. If the aim of sustainable development is constantly changing in terms of what the concept is trying to achieve, for example the intensified development of new greener communities or the introduction of more sustainable employment[311], then to have

[307] United Nations General Assembly, *Declaration on the Right to Development* (1986) UNGA/RES/41/128.
[308] *Declaration on the Right to Development*: *ibid* Article 1.
[309] *Rio Declaration*: [n 21] Principle 1.
[310] J. William Futrell, 'Defining Sustainable Development Law' (2004-2005) *Natural Resources & Environment*, Vol. 19, No. 2, 9.
[311] IBSA International Conference on South-South Cooperation, *Innovations in Public Employment Programs and Sustainable Inclusive Growth* (2012) New Delhi.

relatively vague descriptions of the characteristics would be flexible enough to embrace and adapt to the changing societal needs and therefore keep the concept effective. Indeed, Victor provides the most enlightening example:

> "Cocktail-party visions of sustainability properly laud the benefits of electricity, for example, as a cure for darkness and a substitute for costly candles. Yet the diesel generators that bring electric lighting to the most remote areas are, in some respects, a paragon of unsustainability: diesel, which is derived from oil, is an exhaustive and polluting resource"[312].

Victor concludes his argument by stating that the "concept has practical relevance only if it can accommodate local preferences and capabilities"[313]. Thus, another one of the vital theories and principles of sustainable development is its ability to mold to different state requirements and situations. Therefore, the adaptability and flexibility could be classed as fundamental as without certainty in overall actions to be taken, sustainable development can be fulfilled in varying situations without limitation.

To move away from the comparatively general substantive theories related to sustainable development and turning towards the procedural rights associated with the concept, at present there is a link between sustainable development and the right to development[314]. Principle 3 of the Rio Declaration is an example of such association and states "[t]he right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations"[315]. At first sight there is a fundamental connection between the right to development and the content of the concept of sustainable development. However, there is also a similarity in the infrastructure adopted by both concepts. The United Nation Declaration on the Right to Development[316] contains, in documentation form, the so-called 'right to development'. Although the meaning and significance of such right is heavily debated[317], it can be submitted that due

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[312] D.G. Victor: [n 31] 99.
[313] D.G. Victor: *ibid* 99.
[314] *Rio Declaration*: [n 21] Principle 3; A. Boyle and D. Freestone: [n 16] 11.
[315] *Rio Declaration*: *ibid* Principle 3.
[316] *Declaration on the Right to Development*: [n 307].
[317] A. Boyle and D. Freestone: [n 16] 11-12; Isabelle D. Bunn, *The Right to Development and International Economic Law* (2012) 94; Arjun Sengupta, 'The Human Right to Development' in Bard A. Andreassen and Stephen Marks (Eds) *Development as a Human Right: Legal, Political and Economic Dimensions* (2006) 11; Karel de Vey Mestdagh, 'The Right to Development' (1981) *Netherlands International Law Review*, Vol. 28, Issue 1, 30-53; T. Ansbach, 'Peoples and Individuals as Subjects of

to the clarity produced within the Preamble, the choice of the relationship can be confirmed. The Preamble states:

> "… development is a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all the individuals on the basis of their active, free and meaningful participation in development and the fair distribution of benefits resulting therefrom"[318].

Such a definition would suggest that the aforementioned theories and characteristics of the concept of sustainable development could adequately be incorporated into this definition and therefore the basis to an appropriate link could be formed. Thus, the ultimate significance of this connection is that of future development of the concept of sustainable development within the right to development itself and the usefulness of each concept to each other.

Other related directions of the concept of sustainable development are as equally prominent. Futrell believes that "policy makers must take the lead in crafting a positive agenda to foster sustainable conditions"[319] and "advocates of sustainability need to spur thinking on new legal structures"[320], thereby again calling into question the policy implementation to achieve a greater amount of success. The ILA New Delhi Principles do foster this emerging idea, in doing so solidifying another one of the cornerstones of the concept. Principle 5 states:

> "Public participation is essential to sustainable development and good governance … [p]ublic participation in the context of sustainable development requires effective protection of the human right to hold and express opinions and to seek, receive and impart ideas"[321].

And Principle 6 states:

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the Right to Development' in Subrata Roy Chowdhury *et al* (Eds) *The Right to Development in International Law* (1992) 155.

[318] *Declaration on the Right to Development*: [n 307] Preamble.

[319] J. W. Futrell: [n 310] 11.

[320] J. W. Futrell: *ibid* 11.

[321] *ILA New Delhi Principles*: [n 1] Principle 5.

> "[G]ood governance … commits States and international organizations … to adopt democratic and transparent decision-making procedures and financial accountability … to take effective measures to combat official or other corruption … to respect the principle of due process in their procedures and to observe the rule of law and human rights …"[322].

Certainly, these procedural characteristics of democratic process and accountability were outwardly demonstrated within the Rio Declaration[323].

Indeed, the procedural rights associated to the fulfillment of sustainable development within the ILA New Delhi Declaration is present within international agreements that have a relationship to the concept. The Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention)[324] and the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention)[325] are exemplary. The Espoo Convention "sets out the obligations of Parties to assess the environmental impact of certain activities at an early stage of planning"[326]. It is provided both "the need to ensure environmentally sound and sustainable development"[327] and that "[e]ach Party shall take the necessary legal, administrative or other measures to implement the provisions of this Convention, including … the establishment of an environmental impact assessment procedure that permits public participation and preparation"[328]. Bao, Mitra and Kuyama have recognized "[t]he Espoo Convention acknowledged … separate political identities and national goals together represent one of the main barriers in transboundary environmental management"[329]. Similarly, the Aarhus Convention "establishes a number of rights of the

[322] *ILA New Delhi Principles*: *ibid* Principle 6(1).
[323] *Rio Declaration*: [n 21] Principle 10.
[324] Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention), (signed 25/02/1991, entered into force 10/09/1997) 1989 UNTS 309.
[325] Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention) (signed 25/06/1998, entered into force 30/10/2001) 2161 UNTS 447; 38 ILM 517.
[326] United Nations Economic Commission for Europe Website (UNECE), 'ESPOO Convention', found at < https://www.unece.org/env/eia/eia.html > accessed November 2019.
[327] Espoo Convention: [n 324] Preamble.
[328] Espoo Convention: *ibid* Article 2(1).
[329] Pham Ngoc Bao, Bijon Kumer Mitra & Tetsuo Kuyama, 'Integrated Approach for Sustainable Hydropower Development in the Mekong River Basin' (2017) *Environment and Natural Resources Research*, Vol. 7, No. 1, 70.

public … with regard to the environment"[330] with an appreciation "to ensure sustainable and environmentally sound development"[331]. Ankersmit usefully reminds that "[o]ne of the key mechanisms that facilitate compliance in the convention is the Aarhus Convention Compliance Committee, a non-judicial consultative body empowered to review compliance inter alia based on communications from the public"[332]. Together these Conventions reaffirm still at the heart of the deployment of the concept of sustainable development are anthropomorphic or human-centered actions.

b. *Economics: as represented by the ILA New Delhi Principle No. 2 on The principle of equity and the eradication of poverty and No. 7 on The principle of integration and interrelationship.*

Although the sense of anthropocentrism is perceived to be fundamental to the fulfillment of sustainable development, economic theory is seen to be as central to the concepts understanding and deployment. Economics is suggested to be another focal point of sustainable development, with the creation of "wealth"[333] through "a process that generate[s] economic and social … quantitative and … qualitative changes"[334]. Wealth, as outlined in Chapter One[335], can be broadly construed through the utilization of renewable resources, eradication of non-renewable resources or maintenance and improvement of the social development agenda. Principle 2 of the ILA New Delhi Principles states:

> "The present generation has a right to use and enjoy the resources of the Earth but is under an obligation to take into account the long-term impact of its activities and to sustain the resource base and the global environment for the benefit of future generations of humankind. 'Benefit' in this context is to be understood in

[330] European Commission Website, 'The Aarhus Convention', found at < https://ec.europa.eu/environment/aarhus/ > accessed November 2019.
[331] Aarhus Convention: [n 325] Preamble.
[332] Laurens Ankersmit, 'Judging International Dispute Settlement: From the Investment Court System to the Aarhus Convention's Compliance Committee' (2017) Amsterdam Centre for European Law and Governance Research Paper No. 2017-05, 8.
[333] David Pearce and Giles Atkinson, 'The Concept of SD: An Evaluation of its Usefulness Ten Years After Brundtland' (1998) CSERGE Working paper PA 98-02, 1.
[334] Alina-Petronela Haller, 'Concepts of Economic Growth and Development; Challenges of Crisis and of Knowledge' (2012) *Economy Transdisciplinarity Cognition,* Vol. 15, Issue 1, 66.
[335] Chapter One, Section Two.

its broadest meaning as including, inter alia, economic, environmental, social and intrinsic benefit"[336].

Therefore, pitting the achievement of long-term positive and beneficial economic policy alongside that of current environmental and social policy. However, Principle 7 of the ILA New Delhi Principles also refers to "financial"[337] acknowledgements alongside that of economic, which does suggest a more strengthened acknowledgement of monetary wealth, as 'finance' is rather more direct in implication than economics. The Rio Declaration does provide a suitable precursor to the understanding provided in the ILA New Delhi Principles:

> "States should cooperate to promote a supportive and open international economic system that would lead to economic growth and sustainable development in all countries, to better address the problems of environmental degradation. Trade policy measures for environmental purposes should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade. Unilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided. Environmental measures addressing transboundary or global environmental problems should, as far as possible, be based on an international consensus"[338].

In a similar manner, the SDGs do continue to encapsulate this broader appreciation of economic policy by providing to:

> "Promote development-oriented policies that support productive activities, decent job creation, entrepreneurship, creativity and innovation, and encourage the formalization and growth of micro-, small- and medium sized enterprises, including through access to financial services"[339].

Ultimately therefore expanding and in some ways specifying what is meant by 'economics'. Nonetheless, it is important to remember that economics and all the subsequent accompanying implications are fundamental to the overall concept of

[336] *ILA New Delhi Principles*: [n 1] Principle 2(2).
[337] *ILA New Delhi Principles*: *ibid* Principle 7(4).
[338] *Rio Declaration*: [n 21] Principle 12.
[339] SDGs: [n 18] Goal 8.

sustainable development within the policy documents analyzed.

Strongly related is the view that sustainable development concerns the need to continually generate non-natural and natural capital, or resources. Within limitations, this assertion could also encapsulate that of goods of a monetary nature, as possibly determined by the ILA New Delhi Declaration Principle 7. If the concept of sustainable development itself is considered, the aspect of sustainability itself does require patterns of consumerist action to be reflected upon and possibly changed to achieve the necessary "non-declining per capita"[340] and as Jenkins clearly states in very basic terms, "to sustain … capital"[341]. Appropriate economic models can adequately control the appropriate consumerist actions relating to non-natural and natural goods. Sustainable economic grounding therefore does have a convincing part to play within the deployment of sustainable development, as has been outlined within Chapter One[342], with the consideration of the movement away from traditional economic theory, which demonstrates "no special reason to conserve natural capital"[343] to a theory that could "be operationalized in terms of the conservation of natural capital"[344]. Reflecting on, for example, Toman's appreciation of "neo-classical market efficiency"[345] or "safe minimum standard"[346].From this perspective therefore, sustainable economic theory can be used as a valuable tool to generate both the sustainability and development required by the concept.

c. *<u>Environmental Protection</u>: as represented by the ILA New Delhi Principle No. 1 on The duty of States to ensure sustainable use of natural resources.*

An additional and important theoretical base can be found in the achievement of environmental protection or considering the concept of sustainable development from a beneficial ecological perspective. The protection of the environment is repeatedly stated

[340] D. Pearce and G. Atkinson: [n 333] 1.
[341] W. Jenkins: [n 299] 380.
[342] Chapter One, Section Two.
[343] Jonathan M. Harris, 'Basic Principles of Sustainable Development' (June 2000) Global Development and Environment Institute Working Paper 00-04, 9.
[344] J. M. Harris: *ibid* 9.
[345] J. M. Harris: *ibid* 10.
[346] Michael A. Toman, 'The Difficulty in Defining Sustainability' in Wallace E. Oates (Eds) *The RFF Reader in Environmental and Resource Policy* (2006) 249-250.

to be an important feature underpinning the concept of sustainable development. The ILA New Delhi Principles convey:

> "It is a well-established principle that … **all States have the sovereign right to manage their own natural resources pursuant to their own environmental and developmental policies**, and the responsibility to ensure that activities within their jurisdiction or control **do not cause significant damage to the environment of other States or of areas beyond the limits of national jurisdiction**"[347]. [Emphasis added]

And:

> "**States are under a duty to manage natural resources**, including natural resources within their own territory or jurisdiction, in a rational, sustainable and safe way so as to contribute to the development of their peoples, with particular regard for the rights of indigenous peoples, and to **the conservation and sustainable use of natural resources and the protection of the environment**, including ecosystems. **States must take into account the needs of future generations in determining the rate of use of natural resources**. All relevant actors (including States, industrial concerns and other components of civil society) **are under a duty to avoid wasteful use** of natural resources and promote waste minimization policies"[348]. [Emphasis added]

Later there is reference to "[t]he protection, preservation and enhancement of the natural environment, particularly the proper management of climate system, biological diversity and fauna and flora of the Earth"[349]. There is an obvious sense of the act of environmental protection through both indications in the refraining from actions that would cause environmental degradation and the active maintenance the biological environmental processes.

[347] *ILA New Delhi Principles*: [n 1] Principle 1(1).
[348] *ILA New Delhi Principles*: *ibid* Principle 1(2).
[349] *ILA New Delhi Principles*: *ibid* Principle 1(3).

The Rio Declaration[350] does emulate the understanding highlighted in the ILA New Delhi Principles. In a similar reference within the SDGs[351], Goal 7 on Affordable and Clean Energy, Goal 13 on Climate Action, Goal 14 on Life Below Water and Goal 15 on Life on Land do repeat and further detail the environmental understanding demonstrated in the earlier ILA New Delhi Principles. For example, specifically using SDG Goal 12 on Responsible Consumption and Production, it is provided in the targets that "[b]y 2030, substantially reduce waste generation through prevention, reduction, recycling and reuse"[352], thereby replicating in more detail Principle 1(2) of the ILA New Delhi Principles.

Although the soft-law proclamations have enunciated the importance of environmental protection to the concept of sustainable development for a considerable temporal period, equal recognition can be found within hard-law proclamations that contain a fundamental connection to the concept. It could be stated that the difference between the soft-law and hard-law proclamations is that the hard-law counterparts attribute the environmental protection to specific factual situations as opposed to blanket recognition. The CBD is one such example of many[353] which predominantly expresses environmental protection alongside that of social and economic development[354]. The Preamble states "biological diversity is being significantly reduced"[355] and that "it is vital to anticipate, prevent and attack the causes of significant reduction or loss of biological diversity"[356].

Even before the concept truly came to fruition in both international agreements and academic circles in 1972, Falk outlined "informing values"[357] of sustainable development. One pertained to "the maintenance of environmental quality"[358] and as such it is obvious of the link to the level of protectionism involved. Estes much later similarly

[350] *Rio Declaration*: [n 21] Principle 2 and 7.
[351] SDGs: [n 18].
[352] SDGs: *ibid* Goal 12, Target 12.5.
[353] Examples include: UNFCCC: [n 38]; Convention on Wetlands of International Importance, especially as Waterfowl Habitat (Ramsar Convention) (adopted 02/02/1971, entered into force 21/12/1975) 996 UNTS 245; Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) (adopted 03/03/1973, entered into force 01/07/1975) 993 UNTS 243; International Tropical Timber Agreement (2006) 2797 UNTS 75.
[354] Elisa Morgera, 'Ecosystem and Precautionary Approaches' (2015) in J. Razzaque and E. Morgera (Eds) *Encyclopedia of Environmental Law: Biodiversity and Nature Protection Law* (2016), found at < http://dx.doi.org/10.2139/ssrn.2611918 > accessed December 2019.
[355] CBD: [n 284] Preamble.
[356] CBD: *ibid* Preamble.
[357] Richard Falks, *This Endangered Planet: Prospects and Proposals for Human Survival* (1972) 293.
[358] R. Falks: *ibid* 300.

refers to this aspect as one of the "dimensions" [359] of sustainable development. While it is extremely clear that there is the maintenance of environmental standards through protection with great consideration given to "biological diversity and ecological integrity"[360], there is also an obvious element of the continual use of the environment. It is implied within the parameters of sustainable development that the environment will be exploited, be it through extracting resources or simply through the utilization of green un-developed space. However also it is clear that the action will not impact the "ecological resilience"[361] present before development, thus preserving the ecological value of the environment as demonstrated by Perrings through the recognition of either "capturing the speed of return to equilibrium following perturbation"[362] or through the "capturing the size of a disturbance needed to dislodge a system from its stability domain"[363]. A delicate balancing act is therefore in constant play, underpinning all action attributed to the fulfillment of the concept from this perspective.

d. *Integration of Policy: as represented by the ILA New Delhi Principle No. 7 on The principle of integration and interrelationship.*

Even though the above discussions highlight the various individual thematic foundations upon which the concept of sustainable development seems to rely, it does seem true in those discussions that "those still discussing theory are much more likely to be found doing so in relation to a specific aspect of sustainable development delivery"[364]. This point provides intensified weight to the argument forwarded relating to the confused nature of the thematic groundings. Nevertheless, while there is much variance in the specific theories and principles themselves, there is agreement that another theory underpinning the concept is a mixture of all the previously discussed theoretical bases,

[359] R. J. Estes: [n 291] 8.
[360] W. Jenkins: [n 299] 383.
[361] J. M. Harris: [n 343] 13.
[362] Charles Perrings, 'Resilience and Sustainable Development' (2006) *Environment and Development Economics*, Vol. 11, Issue 4, 417.
[363] C. Perrings: *ibid* 417.
[364] The Scottish Executive, 'Sustainable Development: A Review of International Literature' (2006) Scottish Executive Social Research Report, found at < www.scotland.gov.uk/Publications/2006/05/23091323/4 > accessed December 2019.

thereby implying integration of all policies. In this light, the ILA New Delhi Principles state:

> "The Principle of integration reflects the interdependence of social, economic, financial, environmental and human rights aspects of principles and rules of international law relating to sustainable development as well as of the interdependence of the needs of current and future generations of humankind … All levels of governance – global, regional, national and local – and all sectors of society should implement the integration principle, which is essential to the achievement of sustainable development"[365].

Correspondingly, the SDGs do further implicate the integration of policy by way of referencing all the 17 Goals altogether, which each are of differing and specific origins, but ultimately incorporating all three of the pillars of sustainable development. Although the phrase 'integration of policy' is missing, the placing of all the Goals collectively does suggest this form of co-operation.

To explain further this theory and inter-linkage in a much more visual manner, Moir and Carter have produced the most enlightening 'diagrammatic representations':

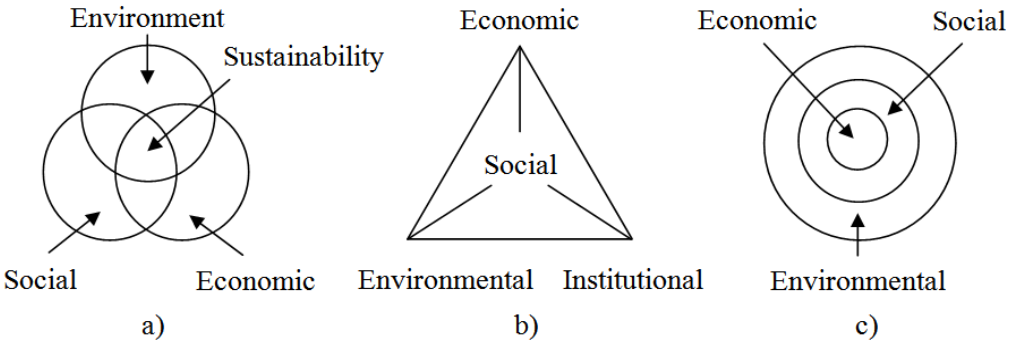

Figure 1: taken from 'Diagrammatic Representations of Sustainability – A Review and Synthesis', by Stuart Moir and Kate Carter[366].

[365] *ILA New Delhi Principles*: [n 1] Principle 7(1 and 2).
[366] Stuart Moir and Kate Carter, 'Diagrammatic Representations of Sustainability – A Review and Synthesis' in S. D. Smith (Eds) Proceedings 28th Annual ARCOM Conference (3-5 September 2012) 1480.

The most clarifying of all three diagrams, in my opinion, is that of diagram 'a' in Figure 1. This diagram shows the environmental, social and economic thematic dimensions of sustainable development. It also clearly highlights the great inter-linkages between these areas and that 'sustainability' is located in the center where all three areas are joined. It is in the consideration of these diagrams that the inter-linkages are made apparent. Moir and Carter's view that sustainable development "is frequently conceptualized as consisting of three distinct dimensions – environment, society and economy"[367] is apparent. Ultimately therefore, the three theoretical models previously discussed are all still at play independently. The individual pronouncements of the underlying theories and principles do forward a rather limited scope of the concept of sustainable development, whereas the diagrams chosen do provide a collective assimilation of the theories together. Harris states, "sustainable development … remed[ies] social inequities and environmental damage, while maintaining a sound economic base"[368]. Therefore, although this description provided highlights elements of all the previously outlined theories, there is present another specific theory that limits each other in light of each other's theory and is joined as such.

For if, as an example, internationally there was an emphasis on state-based employment prospects, naturally it would be expected that social and economic development policy would be somewhat strengthened and possibly the environmental policy also. The UNFCCC is an example of the initiation of integration with an international agreement. The Preamble acknowledges "activities within their jurisdiction or control do not cause damage to the environment … taking into full account the legitimate priority needs of developing countries for the achievement of sustained economic growth and the eradication of poverty"[369]. Not only is environmental protection extremely prominent within the Convention, so too are elements of economic and social policy. A combination could be argued to be pivotal to the success of the other policy. Thus, the process of integration can be seen as beneficial to the achievement of the concept as a whole[370].

[367] S. Moir and K. Carter: *ibid* 1480.
[368] J.M. Harris: [n 343] 19.
[369] UNFCCC: [n 38] Preamble.
[370] David Le Blanc, 'Towards Integration at Last? The Sustainable Development Goals as a Network of Targets' (2015) *Sustainable Development*, Vol. 23, Issue 3, 176-187.

The next appropriate characteristic linked to integration of policy are the subsequent procedural and "governance"[371] necessities that are required to be put in place, such as the use of the Environmental Impact Assessment (EIA). If the concept through the element of 'development' covers a vital mixture of environmental, social and economic aspects, with Barral also including "political … and cultural discourses"[372], then it is of only natural consequence that in terms of policy implementation, all areas of policy are therefore utilized to support such a conceptual aim. The CBD states:

> "Integrate, as far as possible and as appropriate, the conservation and sustainable use of biological diversity into relevant sectoral, or cross-sectoral plans, programs and policies"[373].

This Article most appropriately shows this inter-linkage of policies. The reasoning is very clear, to create the most beneficial policy environment[374].

e. <u>*Sustainability:*</u> *as represented by the New Delhi Principle No. 1 on The duty of States to ensure sustainable use of natural resources.*

> "States are under a duty to manage natural resources within their own territory or jurisdiction, in a rational, **sustainable** and safe way so as to contribute to the development of their peoples … and to the conservation and sustainable use of natural resources and the protection of the environment, including ecosystems … All relevant actors … are under a duty to **avoid wasteful use** of natural resources and **promote waste minimization** policies"[375]. [Emphasis added]

Sustainability is another foundational theory of the current understanding afforded to sustainable development. Initially it is extremely important to examine the meaning of sustainable action or sustainability itself. Using a basic definition, 'sustainable' in the Oxford Dictionary is defined as "able to be maintained at a certain rate or level"[376]. In a

[371] *ILA New Delhi Principles*: [n 1] Principle 7.
[372] V. Barral: [n 18] 377.
[373] CBD: [n 284] Article 6(b).
[374] Mark Stafford-Smith *et al*, 'Integration: the key to implementing the Sustainable Development Goals' (2017) *Sustainability Science*, Vol. 12, No. 6, 911-919.
[375] *ILA New Delhi Principles*: [n 1] Principle 1(2).
[376] *Oxford Dictionary of English* (2005) 1779.

legal context, this definition is contextually enhanced. The UNFCC[377], as an example, claims that sustainable action is the "stabilization"[378] of gas emissions at a level that would not provide detrimental effects upon the physical environment. This goal could therefore align with the degree of generalization provided within the dictionary definition forwarded.

The reference to the generalized ideals of sustainability is quite common in academic literature. Gherasim and Tanase give many examples[379]. Lynam and Herdt define this action as "the capacity of a system to maintain its output at a level equally or higher than its historical output"[380]. These descriptions are again rather imprecise, though do importantly further provide a core outline of sustainability particularly in relation to its place alongside development[381]. Despite the level of vagueness, the repeated principle of the constant improvement to the current status of development is quite apparent with a continual temporal factor. The action of sustainable development therefore could be considered to entail a principle of the maintenance of an enhanced status quo of development with a constant recognition to future human community needs.

Furthermore, and with a high degree of relatedness, there is the combined aspect of 'sustainable utilization' under the auspice of the concept of sustainable development. Harris realizes the connection between the "ecological perspective"[382] and "more of the critical problems facing humanity arise from failures of ecological resilience"[383]. With this relationship in mind, it means that in action together with this protection, there would logically be "some limits on the utilization of natural resources"[384]. Indeed, as these authors point out, the inclusion of conservatory remedies and sustainable development go hand in hand in many of the international treaties. The same authors provide the examples of the 1995 Agreement for the Conservation of Straddling and Highly Migratory Fish

[377] UNFCCC: [n 38].
[378] UNFCCC: *ibid* Article 2.
[379] Mihaela Elvira Gherasim and Gheorghe Tanase, 'The Fundamentals of Sustainable Development' (2012) *Contemporary Readings in Law and Social Justice*, Vol. 4, Issue 1, 450-451.
[380] J.K. Lynam and R.W. Herdt, 'Sense and Sustainability: Sustainability as an Objective' (1989) *Agricultural Economics*, Vol. 3, Issue 4, 388.
[381] Justice Mensah, 'Sustainable development: Meaning, history, principles, pillars, and implications for human action: Literature review' (2019) *Cogent Social Sciences*, Vol. 5, Issue 1, found at < DOI: 10.1080/23311886.2019.1653531 > accessed November 2019, 5.
[382] J. M. Harris: [n 343] 13.
[383] J. M. Harris: *ibid* 13.
[384] A. Boyle and D. Freestone: [n 16] 9.

Stocks and the 1994 International Tropical Timber Agreement[385]. The 1995 Agreement[386] "sets out principles for the conservation and management of these fish stocks and establishes that such management must be based in the precautionary approach and the best available scientific information"[387]. This Agreement demonstrates the concept of sustainable utilization as not only is an environmentally precautionary approach taken in the management of fish stocks, but also the fact that due to the scientific information available in certain cases fishing is allowed to commence. Therefore fishing, by members of this Agreement, is carried out in a manner that is sustainable and therefore environmentally beneficial. Likewise, the International Tropical Timber Agreements refer to "sustainable forest management"[388], which again depicts the idea of sustainable utilization of this important resource in the same way.

If a more expanded view is generated, the Rio Declaration[389] views environmental protection and management as equivalently fundamental within the concept. The recent 2015 SDGs highlight the need for protective management i.e., sustainable utilization, also. Goal 12 relevantly states the need to "ensure sustainable consumption and production patterns"[390]. However, it must also be noted that although the principle of environmental protection and management is significant, equally are the principles of economic and social development, which can even be worded as economic and social protection.

[385] A. Boyle and D. Freestone: *ibid.*
[386] Agreement for the Implementation of the Provisions of The United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling and Highly Migratory Fish Stocks (1995) A/CONF.164/37; 2167 UNTS 3.
[387] United Nations Oceans & Law of The Sea Website, found at < https://www.un.org/Depts/los/convention_agreements/convention_overview_fish_stocks.htm >accessed December 2019.
[388] International Tropical Timber Agreement: [n 353] Paragraph F.
[389] *Rio Declaration*: [n 21] Principle 8.
[390] SDGs: [n 18] Goal 12.

f. *<u>Precautionary Principle:</u> as represented by the New Delhi Principle No. 4 on The principle of the precautionary approach to human health, natural resources and ecosystems.*

An additional theory, which has been transformed into a principle, and that which can be related to the concept of sustainable development, is the precautionary principle. One of the most referred to principles of the concept of sustainable development is environmental protection and this principle provides an integral part of the backbone attributed to 'sustainable utilization'[391]. At this heart however, sustainable development takes the environmentally precautionary approach to the appropriate use of natural resources, which Lowe considers as "central to the concept"[392]. The precautionary approach is well revealed within legal proclamations that can be attributed to the concept. The Rio Declaration details this approach:

> "…Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation"[393].

The ILA New Delhi Principles similarly define the precautionary approach that should be taken:

> "A precautionary approach is central to sustainable development in that it commits States, international organizations and the civil society, particularly the scientific and business communities, to avoid human activity which may cause significant harm to human health, natural resources or ecosystems, including in the light of scientific uncertainty"[394].

In line with this approach, Jordan and O'Riordan believe that the principle consists of several "core elements"[395], such as "a willingness to take action in advance of formal

[391] A. Boyle and D. Freestone: [n 16] 9.
[392] V. Lowe: [n 289] 28.
[393] *Rio Declaration*: [n 21] Principle 15.
[394] *ILA New Delhi Principles*: [n 1] Principle 1(3).
[395] Andrew Jordan and Timothy O'Riordan, 'The Precautionary Principle in U.K. Environmental Law and Policy' (1995) CSERGE Working Paper GEC 94-11, 8.

justification of proof; proportionality of response … [and] a concern with future generations and dysgenic impacts"[396].

Many forms of legal proclamations do highlight precaution in this context[397]. The most obvious formulation is found in the UNFCCC in which it is stated that there should be taken "measures to anticipate, prevent or minimize the causes of climate change … lack of full scientific research should not be used as a reason for postponing such measures"[398]. In fact, Deloso has recognized that the "1992 [Convention] paved the way for the convergence of the precautionary principle and the climate change issue in international law"[399]. Similarly, international judicial decisions do encapsulate that which is given within the ILA New Delhi Principles[400]. Most prominently however, Judge Weeramantry in the *Case Concerning the Gabcikovo-Nagymaros Dam* delivered that the principle reached the status of a general principle of international law[401], thereby reaffirming the presence of the principle within the international legal ether.

g. *Inter and Intra Generational Equity: as represented by the ILA New Delhi Principle No. 2 on The principle of equity and the eradication of poverty and No. 3 on The principle of common but differentiated responsibilities.*

> "The principle of equity is central to the attainment of sustainable development. It refers to both inter-generational equity (**the right of future generations to enjoy a fair level of the common patrimony**) and Intra-generational equity (**the right of all peoples within the current generation of fair access to the current**

[396] A. Jordan and T. O'Riordan: *ibid* 8.
[397] Treaties utilizing the precautionary principle: Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR Convention) (signed 22/09/1992, entered into force 07/10/1997) Decision 98/249/EC; Consolidated version of the Treaty on the Functioning of the European Union (TFEU) 2008 O.J. C 115/47, Article 191.
[398] UNFCCC: [n 38] Article 3.
[399] Rabbi Elamparo Deloso, 'The Precautionary Principle: relevance in International Law and Climate Change' (2005) Lund University Publication, found at < www.lumes.lu.se/sites/lumes.lu.se/files/rabbi_deloso.pdf > accessed December 2019, 17.
[400] David VanderZwaag, 'The ICJ, ITLOS and the Precautionary Approach: Paltry Progressions, Jurisprudential Jousting' (2013) *University of Hawaii Law Review*, Vol. 35, No. 2, 617-632.
[401] *Case Concerning the Gabcikovo-Nagymaros Project (Hungary/Slovakia)* (1997) ICJ Rep 7, Separate Opinion of Vice-President Judge Weeramantry.

generation's entitlement to the Earth's natural resources)"[402]. [Emphasis added]

Both Inter- and intra-generational equity have similarly important roles in the dissection of the foundations that lay at the base of the concept of sustainable development.

To discuss inter-generational equity first, this principle can be described as "the basis for the relationship between one generation and the next"[403], and in other words, the principle "… requires each generation to use and develop its natural and cultural heritage in such a manner that it can be parted onto future generations in no worse condition than it was received"[404]. This is essentially a similar definition to that found in the Brundtland Report, which states sustainable development must "ensure that it meets the needs of the present without compromising the ability of future generations to meet their own needs"[405]. Spijkers notes that although "[t]here is not a single explicit reference in the Sustainable Development Goals (SDGs), adopted by the UN General Assembly in 2015, to the principle of "intergenerational equity" … [t]here are references to "future generations" in the SDGs"[406]. Simply summarized however, levels in development as viewed from the social, economic and environmental perspectives should be maintained or even bettered through subsequent generations, which are closely linked to the idea of sustainable utilization[407]. This could easily therefore be related back to the discussion on sustainability and the meaning of sustainable action. For example, Goodland and Ledec state that "the use of renewable natural resources so that these should not be exhausted or degraded or not to be reduced for the future generations"[408].

Many times is the inter-generational equity principle demonstrated within hard-law proclamations[409]. One of the most observable is found in CITES, which states in the

[402] *ILA New Delhi Principles*: [n 1] Principle 2(1).
[403] A. Boyle and D. Freestone: [n 16] 12.
[404] A. Boyle and D. Freestone: *ibid* 9.
[405] *Our Common Future*: [n 276] Paragraph 27.
[406] Otto Spijkers, 'Intergenerational Equity and the Sustainable Development Goals' (2018) *Sustainability*, Vol. 10, No. 11, 8.
[407] O. Spijkers: *ibid.*
[408] R. Goodland and G. Ledec, *Neoclassical Economics and Principles of Sustainable Development* (1987) 38.
[409] Other examples include: UNFCCC: [n 38]; CBD: [n 284]; United Nations Paris Agreement adopted under the United Nations Framework Convention on Climate Change (2015) (signed 12/12/2015, entered into force 04/11/2016).

Preamble the protection for "the generations to come"[410]. Therefore, the intention behind this legal instrument is the protection of biodiversity through conservation for the future generations. Indeed, management is put in place for longevity and endurance as well as for immediate purpose. If Lynam and Herdt's[411] opinion is considered, instead of this principle of inter-generation equity being procedural in nature, similar to that of the previous principle discussed, this particular principle is rather more general and again provides longevity for the concept.

In comparison, intra-generational equity is fundamentally different from the previous principle characteristic in many significant ways. Initially, although both could be described as quite vague and fully dependent on the factual circumstances each are applied, intra-generational equity is rather more contemporary and as such it can be submitted to place more emphasis upon procedural development and subsequently development in the present as opposed to the long-term achievement and the consideration of the future generations. Intra-generational equity can be related to the well-recognized international principles of common but differentiated responsibility and cooperation[412], which is again significantly outlined within the ILA New Delhi Principles[413].

Secondly, the main importance perceived of this principle characteristic is that of the foreseen ability to adapt the policy for the contemporary needs, with primary consideration given to those who are currently suffering "injustice"[414]. As an example, the most prime illustration is highlighted again within the UNFCCC[415], as it states:

> "Recognizing also the need for **developed countries to take immediate action** in a flexible manner on the **basis of clear priorities**, as a first step towards comprehensive response strategies at the global, national and, where agreed, regional levels that take into account all green house gases…"[416]. [Emphasis Added]

[410] CITES: [n 353] Preamble.
[411] J.K. Lynam and R.W. Herdt: [n 380].
[412] A. Boyle and D. Freestone: [n 16] 15.
[413] *ILA New Delhi Principles*: [n 1] Principle 3 (1-4).
[414] Edmond N. Cahn, *The Sense of Injustice* (1951) taken from J. W. Futrell: [n 310] 9.
[415] UNFCCC: [n 38].
[416] UNFCCC: *ibid* Preamble.

And;

> "Recognizing that States should enact effective environmental legislation … **should reflect the environmental and developmental context to which they apply**, and that standards applied by some countries may be **inappropriate** and of unwarranted economic and social cost to other countries, in particular developing countries …"[417]. [Emphasis added]

For each individual State, the meaning of development and what is required to rectify developmental injustice is different and therefore this characteristic dictates that much appropriate appreciation of current developmental needs is essential.

3.2 Divergent Summarization

As a focal point and culmination of the analysis of these foundational theories, principles and subsequent characteristics, in line with the most current understanding as demonstrated through multiple international legal documentations and declarations, the theories and principles must incorporate, amongst others, social, economic and environmental "concerns"[418] and do ultimately mirror to varying extents those forwarded by the ILA New Delhi Principles and the SDGs. Simultaneously however, there are significant divergencies present and it must be remembered:

> "Complete sustainable development is achieved through a balance between all these pillars, however, the required condition is not easy to achieve, because in the process of achieving its goals each pillar of sustainability must respect the interests of other pillars not to bring them into imbalance. So, while a certain pillar of sustainable development becomes sustainable, others can become unsustainable, especially when it comes to ecological sustainability, on which the overall capacity of development depends"[419].

[417] UNFCCC: *ibid* Preamble.
[418] N. Schrijver: [n 5].
[419] T. Klarin: [n 281] 68.

The table below outlines the basic extent of these divergent characteristics and ultimately demonstrates the nature of the complexity.

Theories and Principles of Sustainable Development	**Principle Normative Characteristic: Identifying Feature**	**Secondary Inherencies**
A. Anthropocentricism	Promotion of human dignity	Human centered action in relation to wider environment. Procedural and political rights.
B. Economics	Generation of wealth.	Changes in production processes. Long term economic wealth.
C. Environmental Protection	Conservation of the environment and biological processes.	Sustainable use with the maintenance of the environment as paramount.
D. Integration of Policy	Interrelationship with social, economic and environmental ideals.	Removal of focus upon individual ideals. Governance structure.
E. Sustainability	Sustainable action.	Maintenance of the environment. Utilization.
F. Precautionary Principle	Careful approach to environmental utilization.	Management of biological processes. Maintenance of the environment.
G. Inter. and Intra. Generational Equity	Equitable distribution for present and future generations.	Common but differentiated responsibility. Contemporary appreciation.

Figure 2: table demonstrating central focus of each ideal.

At first sight the appreciation of the concept of sustainable development may be considered rather straight forward, substantially bringing to the forefront ideals that can be categorized easily into co-existing and independent parameters**.** The relationship between the degree of anthropocentrism and elements pertaining to economics, for example, does observably demonstrate overlapping characteristics. The recognition of

human dignity could reasonably correlate with the ability of the individual to generate wealth and remove the experience of poverty. Similarly, the relationship between environmental protection and the precautionary principle could be argued to somewhat enhance a vigilant attitude towards environmental and biological processes.

This extremely simplistic mindset however fails to acknowledge the actual degree of complexity in their individually precise ideological remit and ultimately practical performance. As has been demonstrated within the distinct capacities of the theories and principles, although on a broad and general analysis there is some degree of logicality, upon a deeper and less superficial examination, this logicality is diminished. This understanding would confirm Klarins[420] view of the inherent compromised nature of the concept of sustainable development through the contractionary functioning of the foundational ideals. Take, for instance, the inconsistency between anthropocentrism and environmental protection. The first dictates a human-centered approach to the concept, whereas the latter places the environment as the paramount consideration. Anthropocentrism, as discussed above, enables action taken for the benefit of humans, while environmental protection clearly acknowledges action taken on behalf of the biological processes, which is also consequently far removed from the ideal of sustainable utilization. This leads to the important questioning of at what point do human or environmental interests prevail in the event of a collision of ideals. This degree of contradiction can be equally seen, for example, within the ideals and subsequent characteristics of environmental protection and sustainable use, and environmental protection and precaution.

These fundamental contradictions can be primarily eased through the use legal promulgations in the form of international declarations and treaties, such as those discussed previously, of which aspects of the theories and principles are enhanced or diminished dependent on the context of the promulgation. Nonetheless, these contradictions do remain and confusion over the precise nature of the normative content of the concept is lasting. Though what is clear is that sustainable development is formulated through a mixture of complex and competing ideals that together form an overall objective with varying legal norms protracting these ideals in different methods.

[420] T. Klarin: *ibid* 68.

3.3 The Field of International Investment Law

The appreciation of the gradual development of international investment law through the key historical turning points[421] brings forth both the reactive nature of the regulation and subsequently the recognition of the sources utilized by this field of regulation. As shown in Chapter One[422], it is noticeable that "the literature … contains a number of reasons why a country … may have an advantage in exporting a commodity to another country"[423] and alludes specifically to the beneficial transference such actions induce. Expectedly the guiding principles and numerous characteristics of international investment law, which will be shown below, are in line with this assertion.

The primary principle of international investment law and the subsequent regulation of FDI is, as the titles suggests, concentrated upon the relationship between states. The important international relationship can be defined as existing between two or multiple sovereign states and not between, for example, two public actors. Unlike the governance structure whereby national actions and decisions are made, which are ultimately coordinated within the strict constraints of a set of rules dictated by that state, international decision-making is somewhat more distinctive and complex. Much appreciation therefore must be given to this distinction as this specificity further provides many crucial regulatory principles and unique characteristics.

Inherent in this international dimension of investment law is the involvement of the numerous international sources of law that provide the overall regulatory environment. This imposition importantly provides intriguing effects upon this field of law. The principal sources of law i.e., facilitative mechanisms, adopted by the field of international investment law and the regulation of FDI have been demonstrated previously[424]. However, there are some exemplary points of particular interest that are necessary to detail initially. The international arena does advance the presence of, for example, the general principles of international law, which importantly includes the established principles of cooperation and fairness. Although repeatedly described as "unlikely to offer

[421] Please see: S. P. Subedi: [n 7] Chapter 2; Zachary Douglas, Joost Pauwelyn and Jorge E. Vinuales, *The Foundations of International Investment Law: Bringing Theory into Practice* (2014) 5.
[422] Chapter One, Section Two.
[423] Satya Dev Gupta, 'Comparative Advantage and Competitive Advantage: An Economics Perspective and a Synthesis' (2015) *Athens Journal of Business and Economics*, Vol. 1, Issue 1, 10.
[424] Chapter Two, Section Two.

clear and concrete rule of behavior, or specific rights or obligations"[425] in their usage, these principles can "supply much fodder for arguments in this area of law"[426] and are mainly enforced through judicial proceedings. Another generalized example of the utilization of international sources of law is that of the "overwhelming"[427] and numerous approaches taken to treaty formation within the international investment arena. The use of treaties as a facilitative mechanism for the creation of regulation is flourishing and the process of negotiation produces significant impacts upon the substance of the treaty in terms of the compromised provisions contained therein.

Closely related to this characteristic of the resort to international sources of law is the understanding and important characteristic that there is no overarching requirement in the field of international investment law to produce treaties that must contain certain provisions or standards. This realization is linked somewhat to the discussion of the failed attempts of an all-encompassing and comprehensive investment treaty[428], "[u]nlike in international trade law or international human rights law, there is as yet no single comprehensive international treaty regulating foreign investment, spelling out what the law is and what would be the mechanism to enforce law"[429]. Garcia, Ciko, Gaurav and Hough believe because of this "[t]he quality of dispute resolution decisions varies greatly, as do outcomes on substantive law matters, and there is no comprehensive institutional mechanism to promote quality or coherence"[430]. Sauvant would agree with position, stating "there is no overarching and unified set of rules governing this subject matter"[431]. If reference to BITs is solely made, for example, the difference between these treaties in terms of content can be at times obvious. In fact, the research that will be delivered later in this Thesis would account for this characteristic in the different approaches taken to the translation of concept of sustainable development. Although different states, including

[425] Cassandra Steer, 'Sources and law-making processes relating to space activities' in Ram S. Jakhu and Paul Stephen Dempsey (Eds) *Routledge Handbook of Space Law* (2017) 7; Lynne M. Jurgielewicz, *Global Environmental Change and International Law: Prospects for Progress in the Legal Order* (1996) 183.
[426] M. Sornarajah: [n 67] 85.
[427] Patrick Dumberry, *The Formation and Identification of Rules of Customary International Law in International Investment Law* (2016) xvi.
[428] Chapter Two, Section Two.
[429] Nicolette Butler and Surya Subedi, 'The Future of International Investment Regulation: Towards a World Investment Organisation?' (2017) *Netherlands International Law Review*, Vol. 64, 44.
[430] F. J. Garcia *et al*: [n 163] 861-862.
[431] Karl P. Sauvant, 'The Evolving International Investment Law and Policy Regime: Ways Forward' (2016) E15 Task Force on Investment Policy – Policy Options Paper, E15 Initiative, Geneva: International Centre for Trade and Sustainable Development (ICTSD) and World Economic Forum, 11.

that of The Netherlands[432], have draft BIT models that will "be used for renegotiation of the 79 existing Dutch BITs with non-EU countries and negation of future agreements"[433], which from a narrow perspective forms a degree of uniformity, however this uniformity is undermined by the simultaneous incorporations of alternative BIT model regimes of other states.

To continue with the implications of the utilization of international sources of law and the subsequent fragmented approach taken to the regulation of FDI, Butler and Subedi correctly acknowledge the notable characteristic that "[i]n the absence of an international investment court, states hosting foreign investment or investor states have opted for investor-state dispute settlement mechanism (ISDS)"[434]. Indeed, textual regulations adopted by the FDI do correspond with this assertion that there is no centralization of arbitration. For example, the Agreement between the Government of the Republic of Uzbekistan and the Government of the Republic of Korea for the Reciprocal Promotion and Protection of Investments[435]:

> "lf any dispute cannot be settled within one hundred and eighty (180) days from the date of request for settlement, it shall, at the request of either Contracting Party, be submitted to an ad hoc Arbitral Tribunal in accordance with the provisions of this Article"[436].

And that:

> "The investor and the Contracting Party in whose territory the investments are made shall endeavor to settle the dispute by consultations and negotiations in good faith, and at the same time, by local remedies of the Contracting Party. Such dispute shall be notified in writing by the investor to the Contracting Party. If the dispute cannot be resolved by consultations, negotiations and/or local remedies

[432] Bart-Jaap Verbeek and Roeline Knottnerus, International Institute for Sustainable Development Website, 'The 2018 Draft Dutch Model BIT: A Critical Assessment', found at < https://www.iisd.org/itn/en/2018/07/30/the-2018-draft-dutch-model-bit-a-critical-assessment-bart-jaap-verbeek-and-roeline-knottneruus/> accessed February 2021.
[433] B. J. Verbeek and R. Knottnerus: *ibid.*
[434] N. Butler and S. Subedi: [n 429] 43.
[435] Agreement Between the Government of the Republic of Uzbekistan and the Government of the Republic of Korea for the Reciprocal Promotion and Protection of Investments (Uzbekistan – Korea BIT) (signed 19/04/2019).
[436] Uzbekistan – Korea BIT: *ibid* Article 10(2).

within one hundred and eighty (180) days from the date on which the written request is notified, the investor may choose to submit the dispute for resolution by arbitration in accordance with this Article under:

(a) the Convention on the Settlement of Investment Disputes between States and Nationals of other States (the "ICSID Convention"), if the ICSID Convention is available;

(b) the Additional Facility Rules of the Centre for Settlement of Investment Disputes (the "ICSID Additional Facility Rules"), if the ICSID Additional Facility Rules are available;

(c) the Arbitration Rules of the United Nations Commission on International Trade Law (the "UNCITRAL Arbitration Rules") or;

(d) if agreed by both parties to the dispute, any other arbitration institution or any other arbitration rules"[437].

Thus, highlighting the decentralized nature and approach to the dispute settlement within the FDI regime and in particular BITs.

Another fundamental principle related to the field of international investment law is again forwarded within the title of international investment. The rule relates to the specific definition of the term 'investment' in regard to FDI, as opposed to the action of foreign portfolio investment for example[438]. From a legal viewpoint, investment has been explored in-depth and could be argued, in terms of meaning, to be somewhat resolved in both legal promulgations and academic circles[439]. It is well acknowledged that the term 'investment' contains certain characteristics that include a transfer of funds, the project must be long term in duration, must provide a regular income, must be managed by the

[437] Uzbekistan – Korea BIT: *ibid* Article 11(2).
[438] Marcin Humanicki, Robert Kelm and Krzysztof, 'Foreign Direct and Portfolio Investment in the Contemporary Globalized World: Should They Be Still Treated Separately?' (2017) *Central European Journal of Economic Modeling and Econometrics*, Vol. 9, 115-135; M. Sornarajah: [n 67] 12.
[439] Please see: R. Dolzer, U. Kriebaum and C. Schreuer: [n 73] Chapter 4; Wenhua Shan and Lu Wang, 'The Concept of "Investment": Treaty Defeinition and Arbitration Interpretations' in Julien Chaisse, Leila Choukroune and Sufian Jusoh (Eds) *Handbook of International Law and Policy* (2021).

person transferring the funds and must be open to business risk[440]. Sornarajah would agree to an extent with these assertions[441].

These definitional characteristics are reflected in much legal promulgation. USMCA defines the meaning of investment as:

> "[I]nvestment means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. An investment may include:
>
> (a) an enterprise;
>
> (b) stock and other forms of equity participation in an enterprise;
>
> (c) bonds, debentures, other debt instruments, and loans;
>
> (d) futures, options, and other derivatives;
>
> (e) turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts;
>
> (f) intellectual property rights;
>
> (g) licenses, authorizations, permits, and similar rights conferred pursuant to a Party's law;
>
> (h) other tangible or intangible, movable or immovable property, and related property rights, such as liens, mortgages, pledges, and leases"[442].

A parallel of reflection regarding the underlying characteristics of the term 'investment' is found in the correspondingly progressive international case law also. In *Fedax v. Venezuela*[443], it was stated that "the basic features of an investment have been described

[440] Rudolf Dolzer, 'The Notion of Investment in Recent Practice' in S. Charnovitz, D. P. Steger and P. van den Bosche (Eds) *Law in the Service of Human Dignity: Essays in Honour of Florentino Feliciano* (2005) 263.
[441] M. Sornarajah: [n 67] 16-17.
[442] USMCA: [n 144] Chapter 14(1).
[443] *Fedax v. Venezuela*: [n 244].

as involving a certain duration, a certain regularity of profit and return, assumption of risk, a substantial commitment and a significance for the host State's development"[444] and in this decision, it was held on the particular facts that the promissory notes did "meet the basic features of an investment"[445]. A high degree of reaffirmation has also been found in later cases[446].

The above recognition of both the crucial principle and characteristic foundations of international investment law and the regulation of FDI gradually reveals an ultimate reliance on the rule of law. In the simplest form, Radin states that "[t]he ideal of 'the rule of law, not of men' calls upon us to strive to ensure that our law itself will rule (govern) us, not the wishes of powerful individuals"[447]. Indeed, the system upon which international investment is governed is concerned with alternative forms of legal control. Starting from a prevalent number of hard-law promulgations stretching to multiple soft-law promulgations in the form voluntary guidelines, such as the ILOs *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy* (MNE Declaration)[448]. Therefore, it could be stated that the regulation of international investment and FDI is generated through numerous dedicated legal measures and the current regulatory environment that surrounds the field would agree with such an assertion[449].

Alongside this important awareness and with an equal amount of generality, there is at play a continual and rather unique balance between the protectionist and free market economic policies. It has already been demonstrated the delicate balance between the two contrasting economic policies, which can be especially seen in USMCA. Although this

[444] *Fedax v. Venezuela*: *ibid* 43.
[445] *Fedax v/ Venezuela*: *ibid* 43.
[446] R. Dolzer and C. Schreuer: [n 190] 66-78; *Salini v. Morocco*: [n 245]; *Malaysian Historical Salvors v. Malaysia*: [n 246]; *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S v. Islamic Republic of Pakistan* (ICSID Case No. ARB/03/29) Decision on Jurisdiction, 14 November 2005; *Jan de Nul N.V. Dredging International N.V. v. Arab Republic of Egypt* (ICSID Case No. ARB/04/13) Decision on Jurisdiction, 16 June 2006.
[447] Margaret Jane Radin, 'Reconsidering the Rule of Law' (1989) *Boston University Law Review*, Vol. 69, No. 4, 781.
[448] International Labor Organization, *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy* (MNE Declaration) (2017), found at < https://www.ilo.org/empent/areas/mne-declaration/lang--en/index.htm > accessed November 2019.
[449] Velimir Zivkovic, 'Pursuing and Reimagining the International Rule of Law Through International Investment Law' (2019) *Hague Journal on the Rule of Law*, Vol. 11, 1-27; Noora Arajarvi, 'The Rule of Law in the 2030 Agenda' (2018) *Hague Journal on the Rule of Law*, Vol. 10, Issue 1, 187-217.

Agreement does encourage "freer … markets"[450] which directly corresponds with traditional free market economics, however a degree of protectionism is constantly present when it is considered that this 'freedom' is curtailed as there are few States involved. If for example, the USMCA was not a purely regional agreement but a more multilateral style agreement with a much higher number of states participating, then a less protectionist and a much higher free market approach would be seen. The degree of protectionism is demonstrated in the degree of free market economics only afforded to a very limited group of states with the preferred utilization of regional, sectoral or bilateral treaties.

There are also many other general principles that are revealed within the provisions the sources of law the regulation of FDI relies. Bering, Braun *et al* forward the much-related principles of "transparency"[451], "stability, predictability, consistency"[452] and "administrative due process and denial of justice"[453] are present within the enactment of the regulatory governance. Understandably, the reasoning for the positive incorporation of these characteristics has direct relation to the historical evolution and nature of international investment itself. Therefore, a pronounced degree of certainty could be attributed to the functioning of this field of law in that the dictation of expected behavior is provided and predictable considering this availability.

In light of this recognition, it is unsurprising that another characteristic is that of the feature of reasonableness. This feature can be found in the provisions of the investment treaties and in the general behavior provided to foreign investments. International investment can be summarized as the preservation of a relationship with many benefits and duties on behalf of each state involved, therefore the presence of this particular guiding principle is somewhat expected for the maintenance of this relationship. Reasonableness can, for example, "be used to control the extent to which interferences of host states with foreign investments are permitted"[454] and to the recourse to judicial

[450] USMCA: [n 144] Preamble.
[451] Jurgen Bering, Tillmann Rudolf Braun, Ralph Alexander Lorz, Stephan Schill, Christian J. Tams and Christian Tietje, 'General Public International Law and International Investment Law – A Research Sketch on Selected Issues' (March 2011) ILA German Branch/ Working Group, found at < http://telc.jura.uni-halle.de/sites/default/files/BeitraegeTWR/Heft%20105.pdf > accessed November 2019, 26 -27.
[452] J. Bering *et al*: *ibid* 20 – 21.
[453] J. Bering *et al*: *ibid* 24 – 26.
[454] J. Bering *et al*: *ibid* 27.

intervention which is present in all modern BITs. Additionally, the feature of reasonableness can also heavily relate to the "protection of confidence and legitimate expectations"[455] of the investor. Cases such as *Pope & Talbot v. Canada*[456] and *MTD v Chile*[457] do highlight the presence of this characteristic within the regulatory sphere.

Related to this feature of reasonableness, the motivations of the relevant parties involved have been identified as an attributed characteristic of international investment regulation[458]. Indeed, when forming international investment treaties, the motivations of the parties are translated into the final agreements negotiated. In fact, this statement could be true of any international agreement, such as the 2017 Revised African Convention on the Conservation of Nature and Natural Resources[459] in regard to environmental protection within the region. However, this description does highlight the extremely delicate balance the investment agreements do have to make which is in line with their theoretical purpose. Conforming more to and in recognizing Hirsch's particular argument, in the event of breach of investment obligations, tribunals also contemplate the "host state's genuine intention"[460]. Cases in which the tribunals have given attention to these precise motivations include that of *SPP v Egypt*[461] and *International Bank of Washington v OPIC*[462], and together additionally highlights the nature of international investment practice.

In light of the provisions that suggest such characteristics within the international investment regime, an additional characteristic that can be constantly attributed to international investment law is that of, as Bering, Braun *et al* again suggest[463], a level of definitional vagueness within the provisions provided with the agreements. Much

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[455] J. Bering *et al*: *ibid* 22-23.
[456] *Pope & Talbot Inc. v. The Government of Canada* (UNICITRAL) Award on the Merits of Phase 2 of 10 April 2001, paras 123, 125, 128 and 155.
[457] *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile* (ICSID Case No. ARB/01/7) Award, 25 May 2004, para 109.
[458] Moshe Hirsch, 'Interactions Between Investment and Non-Investment Obligations' in Peter Muchlinski, Federico Ortino and Christoph Schreuer (Eds) *The Oxford Handbook of International Investment Law* (2008) 175.
[459] Revised African Convention on the Conservation of Nature and Natural Resources (signed 03/07/2017), found at < https://au.int/en/treaties/african-convention-conservation-nature-and-natural-resources-revised-version > accessed November 2019.
[460] M. Hirsch: [n 458] 175.
[461] *Southern Pacific Properties (Middle East) Limited v Arab Republic of Egypt* (*SPP v. Egypt*) *(ICSID Case No. ARB/84/3)* Award, 20 May 1992, para 154.
[462] *International Bank of Washington v Overseas Private Investment Corporation* (1972) 11 ILM 1216, para 1227.
[463] J. Bering *et al*: [n 451] 14.

relevance is given to the contextual matrix of the time of negotiation and the particulars of the case at hand, i.e., handled in a "case-sensitive way"[464]. These academics do reflect upon the protective standard of fair and equitable treatment[465] and within many international investment agreements there is much imprecision and ambiguity attributed. Although these academics do refer to vagueness in relation to fair and equitable treatment, this vagueness description could equally relate to many other provisions also. The Agreement between Japan and the Oriental Republic of Uruguay for the Liberalization, Promotion and Protection of Investment[466] is exemplary of the ambiguous provision if the 'minimum standard of treatment' is considered and the only detail provided later in this provision states:

> "[F]air and equitable treatment" includes the obligation of the Contracting Party not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process of law"[467].

This amount of detail afforded to the legal regime is not unique to this BIT. An example of the level of vagueness can be found also in the Statement of the European Union and the United States on Shared Principles for International Investment[468].

Despite this lack of certainty and definitional vagueness, it must also be recognized that there is constantly present the principle that there is ultimately an expected transfer of beneficial duties and entitlements provided within the sources of law outlined previously. The negotiated relationship is designed to be beneficial to all states involved in the creation of a positive investment environment and that the relationship therefore is not purely one sided in nature. Unquestionably, the historical development of this legal field is placed fully within the realms of protection, equality and fairness, and these ideals are represented in the regulation. Within BITs, for example, there are many provisions that do highlight these intentions. The most obvious examples are that of the fair and equitable standard of treatment and national treatment clauses that act as a form of "protection due

[464] J. Bering *et al*: *ibid* 16.
[465] J. Bering *et al*: *ibid* 14 - 18.
[466] Agreement Between Japan and the Oriental Republic of Uruguay for the Liberalization, Promotion and Protection of Investment (Japan – Uruguay BIT) (signed 26/01/2015, entered into force 14/04/2017).
[467] Japan – Uruguay BIT: *ibid* Article 5.
[468] US State Department Website, 'Statement of the European Union and the United States on Shared Principles for International Investment' (2012), found at < https://2009-2017.state.gov/p/eur/rls/or/2012/187618.htm > accessed November 2019.

to foreign direct investment by host countries"[469]. These provisions require both action on behalf of the states to uphold a degree of protection as well as the expectation that the receiving of benefits will occur from hosting such foreign investments.

However, in this regard and alongside the lack of uniformity in the "quality or coherence"[470] and definitional vagueness of the provisions employed by the FDI regime, it has equally been observed within treaties the characteristic that "[i]nternational investment law is highly asymmetric in its basic normative structure"[471]. The term 'asymmetry' in this context refers to the imbalance of duty of protection within regulations adopted by the FDI regime between the investor or foreign investment and host state. Garcia, Ciko, Gaurav and Hough stated that creation of BITs should have rebalanced previous protection imbalance (i.e., host state power over investors), however now much more protection is given to the investors to the detriment of host states[472]. In other words, "empowering investors to effectively override legitimate state concerns and resulting in a second asymmetry favoring investors over host states"[473]. Arcuri similarly accepts that "[u]nder the regime of investment treaties, investors are granted rights to challenge governments, whereas the State has no right to lodge complaints against investors: states have defensive rights only and, in rare occasions, can resort to counterclaims"[474]. In treaties, this characteristic is predominantly seen in the obligations of the host state in relation to the protections afforded to the investor or foreign investment.

The Agreement between the Government of the Republic of Kazakhstan and the Government of the United Arab Emirates on Promotion and Reciprocal Protection of Investments[475] is considered exemplary of this nature alongside many others[476] of the

[469] OECD, 'Fair and Equitable Treatment Standard in International Investment Law' (2004) OECD Working Papers on International Investment 2004/03 (OECD Publishing), found at < http://dx.doi.org/10.1787/675702255435 > accessed November 2019, 2.
[470] F. J. Garcia *et al*: [n 163] 861-862.
[471] F. J. Garcia *et al*: *ibid* 861-862.
[472] F. J. Garcia *et al*: *ibid* 869-870.
[473] F. J. Garcia *et al*: *ibid* 870.
[474] Alessandra Arcuri, 'The Great Asymmetry and The Rule of Law in International Investment Arbitration' in Lisa Sachs, Lise Johnson and Jesse Coleman (Eds) *Yearbook on International Investment Law and Policy* (2019) 6.
[475] Agreement Between the Government of the Republic of Kazakhstan and the Government of the United Arab Emirates on Promotion and Reciprocal Protection of Investments (Kazakhstan – United Arab Emirates BIT) (signed 24/03/2018).
[476] Please see, for example: Agreement Between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Qatar for the Promotion and Reciprocal Protection of

obligations placed on the host state that far exceed those directed to the investor. Article 2(1) provides:

> "In accordance with its national legislation each Contracting Party shall promote and create favorable conditions in its territory for investments of investors of the other Contracting Party for attaining its development goals"[477].

Together with this rather direct requirement are the host states obligations of full protection and security[478], national treatment and the most-favored-nation treatment[479], compensation for damage and losses[480], nationalization and expropriation[481]. Observably therefore, the majority of the obligations within this Treaty do heavily rest upon the host state. If the purpose of BITs is briefly considered, to reinforce the level of protection provided and to maintain a baseline level of treatment afforded to international investors[482], then in the creation of a favorable investment environment, the reasoning behind the extent of obligations is apparent.

Importantly, this asymmetry creates a more potentially profound characteristic than just a simple observance of an imbalance of duty. The asymmetry essentially allows for much of the duty of protection to be granted upon host states and not the investor or investment. With this particularly favorable view from the perspective of the investor in the host state, the investment receives a higher degree of protection from the host state than the host state receives from the investor, whilst this does not mean that the host state receives no protection from the investor or investment at all. For example, the Agreement between the Government of The Republic of Korea and the Government of The Republic of Cameroon for the Promotion and Protection of Investments[483] provides not only the common asymmetric standards of protection. There are also provisions pertaining to

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Investments (signed 14/11/2017); Agreement Between Japan and the Kingdom of Saudi Arabia for the Promotion and Protection of Investment (signed 30/04/2013, entered into force 07/04/2017).

[477] Kazakhstan – United Arab Emirates BIT: [n 475] Article 2(1).

[478] Kazakhstan – United Arab Emirates BIT: *ibid* Article 3.

[479] Kazakhstan – United Arab Emirates BIT: *ibid* Article 4.

[480] Kazakhstan – United Arab Emirates BIT: *ibid* Article 5.

[481] Kazakhstan – United Arab Emirates BIT: *ibid* Article 6.

[482] Nartnirun Junngam, 'The Full Protection and Security Standard in International Investment Law: What and Who Is Investment Fully? Protected and Secured From?' (2018) *American University Business Law Review*, Vol. 7, No. 1, 20-21.

[483] Agreement Between the Government of the Republic of Korea and the Government of the Republic of Cameroon for the Promotion and Protection of Investments (Korea – Cameroon BIT) (signed 24/12/2013, entered into force 13/04/2018).

transparency[484], which states "[n]othing in this Agreement shall prevent one Contracting Party from requiring an investor of the other Contracting Party, or its investment, to provide routine information concerning that investment solely for informative or statistical purposes"[485]. Additionally, there is a provision concerning security, which forwards:

> "Nothing in this Agreement shall be construed:
>
> (a) to require a Contracting Party to furnish any information, the disclosure of which it considers contrary to its essential security interests;
>
> (b) to prevent a Contracting Party from taking any actions which it considers necessary for the protection of its essential security interests; or
>
> (c) to prevent a Contracting Party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security"[486].

Both highlighted Articles which are obligations placed upon the investor for the protection of the host state and allow the justified interference of the investment by the host state.

Though, for the precise purpose of the direction of this Thesis in relation to the incorporation of the concept of sustainable development, this asymmetry could potentially cause a concerning problem for any action made by the host state taken in the application of sustainable development as there are only limited and strict legal interferences permitted. Fundamentally BITs do not contain provisions or exception for the justified interference by the host state on the grounds of the specific development agenda pronounced by sustainable development, even though some BITs contain the exception that, for example, "nothing in this Agreement shall be construed so as to prevent the former Contracting Party from adopting or enforcing measures … necessary to protect human, animal or plant life or health"[487], and later in the same BIT it is also

[484] Korea – Cameroon BIT: *ibid* Article 8.
[485] Korea – Cameroon BIT: *ibid* Article 8(3).
[486] Korea – Cameroon BIT: *ibid* Article 15.
[487] Agreement Between Japan and Georgia for the Liberalization, Promotion and Protection of Investment (Japan – Georgia BIT) (signed 29/01/2021) Article 15 (1)(a).

given that:

> "Each Contracting Party recognizes that it is inappropriate to encourage investment by investors of the other Contracting Party and of a non-Contracting Party by relaxing its health, safety or environmental measures, or by lowering its labor standards. To this effect, each Contracting Party should not waive or otherwise derogate from such measures or standards as an encouragement for the establishment, acquisition or expansion of investments in its Territory by investors of the other Contracting Party and of a non-Contracting Party"[488].

Neither reference contains a legitimate expectation that would constitute a robust reference to the concept. It is also important to note, especially in the case of the second reference, that the onus of duty is again placed upon the host state in not lowering "health, safety or environmental measures, or … labor standards"[489]. Thereby initially indicating that such an interference with an investment would contravene the terms of this BIT.

Additionally, although BITs do not contain an explicit reference to the acceptable interference of the functioning of the investment by way of the furtherance of the sustainable development agenda and are essentially extremely strict in justification for the host state interference of the investment, the protection standards of fair and equitable treatment and the rules against expropriation found within BITs could generate even more potential difficulty in any action taken on behalf of sustainable development. The protection afforded by both provisions have been outlined previously in this Chapter[490], however for the purposes of this discussion, it must be recognized the high and lack of precise threshold present that must be attained to gain legal interference of the investments that would not constitute a breach of treaty provisions through not breaching these standards of protection.

Muchlinski has stated that "[t]he fair and equitable treatment standard is a cornerstone of the evolving international law on the protection of investors and their investments … [and] a measure for determining the obligations of host countries towards investors and

[488] Japan – Georgia BIT: *ibid* Article 20.
[489] Japan – Georgia BIT: *ibid* Article 20.
[490] Chapter Two, Section Two.

investments"[491], thereby instantly acknowledging that this standard of protection is for the benefit of the investment and the duty of care is placed upon the host state. In application, it has been argued that "in its substance closely related to the more specific standards of an indirect expropriation, to a violation of the umbrella clause, or to the standard of national treatment"[492] and that "the open-ended language of clauses on fair and equitable treatment gives rise to speculation which assumes that … it will be possible to identify one or more aspects"[493]. With this extensive perspective, Paparinskis has fundamentally forwarded:

> "The textual expression of the BIT clause is not necessarily self-explanatory, either regarding the relationship of treaty and customary law or the perspective and techniques that the interpreter should employ in applying the broadly termed rule in particular disputes"[494].

Alongside this recognition, specifically regarding the incorporation of the sustainable development agenda within states and that which affects foreign investments, "[m]any scholars, states, and non-governmental organizations … fear this effective investment protection regime may intrude on or 'chill' the host state's sovereign right to regulate public interests"[495]. The standard has been observed as causing "chaos in jurisprudence"[496] and that "[t]he arbitral case law discloses the somewhat unsettled correlation between fair and equitable treatment and sustainable development"[497]. However, this does not mean international jurisprudence has prevented the incorporation of the concept when determining the legality of interference with the investment[498].

Zhu has ultimately provided to not be considered a breach of the fair and equitable

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[491] Peter Muchlinski, 'Caveat Investor – The Relevance of the Conduct of the Investor under the Fair and Equitable Treatment Standard' (2006) *International and Comparative Law Quarterly,* Vol. 55, Issue 3, 527.
[492] Rudolf Dolzer, 'Fair and Equitable Treatment: A Key Standard in Investment Treaties' (2005) *The International Lawyer,* Vol. 39, No. 1, 87.
[493] R. Dolzer: *ibid* 87.
[494] Martins Paparinskis, *The International Minimum Standard and Fair and Equitable Treatment* (2013) 3.
[495] Ying Zhu, 'Fair and Equitable Treatment of Foreign Investors in an Era of Sustainable Development' (2018) *Natural Resources Journal,* Vol. 58. No. 2, 319.
[496] Y. Zhu: *ibid* 319.
[497] Roland Klager, *'Fair and Equitable Treatment' in International Investment Law* (2011) 211.
[498] Please see, for example: *Parkerings-Compagniet AS v. Republic of Lithuania* (ICSID Case No. ARB/05/8) Award, 11 September 2007; *Pantechniki S.A. Contractors and Engineers (Greece) v. The Republic of Albania* (ICSID Case No. ARB/07/21) Award, 30 July 2009.

treatment standard of protection with the advancement of the sustainable development agenda, that:

> "[W]ithout specific commitments made by a host state to foreign investor, the host state's environmental regulation does not violate the FET [fair and equitable treatment] standard, as long as the regulation is **reasonable** to achieve a genuine environmental protection objective and is applied **non-discriminately** and with **due process**"[499]. [Emphasis added]

This assertion, which also has previously been somewhat accepted by Klager[500], demonstrates the high threshold level that is required for a justification of the interference of the investment under the standard of protection of the standard. Also, given the uncertain nature of the concept of sustainable development as previously discussed[501], determination of reasonableness would be significantly harder to ascertain.

Equally, the rules against expropriation could be seen to provide a broad level of protection for the investment besides an uncertain threshold required to be determined for a breach of a treaty. Expropriation is the "confiscation by the host-country government"[502] of the foreign investment and can either be of "a direct or formal expropriation … [or] an indirect expropriation"[503]. The crux of the issue rests chiefly upon instances of indirect expropriation and ultimately "the conditions under which a state may expropriate alien property"[504], with the understanding that "[t]he contours of the definition of an indirect expropriation are not precisely drawn"[505]. Kriebaum identifies:

> "Most treaties do not go beyond a broad generic reference to indirect expropriation or measures equivalent or tantamount to expropriation. The reason is the great variety of possible measures, mounting to an indirect or *de facto* taking of foreign owned property, which defies any more specific description"[506].

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[499] Y. Zhu: [n 495] 319.
[500] R. Klager: [n 497].
[501] Chapter Two, Section Three.
[502] J. Martin Wagner, 'International Investment, Expropriation and Environmental Protection' (1999) *Golden Gate University Law Review,* Vol. 29, Issue 3, 465.
[503] R. Dolzer and C. Schreuer: [n 190] 101.
[504] R. Dolzer and C. Schreuer: *ibid* 99.
[505] R. Dolzer and C. Schreuer: *ibid* 101.
[506] Ursula Kriebaum, 'Expropriation' in M. Bungenberg, J. Griebel, S. Hobe, A. Reinisch (Eds) *International Investment Law* (2013) 8.

Together both the provisions of BITs and other international investment treaties in relation to expropriation contain extremely vague provisions which lack in substantive detail[507]. Exemplary is the Agreement between the Government of The Republic of Lithuania and the Government of The Republic of Turkey on the Reciprocal Promotion and Protection of Investments[508].

Therefore, reliance on subsequent international jurisprudence is essential to determine whether expropriation of the investment has occurred. However, primarily due to the broad remit provided by the treaty terms, it is observed by Fortier and Drymer that "case law on expropriation in the international law remain somewhat unsettled"[509] and Perkams has even gone to the extent to state that the doctrine has "remained in the dark"[510]. Considering this, Nikiema has observed that any action taken under the auspice of indirect expropriation "remains a major issue to this day"[511] and as a result:

> "[D]ue to the fact that current international investment treaties offer substantial protection to private foreign investments, the outstanding uncertainty over the definition of indirect expropriation raises concerns over the ability of States that host such investments to retain their regulatory and policy space. There is good reason to believe that a State might decide not to take action in the public interest if it fears that such measures may qualify as indirect expropriation and, as such, require the State to pay substantial compensation"[512].

Although the precise provisions of international investment treaties in relation to expropriation remain somewhat vague in detail, case law has subsequently been applied with inconsistent fact-based approaches to this determination. It has been stated that

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[507] Please see, for example: Agreement Between the Government of the Republic of Singapore and the Government of the Republic of Rwanda on the Promotion and Protection of Investments (signed 14/06/2018) Article 5; ECT: [n 43] Article 13; NAFTA: [n 136] Article 1110.
[508] Agreement Between the Government of the Republic of Lithuania and the Government of the Republic of Turkey on the Reciprocal Promotion and Protection of Investments (signed 28/08/2018) Article 8.
[509] L. Yves Fortier and Stephen L Drymer, 'Indirect Expropriation in the Law of International Investment: I Know It When I See It, or Caveat Investor' (2004) *ISCID Review – Foreign Investment Law Journal*, Vol. 19, Issue 2, 294.
[510] Markus Perkams, 'The Concept of Indirect Expropriation in Comparative Public Law – Searching for Light in the Dark' in Stephan W. Schill (Eds) *International Investment Law and Comparative Public Law* (2010) 108.
[511] Suzy H. Nikiema, 'Best Practices: Indirect Expropriation' (2012) Report of the International Institute for Sustainable Development, 2.
[512] S. H. Nikiema: *ibid* 2.

"[a]pproaches differ and arbitration awards can vary. There is, therefore, a problem of consistency and foreseeability"[513]. It is due to this subsequent uncertain and fragmented interpretation by tribunals of the expropriation clauses within international investment treaties that could be potentially detrimental to the furtherance and application of the sustainable development agenda that would not constitute a breach.

Together with broad and uncertain levels of protection both standards afford to investments and the consequential high degree to which these standards could prevent host state interference, any action taken on behalf of the concept of sustainable development could possibly be deemed to compromise these standards of protection, in turn finding a breach of the FDI regime. Alongside this appreciation, it is essential to recognize the nature of the concept of sustainable development itself. As previously presented within this Chapter[514], the concept is inherently vague and uncertain, subsequently only being identified in the recognition of certain basic principles. With such an inherent indeterminate characterization, the legitimization of any interference with the investor or investor could be extremely difficult to ascertain.

4. Conclusion

As a conclusion, it is hoped that a simultaneous outline of the concept of sustainable development and the field of international investment law, with specific regard to FDI, is gained. Primarily it is shown the translation of sustainable development within the international legal ether. Additionally, it becomes evident of the constant interaction between the environmental, social and economic pillars. In a similar manner, the facilitative mechanisms predominantly utilized by the field of international investment law in the regulation of FDI were identified. To complete this task, consideration of the methodological approaches as outlined previously in Chapter One was made and predominance was given to textual sources of law. The predominant sources of law include that of BITs, multilateral investment agreements and international voluntary guidelines. Also, there was great discussion upon the common provisions contained within the agreements. Therefore, at this stage it must be recognized the difference in

[513] S. H. Nikiema: *ibid* 21.
[514] Chapter Two, Section Three.

approach of the consideration of sources in that sustainable development was examined from the viewpoint of recognition of related theories, rules and principles and international investment law was observed from the perspective of a vestibule for translation.

Secondly, an extensive investigation into the current theories, rules and principles of sustainable development is made. Although there has been much development in the understanding of the concept, a degree of confusion in definitive content remains. However, there is present a constant running thread of similarity, which contains the theories, rules and principles characteristics of anthropocentrism, economics, environmental protection, integration of policies, intra-generational equity and inter-generational equity. A table highlighting these areas show both a degree of cohesion and complexity at the same time. Equally, the theories, rules and principles of international investment law were fully explored, including that of the general effects of international sources of law, fragmentation, definition of investment, the balance between free market and protectionist policies, definitional vagueness of provisions and asymmetry in duties. The first substantive Section which detailed the sources of law utilized by international investment law significantly aided in this determination.

While the importance of this Chapter is shown above, significance is also derived from the position this Chapter maintains within the Thesis as a whole. This Chapter ultimately enables both a broad and essentially effective interpretative ability to determine whether a meaningful translation of the concept has occurred alongside the recognition the precise facilitative mechanisms in which the translation is to be determined. Without such exploration, any later determination of effectiveness would detrimentally ensue. Overall, this Chapter dictates the definitional boundaries attributed to the concept of sustainable development, even though at times these are blurred, and the predominant sources of law in which to consider translation.

Part 2: The importance of Governance Strategies

Chapter 3: The Importance of Governance Strategies and Effect on Practical Outcomes

Emily Charlotte Jameson

1. Introduction

After detailing both the current understanding afforded to the concept of sustainable development and the most prevalent facilitative mechanisms offered by the field of international investment law in the regulation of FDI, it becomes now essential to explore governance. Potůček indicates:

> "Strategic governance can be understood as a dynamic process of the creation and implementation of policy, politics, and administration, that is animated by the endeavor of manifold social and economic groups with different interests, but also by the search for a sustainable development orientation … that could counterbalance these interests in a way that will be compatible with the long-term interests of the whole society – including its future generations"[1].

In line with this assertion, this Chapter aims to critically disseminate the role and importance of governance strategies, so that it can be decided how and to what extent the governance strategy in place can be used to improve the relationship between the concept of sustainable development and international investment law.

[1] Martin Potůček, 'Strategic Governance in Central and Eastern Europe: From Concepts to Reality' in Ľ. Malíková, K. Staroňová and E. Sičáková-Beblavá (Eds) *Quality of Governance in the New European Administrative Area* (2006) 84-85.

2. Exploration of Governance and Governance Strategy

The precise definition of the term ‘governance’ must be surveyed to provide the most basic starting point for discussion. From the outset, it must be appreciated that the term “governance has no definite normative meaning”[2]. However, if a purely linguistic viewpoint is considered, the term “‘governance’ came from the Latin verb ‘gubernare’, or more originally from the Greek word ‘kubernaein’, which means ‘to steer’”[3]. This translation renders initial thoughts of directed development and guided achievement. Moving to a definition found within a legal dictionary, the term ‘governance’ requires “applying policies, proper implementation, and continuous monitoring. Typically done through or by an organization's governing body. Accountability, balance of power, and improving the worth and continuance of the firm are the mechanisms of governing”[4]. Again, thoughts of calculated movement are induced, opposing any attention given to natural determination in favour of premeditated behaviour. It is these thoughts to varying extents that dominate this specific argument.

If specific international facilitative mechanisms are considered, then continuances of these primary thoughts on the term ‘governance’ could be provided. The United Nations Framework Convention on Climate Change (UNFCCC)[5], for example, forwards that “[t]he financial mechanism shall have an equitable and balanced representation of all Parties within a transparent system of governance”[6]. Although there is no certain further definition provided within the UNFCCC as to what is precisely meant by ‘governance’, it could be inferred by the surrounding text of the nature of governance. Within the immediate surrounding text, governance is portrayed to “function under the guidance of and be accountable to the Conference of the Parties”[7], which in turn could induce contextual developments and directed achievement. Adjoining substantive Articles of the UNFCCC induce a similar attitude. Article 3 provides:

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[2] M.P. Ferreira-Snyman and G.M. Ferraira, ‘Global Good Governance and Good Global Governance’ (2006) *South African Yearbook of International Law*, Vol. 32, No. 1, 54.
[3] Law, Politics, and Philosophy, ‘What is Governance?’, found at < https://tamayaosbc.wordpress.com/2014/08/21/what-is-governance/ > accessed December 2019.
[4] Black’s Law Online Dictionary Website, found at < http://thelawdictionary.org/governance/ > accessed December 2019.
[5] United Nations Framework Convention on Climate Change (UNFCCC) (signed 09/05/1992, entered into force 21/03/1994) 1771 UNTS 35.
[6] UNFCCC: *ibid* Article 11(2).
[7] UNFCCC: *ibid* Article 11(1).

> "Modalities to ensure that the funded projects to address climate change are in conformity with the policies, programme priorities and eligibility criteria established by the Conference of the Parties"[8].

The idea of governance within the UNFCCC does reiterate the contemporarily directed nature of such an action. The specific referral to "conformity with the policies, programme priorities and eligibility criteria"[9] simply adds weight to the argument that contextual realities are important and relevant to the nature of governance.

To continue with the United Nations exploration of the meaning of the term 'governance', the United Nations Educational, Scientific and Cultural Organization (UNESCO) have declared that the act of governance includes three important characteristics:

> "- Set and norms, strategic vision and direction and formulate high-level goals and policies;
>
> - Oversee management and organizational performance to ensure that the organization is working in the best interests of the public, and more specifically the stakeholders who are served by the organization's mission;
>
> - Direct and oversee the management to ensure that the organization is achieving the desired outcomes and to ensure that the organization is acting prudently, ethically and legally"[10].

A high degree of parallel is produced when this definition is compared with the United Nations Economic and Social Council (Ecosoc) assertion that governance is:

> "The exercise of economic, political, and administrative authority to manage a country's affairs at all levels. It comprises mechanisms, processes, and

[8] UNFCCC: *ibid* Article 3.
[9] UNFCCC: *ibid* Article 3(a).
[10] International Bureau of Education (UNESCO) Website, found at < http://www.ibe.unesco.org/en/geqaf/technical-notes/concept-governance > accessed December 2019.

institutions through which citizens and groups articulate their interests, exercise their legal rights, meet their obligations, and mediate their differences"[11].

Despite the variance in language employed to portray the definition of the term 'governance', both descriptions do provide an equally imposing representation. Characteristically comparable is the reaffirmed connection to actively directed political policy with a compassionate appreciation for the receivers of the policy. Both definitions also incorporate the recognition of the use of the facilitative mechanisms through which governance is to be achieved.

Academic reaction seems to concur with this notion of the definition of the term 'governance'. Fukuyama pronounces governance "as a government's ability to make and enforce rules, and to deliver services"[12]. Kaufman *et al* equally describe governance as "[t]he traditions and institutions by which authority in a country is exercised"[13]. Although these references refer to state-based governance, the same principles can be applied to governance within the international community. These definitions would therefore also correspond with the UNFCC, UNESCO and Ecosoc explanations.

Considering the similarity in the observances of the general meaning afforded to the term 'governance', attention must now be provided to the theory behind such governance strategy to give more meaning to these definitions. To start with, the term 'governance' must be immediately distinguished from the linguistically similar term 'government'. As Bevir denotes:

> "Governance refers to all processes of governing, whether undertaken by a government, market or network; whether over a family, tribe, corporation or territory; and whether by laws, norms, power or language. **Governance is a broader term than government because it focuses not only on the state and**

[11] United Nations Economic and Social Council (Ecosoc), Committee of Experts on Public Administration, 'Definition of Basic Concepts and Terminologies in Governance and Public Administration' (2006) E/C. 16/2006/4, 3.
[12] Francis Fukuyama, 'What Is Governance?' (2013) CGD Working Paper 314, Washington, DC: Centre for Global Development, 3.
[13] Daniel Kaufman, Aart Kraay and Pablo Zoido-Lbaton, '*Aggregating Governance Indicators*' (October 1999) Policy Research Working Paper 2195, 1.

> **its institutions but also on the creation of rule and order of social practices**"[14].[Emphasis added]

Indeed, in understanding Bevir's[15] attempt to differentiate both terms, governance symbolizes a much larger and ultimately more fluid appreciation of task fulfilment i.e., policy creation and implementation, within and outside the realm of a state's political environment. The Commission on Global Government further demonstrates this fluidity in relation to the term 'governance' and states:

> "[G]overnance is the sum of the many ways individuals and institutions, public and private, manage their common affairs. It is a continuing process through which conflicting or diverse interests may be accommodated and cooperative action may be taken. It includes formal institutions and regimes empowered to enforce compliance, as well as informal arrangements that people and institutions either have agreed to or perceive to be in their interest"[16].

The term 'government' however remains rather stationary, only to pertain to the main characters involved in state-based decisions. Sorensen and Torfing reiterate the differentiated nature of governance:

> "Governance networks contribute to the production of public policy and governance. Political visions, policy ideas, comprehensive plans, informal norms and detailed regulations are often crafted, or at least influenced, through policy processes involving relevant and affected actors from state, market and civil society. The networked policy output is a contingent result of negotiated interaction between a plurality of interdependent, and yet operationally autonomous, actors. The form and character of the policy output depends on the form and character of the horizontal interplay between the network actors"[17].

[14] Mark Bevir, *A Theory of Governance* (2013) 1.
[15] M. Bevir: *ibid* 1.
[16] Commission on Global Governance, 'Our Global Neighborhood: The Report of the Commission on Global Governance' (1995) 2-3.
[17] Eva Sorensen and Jacob Torfing, 'Theoretical Approaches to Governance Network Dynamics' in Eva Sorensen and Jacob Torfing (Eds) *Theories of Democratic Network Governance* (2008) 25.

Governance thus adds a degree of appreciation of how these important characters interact and function.

Therefore, from these descriptions of governance, and now in direct relation to the term 'governance strategy', which in this case depicts the subsequent operational and functioning aspects taken in the consideration of international governance, the principle foundational theory behind the deliverance of a governance strategy that emerges is coalition. Coalition in the sense of positive interaction between the relevant legal characters to produce certain intended policy consequences. An extremely effective diagrammatic representation of the coalition in governance can be demonstrated by Toikka. Toikka presents the essential characters involved within a governance strategy and outlines the exact nature and direction of the linkages.

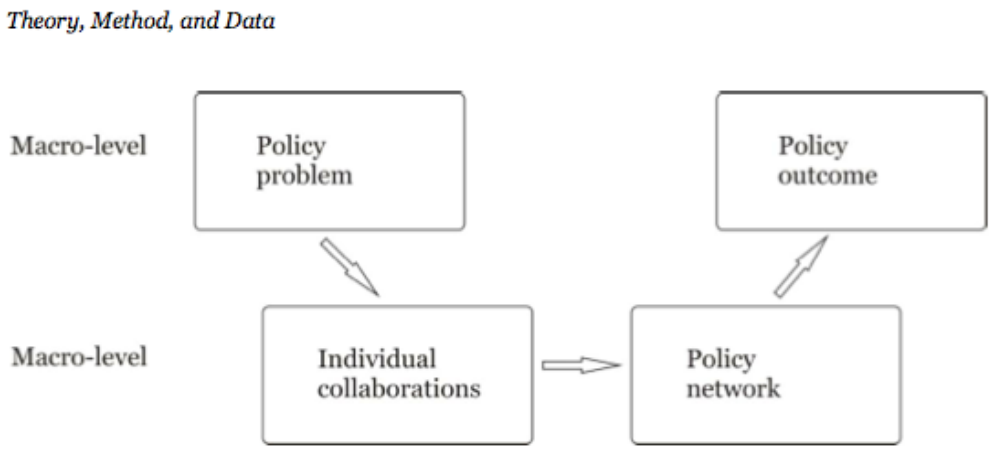

Figure 1: taken from Toikka, *Governance Theory as a Framework for Empirical Research* (2011)[18].

The above diagram establishes a clear and uncomplicated response within the realms of a governance strategy. The diagram recognises at the first stage a 'policy problem'. A policy problem could include for example, the international trade in objects containing

[18] Arho Toikka, '*Governance Theory as a Framework for Empirical Research: A Case Study on Local Environmental Policy-Making in Helsinki, Finland*' (2011) Publications of the Department of Social Research, Social Policy, 22.

parts of threatened species leading to an increase in the hunting of endangered species[19] or the limitation of the effects of climate change[20]. Therefore, referral to the 'policy problem' essentially relates to an issue to be addressed. The second stage, 'individual collaborations', typically denotes the gathering of essential information, for example, that seen in the Fifth Assessment Report generated by the Intergovernmental Panel on Climate Change (IPCC)[21]. The third stage of the coalition, that of 'policy network', sets into motion the required and contextually dependent response. Indeed, different 'policy problems' require different levels of reaction i.e., international policy problems are usually dealt with through international treaties, which are typically of a bilateral, regional or sectoral nature. Again, reference to the regulation of climate change and in particular the delivery of the Glasgow Climate Pact[22] out of the Cop26[23] is exemplary of such a stage[24]. Once decided, stage four of the diagram, 'policy outcome' is brought into play. This final stage refers to the creation of the content of the legal reaction.

In 2013, the Human Development Report Office delivered the *Transforming Global Governance for the 21st Century Report* and stated that there are now "new demands for multilateral institutions and jumpstarting regionalism"[25]. Woods, Betts, Prantl and Sridhar also state that there is a new range of strategic choices available to developing countries, and a new imperative to reform and reinvigorate multilateral and regional organizations"[26]. Overall, these stages outline the theory of coalition and the multiple required interactions of governance and within a governance strategy.

Although coalition with the subsequent required interactions is an extremely pertinent theoretical foundation to the act governance and the successive implementation of a

[19] Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) (signed 03/03/1973, entered into force 01/07/1975) 993 UNTS 243.
[20] United Nations Paris Agreement adopted under the United Nations Framework Convention on Climate Change (2015) (signed 12/12/2015, entered into force 04/11/2016).
[21] IPCC, 2014: Climate Change 2014: Synthesis Report. Contribution of Working Groups I, II and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change [Core Writing Team, R.K. Pachauri and L.A. Meyer (Eds.)]. IPCC, Geneva, Switzerland, 151.
[22] United Nations Climate Change Conference 2021, Glasgow Climate Pact (13/11/2021) UN Decision CP.26.
[23] United Nations Climate Change Conference 2021 (Cop26) (31/10/21 – 12/11/21) Glasgow.
[24] Please see: Mitchell Lennan and Elisa Morgera, 'The Glasgow Climate Conference (COP26)' (2022) *The International Journal of Marine and Coastal Law*, Vol. 37, No. 1, 1-15.
[25] Ngaire Woods, Alexander Betts, Jochen Prantl and Devi Sridhar, '*Transforming Global Governance for the 21st Century*' (2013) United Nations Development Programme, Human Development Report Office, Occasional Paper 2013/09, 1.
[26] N. Woods, A. Betts, J. Prantl and D. Sridhar: *ibid* 1.

beneficial international governance strategy in particular, Stocker broadens this acknowledgment in providing that "[i]ts theoretical roots are various: institutional economics, international relations, organizational studies, development studies, political science, public administration … Its precursors would include work on corporatism, policy communities and a range of economic analysis concerned with the evolution of economic systems"[27]. Indeed, from this assertion, it can be appreciated the wide variety of theories that underlie international governance strategy.

With these broad appreciations in mind, it must be made clear however that essentially there are five predominant theories that underpin a governance strategy, with coalition of action being the first. Another important theoretical foundation is that of organisation or organisational capability. In general terms, without organisation of capability, i.e., the coming together for positive action, coalition of thought will remain just that, a thought not translated into action. To transition a key ideology, for example the concept of sustainable development, there must be the ability to organise multiple international institutional organisations into action that would positively benefit and produce the targeted approach. Referring briefly to the previous debate of the difference between the terms 'governance' and 'government', governance strategy can attract important institutional characters from within and outside the government framework and it is this far-reaching and somewhat extended attraction that produces certain organisational advantages[28].

Another related theory is that of management of task. Put simply, with a multitude of institutional actors addressed and with the furtherance of a particular goal to be achieved, it is important of the recognition of the actual task at hand and the remembrance specifically of the exact detail of the task needed to be achieved. With the interaction of many different actors, the ability to maintain a continuity of thought, for example the implementation of the practical improvement of the treatment of animals within airport facilities, is significant. It could become extremely easy for several institutional

[27] Gerry Stoker, 'Governance as Theory: Five Propositions' (2008) *International Social Science Journal*, Vol. 50, Issue 50, 18.

[28] Although discussion on the influence of Non-Governmental Organisations (NGOs) upon governance is of interest, it remains outside the remit of this Thesis. However, please see: Steve Charnovitz, 'Nongovernmental Organizations and International Law' (2006) *American Journal of International Law*, Vol. 100, No. 2, 348 – 372; Elisa Ricciuti and Francesca Calo, 'NGOs and Governance' in Ali Farazmand (Eds) *Global Encyclopaedia of Public Administration, Public Policy, and Governance* (2018); Fiona McGaughey, *Non-Governmental Organisations and the United Nations Human Rights System* (2021).

organisations to veer off from the task at hand. Straying away from the task in hand can prove fatal for overall implementation as, for example, a treaty may come into force which is an extremely weak version of the originally intended thought as many compromises may be made in line with the 'additional' thoughts entered by way of natural movement. Effectiveness through management of task understandably has an important place within the theory of governance strategy.

Accountability is the fourth foundational theory of governance strategy and is related to that of the theory of management. As with management, the institutional organisations do require a level of accountability. Again, if it is briefly mentioned the meaning of governance, Katsamunska states that "[g]overnance is the institutional capacity of public organisations to provide public and other goods demanded by a country's citizens or the representatives thereof in an effective, transparent, impartial, and accountable manner…"[29]. If this reference is analysed, then it is obvious of the relationship governance has with accountability[30]. Accountability has two important implications. Firstly, this theory recognizes that there is accountability given to institutional organisations of the international community. Secondly, accountability can be found in the institutional workings within the institution itself. Without accountability on these two grounds, the level of governance and more importantly the effectiveness of the policy achieved could be somewhat lacking and even in some circumstances disadvantageous.

Stemming from the theory of accountability is the final foundational theory of good governance, which is of relevance when discussing international governance strategy. Good governance, as described by Ekundayo, is a "theory [which] develops from a set of

[29] Polya Katsamunska, 'The Concept of Governance and Public Governance Theories' (2016) *Economic Alternatives*, Issue 2, 134.
[30] For further understanding on accountability of International Organizations, please see: Alexsandro Eugenio Pereira, Rodrigo Rossi Horochovski, Mariana Mattos de Almeida Cruz and Noeli Rodrigues, 'Accountability in International Organizations: the case of World Bank Inspection Panel (1993 – 2015)' (2017) *Brazilian Political Science Association*, Vol. 11, No. 1, 1 – 28; Kristen E Boon and Frederic Megret, 'New Approaches to the Accountability of International Organizations' (2019) *International Organizations Law Review*, Vol.16, No. 1, 1 – 10; Ved P. Nanda, 'Accountability of International Organizations: Some Observations' (2020) *Denver Journal of International Law & Policy*, Vol. 33, No. 3, 379 – 390.

principles or policies first introduced by the World Bank in relating with and in assisting developing or third world countries"[31] and "is still evolving"[32]. Ekundayo also states that:

> "Good governance theory … is a governance theory that sets some basic principles according to which a good government, *whatever its form*, must be run. Such principles include accountability, control, responsiveness, transparency, public participation, economy, efficiency etc. In sum, the theory of good governance is created to reflect all the principles enunciated above and many more"[33]. *[Emphasis added]*

Keping agrees and similarly induces the comparable characteristics of "legitimacy … transparency … accountability … rule of law … responsiveness … [and] effectiveness"[34]. Thus, the theory fundamentally aids in the establishment of positive governance strategy running techniques. Without a functioning, effective and anti-corrupt governance strategy, governance in any form would be rendered somewhat useless.

3. The Role and Workings of Governance Strategy

As an emanation from the exploration of the term 'governance' and the corresponding theoretical foundations of 'governance strategy', the next discussion is intended to be directed towards the operational aspects of the governance strategy, in turn analyzing the importance and role of a functioning governance strategy alongside the introduction of policy internationally. The recognition of the operational consequences of a governance strategy is pivotal as a successful governance strategy could translate into an advantageous policy translation.

Initially, one of the primary operating consequences of initiating a governance strategy is the identification of a particular issue, which is at the heart of the instigation of the policy. The recognition of a contextual relevance for a change in policy is the initial step in the

[31] Woleola J. Ekundayo, 'Good Governance Theory and the Quest for Good Governance in Nigeria' (May 2017) *International Journal of Humanities and Social Science*, Vol. 7, No. 5, 154.
[32] P. Katsamunska: [n 29] 139.
[33] W. J. Ekundayo: [n 31] 154.
[34] Yu Keping, 'Governance and Good Governance: A New Framework for Political Analysis' (2018) *Fudan Journal of the Humanities and Social Sciences*, Issue 11, 5 - 6.

initiation of a beneficial governance strategy. Without the recognition of a legitimate reasoning behind the instigation of policy, the gaining of widespread support later in the governance strategy operation may become difficult. The recognition of the issue is not only important for the gaining of support, but also significant for the necessary outlining of the specific issue at hand, which can be likened to a streamlining effect, turning descriptive projected aims into certain targeted approaches.

An example from international policy that depicts contextual relevance is that of the Sustainable Development Goals (SDGs)[35]. Goal 3[36], as an example, sets precise numerical targets and includes:

> "By 2030, reduce the global maternal mortality ratio to less than 70 per 100,000 live births …
>
> By 2030, substantially reduce the number of deaths and illnesses from hazardous chemicals and air, water and soil pollution and contamination …"[37].

Although it must be remembered that these SDGs contain a great level of significance for the application of the concept of sustainable development, the legal significance however remains purely influential. The reference highlights the overall target to improve the health and well-being of the international community and the individual specific elements that are required to make this overall target a reality. The numerical accountability is a beneficial aspect as it allows states to work toward outlined goals. This is important as an uncertain or ambiguous subject content could lead to potential disappointment within subsequent declarations or treaties which contain the policy content.

With the realization of specific policy targets required, somewhat related to the underlying governance strategy theories of coalition and management, is the operation of multiple institutions coming together to enable the enactment of a particular policy. The use of the term 'institutions' is rather broad for the purpose of this argumentation as it denotes multiple policy characters working together to enable a specific policy to be deployed. From an organizational viewpoint, to enact a policy many forms of institutional

[35] United Nations General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development* (SDGs) (2015) A/RES/70/1.
[36] SDGs: *ibid* Goal 3.
[37] SDGs: *ibid* Goal 3.

characters could be responsible. Institutional actors range from scientists, non-governmental organizations, government agencies and international organizations. Examples of these international organizations include that of the United Nations, Organization for Economic Co-operation and Development and the International Labor Organization. Consequentially, with governance strategies there are possibilities for many actors to come together and enable the enactment of policy. If Toikka's diagrammatic representation of governance is once again referred[38], it is the "individual collaborations"[39] that aid the policy enablement. A sentiment that is shared by Bressers, O'Toole and Richardson:

> "(N)o organization of government possesses sufficient authority, resources, and knowledge to effect the enactment and achievement of policy intentions. Instead, polices require the concerted efforts of multiple actors, all possessing significant capabilities but each dependent on multiple others to solidify policy intention and convert it into action. Indeed, it is often difficult for any one actor, or group of actors, to manage, or manipulate, the flow of problems and solutions onto the political agenda in the first place"[40].

From the reference provided above, it is made clear of the view that governance and the subsequent governance strategies employed do require a multiple institutional approach if success is to be achieved in policy deployment. An example of the multiple institutional approaches can be made again in relation to the creation of the influentially important SDGs[41]. For these important goals, which do advance the significant characteristics of sustainable development through the 17 goals prescribed, a myriad of interaction between scientific, developmental and governmental organizations occurred. If instead, the SDGs were a unilateral proclamation by the United Nations, then possibly the acknowledgement of the SDGs would not be so high as the contextual relevance may be lacking.

If it is then agreed that one of the important operational features of a functioning governance strategy is the "individual collaborations"[42] of networks that together aid in

[38] A. Toikka: [n 18] 22.
[39] A. Toikka: *ibid* 22.
[40] Hans Bressers, Laurence J. O'Tool, and Jeremy Richardson 'Networks as models of analysis: Water policy in comparative perspective' (1994) *Environmental Politics*, Vol. 3, Issue 4, 4.
[41] SDGs: [n 35].
[42] A. Toikka: [n 18] 22.

the deploying of policy, what must also be subsequently accepted is that these 'collaborations' occur because each collaborator brings forth certain institutional advantages that together aid in the deployment of the policy. Many institutions have individual characteristics that are beneficial. For example, in relation to the regulation of climate change, the incorporation of scientific data provided by the Intergovernmental Panel on Climate Change (IPCC) has become extremely valuable. The IPCC provides awareness of scientific data surrounding climate change. It is stated that "IPCC assessments provide a scientific basis for governments at all levels to develop climate-related policies, and they underlie negotiations at the UN Conference … (the panel) embodies a unique opportunity to provide rigorous and balanced scientific information to decision-makers because of its scientific and intergovernmental nature"[43]. Therefore, it is obvious of the respected part the IPCC plays within the international regulation of Climate Change in the providing of independent scientific data and in turn generating some influence in the generation of climate change policy and regulation.

Another example that derives from the field of international investment law can be provided in regard to the creation of BITs, which have been significantly discussed within Chapter Two[44]. Certain BITs do refer to and essentially represent developmental demands. The Agreement Between the Government of the Republic of Rwanda and the Government of the Republic of Turkey concerning the Reciprocal Promotion and Protection of Investments[45] is characteristic of this recognition. The Preamble states:

> "Agreeing that fair and equitable treatment of investments is desirable in order to maintain a stable framework for investment and will contribute to maximizing effective utilization of economic resources and improve living standards; and

[43] The Intergovernmental Panel on Climate Change (IPPC) Website, 'IPCC Factsheet: What is the IPCC?', found at < https://www.ipcc.ch/site/assets/uploads/2018/02/FS_what_ipcc.pdf > accessed December 2019.
[44] Chapter Two, Section Two.
[45] Agreement Between the Government of the Republic of Rwanda and the Government of the Republic of Turkey concerning the Reciprocal Promotion and Protection of Investments (Rwanda-Turkey BIT) (signed 03/11/2016).

> Convinced that these objectives can be achieved without relaxing health, safety and environmental measures of general application as well as international labor rights"[46].

In line with these precise observations above, if the Republic of Rwanda is momentarily considered, the occurrence of the Rwandan genocide in 1994 halted the development of the State and in fact placed extreme strain upon any progress made. Grun has stated that the Rwandan genocide had "claimed the lives of one million people"[47]. This contextualization could be therefore reflected in the language utilized in the Preamble. The reference to the 'stable framework' to enhance economic development and to the improvement of living standards and international labor rights, which could be extended to incorporate labor standards due to the ambiguity in the phrasing, could be deemed to represent the extent of the developmental crisis Rwanda has found itself in since the Civil War. The representation of the developmental crisis can also be found in the substantive text. Article 5 prescribes that:

> "Nothing in this Agreement shall be construed … to prevent any Contracting Party from taking any action that it considers necessary for the protection of its essential security interests … relating to the traffic in arms, ammunition and implements of war and to such traffic and transactions in other goods, materials, and services and technology undertaken directly or indirectly for the purpose of supplying a military or other security establishment …"[48].

Such action is an exemplary requirement of extensive research networks taken on behalf of each Government involved.

At this point, in terms of operational consequences, it must be realized not only do governance strategies provide strength in determination of policy content, but governance strategies also provide multiple opportunities of methodological options for policy deployment. Through the numerous actors involved, there remains the ability to have choice in the type of regulation chosen. Internationally there are two main categories of regulation, the first being that of hard-law regulation and the second being that of soft-

[46] Rwanda-Turkey BIT: *ibid* Preamble.
[47] Nathalie Grun, 'The Crisis of Global Governance' (2007-2008) *Law and Society Journal at the University of California, Santa Barbara*, Vol. 7, Issue 5, 47.
[48] Rwanda-Turkey BIT: [n 45] Article 5.

law. The two categories differ in approach with hard-law attracting accountability and soft-law generating influence. The subject matter of the policy can determine the type of regulation in force.

Regarding the concept of sustainable development and having consideration of the relatively recent historical significance between the 1970's and 1990's, the inclusion of policy pertaining to sustainable development containing the most contemporary understanding can be found predominantly within international soft-law mechanisms. In 1972, the initiation of the Stockholm Declaration[49] could be considered the first elucidation of the inclusion of the concept into policy on the international level. Principle 11 recognizes that:

> "The environmental policies of all States should enhance and not adversely affect the present or future development potential of developing countries, nor should they hamper the attainment of better living conditions for all …"[50].

Two decades later in 1992, the Rio Declaration[51] again emphasized the importance of sustainable development. Principle 8 and 9 advances:

> "To achieve sustainable development and a higher quality of life for all people, States should reduce and eliminate unsustainable patterns of production and consumption and promote appropriate demographic policies ... States should cooperate to strengthen endogenous capacity-building for sustainable development by improving scientific understanding through exchanges of scientific and technological knowledge, and by enhancing the development, adaptation, diffusion and transfer of technologies, including new and innovative technologies"[52].

Apart from highlighting a progression in the substance afforded to the concept of sustainable development, the somewhat lacking regulation of sustainable development in hard-law mechanisms is present. However, due to the influential nature of the Rio

[49] United Nations, *Declaration of the UN Conference on the Human Environment* (*Stockholm Declaration*) (1972) U.N. Doc. A/Conf.48/14/Rev 1; 11 ILM 1416.
[50] *Stockholm Declaration*: *ibid* Principle 11.
[51] United Nations Conference on Environment and Development, *Rio Declaration on Environment and Development* (*Rio Declaration*) (1992) UN Doc. A/CONF. 151/26 (vol. 1): 31 ILM 874.
[52] *Rio Declaration*: *ibid* Principle 8 and 9.

Declaration, soon after publication, many hard-law mechanisms contained this understanding of sustainable development in various degrees. Though the important point to be made is that a governance strategy can determine the best method of regulation of policy due to the multiplicity of the institutional actors involved. Up to the 1990's, on reflection, a hard-law approach to regulation may have led to disadvantageous results i.e., the lowest common denominator approach or the concept may have been afforded an inappropriate definition altogether. Alternatively, it must also be recognized the ability of soft-law, such as the adoption of the UN General Assembly Resolution 72/277 'Towards a Global Pact for the Environment'[53], to positively clarify and "synthesize … the principles outlined in the Stockholm Declaration … the Rio Declaration … and other instruments to solidify the environmental rule of law around the world"[54]. Seemingly the governance strategy in force can acknowledge the most appropriate form of regulation in terms of context.

Likewise, within international investment law parameters, the first BIT was concluded in 1959 between Germany and Pakistan[55]. At the time, this action could be considered revolutionary in terms of the respective duties and protection of rights afforded to FDI. The timing had significant contextual purpose as this temporal period contained an ever-increasing capacity to engage in such an international economic transaction. Again, highlighted is the ability of a governance strategy to engage with contextual relevance and determine the best course of action. Without a network of institutional actors or access to "individual collaborations"[56], then perhaps there could be a degree of rigidness in application of regulation of policy and this could potentially produce detrimental effects upon the policy itself.

The previous examples demonstrate the generation of active legal regulation, in the form soft and hard sources of law through the implementation of both international declarations and treaties. However, another operational aspect of a governance strategy may include the continuation of regulation or self-governing strategies, i.e., once a treaty is in force,

[53] United Nations General Assembly, Resolution adopted by the General Assembly (10 May 2018) A/RES/72/277.
[54] International Union for the Conservation of Nature Website, 'Global Pact for the Environment', found at < https://www.iucn.org/commissions/world-commission-environmental-law/resources/important-documentation/global-pact-environment > accessed February 2021.
[55] Treaty for the Promotion and Protection of Investments, Germany and Pakistan (signed 25/11/1959, entered into force 28/11/1962).
[56] A. Toikka: [n 18] 22.

there are facilitative mechanisms that could assist in the monitoring of the accountability. Many treaties do utilize this important facility that ensures longevity and essentially the fulfillment of the policy. An example can be found in the 1992 Convention on Biological Diversity[57](CBD), which concerns the protection of biodiversity. Within the substantive text, there are two clear signs of compliance mechanisms, that of reporting and dispute resolution. Articles 7 and 27 provide the obligations:

> "Each Contracting Party shall, as far as possible and as appropriate …
>
> a) Identify components of biological diversity important for its conservation and suitable use having regard to the indicative list of categories set down in Annex I;
>
> b) Monitor, through sampling and other techniques, the components of biological diversity identified pursuant to subparagraph (a) above, paying particular attention to those requiring urgent conservation measures and those which offer the greatest potential for sustainable use;
>
> c) Identify processes and categories of activities which have or are likely to have significant adverse impacts on the conservation and sustainable use of biological diversity, and monitor their effects through samplings and other techniques; and
>
> d) Maintain and organize, by any mechanism date, derived from identification and monitoring activities pursuant to subparagraphs (a), (b) and (c) above"[58].

And:

> "1. In the event of a dispute between Contracting Parties concerning the interpretation or application of this Convention, the parties concerned shall seek solution by negotiation.

[57] Convention on Biological Diversity (CBD) (signed 05/06/1992, entered into force 29/12/1993) 1760 UNTS 79; 31 ILM 818.
[58] CBD: *ibid* Article 7.

2. If the parties concerned cannot reach agreement by negotiation, they may jointly seek the good offices of, or request mediation by, a third party.

3. When ratifying, accepting, approving or acceding to this Convention, or at any time thereafter, a State or regional economic integration organization may declare in writing to the Depository that for a dispute not resolved in accordance with paragraph 1 or paragraph 2 above, it accepts one or both of the following means of dispute settlement as compulsory:

(a) Arbitration in accordance with the procedure laid down in Part 1 of Annex II;

(b) Submission of the dispute to the International Court of Justice…"[59].

The compliance mechanisms are written in clear language and ultimately provide redress options. Additionally, under Article 23, the CBD does provide for the creation of the Conference of the Parties (CoPs), which has the duty to "by consensus agree upon and adopt rules of procedure for itself and for any subsidiary body it may establish, as well as financial rules…"[60]. The creation of the CoPs is another form of self-governance strategy that further ensures compliance, contextual relevance and long-term policy implementation. Under the CBD, the CoPs, for example, in 1995[61] determined that the national reports should be made available at the 1998 CoP 4, in turn strategically determining the direction of the policy. Therefore, once again highlighting the functionality of beneficial governance strategies.

The Stockholm Convention on Persistent Organic Pollutants (Stockholm Convention)[62] entered into force in 2004 and employs similar techniques of compliance, including that of the CoPs. The intention is clear, "to protect human health and the environment from

[59] CBD: *ibid* Article 27.
[60] CBD: *ibid* Article 23.
[61] Conference of the Parties to the Convention on Biological Diversity, Second Meeting, *Report of the Second Meeting of the Conference of the Parties to the Convention on Biological Diversity* (30 November 1995) UNEP/CBD/COP/2/19.
[62] Stockholm Convention on Persistent Organic Pollutants (Stockholm Convention) (signed 22/05/2001, entered into force 17/05/2004) 2256 UNTS 119; 40 ILM 532.

chemicals that remain intact in the environment for long periods … and have harmful impacts on human health or on the environment"[63]. In terms of reviewing techniques, Article 7(1) provides:

> "1. Each Party shall:
>
> (a) Develop and endeavor to implement a plan for the implementation of its obligations under this Convention;
>
> (b) Transmit its implementation plan to the Conference of the Parties within two years of the date on which this Convention enters into force for it; and
>
> (c) Review and update, as appropriate, its implementation plans on a periodic basis and in a manner to be specified by a decision of the Conference of the Parties"[64].

In the context of reporting, the Stockholm Convention Article 15 provides:

> "1. Each Party shall report to the Conference of the Parties on the measures it has taken to implement the provisions of this Convention and on the effectiveness of such measures in meeting the objectives of the Convention.
>
> 2. Each Party shall provide to the Secretariat:
>
> (a) Statistical data on its total quantities of production, import and export of each of the chemicals listed in Annex A and Annex B or a reasonable estimate of such data; and

[63] Stockholm Convention website, found at < http://chm.pops.int/TheConvention/Overview/tabid/3351/Default.aspx > accessed December 2019.
[64] Stockholm Convention: [n 62] Article 7 (1).

(b) To the extent practicable, a list of States from which it has imported each such substance and the States to which it has exported each such substance …"[65].

Again, highlighting the ability of international environmental treaties to self-govern and to perpetuate the original objectives. The CoPs are a useful manifestation of the governance strategy as they afford treaties periodic reviews, in turn allowing for contextual change and therefore modification considering any unforeseen change after entering into force.

The occurrence of a form of compliance mechanism in relation to investment regulation under the auspice of international investment law can furthermore be found. The preference to utilize investor-state arbitration is a somewhat unique feature, with Ding stating "investor-state arbitration is a novel invention by international investment law, because it gives individuals standing to bring claims against a sovereign nation"[66]. To oversee such arbitration, treaties have been created to establish this procedure. One of the primary compliance regimes can be found in ICSID[67], which has been outlined previously[68]. Under this regime, arbitration can only occur between two parties that are signatories of ICSID and it must be recognized that "the ICSID Convention creates a self-contained investor-arbitration system, in which any disputes about awards must go back to the ICSID and cannot be challenged in a national court"[69]. Fundamentally however, it is a correct observance that this is a method in which the governance of the original treaty is continued.

The final operational aspect linked to the governance strategy is the pressing realization of the appropriate levels of governance mechanisms required. In the same way in which the subject content of a particular policy may require alternative forms of regulation to be used due to the contextual requirements, as seen with sustainable development, the policy issue may alternatively attract certain levels of facilitative mechanisms. Put simply, if the

[65] Stockholm Convention: *ibid* Article 15.
[66] Jieying Ding, 'Enforcement in International Investment and Trade law: History, Assessment, and Proposed Solutions' (Spring 2016) *Georgetown Journal of International Law*, Vol. 47, Issue 3, 1142.
[67] Convention on the Settlement of Investment Dispute Between States and Nationals of Other States (ICSID) (1965) 17 UST 1270, TIAS 6090, 575 UNTS 159.
[68] Chapter Two, Section Two.
[69] J. Ding: [n 66] 1143.

policy is intended for international implementation, then the use of a governance strategy that maintains accountability solely on the national level would be inappropriate.

4. General Failings in Current Governance Strategy

The most obvious way in which the governance strategy employed by international investment law can create an extremely negative effect upon the translation of sustainable development is through a complete, and potentially deliberate, lack of presence within the wording of relevant investment treaty texts. The complete lack of inclusion within the text could lead to the perception that the concept is not imperative to the regulation of the investment agenda. Examples of international investment treaties that do not contain regulatory language pertaining to the concept include many BITs[70]. The Treaty Between the Government of the United States of America and the Government of the Republic of Estonia for the Encouragement and Reciprocal Protection of Investment[71] makes no reference to the concept either directly or indirectly. Likewise, the recent Investment Agreement of the Mainland and Hong Kong Closer Economic Partnership Arrangement (CEPA)[72] does not make any specific reference within the text to the concept or even from the perspective of all three of the individual pillars, although there is a degree of acknowledgement of environmental protection[73]. Environmental protection is one of the foundational pillars to sustainable development.

[70] Examples include: Singapore – Turkey Free Trade Agreement (Singapore – Turkey FTA 2015) (signed 14/11/2015, entered into force 01/10/2017); Agreement Between the Government of the Republic of Rwanda and the Government Kingdom of Morocco on the Reciprocal Promotion and Protection of Investments (Rwanda – Morocco) (signed 19/10/2016); Agreement Between Japan and the Islamic Republic of Iran on Reciprocal Promotion and Protection of Investment (Iran – Japan BIT) (signed 05/02/2016, entered into force 26/04/2017).
[71] Treaty Between the Government of the United States of America and the Government of the Republic of Estonia for the Encouragement and Reciprocal Protection of Investment (Estonia – United States of America BIT) (signed 19/04/1994, entered into force 16/02/1997).
[72] Investment Agreement of the Mainland and Hong Kong Closer Economic Partnership Arrangement (CEPA) (signed 28/06/2017, entered into force 28/06/2017).
[73] CEPA: *ibid* Article 22 and 25.

With direct reference to Gordon, Pohl and Bouchard's *OECD Working Papers on International Investment*[74] and the observations made in light of the statistical analysis undertaken, two important "responses"[75] have been formed. The first postulates:

> "Inclusion of SD/RBC [Sustainable Development/ Responsible Business Conduct] issues has become a dominant treaty practice in recent years. More than three-fourths of recently concluded IIAs [International Investment Agreements] (i.e., between 2008 and 2013) contain language on SD/RBC … and virtually all of the investment treaties concluded in 2012 and 2013 include such language. Forty-seven of the fifty-four countries covered by the survey have included some form of SD/RBC language in at least one of their treaties"[76].

And the second provides:

> "Older treaties without any SD/RBC language continue to dominate the treaty sample. Only 12% of the entire stock of IIAs contain language on these matters. The issue most often addressed being environmental protection (10%), followed by Labor standards (5.5%), anti-corruption (1.5%) and human rights (0.5%)"[77].

Although the first 'response' to the data collected does seem positive in terms of increased presence of the reference to sustainable development and/or responsible business conduct, a second glance at the phrasing utilized does cast significant doubt in relation to the extent of presence. When it is considered that the sample size of the statistics only included the "results of 2017 investment treaties"[78], the steady dilution of the positivity is commenced. Then, the reference to only three-quarters "of recently concluded IIAs" contain reference to SD/RBC and the further reference to only "forty-seven of the fifty-four countries"[79] covered in the statistics contain "some form of SD/RBC language in a least one of their treaties"[80], does generate a rather negative view of the translation of the concept within IIAs. Also, when this insight is added to the statistical information that

[74] K. Gordon, J. Pohl and M. Bouchard, 'Investment Treaty Law, Sustainable Development and Responsible Business Conduct: A Fact Finding Survey' (2014) OECD Working Papers on International Investment, 2014/01.
[75] K. Gordon, J. Pohl and M. Bouchard: *ibid* 5.
[76] K. Gordon, J. Pohl and M. Bouchard: *ibid* 5.
[77] K. Gordon, J. Pohl and M. Bouchard: *ibid* 5.
[78] K. Gordon, J. Pohl and M. Bouchard: *ibid* 5.
[79] K. Gordon, J. Pohl and M. Bouchard: *ibid* 5.
[80] K. Gordon, J. Pohl and M. Bouchard: *ibid* 5.

only 12% of the IIAs contain reference to SD/RBC, then further negative dilution of translation is generated. It is important to recognize however that within the sample taken for the creation of the statistics, there remains IIAs that do not contain any reference to the concept.

From the previous paragraph and the examples made in relation to lack of presence of sustainable development, the current governance strategy employed includes a significant weakness in terms of the translation of the concept and lack thereof, with the quality of the presence being discussed subsequently. The uncertainty in the basic inclusion into treaties is detrimental to the ultimate effectiveness of the translation of sustainable development. Without any form of translation into facilitative mechanisms of this nature, two significant effects upon the concept occur. The first, most notably, removes any accountability to observe any action taken in consideration of the concept of sustainable development. The second removes instantly the ability of sustainable development to become an ever more present concept within facilitative mechanisms, therefore instantly eliminating a major influential opportunity. Ultimately though, the governance strategies capacity to include or refrain from translation is characteristic and it is this which dictates international investment law.

To improve upon and to some extent rectify a complete lack of presence within treaty texts, when there is presence within the regulations, the facilitative mechanisms do indicate a varied approach to the understanding. Due to the nature of international investment whereby the field is regulated by various treaties as opposed to one comprehensive single agreement upon which all elements of international investment law and FDI are governed, it could be argued that there is a fragmented approach to the regulation generated. For example, the often-referenced framework set out in the ICSID[81] only concerns the method to engage in dispute settlement, which has articles pertaining to the constituent Panels[82], Jurisdiction of the Centre[83] and Arbitration[84], and due to these component articles, it is clear of the narrow remit. The regulation of dispute settlement

[81] ICSID: [n 67].
[82] ICSID: *ibid* Articles 12 – 16.
[83] ICSID: *ibid* Articles 25 – 27.
[84] ICSID: *ibid* Articles 36 – 55.

with international investment parameters is only a single mechanical cog within the whole functioning of the international investment regulatory scheme of protections and duties.

The fragmented approach taken in the regulation of international investment is a direct result of the governance strategy employed. In realization however, born out of a regulatory approach that generates numerous international treaties, is the fact that the translation of any concept, including that of sustainable development, has multiple opportunities to be translated within these numerous treaties. In international investment law the concept is included within many agreements, though this representation is not uniform. Different international treaties, even of the same nature, do refer to the concept in varying ways. Andresen reveals, when discussing the rise in adoption of multilateral environmental treaties, that "on the one hand it may be deemed positive that new institutions are created to deal with environmental problems as more political energy is added; on the other, this may create problems through duplication of work and problems of co-ordination"[85]. Although Andresen[86] is discussing the proliferation of treaty making regarding international environmental law, the same application of thought can be applied to that of international investment law due to international investment regulation being equally fragmented and created in response to contextual issues. For example, the creation of ICSID[87] came into fruition as investor-state disputes were increasing in number. It is Andresen's comment of "problems of co-ordination" that is the most relevant for this debate.

Indeed, the 'co-ordination' of the representation of the concept of sustainable development could be described as extremely poor within international investment parameters. It has already been shown above how not all international regulatory legislation contains any reference to sustainable development. Even when there is translation of the concept, the approach can be varied. There are many examples of this fragmented occurrence. The North American Free Trade Agreement (NAFTA)[88] in the Preamble states ambitions to:

[85] Steinar Andresen, 'Global Environmental Governance: UN Fragmentation and Co-ordination' (2001) *Yearbook of International Co-Operation on Environment and Development*, 2001/02, 19.
[86] S. Andresen: *ibid* 19.
[87] ICSID: [n 67].
[88] North American Free Trade Agreement (NAFTA) (1993) 32 ILM 289, 605.

> "Create new employment opportunities and improve working conditions and living standards in their respective territories … undertake each of the preceding in a manner consistent with environmental protection and conservation … preserve their flexibility to safeguard the public welfare … strengthen the development and enforcement of environmental laws and regulations … and … protect, enhance and enforce basic workers' rights"[89].

The degree of reference to the concept could be described as rather robust, with each of the three foundational pillars of sustainable development being present in the reference. Additionally, it is also given within NAFTA, that one of the core guiding principles of the agreement is that of the promotion of "sustainable development"[90]. When it is considered that NAFTA came into force in 1994, the vision of sustainable development continues to, it could be argued, stand in line with the understanding of the concept as portrayed in the SDGs[91], which were not presented to the international forum until 2015. Although for now, presence of reference as opposed to accountability is at the forethought of concentration.

However, not all treaties approach sustainable development in such a noticeable manner. The Agreement for the Promotion and Reciprocal Protection of Investments between Canada and the Republic of Guinea in the Preamble provides simply for "the promotion of sustainable development"[92]. Within the substantive text, there is reference to "environmental measures"[93] and to "corporate social responsibility"[94], which do indirectly provide a silent nod to the concept. The weakness in presence and ultimately translation can be particularly seen if compared with the presence of sustainable development within NAFTA[95]. Therefore, the disparity in the presentation of the reference shown highlights an obvious incidence related to the governance strategy utilised.

[89] NAFTA: *ibid* Preamble.
[90] NAFTA: *ibid* Preamble.
[91] SDGs: [n 35].
[92] Agreement for the Promotion and Reciprocal Protection of Investments Between Canada and the Republic of Guinea (Canada - Guinea BIT) (signed 27/05/2015) Preamble.
[93] Canada - Guinea BIT: *ibid* Article 15.
[94] Canada - Guinea BIT: *ibid* Article 16.
[95] NAFTA: [n 88].

Reasoning behind such an occurrence can be found in the nature of international law generally. When dealing with international investment law, the characteristics of such a law must be appreciated. Biermann states that "[g]lobal governance is a political response to economic, cultural, social and ecological globalization. It is not initiated and developed by some centralized decision-making body, but by an amalgam of centres of authority at various levels"[96]. Biermann is indicating the fragmented nature of the international governance regime, i.e., the multi-facetted approach to agreement making. The conducting of agreements on "various levels"[97] brings forth the ability to independently create agreements, that ultimately have no authority to require co-ordination upon the translation of the concept of sustainable development, and the ability to be influenced by the interests of the relevant states involved in the treaty making. When added together, these elements do make for an uncoordinated response within the governance strategy employed.

With this realisation kept in mind, it must also be remembered that certainty in the understanding of a concept is integral to the functioning of the translation within a governance strategy. Section Three[98] outlined the necessity of understanding the exact nature of that what is to be the focus of the regulation. Without certainty of understanding from the outset, then a great degree of uncertainty will be found in the translation within regulatory facilitative mechanisms. It could be argued that the concept of sustainable development was too broad and ambiguous in the early periods to have understanding or, as after the SDGs, to specific in goals wanting to be achieved.

To move away from the generalisation of the concept, "the exact meaning of sustainable development remains unclear"[99], especially resounding before the production of both the

[96] Frank Biermann, 'Global Environmental Governance: Conceptualization and Examples' (2004) Global Governance Working Paper No 12, The Global Governance Project, 12.
[97] F. Biermann: *ibid* 12.
[98] Chapter Three, Section Three.
[99] Andrea Ross, 'Modern Interpretations of Sustainable Development' (2009) *Journal of Law and Society*, Vol. 36, Issue 1, 34; Stuart Moir and Kate Carter, 'Diagrammatic Representations of Sustainability – A Review and Synthesis' in S. D. Smith (Eds) *Proceedings 28th Annual ARCOM Conference*, (3-5 September 2012); Joyce Fortune and John Hughes, 'Modern Academic Myths' in F.A. Stowell, R.L. Ison, R. Armson, J. Holloway, S. Jackson and S. McRobb (Eds) *Systems for Sustainability: People, Organizations and Environment* (London: Springer, 1997); M. Wackernagel and W. Rees, *Our Ecological Footprint: Reducing Human Impact on the Earth* (New Society Publishers, 1996); Wilfred Beckerman, 'Sustainable Development: Is it a Useful Concept?' (1994) *Environmental Values*, Vol. 3, No. 3, 191-209.

Millennium Development Goals (MDGs)[100] and SDGs, in terms of specificity. Theoretically at first sight, the implementation of higher environmental standards could bring forth greater social and economic development, increased social development could bring forth greater economic and environmental development and improved economic development could bring forth greater environmental and social development, is rather simple. Governance strategy however requires more specific regulatory observances. An example of a more specific regulatory observance is the combating of international human trafficking. The aim is simple, to prevent humans from being trafficked and the target is clear, to create a total prevention of this illegal act through eradicating factors of this behaviour. With the then contextual understanding of sustainable development, the simple outlining of a single aim and a target was to a great extent unavailable. Therefore, one could argue that until the deliverance of the MDGs and SDGs, the aims and targets together form a blurred picture. Instead, the concept affords a situation of idealness.

Although the clarity of the translation of the concept could be improved as the MDGs and SDGs[101] have started to equate specific aims with the achievement of sustainable development through the outlining of unambiguous goals, Abbott and Snidal comment, "many international issues are new and complex. The underlying problems may not be well understood, so States cannot anticipate all possible consequences of a legalized arrangement"[102]. Indeed, if uncertainty continues to be found in the concept, then translation will be carried out in a detrimental and uncoordinated manner. Likewise, as stated by Abbott and Snidal[103], if new and related aims are arising, states cannot retrospectively react to these. When writing treaties, states cannot predict all eventualities.

A somewhat related feature, in terms of the ability of the facilitative mechanisms to include various translations of the concept, is that the governance strategy employed does allow for states, who generate these treaties, to determine the extent and choice of translation. International law, including that pertaining to the regulation of investment, is generated based on agreement and compromise between different states. Due to the recognised principle of state sovereignty, states can determine through negotiation of the

[100] United Nations General Assembly, *United Nations Millennium Declaration* (MDGs), *Resolution Adopted by the General Assembly* (2000) A/RES/55/2.
[101] SDGs: [n 35].
[102] Kenneth W. Abbott and Duncan Snidal, 'Hard and Soft Law in International Governance' (Summer 2000) *International Organization*, Vol. 54, No. 3, 442.
[103] K. W. Abbott and D. Snidal: *ibid* 442.

treaty the extent to which this sovereignty is weakened through international law in the terms enforced. One noticeable feature of the international governance strategy is that there is no overarching international government that dictates what must be included in the terms of the treaty. Therefore, there is no international legal rule that stipulates that sustainable development must be included in every treaty made in relation to international investment and likewise there is equally no condition regarding the content of the inclusion of the concept. This choice of inclusion could be a detrimental feature of the governance strategy employed. The reliance upon the inclusion is made considering the interests of the relevant states, the political will within and between the states, and upon the influential ability of other facilitative mechanisms. The United States of America's withdrawal from the Paris Agreement of the United Nations Framework Convention on Climate Change (UNFCCC)[104] is an outcome of this feature of governance strategy.

As previously identified, due to the unique nature of international law, states have the ability through negotiation to determine the exact content and scope of the translation of the concept of sustainable development. Part of the determination of extent of translation can be not only found in the content, but also in the precise location within the treaty the concept is detailed. Governance strategy affords this power to states, which could additionally provide a detrimental weakness upon the translation of the concept. Again, there is no overarching international legal requirement that dictates that all references to the concept of sustainable development should be found in the substantive texts, where accountability is created, and not in the preambular provisions only. The aspect of accountability is an important feature of any beneficial regulatory regime as accountability allows actions to be legally considered and reaction to occur if judgement has deemed inappropriate action. Abbott and Snidal suitably analyse the crux of the situation:

> "Accepting a binding legal obligation, especially when it entails delegating authority to a supranational body, is costly to states. The costs involved can range from simple differences in outcome on particular issues, to loss of authority over

[104] Paris Agreement: [n 20]; UNFCCC: [n 5].

decision making in an issue-area, to more fundamental encroachments on state sovereignty"[105].

The ability of states to determine the location of the translation of the concept does encroach upon the beneficial translation as this ability can essentially determine whether the concept has any accountability at all. This operational feature is incredibly important to recognize as the outcome fundamentally determines the level of effectiveness that can be attributed to the concept, leaving aside the content of the reference. Boyle and Freestone assert that there is "no easy answer [that] can be given to the question whether international law now requires that all development should be sustainable"[106].

A similar argument can be made in relation to the governance strategies ability to utilise secondary or soft, as opposed to hard, sources of law. It is stated that "(c)ontemporary international relations are legalized to an impressive extent, yet international legalization displays great variety. A few international institutions and issue areas approach the theoretical ideal of hard legalization, but most international law is "soft" in distinctive ways"[107]. Secondary or soft sources of law include declarations and voluntary guidelines, of which are frequently employed in the governance strategy retained by the field of international investment law. Examples include the OECD Guidelines for Multinational Enterprises[108] and the UN Principles for Responsible Investment[109], which "[d]espite their different scope and focus, both instruments share the common goal of enhancing the positive contribution of the private sector to economic, social and environmental progress with a view to achieving sustainable development"[110].

Considering these examples, Kirton and Trebilcock succinctly highlight the detrimental nature of these sources of law utilised:

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[105] K. W. Abbott and D. Snidal: [n 102] 436.
[106] Alan Boyle and David Freestone, 'Introduction' in Alan Boyle and David Freestone (Eds) *International Law and Sustainable Development: Past Achievements and Future Challenges* (1999) 9.
[107] K. W. Abbott and D. Snidal: [n 102] 422.
[108] Organization for Economic Co-operation and Development, *OECD Guidelines for Multinational Enterprises* (2011) OECD Publishing.
[109] United Nations Global Compact, *UN Principles for Responsible Investment,* found at < https://www.unpri.org/ > accessed December 2019.
[110] OECD Website, 'The UN Principles for Responsible Investment and The OECD Guidelines for Multinational Enterprises: Complementarities and Distinctive Contributions', found at < https://www.oecd.org/investment/mne/38783873.pdf > accessed December 2019, 2.

> "[T]he soft law approach comes with its own challenges. It may lack the legitimacy and strong surveillance and enforcement mechanisms offered by hard law. With a broader array of stakeholders, soft law may promote compromise, or even compromised, standards, less stringent than those delivered by governments acting with their full authority all-alone. And soft law can lead to uncertainty, as competing sets of voluntary standards struggle for dominance, and as actors remain unclear about the costs of compliance, or its absence, and about when governments might intervene to impose a potentially different, mandatory regime"[111].

Therefore highlighting the undermining effect the use of these facilitative mechanisms could have upon the translation of the concept of sustainable development. Not only is the depth of the content potentially full of compromise, i.e., generation of the "lowest common denominator"[112], but the removal of any binding power also simply detracts away from the level of effectiveness afforded to the concept.

Even in the exploitation of legally binding facilitative mechanisms within the governance strategy in which sustainable development can be translated, the translation does not necessarily equate with instant beneficial advantage. The incorporation of the concept within hard-law facilitative mechanisms does not guarantee a translational advantage in terms of accountability. Although there may be reference to sustainable development in hard-law mechanisms, which is a benefit, accountability is valuable but not always ensured. The precise location is required to be examined and from this effectiveness can be determined. In terms of location of reference to the concept of sustainable development, there are many hindrances to the degree of effectiveness induced, with the preamble being the most disadvantageous. VanDuzer, Simons and Mayeda state that "a preamble to an IIA consists of statements at the beginning of the agreement expressing the parties' general intentions and goals in entering into the treaty"[113]. The Free Trade

[111] John J. Kirton and Michael J. Trebilcock, *Hard Choices, Soft Law: Voluntary Standards in Global Trade, Environment and Social Governance* (2004) 6.
[112] Elli Louka, *International Environmental Law: Fairness, Effectiveness and World Order* (2006) 21.
[113] J. Anthony VanDuzer, Penelope Simons and Graham Mayeda, 'Integrating Sustainable Development into International Investment Agreements: A Guide for Developing Countries' (Prepared for the Commonwealth Secretariat, August 2012) 50.

Agreement Between the Government of The People's Republic of China and the Government of Iceland (China – Iceland FTA 2013)[114] acknowledges in the Preamble:

> "Mindful that economic development, social development and environmental protection are interdependent and mutually reinforcing components of sustainable development, and that closer partnership can play an important role in promoting sustainable development"[115].

The reference found in the Preamble does recognize the concept as the inter-linkage between environmental, social and economic development, however there is no further reference to sustainable development within the main body of the treaty.

Location of reference purely in the preamble creates extremely little accountability, instead rather a weak commitment that when the substantive terms are considered, the terms must be contemplated considering the preambular provisions[116]. The World Investment Report (2015) outlines the significance of objectives outlined in the preamble alone, "the preamble is a clause with a cross-cutting impact … it plays a role in interpretating all other IIA obligations and … by identifying and clarifying the treaty objectives in the preamble, contracting parties provide important guidance for tribunals in investment"[117]. All specific legal accountability is removed and therefore actions could ensue that would be detrimental to the furtherance of the concept. Abbott and Snidals view that "[i]nternational actors choose to order their relation through international law"[118] encapsulates a rather deliberate idea that states through negotiation place particular commitments in specific locations within the hard-law proclamations to reach a compromise. Recognition of the interests of all relevant states naturally plays an extremely influential part within the negotiations.

In addition to the effect of the precise location of the concept of sustainable development within the relevant facilitative mechanisms, there must also be present in equal measure

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[114] The Free Trade Agreement Between the Government of the People's Republic of China and the Government of Iceland (China – Iceland FTA) (signed 15/04/2013, entered into force 01/07/2014).
[115] China – Iceland FTA: *ibid* Preamble.
[116] Please see Chapter One, Section Three.
[117] UNCTAD Website, 'Reforming the International Investment Regime: An Action Menu: Chapter IV, World Investment Report 2015: Reforming International Investment Governance', found at < https://unctad.org/en/pages/PublicationWebflyer.aspx?publicationid=1245 > accessed November 2019, 142.
[118] K. W. Abbott and D. Snidal: [n 102] 422.

a sufficient capability for regulatory effectiveness within the mechanisms used, be it in the form of compliance mechanisms or in the ability to create a new agreement altogether. Internal compliance mechanisms should be present to create a continual relationship for the duration of the life of the investment agreement. It is simply ineffective and naive to generate terms and protections within a treaty without some form of compliance mechanism. Borzel and Panke crucially recognize that "effective governance produces policies that solve the problems and satisfy the demands they were designed to cope with (goal attainment; problem-solving capacity)"[119]. One of the major failings of soft-law regulatory mechanisms is the lack of reference to enforcement mechanisms present within the influential facilitative mechanism. Indeed, to remove forms of compliance mechanisms would be extremely detrimental to the life of treaties and ultimately to the application of the concept. Regarding the creation of new international investment treaties in entirety, Sorensen and Torfing state:

> "[M]any people have great expectations that governance networks will facilitate an informed, consensual and legitimate decision making that will lead to responsive, just and tailor-made solutions. Nonetheless, there are good reasons to expect that governance networks will not deliver all this and that they are just as prone to crisis and failure"[120].

Thereby decreasing the justifiable expectation that the governance strategy of international investment law will provide a 'responsive' approach. Within this Section, it has already been shown both the continued lack of reference to sustainable development within investment treaties as well as the impractical pairing of the location of the reference to sustainable development within certain facilitative mechanisms.

Relatedly, a final potential inherent weakness found due to a common operational feature of the governance strategy adopted by international investment law is the availability and ultimately limited choice of facilitative mechanisms that have been utilized within this regulatory field. The most common utilized facilitative mechanism created are that of BITs. As highlighted previously within this Thesis, BITs can reflect contextual

[119] Tanja A. Borzel and Diana Panke, 'Network Governance: Effective and Legitimate' in Eva Sorensen and Jacob Torfing (Eds) *Theories of Democratic Network Governance* (2008) 157.
[120] E. Sorensen and J. Torfing: [n 17] 95.

relevance[121] and are intrinsically a relevant declaration of power between the two states concerned as to the degree of protection afforded. The preferential choice to create BITs over an all-encompassing multilateral treaty, which would perhaps guarantee the rights also, is obvious. The nature and historical development of international investment may go some way to justify the presence of BITs. Importantly however, it is the lack of uniformity that can be created within each individual BITs that causes a level of concern for the reference to and presence of sustainable development.

At present, there are no multilateral treaties that afford such rights and protections that could be deemed comparative to the BITs. There are multilateral treaties that concentrate on specific issues related to the governance, for example, in relation to dispute settlement. The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Arbitration Convention)[122] is exemplary and Article 1 states:

> "This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other that the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought"[123].

Therefore, the scope of the New York Convention is clear, dealing only in the enforcement of arbitral awards. If a multilateral treaty was signed which gave the same rights and protections, then the translation, whether positive or negative for the concept of sustainable development, would be uniform within the group of signatories concerned. Thus, it could be determined that the preferential choice of regulatory facilitative mechanisms within international investment law could be described as self-limiting regarding the application of international concepts, such as sustainable development. The ability for regulations to be continually negotiated on a bilateral level provides an uncertain resting place for the concept, as there is a persistent tendency to weigh national interests against the interests of the international community. Grun adequately outlines

[121] Chapter Three, Section Three.
[122]New York Convention on the Recognition and Enforcement of Foreign arbitral Awards (New York Arbitral Convention) (June 10, 1958) 330 UNTS 3; ICSID: [n 67].
[123] New York Arbitral Convention: *ibid* Article 1.

the issue, "(t)he Westphalian system of governance does not address global problems … the Westphalian system of global governance focuses on issues within nation-states" [124] and Sorensen and Torfing expand the analysis, "the problem is that … governance relies on precarious social and political processes and takes place in an uncontrollable political and economic context"[125].

After exploring the weaknesses that can be attributed to the operation of the governance strategy employed, Poole's assessment upon the effectiveness of "global environmental governance"[126] could be deemed the most appropriate response. The chief weaknesses Poole acknowledges can be divided into the recognition of "treaty creation"[127] and "institutional architecture"[128].

5. Conclusion

This Chapter has achieved an analysis of the role of international governance and the effect upon the field of law governed. Initially, the primary Section explored the theme of governance and the subsequent governance strategy from a theoretical perspective. The next Section outlined the role of a functioning governance strategy. This Section also contained a review on the need to have governance strategies that work well and how this affects practical outcomes. The final Section predominantly observed the principal weaknesses found in the translation of the governance of sustainable development within international investment law and in turn provided a brief indication of the types of regulatory reforms available.

The international governance strategy adopted by international investment law has many profound consequences for the translation of the concept of sustainable development.

[124] N. Grun: [n 47] 48 – 49.
[125] E. Sorensen and J. Torfing: [n 17] 96.
[126] R. E. Poole, 'Global Governance and the Environment: Evaluating the Effectiveness of Global Governance in Tackling Contemporary Environmental Issues' (2012) *Inquiries Journal, Vol. 4, No.* 06, found at < http://www.inquiriesjournal.com/articles/652/global-governance-and-the-environment-evaluating-the-effectiveness-of-global-governance-in-tackling-contemporary-environmental-issues > accessed December 2019.
[127] R. E. Poole: *ibid*.
[128] R. E. Poole: *ibid*.

These consequences will be illuminated further in the next Chapter[129] in relation to the translation of the concept, however it must be fundamentally appreciated the effect of such a governance strategy. Already it has been demonstrated, for example, the plurality in choice of facilitative mechanism and content afforded to the concept, both of which will be magnified in the subsequent Chapter. This level of generality will be only a foundation for the high level of specificity found in the final substantive chapter.

[129] Chapter Four of this Thesis.

Part 3: Proposals for Change

Chapter 4: Governance Strategy Effectiveness and Subsequent Reform

Emily Charlotte Jameson

1. Introduction

Sorensen and Torfing adequately summarize the content of this final substantive Chapter:

> "Clearly, when we talk about governance network failure, we are referring to an inability to provide effective governance through negotiated interaction between a plurality of public and private actors … **effective government is defined as the ability to transform substantial values and majoritarian decisions into standardized policy outputs and problem-solving policy outcomes**"[1]. [Emphasis added]

The 'transformation' or translation of the concept of sustainable development could equate to a 'substantial value' and the regulatory facilitative mechanisms utilized by the field of international investment law could be compared to the 'policy outputs'. The investigation into the degree of effectiveness of translation and the subsequent potential in the translation is at the heart of the argument forwarded within this Chapter. The nature of the Chapter is intended therefore to provide the most direct response to the research question posed. Although the previous Chapters[2] do cumulatively provide the foundational research upon which the research question relies, it is this Chapter that places all these discussions together to produce a definitive response. It must be acknowledged that at this point in the research presentation, substantial research has been undertaken on the current state of the relationship between sustainable development and international investment law from the viewpoint of the legal facilitative mechanisms

[1] Eva Sorensen and Jacob Torfing, 'Theoretical Approaches to Government Network Failure' in Eva Sorensen and Jacob Torfing (Eds) *Theories of Democratic Network Governance* (2008) 97.
[2] Chapter One, Two and Three.

utilized, on the specific inclusivity the concept of sustainable development requires and on the important role of governance strategies.

1.1 The Current Understanding of the Concept of Sustainable Development

At this stage in the deliberations, it is essential to reaffirm the parameters attributed to the current understanding afforded to the concept of sustainable development. Without such a definitive parameter delamination of the concept, then the determination of effectiveness would not be able to occur successfully.

If the most basic meaning of sustainable development is considered that could be translated, then the translation could remain limited to just the acknowledgement of the three foundational pillars attributed to the concept, that of economic, social and environmental development. Thereby instantly determining that the reference to only one or two of these foundational pillars would be insufficient to amount to a significant translation of the understanding. The Stockholm Declaration[3] clearly recognized the inter-linkage between the three foundational pillars of sustainable development. This inter-linkage is also recognized later by the Rio Declaration, in which it is given that "[t]o achieve sustainable development and a higher quality of life for all people, States should reduce and eliminate unsustainable patterns of production and consumption and promote appropriate demographic policies"[4], which does similarly create an interrelation between economic, environmental and social development. However, the Rio Declaration[5] does also forward the profoundly related principles of precaution[6] and "common but differentiated responsibilities"[7]. Although these related principles are greatly important, for the purposes of the content of what could be translated into international investment regulations, realistically these could be considered as somewhat of an 'added bonus' in terms of the content within the investment regulatory mechanisms.

[3] United Nations General Assembly, *Declaration of the UN Conference on the Human Environment* (*Stockholm Declaration*) (1972) U.N. Doc. A/Conf.48/14/Rev 1; 11 ILM 1416, Principle 11.
[4] United Nations Conference on Environment and Development, *Rio Declaration on Environment and Development* (*Rio Declaration*) (1992) UN Doc. A/CONF. 151/26 (vol. 1): 31 ILM 874, Principle 8.
[5] *Rio Declaration*: *ibid.*
[6] *Rio Declaration*: *ibid* Principle 15.
[7] *Rio Declaration*: *ibid* Principle 7.

A stronger, or medium strength, understanding afforded to the concept of sustainable development that could be realistically translated into the facilitative mechanisms utilized by international investment attributes more than just a simple restatement of the three foundational pillars of the concept or even the full referencing of the term 'sustainable development' itself. The denoting of precise goals, as affirmed in the Millennium Development Goals (MDGs)[8] and equally the later and more recent Sustainable Development Goals (SDGs)[9], do certainly represent an enhanced understanding afforded to the understanding of sustainable development. The MDGs do present a more specific and at the same time generalized approach to the concept. The stated goals to "eradicate extreme poverty and hunger"[10], "achieve universal primary education"[11], "promote gender equality and empower women"[12], "reduce child mortality"[13], "improve maternal health"[14], "combat HIV/AIDS, malaria and other diseases"[15], "ensure environmental sustainability"[16] and "global partnership for development"[17] are exemplary of this approach. The MDGs do represent the start of the latest trend, a trend that is no less followed in the later SDGs, in the international conceptualization of the concept of sustainable development. The reference to these goals delves further into what is meant by economic, social and environmental development.

The most recent understanding afforded to the concept of sustainable development in the international arena can be derived from the SDGs of 2015. The United Nations General Assembly Resolution[18] generated goals with subsequent targets to be attained by all States by 2030. Many more goals are found within the SDGs as compared to the MDGs, which could account for the change in view of the understanding of the concept of sustainable development over the 15 years. The increased goals in the SDGs include a specific

[8] United Nations General Assembly, *United Nations Millennium Declaration* (MDGs), *Resolution Adopted by the General Assembly* (2000) A/RES/55/2.
[9] United Nations General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development* (SDGs) (21 October 2015) A/RES/70/1.
[10] MDGs: [n 8] Goal 1.
[11] MDGs: *ibid* Goal 2.
[12] MDGs: *ibid* Goal 3.
[13] MDGs: *ibid* Goal 4.
[14] MDGs: *ibid* Goal 5.
[15] MDGs: *ibid* Goal 6.
[16] MDGs: *ibid* Goal 7.
[17] *Rio Declaration*: [n 4] Goal 8.
[18] SDGs: [n 9].

reference to "quality education"[19], "gender equality"[20], "decent work and economic growth"[21] and "responsible consumption and production"[22].

The strongest, and consequently most detailed, understanding of sustainable development that could be represented in the translation of the concept of sustainable development could derive from the specific and numerical targets attributed by the United Nations within both the MDGs and SDGs. The MDGs provide, for example, "halve between 1990 and 2015, the proportion of people whose income is less than $1.25 a day"[23], "reduce by two thirds between 1990 and 2015 the under-five mortality rate"[24] and "reduce biodiversity loss, achieving by 2010 a significant reduction in the rate of loss"[25]. In equal measure, the SDGs targets denote, for example, "by 2030, reduce the global maternal mortality ratio to less than 70 per 100,000 live births"[26], "by 2030, progressively achieve and sustain income growth of the bottom 40 per cent of the population at a rate higher than the national average"[27] and "by 2020, conserve at least 10 per cent of coastal and marine areas, consistent with national and international law and based on the best available scientific information"[28]. The inherent contextual importance of the targets produced is obvious. Also, a noticeable distinction can be made between the portrayal of sustainable development through the usage of precise targets and that of the weakest portrayal of the concept in the general recognition of only all the three foundational pillars of the concept.

However, regarding what realistically can be expected in the translation of sustainable development within international investment law, a compromise should be expected between the mild and medium strength representations of the concept of sustainable development. The portrayal of the precise targets, as given by the MDGs and SDGs alike, would perhaps be extremely unrealistic. There are four main reasons that could justify

[19] SDGs: *ibid* Goal 4.
[20] SDGs: *ibid* Goal 5.
[21] SDGs: *ibid* Goal 8.
[22] SDGs: *ibid* Goal 12.
[23] MDGs: [n 8] Goal 1, Target 1.A.
[24] MDGs: *ibid* Goal 4, Target 4.A.
[25] MDGs: *ibid* Goal 7, Target 7.B.
[26] SDGs: [n 9] Goal 3, Target 3.1.
[27] SDGs: *ibid* Goal 10, Target 10.1.
[28] SDGs: *ibid* Goal 14, target 14.5.

such an assertion, in turn highlighting again the inherent limitations found within the facilitative mechanisms employed in the regulation of FDI.

Primarily, it must be recognized that the facilitative mechanisms adopted predominantly concern the specific duties and protections afforded to foreign investors and host states in the pursuance of the act of FDI. Therefore, this understanding initially curtails the precise content of the facilitative mechanisms as the content afforded by the targets are sometimes placed outside the remit of these duties and protections. It has been demonstrated previously within this Thesis[29] of the somewhat similar content of provisions found within regional, sectoral and bilateral treaties in terms of the obligations placed upon the host state and foreign investors, for example in relation to fair and equitable treatment, national treatment and dispute settlement. Although these provisions concern different obligations, each is ultimately directed "to create and maintain favorable conditions for investments of investors of one Contracting Party in the territory of the other Contracting Party"[30]. Nevertheless, some aspects of the MDGs and SDGs do inherently align with the creation of such "favorable conditions"[31], to "ensure environmental sustainability"[32], to "eradicate extreme poverty and hunger"[33], to "promote decent work and economic growth"[34] and to "build resilient infrastructure, promote inclusive and sustainable industrialization and foster innovation"[35].

However, many of the precise targets would enlarge the remit of the creation of the "favorable conditions"[36] for investment activities and place increased obligations upon the parties of the Treaties, which because of the negotiation of process, are strictly defined. For example, SDG 14 to "conserve and sustainably use the oceans, seas and marine resources for sustainable development"[37], which is succeeded by the target to "minimize and address the impacts of ocean acidification, including through enhanced

[29] Chapter Two, Section Two.
[30] Agreement Between the Government of the Republic of Belarus and the Government of Hungary for the Promotion and Reciprocal Protection of Investments (Belarus – Hungary BIT) (signed 14/01/2019, entered into force 28/09/2019) Preamble.
[31] Belarus – Hungary BIT: *ibid* Preamble.
[32] MDGs: [n 8] Goal 7.
[33] MDGs: *ibid* Goal 1.
[34] SDGs: [n 9] Goal 8.
[35] SDGs: *ibid* Goal 9.
[36] Belarus - Hungary BIT: [n 30] Preamble.
[37] SDGs: [n 9] Goal 14.

scientific cooperation at all levels"[38]. This target would place additional obligations principally upon the host state and in a system that has been declared as "asymmetric in its basic normative structure"[39] with many obligations being placed upon the host state already, such a target inclusion could be deemed unpopular. Additionally, there are provisions within treaties that allow states to retain sovereignty in certain regulatory areas, such as:

> "The provisions of this Agreement shall not affect the right of the Parties to regulate within their territories through measures necessary to achieve legitimate policy objectives, such as the protection of public health, safety, environment or public morals, social or consumer protection or promotion and protection of cultural diversity"[40].

The inclusion of the provision may justify the lack of reference to specific targets as such a provision may extremely broadly include these actions.

Another inherent limitation forwarded within the facilitative mechanisms utilized in the regulation of FDI is the appreciation that it is only in recent years specific targets have been produced to enlighten the concept of sustainable development and that many of the international investment regulations were signed and entered into force before the generation of these precise targets. Before the year 2000, such precise targets were not affiliated with the concept. In fact, the MDGs did start to change the view afforded to sustainable development, moving away from generalized ideals. It has been recognized that "[t]he Millennium Development Goals are the most broadly supported, comprehensive … targets the world has ever established … they are the fulcrum on which development policy is based"[41]. Many regional, sectoral and bilateral treaties within the investment sphere have been delivered before such targets were introduced. When it is

[38] SDGs: *ibid* Goal 14, Target 14.3.
[39] Frank J. Garcia, Lindita Ciko, Apurv Gaurav and Kirrin Hough, 'Reforming the International Investment Regime: Lessons from International Trade Law' (2015) *Journal of International Economic Law*, Vol. 18, Issue 4, 861-862.
[40] Agreement Between the Government of Hungary and the Government of the Republic of Cabo Verde for the Promotion and Reciprocal Protection of Investments (signed 28/03/2019, entered into force 02/05/2020) Article 3(1).
[41] Jeffrey D. Sachs, UN Millennium Project, *Investing in Development: A Practical Plan to Achieve the Millennium Development Goals, Overview* (United Nations Development Programme, 2005) 2.

also recognized that the first BIT was signed in 1959[42] and that the system upon which regulation is found can be classed a fragmented, i.e., no overall comprehensive multilateral treaty present, the implication of this limitation can be exaggerated.

An additional inherent limitation provided by the facilitative mechanisms concerns the temporal nature of the targets. The targets are extremely specific in terms of timings, i.e., the attainment of the MDGs by 2015 and the attainment of the SDGs by 2030, and the regulations of international investment maintain a rather more continual life span beyond these timescales. Therefore, with a dated target or explicit reference to a dated target, after such date passes, the target within an investment provision may become invalid. Also, with such a specific target and acknowledging the increase in depth of action required between the MDGs and SDGs, then once the date passes and potentially new targets are set, would the targeted provisions be viewed as somewhat irrelevant within the development agenda.

The final inherent limitation within the regulatory regime, which is closely related to the temporal issue, is the lack of continual monitoring or reviewing mechanisms present within the most prevalent facilitative mechanisms employed in the regulation of FDI. For example, BITs do not contain continual monitoring or reviewing mechanisms which could regularly ascertain the extent of the target reaching, instead only opting for the settlement of disputes between one contracting party and investors of the other contracting party and the settlement of disputes between the contracting parties when a standard of protection has been considered breached or the overall procedure for amendment, which together do not constitute a monitoring or reviewing capacity. The BITs do not contain a Conference of the Parties provision or anything similar, like that seen in the Stockholm Convention[43]. Thereby weakening the incorporation of a temporal target inclusion. In this sense, Johnson, Sachs and Lobel assertion "it is not clear that IIAs as currently designed are fit for that purpose"[44] could be deemed appropriate.

[42] Treaty for the Promotion and Protection of Investments, Germany and Pakistan (signed 25/11/1959, entered into force 28/11/1962).
[43] Stockholm Convention on Persistent Organic Pollutants (Stockholm Convention) (signed 22/05/2001, entered into force 17/05/2004) 2256 UNTS 119; 40 ILM 532, Article 7.
[44] Lise Johnson, Lisa Sachs and Nathan Lobel, 'Aligning International Investment Agreements with the Sustainable Development Goals' (2019-2020) *Columbia Journal of Transnational Law*, Vol. 58, Issue 1, 58.

Considering again the recognition of the expected content of the translation, it must be understood that the inherent vagueness of the legal norm attributed to sustainable development dictates a rather unique two stage approach to interpretation. In line with the methodology adopted, which is has been determined within Chapter One[45], primarily concentration must rest upon the recognition of the three foundational pillars of the concept of sustainable development, be it of environmental, social, or economic direction. Direct reference to the term 'sustainable development' would suffice also and naturally could encompass all these three pillars. Secondly, a more advanced recognition could outline the goals dictated by the most recent projections of the concept of sustainable development or even more directly make direct reference to these Documents by way of title. Flexibility is essential to be attributed to the interpretation of the translation, the uncertain nature of the concept necessitates this particular action.

On a final note, at this stage it is necessary to discuss the scenario where only some pillars of the concept of sustainable development are translated or where the interpretation of some pillars essentially leads to a detrimental effect upon the functioning of the other pillars of the concept. For example, the initiation of economic incentives that could place a strain upon environmental protection. In these cases, initially the translated pillars of the concept will be individually assessed and examined against the most modern outcrops of sustainable development, i.e., the SDGs. This broad and somewhat sympathetic methodology will be adopted in the analysis as to allow for the contextual appreciation the concept of sustainable development requires. Also, as from the discussion above in relation to what would constitute an actual translation of the concept, individual translations of the pillars will not suffice and be determined as a translation of the concept of sustainable development. As continually stated, the concept requires at bear minimum recognition of all three pillars and without such intrusion, the inclusion of sustainable development will not be justified for the purposes of this Thesis. This Thesis fundamentally rests upon this assumption.

[45] Chapter One, Section Three.

1.2 Determination of Effectiveness (Review)

After the content attributed to the concept of sustainable development has been deliberated above to the extent of what would be considered a translation of the concept, the determination of effectiveness that will be adopted will exactly mirror the understanding and formula provided in Chapter One[46]. Again, the formula that will be followed is:

$$\frac{Facilitative\ Mechanism}{Translation(including\ interpretation) + Accountability\ of\ Location} = Degree\ of\ Effectiveness$$

2. Effectiveness within Individual Facilitative Mechanisms

This Section will analyze individual types of regulatory facilitative mechanism utilized and will subsequently strive to show within each regulatory facilitative mechanism the extent of the effectiveness in the varied translations provided. It must be immediately acknowledged that not every single piece of regulation will be scrutinized. However, after a comprehensive investigation into the regulatory outcrops utilized, there will be reference made only to the extent of the variance of effectiveness found within each individual regulatory facilitative mechanism.

2.1 Bilateral Investment Treaties (BITs)

BITs are the primary facilitative mechanism through which FDI is regulated. Whilst it could be argued, in terms of legal protection afforded, that the BITs are rather similar in their provisions, it could be argued the way in which the concept of sustainable development is approached within each of the BITs provides a great degree of variance. Initially, using empirical evidence, Gordon, Pohl and Bouchard observe that not only generally "[t]reaty practice shows wide variation across countries, with no established

[46] Chapter One, Section Three.

pattern in this area"[47], but also "different SD [Sustainable Development]/ RBC [Responsible Business Conduct] concerns have been introduced in treaty language at different times"[48]. With this basic variance of approach to the inclusion, ultimately leading to the concept's translation, the extent of the degree of effectiveness can subsequently be differentiated.

The determination of effectiveness relies upon the acknowledgement of both the content of the translation and the accountability afforded to the translation through location. Combined, these aspects generate a comparable determination of the degree of effectiveness afforded. Also described within the outline of the determination of effectiveness[49] is that both aspects, content and location of presence must be present to determine effectiveness and without such presence, effectiveness is lacking. With this constructive realization, there are examples[50] of where sustainable development has entirely no presence within the preamble of the BIT. Due to the bleakness of this translation, or total lack thereof, this translation could be considered less than least effective. The Agreement Between the Government of Australia and the Government of the Arab Republic of Egypt on the Promotion and Protection of Investments (Australia – Egypt BIT)[51] is exemplary of this categorization. Fundamentally, there is neither reference to a combination of the three pillars of sustainable development nor language present that could implicate such reference.

Another example can be found in the Agreement on Encouragement and Reciprocal Protection of Investments Between the Republic of the Gambia and the Kingdom of the Netherlands (Gambia – Netherlands BIT)[52] whereby the content afforded to the concept is similarly completely lacking. Equally, the tone of this Preamble is dominated by the

[47] K. Gordon, J. Pohl and M. Bouchard, 'Investment Treaty Law, Sustainable Development and Responsible Business Conduct: A Fact Finding Survey' (2014) OECD Working Papers on International Investment, 2014/01, 6.
[48] K. Gordon, J. Pohl and M. Bouchard: *ibid* 11.
[49] Chapter One, Section Three.
[50] Examples include: Free Trade Agreement Between the Republic of Colombia and the Republic of Korea (signed 21/02/2013, entered into force 15/07/2016); Agreement Between the Government of the Republic of Belarus and the Government of the Kingdom of Cambodia on the Promotion and Reciprocal Protection of Investments (signed 23/04/2014).
[51] Agreement Between the Government of Australia and the Government of the Arab Republic of Egypt on the Promotion and Protection of Investments (Australia – Egypt BIT) (signed 03/05/2001, entered into force 05/09/2002).
[52] Agreement on Encouragement and Reciprocal Protection of Investments Between the Republic of the Gambia and the Kingdom of the Netherlands (Gambia – Netherlands BIT) (signed 25/09/2002, entered into force 01/04/2007).

advantageous regulation of FDI and, outside of this overarching ambition, there is no assertion of any other characteristics or ideals linked to the concept of sustainable development. In fact, UNCTAD through the important IIA Mapping Project, has determined that out of the 2575 BITs analyzed[53], 2289 of the mapped BITs do not contain any reference in the preambular provisions to either the term 'sustainable development' or "reference to social investment aspects (e.g., human rights, labour, health, CSR [Corporate Social Responsibility], poverty reduction)"[54] or "reference to environmental aspects (e.g., plant or animal life, biodiversity, climate change)"[55]. This means that only 11.1% (286 out of 2575) of mapped BITs contain a translation, directly or indirectly, of the concept within the preambular provisions. This is an extremely low figure. Also, Gordon, Pohl and Bouchard would to an extent agree with these statistics in stating that "older treaties without any SD/RBC language continue to dominate the treaty sample"[56], with "only 12 % of the entire stock of IIAs contains language on these matters"[57], language located in the preamble and/or substantive provisions.

In relation to context however, it must be remembered that both the Australia – Egypt BIT[58] and the Gambia – Netherlands BIT[59] were signed after the deliverance of the MDGs, which could be considered a significant signposting to the content attributed to the concept. The MDGs outlined specific contributors to the concept's achievement, including the eradication of poverty and hunger[60] and the creation of environmental sustainability[61]. Although this precise targeted response to the achievement of sustainable development would be unlikely to find full reference in these BITs, a brief implication of the three foundational pillars could have been more likely. Basic reference to environmental, economic or social development remains missing. Therefore, within these two BIT examples, it could be stated that the degree of effectiveness is essentially zero since there is no direct or indirect implication of the concept and leading from this

[53] UNCTAD, *UNCTAD IIA Mapping Project*: "The IIA Mapping Project is an ongoing effort that aims to map all IIAs for which texts are available (about 3,000). Over 2,500 IIAs have been mapped already", 1, found at < http://investmentpolicyhub.unctad.org/> accessed February 2021.
[54] UNCTAD, UNCTAD Investment Policy Hub, *Mapping of IIA Content, International Investment Agreements Navigator*, found at < https://investmentpolicy.unctad.org/international-investment-agreements> accessed February 2021.
[55] UNCTAD *Mapping of IIA Content*: *ibid.*
[56] K. Gordon, J. Pohl and M. Bouchard: [n 47] 5.
[57] K. Gordon, J. Pohl and M. Bouchard: *ibid* 5.
[58] Australia – Egypt BIT: [n 51].
[59] Gambia – Netherlands BIT: [n 52].
[60] MDGs: [n 8] Goal 1.
[61] MDGs: *ibid* Goal 7.

negative recognition, subsequently no accountability, not even interpretative, can be found. Again, in relation to a more empirical approach to analysis, Gordon, Pohl and Bouchard have recognized that the "[i]nclusion of SD/RBC issues has become a dominant treaty practice in recent years"[62], referring to the period between "2008-2013"[63] and that through their IIA sample containing both free trade agreements [FTAs] and BITs, "virtually all of the investment treaties in 2012 and 2013 include such language"[64]. Perhaps reasoning behind the lack of such a reference becomes clearer, the Australia – Egypt BIT[65] as well as the Gambia – Netherlands BIT[66] were signed in 2001 and 2002 respectively.

To now consider the most basic implication of the concept of sustainable development within BITs, thereby attributing a small degree of effectiveness to the relationship between the concept and international investment law, there are multiple examples[67] of BITs containing potentially indirect references to sustainable development in the preambular provisions. One of the most common implications could be derived from the reference to the term 'prosperity' in the preambular provisions. The Treaty Between the Federal Republic of Germany and the Islamic Republic of Afghanistan concerning the Encouragement and Reciprocal Protection of Investments (Germany - Afghanistan BIT) is exemplary of this inclusion:

> "RECOGNIZING that encouragement and protection of investments under this Treaty are apt to stimulate private business initiative and **to increase the prosperity of both nations**"[68]. [Emphasis added]

Although at first glance any implication of the concept of sustainable development could be considered lacking, upon a second reading, the phrase "to increase the prosperity of

[62] K. Gordon, J. Pohl and M. Bouchard: [n 47] 5.
[63] K. Gordon, J. Pohl and M. Bouchard: *ibid* 5.
[64] K. Gordon, J. Pohl and M. Bouchard: *ibid* 5.
[65] Australia – Egypt BIT: [n 51].
[66] Gambia – Netherlands BIT: [n 52].
[67] Examples include: Agreement Between the Government of the Republic of South Africa and the Government of the Republic of the Congo for the Reciprocal Promotion and Protection of Investments (signed 01/12/2005); Agreement Between Bosnia and Herzegovina and the Republic of India for the Promotion and Protection of Investments (signed 12/09/2006, entered into force 13/02/2008).
[68] Treaty Between the Federal Republic of Germany and The Islamic Republic of Afghanistan concerning the Encouragement and Reciprocal Protection of Investments (Germany – Afghanistan BIT) (signed 20/04/2005, entered into force 20/04/2005) Preamble.

both nations"[69] becomes analytically and interpretatively interesting due to the ambiguity afforded. The use of the vague term 'prosperity' without any definitive implication added could induce thoughts of all three foundational pillars of sustainable development, i.e., that of economic, environmental and social prosperity. The term 'prosperity' could directly relate to that of valuable development, financial or otherwise. Indeed, if the SDGs are to be considered, one of the principle aims achieved by the attainment of sustainable development is prosperity in multiple guises. For example, Goal 5 regarding Gender Equality[70] induces an idea of social prosperity, Goal 8 on Decent Work[71] and Economic Growth naturally induces thoughts of economic prosperity and Goal 13 in relation to Climate Action[72] could provide linkages to environmental prosperity.

The Preamble of the Agreement Between the Government of the Italian Republic and the Government of the Dominican Republic on the Promotion and Protection of Investments (Dominican Republic – Italy BIT)[73] goes further and implicates enhanced detail:

> "ACKNOWLEDGING that the mutual encouragement and protection of such investments on the basis of international Agreements will contribute **economic relations which will foster the prosperity of both Contracting Parties**"[74]. [Emphasis added]

Importantly however, it must be remembered to generate a determination of effectiveness, one must consider in equal measure both content and accountability. Even though the potential implication of sustainable development within the phrase 'prosperity' could be beneficial in terms of content, a strong degree of accountability of the reference through the implication provided is absent. The preamble of an international treaty does not contain significant accountability on its own. The preamble is a pre-declaration to aid the interpretation of the main body of text containing the substantive provisions of the treaty. The degree of effectiveness highlighted therefore could amount to an extremely basic

[69] Germany – Afghanistan BIT: *ibid* Preamble.
[70] SDGs: [n 9] Goal 5.
[71] SDGs: *ibid* Goal 8.
[72] SDGs: *ibid* Goal 13.
[73] Agreement Between the Government of the Italian Republic and the Government of the Dominican Republic on the Promotion and Protection of Investments (Dominican Republic – Italy BIT) (signed 12/06/2006, entered into force 25/11/2009).
[74] Dominican Republic – Italy BIT: *ibid* Preamble.

level, which is identified as the first stage of effectiveness in the determination of the degree of effectiveness outlined in Chapter One[75].

To continue with the translation in such an indirect manner, numerous BITs in the preambular provisions only, refer to foundational aspects that could be considered in line with the achievement of sustainable development. For example, the Agreement Between the Republic of Austria and the Republic of Guatemala for the Promotion and Protection of Investments[76] provides;

> "Recognizing that the promotion and protection of investments may strengthen the readiness for such investments and hereby make an important contribution to the development of economic relations,
>
> Reaffirming their commitment to the observance of internationally recognized labor standards"[77].

Equally, the Agreement Between the Swiss Confederation and the Republic of Trinidad and Tobago on the Promotion and Reciprocal Protection of Investments (Switzerland – Trinidad and Tobago BIT)[78] outlines:

> "Recognizing the need to promote and protect foreign investments with the aim of fostering the economic prosperity in both States,
>
> Convinced that these objectives can be achieved without relaxing health, safety and environmental measures of general application"[79].

The two examples highlighted do not contain a direct reference to the concept. Instead, each does emphasize an ability to transpose the recognized characteristic and principal ideals of sustainable development, which are represented in the SDGs, into the BIT itself.

[75] Chapter One, Section Three.
[76] Agreement Between the Republic of Austria and the Republic of Guatemala for the Promotion and Protection of Investments (Austria – Guatemala BIT) (signed 16/01/2006, entered into force 01/12/2012).
[77] Austria – Guatemala BIT: *ibid* Preamble.
[78] Agreement Between the Swiss Confederation and the Republic of Trinidad and Tobago on the Promotion and Reciprocal Protection of Investments (Switzerland – Trinidad and Tobago BIT) (signed 26/10/2010, entered into force 04/07/2012).
[79] Switzerland – Trinidad and Tobago BIT: *ibid* Preamble.

More certainty in translation of the concept is induced with the actual reference to the specific term of 'sustainable development'. UNCTAD's IIA Mapping Project has recognized that only 55 out of the 2575 mapped BITs or 2.1% of the mapped BITs contain the direct reference to the term 'sustainable development'[80] within the preamble. Although there are multiple examples of this specific translation[81], the Agreement Between the Government of the Republic of Mauritius and the Government of the Arab Republic of Egypt on the Reciprocal Promotion and Protection of Investments[82], in my opinion, emphasizes the greatest extent of content afforded in the translation of sustainable development that is found solely within the preambular provisions of BITs. The Preamble provides:

> "RECOGNISING that the promotion and reciprocal protection of such investments will lend greater stimulation to the development of business initiatives, foster **sustainable development** and increase prosperity in the territories of both Contracting Parties; and
>
> CONVINCED that these objectives can be achieved without relaxing health, safety, environmental standards of general application, and prevention and combating of transnational organized crimes"[83]. [Emphasis added]

The example above shows the not only a specific reference to the term 'sustainable development', but also located in the following preambular listing, a rather precise set of regulatory factors are given which can be interpreted as aiding inclusiveness in the term 'sustainable development. Particular attention must be drawn to Goal 16 of the SDGs in relation to Peace, Justice and Strong Institutions[84], whereby the targets include, "end abuse, exploitation, trafficking and all forms of violence against and torture of children … by 2030, significantly reduce illicit financial and arms flows … [and] strengthen

[80] UNCTAD *Mapping of IIA Content*: [n 54].
[81] Examples include: Agreement Between the Czech Republic and the Republic of Azerbaijan for the Promotion and Reciprocal Protection of Investments (Czech – Azerbaijan BIT) (signed 17/05/2011, entered into force 09/02/2012); Agreement Between the Council of Ministers of the Republic of Albania and the Government of the Republic of Azerbaijan for the Promotion and Reciprocal Protection of Investments (signed 09/02/2012).
[82] Agreement Between the Government of the Republic of Mauritius and the Government of the Arab Republic of Egypt on the Reciprocal Promotion and Protection of Investments (Mauritius - Egypt BIT) (signed 25/06/2014, entered into force 17/10/2014).
[83] Mauritius - Egypt BIT: *ibid* Preamble.
[84] SDGs: [n 9] Goal 16.

relevant national institutions, including through international cooperation, for building capacity at all levels, in particular in developing countries, to prevent violence and combat terrorism and crime"[85]. It could be argued that a strong parallel exists therefore between the content of sustainable development provided via the SDGs and that forwarded within this BIT.

In terms of content alone, a significant increase in the translation of the concept can be found within BITs in the assertion of indirect features of sustainable development that are in line with the current understanding of sustainable development as well as the direct usage of the term 'sustainable development', as opposed to the potential reference to sustainable development within the use of the term 'prosperity'. Although, when accountability is analyzed, the significant step forward in content is limited to a detrimental degree. The level of content afforded within the BITs is shown within the variance of translation to be increasing, the accountability afforded at this stage is only that of a declaration found within the preambular provisions. As previously discussed, objectives highlighted within the preamble only serve as a guide when interpreting the main provisions of the agreement and in this capacity are not directly accountable. Therefore, with the variance shown so far in the translation of the concept, the degree of effectiveness could be maintained rather a low level, like that demonstrated by stage two of the determination of effectiveness identified in Chapter One[86].

The final degrees of effectiveness and variance shown within BITs in relation to the translation of sustainable development are frequent instances whereby BITs afford both content as well as a higher level of accountability in translation. A higher level of accountability than that found in the preambular provisions would amount to the translation of the concept into the substantive provisions. This presentation can be principally seen in the provisions that limit foreign investment behavior and in turn affirm or expand host state regulatory areas. Such provisions include both that of non-derogation and the retention of the right to regulate.

In recognition of the non-derogation provisions found within numerous BITs, the weakest translation of the concept within substantive provisions can be demonstrated clearly in

[85] SDGs: *ibid* Goal 16, Targets of Goal 16.
[86] Chapter One, Section Three.

the Agreement Between Hungary and The Kingdom of Cambodia for the Promotion and Reciprocal Protection of Investments, which provides:

> "The Contracting Party shall not encourage investment by lowering domestic environmental, labor or occupational health and safety legislation or by relaxing core labor standards. Where a Contracting Party considers that the other Contracting Party has offered such an encouragement, it may request consultations with the other Contracting Party and the two Contracting Parties shall consult with a view to avoiding any such encouragement"[87].

This provision requires a host state (i.e., a contracting party) to not waiver or dilute domestic legislation to attract FDI. The reference to "environmental, labor or occupational health and safety legislation"[88] could induce the vague recognition of the three foundational pillars of sustainable development and the reference to only these three legislative areas could enhance their importance above other areas of legislative capability. The most basic link to both the MDGs and SDGs can be deduced therefore. Ultimately however, the reference to the specific term of 'sustainable development' is lacking. This lacking is somewhat amplified with the acknowledgment that the Preamble[89] contains no reference to this development agenda, thereby again decreasing the translation of the concept in removing the interpretative insertion.

In contrast, the strongest translation of sustainable development within a non-derogation provision can be seen in BITs whereby there is reference to the concept within the preambular provisions alongside an extremely enhanced detail in the deliverance of the provision in the substantive text[90]. The Agreement for the Promotion and Protection of Investment Between the Republic of Austria and the Republic of Tajikistan (Austria-Tajikistan BIT)[91] notably provides initially that:

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[87] Agreement Between Hungary and the Kingdom of Cambodia for the Promotion and Reciprocal Protection of Investments (Hungary – Cambodia BIT) (signed 14/01/2016, entered into force 30/08/2017), Article 2(3).
[88] Hungary – Cambodia BIT: *ibid* Article 2(3).
[89] Hungary – Cambodia BIT: *ibid* Preamble.
[90] Please see, for example: Agreement Between the Slovak Republic and the Islamic Republic of Iran for the Promotion and Reciprocal Protection of Investments (Slovakia – Iran BIT) (signed 19/01/2016, entered into force 30/08/2017); Agreement for the Promotion and Protection of Investment Between the Republic of Austria and The Federal Republic of Nigeria (Austria – Nigeria BIT) (signed 08/04/2013).
[91] The Agreement for the Promotion and Protection of Investment Between the Republic of Austria and the Republic of Tajikistan (Austria – Tajikistan BIT) (signed 15/12/2010, entered into force 21/12/2012).

"foreign direct investments are vital complements to national and international development efforts … the treatment to be accorded to investors and their investments will contribute to the efficient utilization of economic resources, the creation of employment opportunities and the improvement of living standards … the international obligations and commitments concerning respect for human rights … investment, as an engine of economic growth, can play a key role in ensuring that economic growth is sustainable … achieving these objectives in a manner consistent with the protection of health, safety, and the environment, and the promotion of internationally recognized labor standards …

ACKNOWLEDGING that investment agreements and multilateral agreements on the protection of environment, human rights or labor rights are meant to foster global sustainable development and that any possible inconsistencies there should be resolved without relaxation of standards of protection"[92].

This is an extremely detailed and significant reference to the concept of sustainable development, highlighting all three foundational pillars of the concept, usage of the term 'sustainable development' alongside additional related elements. The non-derogation provisions within the substantive text equally addresses the concept. Article 4 states that "[t]he Contracting Parties recognize that it is inappropriate to encourage an investment by weakening domestic environmental laws"[93]. Article 5 also states:

"(1) The Contracting Parties recognize that it is inappropriate to encourage an investment by weakening domestic labor laws.

(2) For the purposes of this Article, "labor laws" means each Contracting Party's statutes or regulations, that are directly related to the following internationally recognized labor rights:

(a) the right of association;

(b) the right to organize and to bargain collectively;

[92] Austria – Tajikistan BIT: *ibid.*
[93] Austria – Tajikistan BIT: *ibid* Article 4.

(c) a prohibition on the use of any form of forced or compulsory labor;

(d) labor protections for children and young people, including a minimum age for the employment of children and the prohibition and elimination of the worst forms of child labor;

(e) acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health;

(f) elimination of discrimination in employment and occupation"[94].

These Articles in detailing the non-derogation provisions not only separate environmental and labor derogations which could potentially highlight the importance of such legislation, but also, particularly in relation to the labor law non-derogations, a significant amount of detail is attached that would reaffirm further alignment to the development agenda as generated by the SDGs. Although there is no specific provision on the non-derogation of economic domestic legislation, there is sufficient detail in both the preamble and the subsequent substantive provisions that could incorporate such an interpretation, thereby referencing not only all three foundational pillars that constitute the concept of sustainable development, but at the same time referring to precise inclusions, for example "labor protections for children and young people"[95], which would create a direct relation to the SDGs and the goal to "promote sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all"[96].

The Austria-Tajikistan BIT demonstrates an unparalleled degree of effectiveness. The content afforded to the concept of sustainable development is generous and unambiguous. In terms of accountability, which is an equally important for the determination of effectiveness, the depiction of the translation within the substantive provisions of the BIT is obvious. As already discussed[97], the determination of effectiveness originates from both the degree of content afforded as well as the accountability acquired. The example given above demonstrates a high degree of effectiveness, falling between the third and

[94] Austria – Tajikistan BIT: *ibid* Article 5.
[95] Austria - Tajikistan BIT: *ibid* Article 5(2)(d).
[96] SDGs: [n 9] Goal 8.
[97] Chapter One, Section Three and Chapter Four, Section One.

fourth stage of the determination of effectiveness. Overall, in the variances shown in relation to the non-derogation provisions, it is the requirement of the host states or contracted parties within BITs to maintain domestic legislation, which could fundamentally align itself with a domestic sustainable development agenda, that can generate and maintain an additional translation of the concept of sustainable development.

The much broader provisions affording the right to regulate in an equal manner can transpose such variable degrees of the concept of sustainable development also. Within BITs, there are two predominant provisions that provide this privilege to the host states, that is in matters referring to indirect expropriation and those in relation to general exception provisions. Both essentially enable the host state to assert justified regulatory power that may affect or essentially interrupt investment activities within their states.

The first of which, that of indirect expropriation, can be defined as the situation "where a State acts in a way that is detrimental to a foreign private investment … even if the investor retains its property rights over the investment"[98]. Although the act itself is important in the retention by the host state of regulatory power, the significance for the concept of sustainable development is introduced in the ambiguously phrased criteria which must be fulfilled to determine a justified interference of investment activities and not indirect expropriation. BITs phrase these provisions and the subsequent exceptions in remarkably similar manners[99]. The Agreement Between Bosnia and Herzegovina and The Council of Ministers of the Republic of Albania on the Reciprocal Promotion and Protection of Investment is exemplary:

> "Investments of investors of either Contracting Party shall not be expropriated or subjected to requisition or to measures having effect equivalent to expropriation (hereinafter referred to as "expropriation") in the territory of the other Contracting Party except **for a public purpose related to the internal needs** and under due

[98] Suzy H. Nikiema, *Best Practices: Indirect Expropriation* (2012) International Institute for Sustainable Development, 1.

[99] Please see, for example: Agreement Between the Government of the Kingdom of Denmark and the Government of the Republic of Argentina concerning the Promotion and Reciprocal Protection of Investments (signed 06/11/1992, entered into force 02/02/1995) Article 5; Agreement Between the Government of the Republic of India and the Government of the People's Republic of Bangladesh for the Promotion and Protection of Investments (signed 09/02/2009, entered into force 07/07/2011) Article 5.

process of law, on a non-discriminatory basis and against prompt, adequate and effective compensation"[100]. [Emphasis added]

The reference to the phrase "for a public purpose"[101] , which is one of the fundamental criteria needed to be proven to gain a justified interference by the host state of the foreign investment, could translate the concept or any actions taken under the fulfillment of sustainable development. The vague and brief phrase alongside no further elucidation as to what constitutes such a purpose allows a broad interpretation, thereby potentially including a translation of the concept. The arbitration bodies would therefore have a broad scope of interpretation capability. Also, when it is considered that the Preamble does not contain any direct or indirect reference to sustainable development, the interpretation net is thrown even wider, not only considering the concept of sustainable development. However, it must be remembered that this provision is found within the substantive and therefore accountable text.

In circumstances whereby the preambular provisions do pertain to the concept of sustainable development, a more obvious relationship between 'public purposes' and the concept could occur. For example, the Reciprocal Investment Promotion and Protection Agreement Between the Government of the Kingdom of Morocco and the Government of the Federal Republic of Nigeria provides in the Preamble that:

> "RECOGNIZING the important contribution investment can make to the sustainable development of the state parties, including the reduction of poverty, increase of productive capacity, economic growth, the transfer of technology, and the furtherance of human rights and human development; …
>
> SEEKING to promote, encourage and increase investment opportunities that enhance sustainable development within the territories of the state parties; …

[100] Agreement Between Bosnia and Herzegovina and the Council of Ministers of the Republic of Albania on the Reciprocal Promotion and Protection of Investment (Bosnia and Herzegovina – Albania BIT) (signed 17/06/2008, entered into force 06/04/2009) Article 4.
[101] Bosnia and Herzegovina – Albania BIT: *ibid* Article 4.

> UNDERSTANDING that sustainable development requires the fulfillment of the economic, social and environmental pillars that are embedded within the concept…"[102].

The content afforded to the concept of sustainable development is extensive, with many of both the MDGs and SDGs covered. The later referred to vague criteria of "public purpose"[103] is present, though with the extremely detailed reference of sustainable development present within the Preamble and using such provisions as an interpretative aid, the presence of sustainable development within this criterion could be justified. Therefore, the concept could be introduced by aligning the sustainable development agenda with 'public purposes' given the broad definition.

To discuss the other predominant right to regulate option the host state retains and could variably transpose the concept of sustainable development through enactment of certain domestic legislations, is that of the general exception provisions. A basic example of such provision can be demonstrated in the Agreement Between the Government of Canada and the Government of the Republic of Armenia for the Promotion and Protection of Investments (Canada - Armenia BIT)[104]. Article XVII provides:

> "Nothing in this Agreement shall be construed to prevent a Contracting Party from adopting, maintaining or enforcing any measure otherwise consistent with this Agreement that it considered appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns …
>
> Provided that such measures are not applied in an arbitrary or unjustifiable manner, or do not constitute a disguised restriction on international trade or investment, nothing in this Agreement shall be construed to prevent a Contracting Party from adopting or maintaining measures, including environmental measures:

[102] Reciprocal Investment Promotion and Protection Agreement Between the Government of the Kingdom of Morocco and the Government of the Federal Republic of Nigeria (Morocco – Nigeria BIT) (signed 03/12/2016) Preamble.
[103] Morocco – Nigeria BIT: *ibid* Article 8(1)(a).
[104] Agreement Between the Government of Canada and the Government of the Republic of Armenia for the Promotion and Protection of Investments (Canada - Armenia BIT) (signed 08/05/1997, entered into force 29/03/1999).

a) Necessary to ensure compliance with laws and regulations that are not inconsistent with the provisions of this Agreement;

b) Necessary to protect human, animal or plant life or health; or

c) Relating to the conservation of living or non-living exhaustible natural resources if such measures are made effective in conjunction with restriction on domestic production or consumption"[105].

The Canada - Armenia BIT dictates that there is no reference to sustainable development within the Preamble, either directly or indirectly, however in relation to the translation of the concept, there is within this provision a reference to the maintenance of environmental, social and economic protection. Though caution in advantage must be made as it is limited to protection only afforded if not incompatible with the investment terms of protection, therefore the capacity to ensure protection is not unfettered, delineated by the other terms of the Agreement, in a manner placing these protections as a secondary thought. The representation of environmental protection in the SDGs is significant nonetheless. For example, Goal 14 of the SDGs on Life Below Water[106], places environmental consideration at the heart of the targets set, for example "by 2025, prevent and significantly reduce marine pollution of all kinds … minimize and address the impacts of ocean acidification … by 2020, sustainable manage and protect marine and coastal ecosystems to avoid significant adverse impacts"[107].

To strengthen the imposition of the translation of sustainable development, thereby increasing the determination of effectiveness, BITs which contain an in-depth recognition of the concept alongside the general exception provision, could be positively interpreted to include an increased translation. The Agreement Between the Slovak Republic and the Islamic Republic of Iran for the Promotion and Reciprocal Protection of Investments states in the Preamble that the purpose of the Agreement is to:

[105] Canada - Armenia BIT: *ibid* Article XVII.
[106] SDGs: [n 9] Goal 14.
[107] SDGs: *ibid* Goal 14, Targets of Goal 14.

> "ensure that investment is consistent with and facilitative of the protection of health, safety and the environment, the promotion and protection of internationally and domestically recognized labor rights …
>
> RECOGNIZING that the promotion and reciprocal protection of investments shall be conducive to the stimulation of economic prosperity in both Contracting Parties …
>
> SEEKING to promote investment that contributes to the sustainable development of the Contracting Parties"[108].

Although, when read in isolation, these preambular provisions do translate many fundamental aspects of the concept of sustainable development, yet alone they only afford interpretive accountability. Therefore, in terms of determination of effectiveness, the Preamble presented in such a manner would only attract stage two, i.e., a high degree of content and low degree of accountability. However, when combined with the subsequent Article pertaining to General Exceptions, much significance and subsequently accountability to translation is provided. The Article states:

> "1. Subject to the requirement that such measures are not applied in a manner that would constitute arbitrary or unjustifiable discrimination between investments or between investors, nothing in this Agreement shall be construed to prevent the Contracting Party from adopting or enforcing measures necessary:
>
> a) to protect public security or public morals or to maintain public order;
>
> b) to protect human, animal or plant life or health;
>
> c) to ensure compliance with laws and regulations; or
>
> d) for the conservation of living or non-living exhaustible natural resources"[109].

Even though there is continued similarity in the vague terminology provided within such a provision that enables the host to enact certain forms of domestic legislation, to have a

[108] Slovakia – Iran BIT: [n 90] Preamble.
[109] Slovakia – Iran BIT: *ibid* Article 11.

more certain interpretative ability that is provided within the Preamble, an enhanced translation of sustainable development could potentially be found. For example, the reference to "domestically recognized labor rights"[110] could be related to the instigation of domestic legislation to "protect human … health"[111]. This is also closely connected to SDG Goal 8 and in particular Target 8.8, which dictates to "[p]rotect labor rights and promote safe and secure working environments for all workers, including migrant workers, in particular women migrants, and those in precarious employment"[112]. Therefore, this highlights the ability to specify sustainable development translations within vague provisions through the deliverance of relevant and directed interpretative aids.

2.2 Other International Investment Agreements: Sectoral and Regional Multilateral Agreements

A similar variance in the degree of effectiveness afforded to the concept of sustainable development can be found within multilateral agreements. The primary vessel through which FDI is regulated is BITs, however there are regulatory mechanisms that do apply a sectoral and regional approach to investment governance.

With the direct determination of effectiveness and the initial consideration of the least degree of effectiveness afforded, i.e., lack of both content and accountability in translation, an example can be found in the well-cited Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID)[113]. Even though, due to the nature of FDI protections, the dispute settlement mechanism has significant consequence[114], crucially for the purpose of this discussion upon the effective translation of the concept of sustainable development, there remains a complete lack of

[110] Slovakia – Iran BIT: *ibid* Preamble.
[111] Slovakia – Iran BIT: *ibid* Article 11(1)(b).
[112] SDGs: [n 9] Goal 8, Target 8.8.
[113] Convention on the Settlement of Investment Dispute Between States and Nationals of Other States (ICSID) (1965) 17 UST 1270, TIAS 6090, 575 UNTS 159.
[114] Meg Kinnear, Geraldine Fischer, Jara Minguez Almeida, Luisa Fernanda Torres and Marie Uran Bildegain, *Building International Investment Law: The First 50 Years of ICSID* (2015). Although this important function is not without criticism, please see: Jose E. Alvarez, 'ISDS Reform: The Long View' (2021) *ICSID Review*, Vol. 36, Issue 2, 253 – 277; Yarik Kryvoi, 'ICSID Arbitration Reform: Mapping Concerns of Users and How to Address Them' (2018) British Institute of International and Comparative Law Research Paper.

any direct or indirect references to the concept. Although in the Preamble it is given that there is a "need for international cooperation for economic development, and the role of private international investment therein"[115], there is no reference to social or environmental development. Additionally, in the main body of the text, the concept has no grounding.

Another example where the determination of effectiveness in the translation of sustainable development could be considered likewise completely ineffective and therefore again never reaching any stage of the calculation degree of effectiveness, is the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (Mauritius Convention on Transparency)[116], which came into force much later in 2017. The mandate of the Mauritius Convention on Transparency is evident, "the Convention is an instrument by which Parties to investment treaties concluded before 1 April 2014 express their consent to apply the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration"[117]. Nothing in the Preamble or the provisions within the main body of the text could constitute a direct or even indirect reference to the concept. However, the adjoining Resolution[118] adopted by the United Nations General Assembly does provide a slight degree of hope in translation, in which it is given that:

> "Recalling its resolution 2205 (XXI) of 17 December 1966, by which it established the United Nations Commission on International Trade Law with a mandate to further the progressive harmonization and unification of the law of international trade **in the interests of all peoples, in particular those of developing countries**, in the extensive development of international trade"[119]. [Emphasis added]

The use of the phrase "in the interests of all peoples, in particular those of developing countries"[120] could loosely denote some form of development. It could be argued that the

[115] ICSID: [n 113] Preamble.
[116] United Nations Convention on Transparency in Treaty-Based Investor-State Arbitration (Mauritius Convention on Transparency) (signed 10/12/2014, entered into force 18/10/2017) UNTC 54749.
[117] United Nations Commission on International Trade Law Website, 'United Nations Convention on Transparency in Treaty-based Investor-State Arbitration', found at < https://uncitral.un.org/en/texts/arbitration/conventions/transparency > accessed November 2019.
[118] United Nations General Assembly Resolution adopted by the General Assembly (10/12/2014) A/RES/69/116 (A/69/496).
[119] Resolution adopted by the General Assembly: *ibid.*
[120] Resolution adopted by the General Assembly: *ibid.*

role of both the MDGs and SDGs are to advance much beneficial interest upon the international community, for example in the eradication of all forms of child labor[121]. Although this brief indication of hope in the translation is somewhat detached as the hope itself is found in only the Resolution to the Mauritius Convention on Transparency and not within the Mauritius Convention on Transparency itself.

Regarding this specific sectoral approach frequently utilized in international investment agreements, it would be misleading to provide the assertion that all sectoral agreements ineffectively translate the concept of sustainable development. The Energy Charter Treaty (ECT)[122] does, in a rather more beneficial manner, purport a more successful translation of sustainable development with Masumy commenting "aspects of the ECT framework actively promote sustainable development"[123]. Although direct reference to the term 'sustainable development' is missing from the Preamble[124], the acknowledgment of both a conservative approach to energy handling and a restatement of environmental protection could amount to a translation of the concept. In comparison to the SDGs, much similarity can be found and the link to environmental protection is fundamental[125]. Goal 7, for example, stipulates the target:

> "By 2030, enhance international cooperation to facilitate access to clean energy research and technology, including renewable energy, energy efficiency and advanced and cleaner fossil-fuel technology, and promote investment in energy infrastructure and clean energy technology"[126].

It would be inaccurate to state that the Preamble of the ECT directly annunciates the specific target of Goal 7, however it would be more appropriate to determine that some of the Goals proposed by the SDGs are generally outlined. As stated in the previous Section[127], it would be somewhat unrealistic if specific targets would be included, especially when it is considered that the ECT came into force in 1998, which is two years

[121] SDGs: [n 9] Goal 8, Target 8.7.
[122] Energy Charter Treaty (ECT) (signed 17/12/1994, entered into force 16/04/1998) 2080 UNTS 95; 34 ILM 360.
[123] Naimeh Masumy, 'The Role of the Energy Charter Treaty in Fostering and Promoting Energy Efficiency and Sustainable Development (2019) *Groningen Journal of International Law*, Vol. 7, No. 1, 72.
[124] ECT: [n 122] Preamble.
[125] SDGs: [n 9] Goal 13, 14 and 15.
[126] SDGs: *ibid* Goal 7, Target 7.A.
[127] Chapter Four, Section One.

before the birth of the MDGs and 17 years before the deliverance of the SDGs. Also, the generality afforded in the language allows for a broad scope of interpretation, thereby potentially including these targets, and any future associated understandings of sustainable development, within the remit of the ECT.

In addition to the translation of the concept within the Preamble, much reference is provided within the substantive provisions also. One example can be found in Article 7, which provides that "Contracting Parties shall encourage relevant entities to cooperate in … modernizing Energy Transport Facilities necessary to the Transit of Energy Materials and Products"[128]. The use of the extremely general term 'modernization' could denote the changing of the relevant facilities in line with modern advancements in technology and knowledge. Such advancement is forwarded within Goal 7[129] of the SDGs. Article 8[130] of the ECT simply bolsters the acknowledgment of this development. Another significant translation can be seen in Article 19[131]. Not only is the term 'sustainable development' prominently stated, reference to all three foundational pillars of the concept are highlighted. In addition, the Article[132] further provides reference to related guiding rules and principles associated with sustainable development, including that of the precautionary principle. The ECT does go one step further and provides supplementary details about specific actions to be undertaken, including:

> " take account of environmental considerations throughout the formulation and implementation of their energy policies … have particular regard to Improving Energy Efficiency, to developing and using renewable energy sources, to promoting the use of cleaner fuels and to employing technologies and technological means that reduce pollution … promote the collection and sharing among Contracting Parties of information on environmentally sound and economically efficient energy policies and Cost-Effective practices and technologies … promote and cooperate in the research, development and application of energy efficient and environmentally sound technologies, practices and processes which will minimise harmful Environmental Impacts of all aspects

[128] ECT: [n 122] Article 7.
[129] SDGs: [n 9] Goal 7.
[130] ECT: [n 122] Article 8.
[131] ECT: *ibid* Article 19.
[132] ECT: *ibid* Article 19(1).

> of the Energy Cycle in an economically efficient manner … promote the transparent assessment at an early stage and prior to decision, and subsequent monitoring, of Environmental Impacts of environmentally significant energy investment projects"[133].

All actions of which influence to a great extent the level of development. It must also be remembered that unlike the translation of sustainable development found within the Preamble[134], Article 19 with the consequent actions attached are substantive and therefore have a higher degree accountability attached. Thereby further increasing the degree of effectiveness of the concept within the ECT to a higher stage of three or four.

Likewise, to continue to encompass a higher degree of content and accountability within sectoral treaties, somewhat equally reflecting the presence of general exceptions discussed in relation to BITs previously, Article XX of General Agreement on Tariffs and Trade (GATT) under the World Trade Organization (WTO) regime does incorporate again a significant translation of the concept of sustainable development which "permit[s] WTO members to adopt measures to achieve certain objectives, notwithstanding any other provisions of these agreements"[135]. The full reference to this Article[136] has been made within Chapter Two[137], however from this provision it is important to recognize the specific citation of the protection of "public morals"[138], "human, animal or plant life or health"[139], "national treasures of artistic, historic or archaeological value"[140] and "the conservation of exhaustible natural resources"[141], which cumulatively do insight a broad reference to sustainable development including all three pillars of environmental, social and economic development. In correspondence to both the MDGs and SDGs, many profound similarities can be deduced. In terms of effectiveness therefore, within the substantive and consequently accountable provisions there is in place a provision to encourage the fulfilment of sustainable development objectives which do not detract from

[133] ECT: *ibid* Article 19(1).
[134] ECT: *ibid* Preamble.
[135] Lorand Bartels, 'The Chapeau of the General Exceptions in the WTO GATT and GATS Agreements: A Reconstruction' (2017) *American Journal of International Law*, Vol. 109, Issue 1, 95.
[136] General Agreement on Tariffs and Trade (GATT) (1994) Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187, 33 I.L.M. 1153, Article XX.
[137] Chapter Two, Section Two.
[138] GATT: [n 136] Article XX (a).
[139] GATT: *ibid* Article XX (b).
[140] GATT: *ibid* Article XX (f).
[141] GATT: *ibid* Article XX (g).

the other provisions of the GATT. When it is also considered the influential nature of this provision within other investment agreements, the importance for the translation of the concept is the ever more increased.

Concentrating efforts now upon regional approaches to international investment treaties, overall a more favorable degree of effectiveness in the translation of the concept of sustainable development is apparent. With the sectoral approach taken highlighted above, there is much more variation in the translation and ultimately degree of effectiveness afforded to sustainable development. Within the sample of regional approaches outlined below, there is much less unfavorable variance. The most obvious regional treaty is that of the North American Free Trade Agreement (NAFTA)[142], which was an Agreement created between the USA and Canada, with Mexico joining later. The Agreement does generate a somewhat effective translation of sustainable development, both in terms of the level of content and, to a lesser degree, the level of accountability present. Primarily, the Preamble distinctly states:

> "CREATE new employment opportunities and improve working conditions and living standards in their respective territories;
>
> UNDERTAKE each of the preceding in a manner consistent with environmental protection and conservation;
>
> PRESERVE their flexibility to safeguard the public welfare;
>
> PROMOTE sustainable development;
>
> STRENGTHEN the development and enforcement of environmental laws and regulations; and
>
> PROTECT, enhance and enforce basic workers' rights"[143].

Although the Preamble of NAFTA has little accountability, only that of an influential nature upon the substantive provisions, it remains undoubted that there is explicit reference to all three foundational pillars of sustainable development. Through the

[142] North American Free Trade Agreement (NAFTA) (1993) 32 ILM 289, 605.
[143] NAFTA: *ibid* Preamble.

acknowledgement of the attainment required of increased employment conditions, environmental protection and social development, many comparative similarities can be found to the current understanding of the concept as promulgated by the SDGs. For example, Goal 8 of the SDGs and aspects of the Preamble could be described as extremely strong in relation to the similarity of language adopted. However, the influential ability of these Preambular listings creates only minor levels of accountability, which would therefore place the determination of effectiveness firmly within the second stage with the consideration of the high degree of content in the translation of the concept alongside a lacking in degree of accountability.

Unfortunately, this strength in detail presented in the Preamble is not fully mirrored as one would hope within the substantive text. To a great extent, the significant implications outlined within the Preamble[144] are not provided any further presence. The only relevant provision is that which relates to both the right to regulate and non-derogation provision, which can be found in Article 1114:

> "1. Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to **environmental concerns**.
>
> 2. The Parties recognize that it is inappropriate to encourage investment by **relaxing domestic health, safety or environmental measures**. Accordingly, a Party should not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such measures as an encouragement for the establishment, acquisition, expansion or retention in its territory of an investment of an investor"[145]. [Emphasis added]

The provision given above does passingly forward an obligation to strive for environmental protection and social development, to the extent that the substantive provisions are not flouted when carrying out investment activities. The level of content afforded to environmental protection or social development is poor and apart from the

[144] NAFTA: *ibid* Preamble.
[145] NAFTA: *ibid* Article 1114.

use of the terms "environmental concerns"[146] and "domestic health, safety or environmental measures"[147], no further elaboration is given. Direct comparison can be made to the high level of detail afforded in the ECT in regard to the actions dictated that would achieve sustainable development[148].

Another issue can be found in the level of accountability provided and can be directly related to the actual language deployed and the subsequent interpretation. The use of the term 'may' in "it may request consultations with the other Party"[149] could somewhat weaken the response if there is disagreement between such aspects and investment actions. The term 'may' generates a choice to both carry out and not to carry out consultations with the relevant states and as such generates a weakened accountability through discretion. There is no further enlightenment provided, in terms of actions warranted, if there is a disagreement between aspects pertaining to sustainable development and those related to investment opportunities, and therefore the degree of accountability is further undermined. Thereby, when analysing the determination of effectiveness, ultimately this provision would fall within the remit of the third stage of effectiveness in which a small degree of translation is accompanied by a relatively higher degree of accountability in terms of movement into the substantive provisions and not solely within the preambular provisions.

However, not all regional approaches offer such a generous initial offering of detail afforded to sustainable development as compared to NAFTA. This can be seen in the ASEAN Comprehensive Agreement[150], which came into force in 2012, and has significantly more Member States than that of NAFTA. The Preamble purports:

> "RECOGNISING the different levels of development within ASEAN especially the least developed Member States which require some flexibility including special and differential treatment as ASEAN moves towards a more integrated and interdependent future …

[146] NAFTA: *ibid* Article 1114.
[147] NAFTA: *ibid* Article 1114.
[148] ECT: [n 122] Article 19(1).
[149] NAFTA: [n 142] Article 1114.
[150] ASEAN Comprehensive Investment Agreement (2009) (signed 26/02/2009, entered into force 24/02/2012).

> RECOGNISING that a conducive investment environment will enhance freer flow of capital, goods and services, technology and human resource and overall economic and social development in ASEAN"[151].

At first glance, the translation of sustainable development highlighted above does seem rather weak, however it is important to recognise that the Preamble outlines one of the concepts main guiding principles, that of common but differentiated responsibility, i.e., recognising each state's developmental capacity and altering policies that would be compatible with such status. The Preamble also overtly acknowledges the foundational pillars of economic and social developmental aspects but does omit an over-obvious direct reference to environmental protection. The translation of the concept provided in the Preamble does sit comfortably alongside the SDGs in many ways though. For example, common but differentiated responsibility is found in the targets of Goal 17[152] and social development is equally found within the targets of Goal 5[153] and Goal 3[154] of the SDGs. In terms of effectiveness therefore, with the specific reference to the common but differentiated principle, an elevation of the content from that found within stage one to stage two of effectiveness would occur. No higher stage of effectiveness would be reached due to the lacking in accountability.

The substantive provisions do reiterate the principle of common but differentiated responsibility. Article 2(f) states that one of the guiding principles of the Agreement is to "grant special and differential treatment and other flexibilities to Member States depending on their level of development and sectoral sensitivities"[155]. Although the reiteration provides a further recognition to one of the identified principles of sustainable development, which does in itself create another nod to the incorporation of the concept, ultimately the lack of any adjoining detail waivers the iteration void of accountable or certain action. Therefore, the later presence of Article 23 in relation to "Special and Differential Treatment for the Newer ASEAN Member States"[156], which affords detailed acknowledgment of common but differentiated responsibility, is certainly a positive

[151] ASEAN Comprehensive Investment Agreement: *ibid* Preamble.
[152] SDGs: [n 9] Goal 17.
[153] SDGs: *ibid* Goal 5.
[154] SDGs: *ibid* Goal 3.
[155] ASEAN Comprehensive Investment Agreement: [n 150] Article 2(f).
[156] ASEAN Comprehensive Investment Agreement: *ibid* Article 23.

translation. The missing detail of Article 2(f)[157] is replaced in Article 23[158] to an extent, which would increase the degree of effectiveness both in terms of content and accountability.

In regard to the foundational pillars of sustainable development, presence has found its way into the substantive provisions also. Article 17 conveys that:

> "Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between Member States or their investors where like conditions prevail, or a disguised restriction on investors of any other Member State and their investments, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member State of measures:
>
> (a) necessary to protect public morals or to maintain public order;
>
> (b) necessary to protect human, animal or plant life or health"[159].

Thereby, it could be argued, placing significance upon the attainment of social and environmental development only as far as it does not infringe upon the investment actions taken under the auspice of this Agreement through the right to regulate provision. Article 17 does provide references to aspects pertaining to social and environmental development, however the level of content is far from detailed. When placed alongside the SDGs there are similarities, but the similarities are only general, and the targets are not closely represented in the interpretation. Regarding the three foundational pillars of sustainable development, this is the only basic reference within the substantive provisions and as such the degree of effectiveness in translation of the concept is rather reduced. With this acknowledgement, the determination of effectiveness will rest solely within stage three.

To remain with the discussion of the effective translation of the concept of sustainable development within regional investment agreements, the Agreement on Investment of the Framework Agreement on Comprehensive Economic Co-operation Between the People's

[157] ASEAN Comprehensive Investment Agreement: *ibid* Article 2(f).
[158] ASEAN Comprehensive Investment Agreement: *ibid* Article 23.
[159] ASEAN Comprehensive Investment Agreement: *ibid* Article 17.

Republic of China and the Association of Southeast Asian Nations (ASEAN – China Investment Agreement)[160] continues to provide a limited translation of sustainable development. The Preamble does again stress the guiding principle of common but differentiated responsibility of sustainable development:

> "NOTING that the Framework Agreement recognised the different stages and pace of development among the Parties and the need for special and differential treatment and flexibility for the newer ASEAN Member States of Cambodia, Lao PDR, Myanmar and Viet Nam"[161].

But alongside this recognition, also acknowledges that:

> "REAFFIRMING the Parties' commitment to establish the China-ASEAN Free Trade Area within the specified timeframes, while allowing flexibility to the Parties to address their sensitive areas as provided in the Framework Agreement, in the realisation of the sustainable economic growth and development goals on the basis of equality and mutual benefits so as to achieve a win-win outcome"[162].

The inclusion of these preambular provisions does generate an important degree of differentiation between this Agreement and that of the ASEAN Comprehensive Agreement as discussed above. The ASEAN – China Investment Agreement does provide a direct reference to sustainable development, with focus upon economic development. The use of the phrase "equality and mutual benefits"[163] could create comparative similarities with the SDGs and the other foundational pillars of sustainable development. For example, the reference to "equality"[164] could specifically insight SDG Goal 5[165] in relation to Gender Equality and the eradication of all forms of gender discrimination through adequate social development. The use of the phrase "win-win outcome"[166] in many ways again outlines the purpose of both the MDGs and SDGs. However, similar to that of the ASEAN Comprehensive Agreement, little substantive recognition is made. In

[160] Agreement on Investment of the Framework Agreement on Comprehensive Economic Co-operation Between the People's Republic of China and the Association of Southeast Asian Nations (ASEAN – China Investment Agreement) (signed 15/08/2009, entered into force 01/01/10).
[161] ASEAN – China Investment Agreement: *ibid* Preamble.
[162] ASEAN – China Investment Agreement: *ibid* Preamble.
[163] ASEAN – China Investment Agreement: *ibid* Preamble.
[164] ASEAN – China Investment Agreement: *ibid* Preamble.
[165] SDGs: [n 9] Goal 5.
[166] ASEAN – China Investment Agreement: [n 160] Preamble.

line with this response, only an extremely similar provision to Article 17 of the ASEAN Comprehensive Agreement can be found in Article 16 of the ASEAN – China Investment Agreement as outlined above, is present. Thereby, when determining degree of effectiveness, the third stage of effectiveness would adequately engage with both the level of content and accountability attached.

2.3 International Voluntary Guidelines

The final facilitative mechanism that the field of international investment law heavily utilizes in the regulation of FDI, is that of international voluntary guidelines. Although these facilitative mechanisms are important as they generate much influential capability, the mechanisms themselves can be considered secondary sources of law as the mechanism does not create legally binding obligations. Instead, and significantly, these international voluntary guidelines serve as a general acknowledgement of what international investment agreements should strive to achieve through international standard setting. At best therefore, apart from the influential accountability, the content afforded to sustainable development will be the primary observance, thereby placing the potential degree of effectiveness only between the first and second stage of the determination of effectiveness. The third and fourth stages of determination will never be reached, just like the accountability afforded to the preambular provisions, as these guidelines maintain no legal accountability.

The most obvious starting point is the discussion on the 1992 World Bank's Guidelines on the Treatment of Foreign Direct Investment (World Bank Guidelines) [167]. The World Bank Guidelines "constitute a further step in the evolutionary process where several international efforts aim to establish a favourable investment environment free from non-commercial risks in all countries, and thereby fostering the confidence of international investors"[168] and as such "calls the attention of member countries to the following Guidelines as useful parameters in the admission and treatment of private foreign investment in their territories, without prejudice to the binding rules of international law

[167] The World Bank, *World Bank Guidelines on the Treatment of Foreign Direct Investment* (1992) found at < https://www.italaw.com/documents/WorldBank.pdf > accessed November 2019.
[168] *World Bank Guidelines on the Treatment of Foreign Direct Investment*: *ibid* Preamble.

at this stage of its development"[169]. The Guidelines set out protections that should be present within the investment agreements, for example expropriation[170] and dispute settlement provisions[171], with an overt appreciation for the attracting of FDI.

Significantly, the concept of sustainable development has an extremely limited presence. Article IV on Expropriation does refer vaguely to "public purpose"[172] and when adopting a broad interpretative technique, the concept may generate such presence. However, apart from this potential translation, the Guidelines are devoid of any reference to environmental protection or social development. Reasoning for the lack of a more robust reference to sustainable development may be found in the contextual analysis of the period in which these Guidelines were generated. Later that year in 1992, the Rio Declaration was delivered, thereby providing the then modern international understanding on the concept. Until this point, understanding of the concept of sustainable development could be considered rather disjointed, finding predominant promulgation in the Stockholm Declaration and the Brundtland Report. The MDGs and SDGs had not been conveyed to the international community and therefore a more streamlined appreciation of the understanding had not occurred. Despite this potential contextual reasoning for the lack of strengthened reference to sustainable development, in terms of degree of effectiveness in translation, these Guidelines are somewhat lacking and potentially only stage one of the determination of effectiveness has been reached.

To turn again to the consideration of international voluntary guidelines with a general mandate, the OECD Guidelines for Multinational Enterprises[173] are of contrasting interest. Instantly the comparative difference is made clear between these Guidelines and the previously referred to World Bank Guidelines[174]. It is purported that:

> "The Guidelines aim to ensure that the operations of these enterprises are in harmony with government policies, to strengthen the basis of mutual confidence between enterprises and the societies in which they operate, to help improve the

[169] *World Bank Guidelines on the Treatment of Foreign Direct Investment*: *ibid* Preamble.
[170] *World Bank Guidelines on the Treatment of Foreign Direct Investment*: ibid IV.
[171] *World Bank Guidelines on the Treatment of Foreign Direct Investment*: *ibid* V.
[172] *World Bank Guidelines on the Treatment of Foreign Direct Investment*: *ibid* Article IV (1).
[173] Organization for Economic Co-operation and Development, *OECD Guidelines for Multinational Enterprises* (2011) OECD Publishing. Please see also: OECD, *OECD Due Diligence Guidance for Responsible Business Conduct* (2018).
[174] *World Bank Guidelines on the Treatment of Foreign Direct Investment*: [n 167].

foreign investment climate and to enhance the contribution to sustainable development made by multinational enterprises"[175].

Not only present is the direct use of the term 'sustainable development', but there is also present the significant acknowledgement of the role FDI has to play within the sustainable development agenda. This could be stated to be an extremely different approach to that forwarded by the World Bank Guidelines[176] and because of this preface alone, the terminology employed would place the determination of effectiveness significantly between stages one and two.

Indeed, in terms of contextual comparison, the OECD Guidelines for Multinational Enterprises may have benefitted far greater from an increased international presence and understanding of the concept. Article 2 of General Policies[177] does forward recognition of the three foundational pillars of sustainable development[178] alongside the recognition of aspects relating to human rights[179] and working conditions[180]. The document then outlines in individual Articles aspects pertaining to employment conditions[181], the environment and protective actions[182] and the eradication of bribery[183]. Both the sets of Goals of the MDGs and the SDGs are represented within this document. For example, a target of Goal 7 of the MDGs states that there should be a reduction in "biodiversity loss"[184], in equal measure a target of Goal 15 of the SDG states that "by 2030, ensure the conservation of mountain ecosystems, including their biodiversity"[185]and in the OECD Guidelines for Multinational Enterprises, it is provided that there should be "establish[ed] and maintain[ed] a system of environmental management"[186], from which the protection of biodiversity could be ensured. The content therefore provides much similarity to the ideals annunciated by the concept and is therefore ultimately beneficial to the translation of the concept of sustainable development. Significance of this translation is heightened

[175] *OECD Guidelines for Multinational Enterprises*: [n 173] Preface, para 1.
[176] *World Bank Guidelines on the Treatment of Foreign Direct Investment*: [n 167].
[177] *OECD Guidelines for Multinational Enterprises*: [n 173] Article 2.
[178] *OECD Guidelines for Multinational Enterprises*: *ibid* Article 2 (1).
[179] *OECD Guidelines for Multinational Enterprises*: *ibid* Article 2(2).
[180] *OECD Guidelines for Multinational Enterprises*: *ibid* Article 2(4) and (9).
[181] *OECD Guidelines for Multinational Enterprises*: *ibid* Article 4.
[182] *OECD Guidelines for Multinational Enterprises*: *ibid* Article 5.
[183] *OECD Guidelines for Multinational Enterprises*: *ibid* Article 6.
[184] MDGs: [n 8] Goal 7, Target 7.B.
[185] SDGs: [n 9] Goal 15, Target 15.4.
[186] *OECD Guidelines for Multinational Enterprises*: [n 173] Article 5(1).

when it is considered that "[t]he Guidelines, which are signed by governments, make recommendations to MNEs [Multinational Enterprises]"[187]. These Governments include both OECD Member States as well as non-member States[188], therefore expanding the application of such positive translations. However, when it is recognized that the document is non-binding, the degree of effectiveness is halved and only an appreciation for the content and not the accountability can be made, resting at a position of the top end of stage two.

To continue upon the acknowledgement of the advantageous translation of concept of sustainable development, the UN Global Compact[189] provides ten principles that all multi-national enterprises should follow, allowing "fundamental responsibilities in the areas of human rights, labor, environment and anti-corruption"[190] to be met. The mandate for these Principles is rather more general and most of the ideals of sustainable development are provided. Although it could be argued, in terms detail, that the Ten Principles of the UN Global Compact do not contain the level of detail as shown in the previously analyzed OECD Guidelines for Multinational Enterprises, the incorporation of the concept of sustainable development is no less clear.

Principles 1 – 2 are most definitely represented within the human rights abuses demonstrated and targeted, for example, in Goal 5 on gender equality[191] and Goal 10 on reduced inequalities[192]. Principles 3 – 6 regarding labor standards can be unquestionably embodied in the targets forwarded under the auspice of Goal 8 on decent work and economic growth[193] and, in terms of work-based discrimination, Goal 5[194] and 10[195] are particularly relevant. Principles 7 – 9 in relation to environmental preservation can find

[187] TUAC, *Trade Union Guide to the OECD Guidelines for Multinational Enterprises* (2016) 1.
[188] OECD Website, 'List of OECD Member countries – Ratification of the Convention on the OECD', found at < https://www.oecd.org/about/document/ratification-oecd-convention.htm > accessed February 2022. Please see also: OECD, 'Annual Report on the OECD Guidelines for Multinational Enterprises 2020: Update on National Contact Point Activity' (2021).
[189] United Nations Global Compact, *The Ten Principles of the UN Global Compact*, found at < https://www.unglobalcompact.org/what-is-gc/mission/principles > accessed December 2019.
[190] *The Ten Principles of the UN Global Compact*: *ibid*.
[191] SDGs: [n 9] Goal 5.
[192] SDGs: *ibid* Goal 10.
[193] SDGs: *ibid* Goal 8.
[194] SDGs: *ibid* Goal 5.
[195] SDGs: *ibid* Goal 10.

representation in Goals 7[196], 13[197], 14[198] and 15[199]. Finally, Principle 10 can be represented in Goal 16 of the SDG of Peace, Justice and Strong Institutions with the clear target to "substantially reduce corruption and bribery in all their forms"[200]. The strong connection demonstrated between the Ten Principles and the Goals and Targets dictated by the SDGs is apparent. Again, due to the nature of the Guidelines, in terms of determination of effectiveness, placement at the top end of stage two is an adequate representation.

Although the Ten Principles do afford a great translation of the current international understanding of the content of sustainable development, a brief note must be made in relation to the language deployed and the exact level of detail afforded. It must be remembered that the UN Global Compact, alongside that of the OECD Guidelines for Multinational Enterprises as well the later discussed ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (MNE Declaration)[201], are a set of voluntary and non-legally binding Principles. As such the continual use of the word "should"[202] as opposed possibly to 'must' reflects this status. The level of discretionary language therefore could prove to be detrimental as discretion could amount to a justifiable refrainment of action. Likewise, the lack of detail afforded by the UN Global Compact Principles could be disadvantageous, as the Principles do not offer strategies for achievement. Again, it is this level of discretion that could lead to a lack of attainment. Therefore, even though the content is somewhat forward thinking in replicating many ideals provided in the most recent manifestations of the concept of sustainable development, the content at the same time could be argued to be rather backward thinking in terms of legal development.

To move away from the concentration of guidance upon the general working of multi-national enterprises and investment-based activities, a more sectoral approach to international voluntary guidelines is also present. The International Labor Organization

[196] SDGs: *ibid* Goal 7.
[197] SDGs: *ibid* Goal 13.
[198] SDGs: *ibid* Goal 14.
[199] SDGs: *ibid* Goal 15.
[200] SDGs: *ibid* Goal 16, Target 16.5.
[201] International Labor Organization, *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy* (*MNE Declaration*) (2017), found at < https://www.ilo.org/empent/areas/mne-declaration/lang--en/index.htm > accessed November 2019.
[202] *The Ten Principles of the UN Global Compact*: [n 189].

(ILO) has generated the MNE Declaration. In essence, the document "offer[s] guidelines to multinational enterprises, governments, and employers' and workers' organizations in such areas as employment, training, conditions or work and life, and industrial relations"[203] and outwardly recognizes "the 2030 Agenda for Sustainable Development"[204], i.e., the SDGs. Indeed, this advantageous recognition is most definitely present in certain provisions, including that of Article 13[205]. Other Guidelines focus upon aspects pertaining to equal pay[206] and non-discrimination in the workplace[207], workplace safety[208] and to collective bargaining[209]. The sectoral approach stems from the acknowledgement of development from a labour perspective. As such there is only minor reference to the environmental or even economic foundational pillars of development, which are as equally vital to the attainment of sustainable development, which would firmly place the determination of effectiveness at stage one. It could be argued that these Guidelines have one aim in mind, that of labour or social orientated development. Therefore, possibly generating the view that with specific sectoral approaches, it is much more beneficial to focus upon one sector (or pillar), i.e., social, economic or environmental, due to the amount of technical knowledge required as opposed having a set of guidelines, like that of the Ten Principles of the UN Global Compact, which are all encompassing and therefore extremely lacking in specific detail.

The rather narrow-minded projection of the sectoral approach in the MNE Declaration discussed above can be seen to be far removed in the Principles for Responsible Investment in Agriculture and Food Systems (2014)[210]. The aim is clear:

> "Responsible investment in agriculture and food systems is essential for enhancing food security and nutrition and supporting the progressive realization of the right to adequate food in the context of national food security. Responsible investment makes a significant contribution to enhancing sustainable livelihoods, in particular for smallholders, and members of marginalized and vulnerable

[203] *MNE Declaration*: [n 201] V.
[204] *MNE Declaration*: *ibid* V.
[205] *MNE Declaration*: *ibid* Article 13.
[206] *MNE Declaration*: *ibid* Article 29.
[207] *MNE Declaration*: *ibid* Article 30.
[208] *MNE Declaration*: *ibid* Articles 43 – 46.
[209] *MNE Declaration*: *ibid* Articles 55 – 62.
[210] Food and Agriculture Organization of the United Nations, *Principles for Responsible Investment in Agriculture and Food Systems* (2014), found at < www.fao.org/3/a-au866e.pdf > accessed November 2019.

groups, creating decent work for all agricultural and food workers, eradicating poverty, fostering social and gender equality, eliminating the worst forms of child labour, promoting social participation and inclusiveness, increasing economic growth, and therefore achieving sustainable development"[211].

Although the sectoral aim is precise and orientated, like that demonstrated by the MNE Declaration, there is obvious reference to all three of the foundational pillars pertaining to the concept of sustainable development. Not only are there Principles referring to precise aspects concerning food security and the subsequent environmental preservation[212], but there are also Principles that declare there should be an "implementation of other international labour standards … and the elimination of the worst forms of child labour"[213], the "fostering [of] decent work"[214] and "gender equality"[215]. Therefore demonstrating, that even though a precise sectoral approach is taken, it is done so by reference to all aspects of the concept as outlined by the SDG's, thereby the translation of sustainable development continues to be aligned at the second stage of determination of effectiveness.

3. Effectiveness in Inter-Linkages

After outlining both the methodological approach to the analysis of the degree of effectiveness and the most heavily utilized individual facilitative mechanisms employed by the field of international investment law, it is necessary now to examine the more indirect translations these facilitative mechanisms afford to the concept of sustainable development. This Section will analyze the mechanical implications which derive importance from the written terms of the facilitative mechanisms

The use of the term 'mechanical' denotes alternative indirect implications afforded by the above regulatory facilitative mechanisms to the translation of the concept of sustainable

[211] *Principles for Responsible Investment in Agriculture and Food Systems*: *ibid* Article 1.
[212] Relevant principles of the *Principles for Responsible Investment in Agriculture and Food*: Principle 1, Contribute to Food Security and Nutrition; Principle 5, Respect Tenure of Land, Fisheries, and Forests, and Access to Water; Principle 6, Conserve and Sustainable Manage Natural Resources, Increase Resilience, and Reduce Disaster Risks.
[213] *Principles for Responsible Investment in Agriculture and Food Systems*: [n 210] Principle 2.
[214] *Principles for Responsible Investment in Agriculture and Food Systems*: *ibid* Principle 2.
[215] *Principles for Responsible Investment in Agriculture and Food Systems*: *ibid* Principle 3.

development. This indirect inference within these mechanisms is the final opportunity for the effective translation of the concept. The methods of indirect transposition can be separated in two principal perspectives. The first is the reference to agreements containing sustainable development within the parameters of the original international investment mechanism. The second opportunity pertains to the analysis of the dispute settlement provisions through which arbitral tribunals and decisions are dictated. Although the case law found within arbitral decisions has significance for the concept, focus instead will be upon the legal obligations placed upon the procedure of decisions.

3.1 Reference to Other Agreements

To start the analysis from the least degree of effectiveness afforded in the indirect reference to sustainable development through reference to other agreements, it must be acknowledged that there is no certainty that regulatory mechanisms include this opportunity. There are abundant quantities of facilitative mechanisms that do not contain any reference to sustainable development through the acknowledgement of other relevant international agreements.

Examples of BITs in which sustainable development cannot be translated in this manner include that of the Agreement Between the Government of the Islamic Republic of Pakistan and the Government of the Kingdom of Bahrain for the Promotion and Protection of Investments[216] and the Czech - Azerbaijan BIT[217]. There are also occasions[218] whereby important multilateral investment treaties do not have reference to sustainable development in this manner, of which the Mauritius Convention on Transparency and ICSID are the most obvious. Additionally, in relation to voluntary guidelines, the UN Global Compact does not make any indication through such a reference.

[216] Agreement Between the Government of the Islamic Republic of Pakistan and the Government of the Kingdom of Bahrain for the Promotion and Protection of Investments (signed 18/03/2014, entered into force 07/10/2015).
[217] Czech – Azerbaijan BIT: [n 81].
[218] Another example can be found in the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) (June 10, 1958) 330 UNTS 3.

This extremely bleak view afforded in the inability of the translation of the concept through the reference to other international agreements is not the only perspective. A more positive light can be found, reversing this view, in turn starting to translate sustainable development. The inference of the concept can be categorized into two principle sub-categories. The first is that of general acknowledgement, without any specific reference to named agreements pertaining to sustainable development. The second sub-category specifically provides agreements that have direct links to the concept. Although the naming of a particular agreement is preferable as there is an increase in the level of certainty of translation present through the removal of any discretion, the broad generality provided in the first sub-category by only a general acknowledgement enables discretion and the ability to infer, within limitations, a broad range of agreements that could transpose sustainable development. At the same time however, with much discretion present, there is an equal ability to dismiss many agreements pertaining to the concept.

The first sub-category of translation of the concept through only the general recognition of other international agreements can be found in numerous agreements upon examination. Referring to the history of BITs, the freedom of the action of investing is placed parallel beside the protection of the investment with attributed rights and duties. Any opportunity to curtail the freedoms, and in this case by the direct reference to other international agreements which would serve to limit the investment freedom, could understandably be rather unpopular. Therefore, the ability to infer in only a general manner legal obligations are important as it allows an influential ability as well as a level of discretion. The Agreement Between Canada and Mali for the Promotion and Protection of Investments (Canada – Mali BIT)[219] is most exemplary of the approach taken which could infer both sustainable development and a high degree of discretion. Article 3 provides:

> "Each Party shall encourage the creation of favourable conditions for investment in its territory by investors of the other Party. Each Party admits investments in

[219] Agreement Between Canada and Mali for the Promotion and Protection of Investments (Canada – Mali BIT) (signed 28/11/2014, entered into force 08/06/2016).

conformity with its laws and regulations otherwise consistent with this Agreement"[220].

Noticeably it is obvious of the vague language used to initiate the translation of the concept. There is no reference to the term 'sustainable development' or even statements alluding to agreements that contain the concept. It is reasonable to believe that at first sight there is no inference of sustainable development. However, upon closer inspection, the reference to "conformity with its laws and regulations otherwise consistent with this Agreement"[221] does allow for the possibility for the translation. The only limitation placed upon this substantive obligation is that the transference must be "consistent with this Agreement"[222]. Again, the limitation is rather broad and could therefore allow for an equally wide discretion. The Contracting States of the Canada – Mali BIT are signatories to, for example, the Convention on Biodiversity (CBD)[223], the Rio Declaration and the United Nations Framework Convention on Climate Change[224]. The inherent attitude shown towards sustainable development within these international agreements could potentially be transposed into this BIT.

The Agreement Between Japan and the State of Israel for the Liberalization, Promotion and Protection of Investment (Japan - Israel BIT)[225] could similarly implicate the concept of sustainable development. Article 22 provides:

"Nothing in this Agreement shall be construed so as to derogate from:

(a) Laws and regulations, administrative practices or procedures, or administrative or judicial decisions of either Contracting Party;

(b) **Obligations under the international agreements which are in force between the Contracting Parties**"[226]. [Emphasis added]

[220] Canada – Mali BIT: *ibid* Article 3.
[221] Canada – Mali BIT: *ibid* Article 3.
[222] Canada – Mali BIT: *ibid* Article 3.
[223] United Nations Convention on Biological Diversity (CBD) (signed 05/06/1992, entered into force 29/12/ 1993) 1760 UNTS 79; 31 ILM 818.
[224] United Nations Framework Convention on Climate Change (UNFCCC) (signed 09/05/1992, entered into force 21/03/ 1994) 1771 UNTS 107.
[225] Agreement Between Japan and the State of Israel for the Liberalization, Promotion and Protection of Investment (Japan - Israel BIT) (signed 01/02/2017, entered into force 05/10/2017).
[226] Japan - Israel BIT: *ibid* Article 22.

The obligations, although given wide discretionary powers as to content, could lead to the translation of sustainable development under the protections of the Japan - Israel BIT. The use of the strong phrase, "nothing in this Agreement shall be construed as to derogate"[227], does enhance the accountability of the legal obligation to adhere to other international agreements. However, this accountability is weakened due to the lack of any reference to specific agreements. Must the obligations be conducive to internationally recognised labour, environmental, economic, health and safety standards? The degree of effectiveness could be therefore again questionable in this presentation.

With detrimental similarity, many multilateral treaties[228] do demonstrate this ability to implicate the concept. The ASEAN – China Investment Agreement[229] provides an extremely general relationship to alternative international agreements. In the Preamble, it is given that "REAFFIRMING further the rights, obligations and undertakings of each Party under the World Trade Organization ("WTO"), and other multilateral, regional and bilateral agreements and arrangements"[230]. Additionally, later in the substantive provisions, Article 23 restates this intention in stating "Nothing in this Agreement shall derogate from the existing rights and obligations of a Party under any other international agreements to which it is a party"[231]. Thereby demonstrating the importance of the Contracting Parties recognition of other international treaties within the application and remit of this Agreement. No matter the importance that the restatement affords, there is still no certainty and specificity in the detailing of precise international agreements. Although the generality could translate sustainable development through certain commitments, these are placed directly alongside legal commitments of a non-sustainable development nature. With the high level of discretion therefore, the accountability of which route to choose is removed. The high level of discretion remains, and discretion can only generate a potential translation from the most positive viewpoint.

Despite the previous examples given, demonstrating only the unspecific elucidation to alternative international agreements that would influence the application of the original agreement referred, there are also agreements that do continue this rather undefined

[227] Japan - Israel BIT: *ibid* Article 22.
[228] Other examples: *OECD Guidelines for Multinational Enterprises:* [n 173] Preamble; *World Bank Guidelines on the Treatment of Foreign Direct Investment*: [n 167] Preamble and Article 1.
[229] ASEAN – China Investment Agreement: [n 160].
[230] ASEAN – China Investment Agreement: *ibid* Preamble.
[231] ASEAN – China Investment Agreement: *ibid* Article 23.

approach in terms of lack of reference to precisely named international treaties, but at the same time having the ability to narrow this level of discretion through reference to certain prerequisites located adjacent or otherwise by way of interpretative aids i.e., those found in the preambular provisions. The wide discretion afforded by the lack of precise reference to other international agreements can be somewhat curtailed in the directional approach given by these interpretative aids to the reference.

The Agreement Between the Government of the Republic of Korea and the Government of the Republic of Cameroon for the Promotion and Protection of Investments[232] is exemplary and provides in the Preamble, "[d]esiring to achieve these objectives in a manner consistent with the protection of health, safety, and the environment and the promotion of consumer protection and internationally recognized labour rights"[233]. Although the term 'international agreements' is lacking within the citation, the reference to "internationally recognised … rights"[234] could suggest such a facilitative mechanism that would affirm such rights and therefore the precise adjacent reference to "health, safety, environment, consumer protection and … labour"[235] could narrow and subsequently specify the international agreements induced. The prerequisite aspects are all related to the concept of sustainable development as represented in both the MDGs and SDGs. However, it must not be assumed that the accountability is improved in the narrowing of interpretation. The content of the inference could be somewhat improved in the narrowing of international agreement referred, but the degree of accountability remains the same and thus limited as the reference in solely found within the Preamble. Considering both accountability and content, ultimately the level of effectiveness in translation of the concept is still extremely low, remaining at the first stage of determination of effectiveness.

In a similar manner, regarding the narrowing of the broad reference to other international agreements through prerequisites provided elsewhere and not directly adjacent, another

[232] Agreement Between the Government of the Republic of Korea and the Government of the Republic of Cameroon for the Promotion and Protection of Investments (Korea - Cameroon BIT) (signed 24/12/2013, entered into force 13/04/2018).
[233] Korea - Cameroon BIT: *ibid* Preamble.
[234] Korea - Cameroon BIT: *ibid* Preamble.
[235] Korea - Cameroon BIT: *ibid* Preamble.

example can be found in the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP). Article 1.2 provides:

> "1. Recognizing the Parties' intention for this Agreement to coexist with their existing international agreements, each Party affirms:
>
> (a) in relation to existing international agreements to which all Parties are party, including the WTO Agreement, its existing rights and obligations with respect to the other Parties; and
>
> (b) in relation to existing international agreements to which that Party and at least one other Party are party, its existing rights and obligations with respect to that other Party or Parties, as the case may be"[236].

Although this Provision broadly recognizes other international agreements and obligations that are not within the remit of the CPTPP, the Provision does not specify any agreements, except of that of the WTO Agreement[237]. Thereby when read considering the preambular provisions and using these as a narrowing interpretative aid, reference to those treaties containing a sustainable development agenda could be induced. The Preamble provides:

> "ESTABLISH a comprehensive regional agreement that promotes economic integration to liberalize trade and investment, bring economic growth and social benefits, create new opportunities for workers and businesses, contribute to raising living standards, benefit consumers, reduce poverty and promote sustainable growth … their inherent right to regulate and resolve to preserve the flexibility of the Parties to set legislative and regulatory priorities, safeguard public welfare, and protect legitimate public welfare objectives, such as public health, safety, the environment, the conservation of living or non-living exhaustible natural resources, the integrity and stability of the financial system and public morals … further their inherent right to adopt, maintain or modify health care systems … high levels of environmental protection, including through

[236] Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) (signed 08/03/2018, entered into force 30/12/2018) Article 1.2.
[237] Marrakesh Agreement Establishing the World Trade Organization (signed 15/04/1994, entered into force 01/01/1995) U.N.T.S. 14, 33 I.L.M. 1143.

> effective enforcement of environmental laws, and further the aims of sustainable development, including through mutually supportive trade and environmental policies and practices … enforce labor rights, improve working conditions and living standards, strengthen cooperation and the Parties' capacity on labor issues … good governance … eliminate bribery and corruption in trade and investment"[238].

This Provision affords many comparisons to the development agenda forwarded by the SDGs, thereby when reading Article 1.2 and considering the Preamble, certainly a narrowing in application of agreement scope effect could be seen. The broad and vague language ultimately allows interpretation and the interpretation can include that offered by the preambular provisions.

Besides this directional approach, there are continual practices where international investment agreements do place the burden of acknowledgement of other international agreements upon themselves. The Free Trade Agreement Between the Government of the Republic of Turkey and the Government of Singapore (Turkey – Singapore FTA)[239] is an example of such an occurrence and places much onus upon the Contracting Parties to enlighten the other as to the other international agreements signed. Article 12(23) states:

> "Each Party shall ensure that international agreements pertaining to or affecting investors or investment activities to which a Party is a signatory shall be promptly published or otherwise made available in such a manner as to enable interested persons or parties to become acquainted with them …"[240].

Once the recognition has been made between the Contracting Parties, the ability to translate varying aspects of sustainable development could hold more accountability. Both Singapore and Turkey, for example, are signatories to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal[241], and

[238] CPTPP: [n 236] Preamble.
[239] The Free Trade Agreement Between the Government of the Republic of Turkey and the Government of Singapore (Turkey – Singapore FTA) (2015) (signed 14/11/2015, entered into force 01/10/2017) Chapter 12: Investment.
[240] Turkey - Singapore FTA: *ibid* Chapter 12: Investment, Article 12(23).
[241] Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (1989) 1673 UNTS 126; 28 ILM 657.

thereby could have a significant degree of bearing upon decisions made in light of the Turkey – Singapore FTA.

To discuss now the analysis of the second sub-category in which alternative international agreements are transposed within the parameters of the international investment agreement. Indeed, the level of preciseness is increased. There must be recognition, after the significant consideration of the facilitative mechanisms, that there are multiple occasions where there is the incorporation of named alternative international agreements that have a relationship to sustainable development. All three of the main regulatory facilitative investment mechanisms, that of voluntary international investment guidelines, BITs and multilateral investment agreements, do make use of this opportunity to induce the concept. Although at first sight this assertion could be seen as positive for the translation of sustainable development, the reference must be independently analysed considering both content and accountability.

The weakest degree of effectiveness in translation can be found in the voluntary international investment guidelines. Although the content of the translation through reference to other international agreements in some instances could be determined to be meaningfully aligned to the SDGs, the accountability afforded to such obligations remains to only positions of influence. Despite this recognition, the visual inclusion of the concept is no less prominent. The MNE Declaration[242] provides in Article 8 that:

> "All the parties concerned by the MNE Declaration should respect the sovereign rights of States, obey the national laws and regulations, give due consideration to local practices and respect relevant international standards. **They should also honour commitments, which they have freely entered into, in conformity with the national law and accepted international obligations. They should respect the Universal Declaration of Human Rights (1948) and the corresponding International Covenants (1966) adopted by the General Assembly of the United Nations as well as the Constitution of the International Labour Organisation and its principles according to which**

[242] *MNE Declaration*: [n 201].

freedom of expression and association are essential to sustained progress"[243]. [Emphasis added]

The above citation not only recognises general legal obligations of the Contracting Parties through other international agreements, but the Article also identifies specifically the Universal Declaration of Human Rights (UDHR)[244] and the principles of the International Labour Organisation. Importantly however, the specific detailing of international agreements adds a rather more concrete intrusion of the concept. The UDHR, for example, contains obligations that pertain to "the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life"[245]. The solid reference to aspects of human development creates alignment to the SDGs. Goal 5 aims to "adopt and strengthen sound policies and enforceable legislation for the promotion of gender equality and the empowerment of all women and girls at all levels"[246] and Goal 1 strives to "create sound policy frameworks at the national, regional and international levels, based on pro-poor and gender sensitive development strategies, to support accelerated investment in poverty eradication actions"[247].

Another comparable set of voluntary international investment guidelines can be found in the Principles for Responsible Investment in Agriculture and Food Systems. After consideration of Article 8[248], the reference to these alternative international agreements could be considered exceptional for the translation of sustainable development. For example, reference to the International Treaty on Plant Genetic Resources for Food and Agriculture[249] transposes fundamental aspects pertaining to the concept. The Treaty "[a]cknowledg[es] … that plant genetic resources for food and agriculture are the raw material indispensable for crop genetic improvement, whether by means of farmers' selection, classical plant breeding or modern biotechnologies, and are essential in adapting to unpredictable environmental changes and future human needs"[250], thereby

[243] *MNE Declaration*: *ibid* Article 8.
[244] United Nations General Assembly, *Universal Declaration of Human Rights* (UDHR) (1948) 217 A (III).
[245] UDHR: *ibid* Preamble.
[246] SDGs: [n 9] Goal 5, Target 5.C.
[247] SDGs: *ibid* Goal 1, Target 1.B.
[248] *Principles for Responsible Investment in Agriculture and Food Systems*: [n 210] Article 8.
[249] International Treaty on Plant Genetic Resources for Food and Agriculture (2001) 2400 UNTS 303.
[250] International Treaty on Plant Genetic Resources for Food and Agriculture: *ibid* Preamble.

implicating Goal 2 of the SDGs and the aim to "end hunger and ensure access by all people, in particular the poor and people in vulnerable situations, including infants, to safe, nutritious and sufficient food all year round"[251]. In fact, no further translation of the concept of sustainable development through statement of reference to other legal agreements would be necessary to engage fully with the SDGs. Even in light of this recognition, unfortunately it must be remembered the lack of accountability afforded to such Guidelines, rendering these Guidelines as well as the MNE Declaration's translation of the concept of sustainable development only at stage two of the determination of effectiveness.

To demonstrate an enhanced of accountability in the translation of sustainable development, BITs also have established an ability to incorporate the concept into the agreement in a similar manner. The Agreement for the Promotion and Protection of Investment Between the Republic of Austria and the Federal Republic of Nigeria (Austria – Nigeria BIT)[252] is exemplary. The Preamble dictates:

> "REAFFIRMING the commitments under the **2006 Ministerial declaration of the UN Economic and Social Council of Full Employment and Decent Work** … EMPHASISING the necessity for all governments and civil actors alike to adhere to UN anti-corruption efforts, most notably the **UN Convention against Corruption** … TAKING NOTE OF the principles of the **UN Global Compact** … KNOWLEDGING that investment agreements and multilateral agreements on the protection of environment, human rights or labour rights are meant to foster global sustainable development and that any possible inconsistencies there should be resolved without relaxation of standards of protection"[253]. [Emphasis added]

The Austria – Nigeria BIT references three specific international agreements and declarations that could be argued to have comparable content to that which is afforded within the most current understandings of the concept. Although the inclusion of these individual references is harnessing an alternative way to acknowledge and incorporate the concept of sustainable development, it must be remembered that these references are

[251] SDGs: [n 9] Goal 2, Target 2.1.
[252] Austria – Nigeria BIT: [n 90].
[253] Austria – Nigeria BIT: *ibid* Preamble.

only found within the Preamble of the Austria-Nigeria BIT, which ultimately only provide an influential accountability.

After much research, it is a somewhat common occurrence within BITs to afford direct reference to alternative international agreements within the Preamble, though it is rare to see reference to other specific agreements within the subsequent substantive provisions. The Free Trade Agreement Between the Government of Australia and the Government of the People's Republic of China[254] demonstrates this view. Article 1:2 states:

> "The Parties affirm their existing rights and obligations with respect to each other under multilateral and bilateral agreements to which both Parties are party, including the WTO Agreement.
>
> Nothing in this Agreement shall derogate from the existing rights and obligations of a Party under the WTO Agreement or any other multilateral or bilateral agreement to which both Parties are party.
>
> In the event of any inconsistency between this Agreement and any other multilateral or bilateral agreement to which both Parties are party, the Parties shall immediately consult with a view to finding a mutually satisfactory solution"[255].

The inclusion of general reference to other international agreements in the substantive and more accountable provisions is far more common in BITs.

Alternatively, examples[256] of multilateral investment agreements are, in comparison to BITs, more plainly able to demonstrate specific translation of sustainable development in this manner. NAFTA[257] could be seen to translate sustainable development using this opportunity through Article 104, which provides:

> "In the event of any inconsistency between this Agreement and the specific trade obligations set out in:

[254] Free Trade Agreement Between the Government of Australia and the Government of the People's Republic of China (Australia – China FTA) (signed 17/06/2015, entered into force 20/12/2015).
[255] Australia – China FTA: *ibid* Article 1:2.
[256] Another example is the ECT: [n 122] Article 16.
[257] NAFTA: [n 142].

(a) the **Convention on International Trade in Endangered Species of Wild Fauna and Flora**, done at Washington, March 3, 1973, as amended June 22, 1979,

(b) the **Montreal Protocol on Substances that Deplete the Ozone Layer**, done at Montreal, September 16, 1987, as amended June 29, 1990,

(c) the **Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal**, done at Basel, March 22, 1989, on its entry into force for Canada, Mexico and the United States, or

such obligations shall prevail to the extent of the inconsistency, provided that where a Party has a choice among equally effective and reasonably available means of complying with such obligations, the Party chooses the alternative that is the least inconsistent with the other provisions of this Agreement.

The Parties may agree in writing to modify Annex 104.1 to include any amendment to an agreement referred to in paragraph 1, and any other environmental or conservation agreement "[258]. [Emphasis added]

With the subsequent Annex 104.1 referring to the:

"***Agreement Between the Government of Canada and the Government of the United States of America Concerning the Transboundary Movement of Hazardous Waste*** …

Agreement Between the United States of America and the United Mexican States on Cooperation for the Protection and Improvement of the Environment in the Border Area …"[259]. [Emphasis added]

The inference of sustainable development within these specified international agreements is strong. If one were to examine the Montreal Protocol on Substances that Deplete the Ozone Layer[260], then a portrayal of sustainable development as coordinated by the SDGs

[258] NAFTA: *ibid* Article 104.
[259] NAFTA: *ibid* Annex 104.1.
[260] Montreal Protocol on Substances that Deplete the Ozone Layer (Montreal Protocol) (1987) 1522 UNTS 3; 26 ILM 1550.

would be found in high measure. The Preamble gives, "[m]indful of their obligation under that Convention to take appropriate measures to protect human health and the environment against adverse effects resulting or likely to result from human activities which modify or are likely to modify the ozone layer"[261], which at the core do stimulate interjections to the SDGS, with particular regard to Goals 7 and 13 of the SDGs. However, although the ties are strong to the current understanding of the concept, of ultimate importance is the fact that this international investment agreement has achieved the citation of named international agreements that contribute to the achievement of sustainable development within the substantive obligations. When the degree of effectiveness is considered therefore, one could argue that both the required content and level of accountability are present to assert a high degree of effectiveness in the translation of the concept, resting at stage four of the degree of effectiveness.

3.2 Dispute Settlement Provisions and Legal Obligations Placed Upon Arbitral Decisions

The historical development of international investment law provides justification for the availability of an investment dispute settlement mechanism. Reinisch states that "by giving interested parties, ranging from States and inter-State entities like the EU to private investors, the option of enforcing their rights in specific forums has made such rights real and effective"[262].

The dispute settlement mechanisms can generate important arbitral decisions[263] and it is the occurrence of these provisions that could provide the final mechanical opportunity to forward the concept of sustainable development, which affirms the textual methodology applied to the argumentation employed within this Thesis. Primarily and comparatively succinctly, the sustainable development agenda could be transposed in the treatment of

[261] Montreal Protocol: *ibid* Preamble.
[262] August Reinisch, 'How Narrow are Narrow Dispute Settlement Clauses in Investment Treaties?' (2011) *Journal of International Dispute Settlement,* Vol. 2, Issue 1, 115.
[263] Although outside the remit of this Thesis, there have been calls to improve the ad hoc investment tribunal system. Please see: Marc Bungenberg and August Reinisch, *From Bilateral Arbitral Tribunals and Investment Courts to a Multilateral Investment Court: Options Regarding the Institutionalization of Investor-State Dispute Settlement* (2019); Ahmet Dulger, *Time for the Appeal Tribunal in Investment Arbitration: Lessons from WTO and Transitioning to the New Era* (2018).

investment activities, which was significantly analyzed within the previous Section[264]. There is much scope that can be afforded to sustainable development through the arbitral decisions, for example in refining what is meant by 'public purpose' in relation to indirect expropriation or defining what is considered non-derogation. Translation can even be seen in the exposure of the denial of benefits clause and the "guarantee against the abuse of rights"[265], which commonly dictates within treaties:

> "A Party may deny the benefits of this Chapter to an investor of another Party that is an enterprise of that other Party and to investments of that investor if persons of a non-Party own or control the enterprise and the denying Party adopts or maintains measures with respect to the non-Party or a person of the non-Party that prohibit transactions with the enterprise or that would be violated or circumvented if the benefits of this Chapter were accorded to the enterprise or to its investments"[266].

As such therefore not making the concept itself enforceable or even making sustainable development a proactive obligation, instead only indirectly adding to the development agenda through interpretation.

However, there are many significant setbacks attributed to these dispute settlement mechanisms that need to be recognized. The principal detriment is that the arbitral decisions set no legally binding precedent[267]. Cosbey *et al* reaffirm the degree of detriment:

> "Given that portions of the existing dispute settlement process evolved from the world of international commercial arbitration, where opaque ad hoc resolution was seen as desirable by the business community, it may not be surprising that

[264] Chapter Four, Section Two.
[265] Loukas Mistelis and Crina Baltag, *'Denial of Benefits' Clause in Investment Treaty Arbitration* (2018) Legal Studies Research Paper No. 293/2018, 1.
[266] NAFTA: [n 142] Article 14.14.
[267] Other features of international investment dispute settlement include, for example, the "selection of arbitrators" for the tribunal and the "public access to arbitral hearings", as highlighted by Aaron Cosbey, Howard Mann, Luke Eric Peterson and Konrad von Moltke, *Investment and Sustainable Development: A Guide to the Use and Potential of International Investment Agreements* (2004) 4.

there are growing calls for a more formalized and transparent process to apply to investment treaty disputes"[268].

Despite these recognitions, it is essential to determine the degree of potential further interaction the concept of sustainable development could have within the dispute settlement provisions, which will ultimately discuss the second opportunity for inclusion of the concept. This opportunity will fundamentally rest upon the dispute settlement provisions alongside the consideration of the other provisions within the agreement.

It is within the remit of the agreement to provide the legal obligations behind such dispute provisions. When the provisions are located within BITs, a similar pattern of obligatory regulation can be found. There is a divide between investor-state dispute settlement and state-state dispute settlement, although both do have the same overall aim. The provisions initially consider alternatives to arbitral dispute settlement. The Declaration of Special Arrangements for the Reciprocal Promotion and Protection of Investments (Kuwait – Kenya BIT)[269] primarily gives:

> "Disputes arising between a Contracting Party and an investor from the other Contracting Party in respect of an investment of the latter in the territory of the former shall, as far as possible, be settled amicably"[270].

And:

> "Contracting Parties shall, as far as possible, settle any dispute concerning the interpretation or application of this Agreement through consultations or other diplomatic channels"[271].

However, the BITs do additionally recognise that recall to formal approaches to dispute settlement found in arbitral decisions is necessary. Ideally however, amicable and non-arbitral forms of dispute settlement may be more harmonious for both contracting parties involved.

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[268] A. Cosbey, H. Mann, L. E. Peterson and K. V. Moltke: *ibid* 8.
[269] Declaration of Special Arrangements for the Reciprocal Promotion and Protection of Investments (Kuwait – Kenya BIT) (signed 12/11/2013, entered into force 22/04/2015).
[270] Kuwait – Kenya BIT: *ibid* Article 8(1).
[271] Kuwait – Kenya BIT: *ibid* Article 9(1).

Despite this simplified acknowledgment above, BITs do always outline the legal obligations for the fulfilment of the adversarial approach to dispute settlement. Within the incitement of these rules is the precise detail as to the procedure of the arbitral decisions. It is this directional interpretative additive that provides an alternative, i.e., not initially concerned with the details of the breaches of standards of protection, opportunity for the concept of sustainable development to be translated within international investment law. Due to the lack of precedence in arbitral decisions, any obligation that can transpose the concept is important. There is again a high degree variance in this opportunity of translation, as will be shown within the analysis of BITs.

An example of the least effective degree of onus upon the inclusion of sustainable development within the content of the arbitral decision can be found in the Agreement Between the Government of Australia and the Government of the Republic of Lithuania on the Promotion and Protection of Investments (Australia – Lithuania BIT)[272]. Regarding the relevant dispute settlement provisions, there are no precise obligations within the Australia – Lithuania BIT that could implicate the concept. The provisions concerning the decision refer purely to procedural components as opposed to aspects of content. Article 13(3) in relation to the Settlement of disputes between a Party and an investor of the other Party states:

> "Where a dispute is referred to the Centre pursuant to paragraph 2(b) of this Article:
>
> (a) Where that action is taken by an investor of one Party, the other Party shall consent in writing to the submission of the dispute to the Centre within thirty days of receiving such a request from the investor;
>
> (b) If the parties to the dispute cannot agree whether conciliation or arbitration is the more appropriate procedure, the investor affected shall have the right to choose;

[272] Agreement Between the Government of Australia and the Government of the Republic of Lithuania on the Promotion and Protection of Investments (Australia – Lithuania BIT) (signed 24/11/1998, entered into force 10/05/2002).

(c) A company which is constituted or incorporated under the law in force in the territory of one Party and in which before the dispute arises the majority of the shares are owned by investors of the other Party shall … be treated for the purposes of the Convention as a company of the other Party"[273].

Equally, in relation to Article 14 on the Settlement of disputes between investors of the Parties, it is stated only:

"Each Party shall in accordance with its law:

(a) Provide investors of the other Party who have made investments within its territory and personnel employed by them for activities associated with investments full access to its competent judicial or administrative bodies in order to afford means of asserting claims and enforcing rights in respect of disputes with its own investors;

(b) Permit its investors to select means of their choice to settle disputes relating to investments with the investors of the other Party, including arbitration conducted in a third country …

(c) Provide for the recognition and enforcement of any resulting judgments or awards"[274].

Both citations from the Australia – Lithuania BIT demonstrate the lack of any implication of sustainable development within the dispute settlement mechanisms. Effectiveness in translation is therefore severely deficient as there is no legal obligation that dictates decisions should be made with even the basic consideration of the concept. Effectiveness is further weakened and ultimately completely removed when the preambular provisions of the Australia – Lithuania BIT do not implicate sustainable development and as such cannot be utilised as a beneficial and overall interpretative aid.

[273] Australia – Lithuania BIT: *ibid* Article 13(3).
[274] Australia – Lithuania BIT: *ibid* Article 14.

To insight a basic translation of sustainable development within the dispute settlement provisions, there are occasions[275] whereby the dispute settlement provisions contain indirect references to the concept without any further implication of sustainable development within the substantive provisions and preamble of the treaty. The Agreement Between the Government of Canada and the Government of the Republic of Argentina for the Promotion and Protection of Investment[276] is exemplary of this occurrence. Article X(4) states:

> "The arbitral tribunal shall decide the dispute in accordance with the provisions of this Agreement, with reference to **the laws of the Contracting Party involved** in the dispute, including its rules on conflict of laws; terms of any specific agreement concluded in relation to such an investment and **principles of international law, as may be applicable**. The arbitration decision shall be final and binding on both Parties"[277]. [Emphasis added]

With the acknowledgement of the laws of the Contracting Parties alongside the principles of international law, there could be an indirect implication of the concept of sustainable development. The concept is included within many international agreements of which the Contracting Parties are signatories[278], as well as the consideration that the concept is considered a principle in international law[279]. However, two significant limitations of these acknowledgements must be recognized. The first is the language used that could implicate the concept is discretionary. The use of the word 'may' insinuates a high level of discretion on behalf of the decision makers. Secondly, as previously stated, most BITs contain two strains of dispute settlement recourse, that of settlement of disputes between an investor and a contracting state as well as the settlement of disputes between both contracting states. This example makes the inference of sustainable development only in

[275] Other examples: Agreement Between the Government of the Kingdom of Bahrain and the Government of the United Mexican States on the Promotion and Reciprocal Protection of Investments (signed 29/11/2012, entered into force 30/07/2014); Agreement Between the Government of the Republic of Serbia and the Government of the People's Democratic Republic of Algeria on the Reciprocal Promotion and Protection of Investments (signed 13/02/2012, entered into force 25/11/2013).
[276] Agreement Between the Government of Canada and the Government of the Republic of Argentina for the Promotion and Protection of Investment (Argentina – Canada BIT) (signed 05/11/1991, entered into force 29/04/1993).
[277] Argentina – Canada BIT: *ibid* Article X(4).
[278] Examples: UNFCCC: [n 224]; Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) (signed 03/03/1973, entered into force 01/07/1975) 993 UNTS 243.
[279] An example includes that of the *Arbitration Regarding the Iron Rhine ("Ijzeren Rijn") Railway (Belgium v. Netherlands)*, Permanent Court of Arbitration (May 2005) Arbitral Award.

relation to that of the settlement of disputes between an investor and the host contracting party. Thereby curtailing the implication further by only recognizing these laws and principles when in consideration of investor-state dispute settlement. The determination of degree of effectiveness in this particular translation would subsequently be found only at the bottom of stage three.

An alternative implication of sustainable development within dispute settlement provisions can be found in the ability to afford a minimum implication of the concept through provisions other than that related to dispute settlement, thus transposing sustainable development indirectly into the dispute settlement provisions. There are examples of where there is no reference, direct or indirect, to sustainable development in the specific dispute settlement provisions, though the concept could be construed within provisions that could provide interpretative influence over the provisions. The Agreement Between the Government of the Republic of Serbia and the Government of the Republic of Malta for the Reciprocal Promotion and Protection of Investments (Serbia - Malta BIT)[280] demonstrates no reference to sustainable development within the dispute settlement provisions held within Articles 9 and 10[281]. However, the Preamble of the Serbia - Malta BIT provides:

> "Recognizing that the encouragement and reciprocal protection under international agreement of such investments will be conducive to the stimulation of individual business initiative and will increase prosperity in both States"[282].

As debated in the previous Section[283], the use of the term 'prosperity' could imply sustainable development through the similarity between the underlying meaning afforded to the term and the goals of the SDGs. Although this implication is important, due to the exact location of the reference within the Preamble, the reference could serve to underline any action taken in pursuit of the Malta – Serbia BIT, including that of dispute settlement. However, the degree of positivity could be rather short lived due to the consideration of the location of the reference. The Preamble contains no accountability, just that of

[280] Agreement Between the Government of the Republic of Serbia and the Government of the Republic of Malta for the Reciprocal Promotion and Protection of Investments (Serbia - Malta BIT) (signed 02/07/2010, entered into force 14/12/2010).
[281] Serbia - Malta BIT: *ibid* Articles 9 and 10.
[282] Serbia - Malta BIT: *ibid* Preamble.
[283] Chapter Four, Section Two.

influence. The degree of effectiveness therefore could only be considered marginal at stage one.

Strengthened examples of this approach to the translation of sustainable development afforded in the interpretation of the dispute settlement provisions can be found within the Agreement Between the Government of the Republic of South Africa and the Government of the Republic of Zimbabwe for the Promotion and Reciprocal Protection of Investments (South Africa – Zimbabwe BIT)[284], Kuwait – Kenya BIT[285] and the Agreement Between the Government of the Republic of Singapore and the Great Socialist People's Libyan Arab Jamahiriya on the Promotion and Protection of Investments (Singapore - Libya BIT)[286]. The commonality provided in all three examples demonstrates a rather indirect reference to the concept of sustainable development within the dispute settlement provisions. The South Africa – Zimbabwe BIT states within the dispute settlement provisions that:

> "The decision in resolution of the dispute shall be derived by application of the domestic law, including the rules relating to conflicts of law, of the country of the Party involved in the dispute in whose territory the investment has been made, the provisions of this Agreement, the terms of the specific agreement which may have been entered into regarding the investment **as well as the principles of international law**"[287]. [Emphasis added]

Which is mirrored within the Kuwait – Kenya BIT:

> "The arbitral tribunal shall take its decision by a majority of votes. Such decision shall be made in accordance with this Agreement and **such recognized rules of international law** as may be applicable and shall be final and binding on both Contracting Parties"[288]. [Emphasis added]

[284] Agreement Between the Government of the Republic of South Africa and the Government of the Republic of Zimbabwe for the Promotion and Reciprocal Protection of Investments (South Africa – Zimbabwe BIT) (signed 27/11/2009, entered into force 15/09/2010).
[285] Kuwait – Kenya BIT: [n 269].
[286] Agreement Between the Government of the Republic of Singapore and the Great Socialist People's Libyan Arab Jamahiriya on the Promotion and Protection of Investments (Singapore – Libya BIT) (signed 08/04/2009, entered into force 22/12/2011).
[287] South Africa – Zimbabwe BIT: [n 284] Article 7(4).
[288] Kuwait – Kenya BIT: [n 269] Article 9(5).

And within the Singapore – Libya BIT:

> "In taking its decision, the arbitration tribunal shall take into account all relevant factors including, the provisions of this Agreement, the applicable laws and regulations of the Contracting Party involved in the dispute, the rules of conflict of laws which the arbitration tribunal considers applicable, the terms of any specific agreement concluded in the relation to the particular investment involved and **relevant principles of international law**"[289]. [Emphasis added]

Although the precise phrasing may slightly differ, the underlying content is parallel. Given in neither example is the term 'sustainable development', instead the reference to the more general rules and principles within international law are offered. The concept could be included within this reference, however the implication is merely discretionary. To potentially bolster these implications, one might look at the other provisions of the treaty to interpret this broad statement in line with the aim of sustainable development. All three examples cited above do also refer to the "increasing prosperity in both Contracting Parties"[290], which could induce the aim of the concept within the Preambles. Also, as previously described, in relation to the alignment to the SDGs, only a general comparison can be made with a determination of effectiveness to be found at stage three.

At this point, it must be clearly asserted that in terms of reference to the concept of sustainable development within the international investment dispute settlement provisions themselves and considering the agreements analyzed, that an implication of the concept affording more detail than "relevant principles of international law"[291] will not be found. The only translation of sustainable development within the precise dispute settlement provisions is limited to this general inclusion. There are no treaties which have been examined that forward, for example, a separate consideration of economic, social or environmental development, or even the particular identification of the developmental aims of the contracting states. Alignment with the Rio Declaration, MDGs and chiefly the SDGs thus could be considered rather disappointing. After this clear recognition of the limits afforded to the representation of the concept within the dispute settlement provisions, it is therefore ultimately left to the other provisions of the treaty to implicate

[289] Singapore – Libya BIT: [n 286] Article 10(4).
[290] Singapore – Libya BIT: *ibid* Article 10(4).
[291] Singapore – Libya BIT: *ibid* Preamble.

the concept and should be instantly acknowledged that stage four of the degree of effectiveness will never be reached. As such, with the increasing degree of content afforded to the understanding of sustainable development, the implications within the dispute settlement provisions could be heighted.

Indeed, a step forward from a potential translation of the concept through the basic assertion of 'prosperity', the heightened implication of the concept could be achieved in the amplified inclusion of the concept of sustainable development within other provisions than those of the dispute settlement provisions. In other words, the inclusions of sustainable development can be increasingly implied through an increased recognition of the concept within the other provisions of an interpretative nature. The most straightforward example of this important step forward can be found in the Agreement Between the Republic of Austria and the Republic of Yemen for the Promotion and Protection of Investments (Austria – Yemen BIT)[292]. Article 16(1) could provide a gateway for the inclusion of sustainable development:

> "A tribunal established under this Part shall decide the dispute in accordance with this Agreement and applicable rules and principles of international law"[293].

Thereby acknowledging that any decision made in light of a dispute settlement procedure should take into consideration not only the 'principles of international law', but more significantly the provision determines that any decision should be made with regard to the other provisions of the Austria – Yemen BIT. This does provide another aspect of implication as the Preamble states, "REAFFIRMING their commitment to the observance of internationally recognised labour standards"[294]. This is the only signpost that could be attributed to the concept within the provisions other than those of dispute settlement and although the term 'sustainable development' remains absent, certainly a similarity and alignment with the SDGs could be made. Goal 8 of Decent Work and Economic Growth[295] is exemplary of the comparability[296].

[292] Agreement Between the Republic of Austria and the Republic of Yemen for the Promotion and Protection of Investments (Austria – Yemen BIT) (signed 30/05/2003, entered into force 01/07/2004).
[293] Austria – Yemen BIT: *ibid* Article 16(1).
[294] Austria – Yemen BIT: *ibid* Preamble.
[295] SDGs: [n 9] Goal 8.
[296] SDGs: *ibid* Goal 8, Targets 8.3-8.7.

The comparable detail ultimately could allow a heightened translation of the concept. However, it must be remembered that the purely influential ability of the location of the inference is rather limiting in terms of accountability. Therefore, in terms of assessment of degree of effectiveness, the content is improving and there are links to the current understanding of sustainable development, though the degree of accountability is still compromised in the reliance upon a preambular provision.

As previously discussed in this Section, within the dispute settlement provisions pertaining to investment, hope of a stronger reference to the concept of sustainable development other than that of the recognition of the rules and principles of international law could be seen to be diminished. The inclusion of sustainable development is therefore placed in the hands of the other provisions of the agreement. Although above it is shown how a general reference to the concept could impact the dispute settlement provisions, where there is more detail afforded, increased beneficial interpretation can be demonstrated. The Agreement Between the Government of Japan and the Government of the Independent State of Papua New Guinea for the Promotion and Protection of Investment (Japan – Papua New Guinea BIT)[297] clearly demonstrates this increased ability to transpose sustainable development through the specific reference in earlier Preambular provisions that would create further alignment with the understanding afforded through the SDGs. The Japan – Papua New Guinea BIT provides the well-repeated obligation within the dispute settlement provisions that "[a]n arbitral tribunal established under paragraph 4 shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law"[298]. Apart from the potentially general reference to sustainable development, the metaphorical flesh upon the bones for the concept can be derived from the acknowledgement of the high level of detail afforded in the Preamble, which provides:

> "Recognising that economic development, social development and environmental protection are interdependent and mutually reinforcing pillars of sustainable

[297] Agreement Between the Government of Japan and the Government of the Independent State of Papua New Guinea for the Promotion and Protection of Investment (Japan – Papua New Guinea BIT) (signed 26/04/2011, entered into force 17/01/2014).
[298] Japan – Papua New Guinea BIT: *ibid* Article 16(8).

development and that cooperative efforts of the Contracting Parties to promote investment can play an important role in enhancing sustainable development;

Recognising also that these objectives can be achieved without relaxing health, safety and environmental measures of general application;

Acknowledging the importance of the cooperative relationship between labour and management in promoting investment between the Contracting Parties"[299].

All three listings cited above certainly do generate many fundamental linkages to the most current understanding of the concept of sustainable development. Apart from the actual usage of the term 'sustainable development', there is direct recognition of all three foundational pillars alongside giving significant importance to measures pertaining to that of health, safety, labor and the environment. The detailed approach to the inclusion of further details of actions coordinated under the auspice of sustainable development integrate more aptly the goals of the SDGs within the Agreement through the interpretation of the dispute settlement provisions.

One step further, in terms of detail, can be found in the Agreement for the Promotion and Protection of Investment Between the Republic of Austria and the Republic of Tajikistan (Austria – Tajikistan BIT)[300]. Again, in relation to the content of the decision made, the dispute settlement provisions give that "[t]he arbitral tribunal will decide disputes in accordance with this Agreement and the applicable rules and principles of international law"[301], thereby confirming that the decision of the settlement will be made considering both rules and principles of international law as well as other provisions within this Agreement. The primary part of the obligation, due to the extent of the content afforded within the Preamble, is somewhat more significant to discuss. The Preamble states:

"RECOGNISING that agreement upon the treatment to be accorded to investors and their investments will contribute to the efficient utilisation of economic resources, the creation of employment opportunities and the improvement of living standards;

[299] Japan – Papua New Guinea BIT: *ibid* Preamble.
[300] Austria – Tajikistan BIT: [n 91].
[301] Austria – Tajikistan BIT: *ibid* Article 23(1).

EMPHASISING that fair, transparent and predictable investment regimes based on the rule of law both complement and benefit the world trading system;

REAFFIRMING the commitments under the 2006 Ministerial declaration of the UN Economic and Social Council of Full Employment and Decent Work;

REFERING to the international obligations and commitments concerning respect for human rights;

RECOGNISING that investment, as an engine of economic growth, can play a key role in ensuring that economic growth is sustainable;

COMMITTED to achieving these objectives in a manner consistent with the protection of health, safety, and the environment, and the promotion of internationally recognised labour standards;

EXPRESSING their belief that responsible corporate behaviour, as incorporated in the OECD Guidelines for Multinational Enterprises, can contribute to mutual confidence between enterprises and host countries;

EMPHASISING the necessity for all governments and civil actors alike to adhere to UN and OECD anti-corruption efforts, most notably the UN Convention against Corruption (2003);

TAKING NOTE OF the principles of the UN Global Compact;

ACKNOWLEDGING that investment agreements and multilateral agreements on the protection of environment, human rights or labour rights are meant to foster global sustainable development and that any possible inconsistencies there should be resolved without relaxation of standards of protection"[302].

It could be argued that the detail afforded above touches upon each goal of the SDGs, in fact the alignment to the most current understanding afforded could be considered near complete. The term 'sustainable development' is present alongside further references of other international agreements that contain other dimensions of the concept. To have this

[302] Austria – Tajikistan BIT: *ibid* Preamble.

high level of content within the preamble simply adds weight to the interpretation of all subsequent substantive provisions, placing again the determination of effectiveness at the top end of stage three. The clearer and more direct the content of interpretation, there is a higher opportunity for this interpretative content to be transposed, and in this case, potentially into the provisions pertaining to dispute settlement.

4. Effectiveness in Reform Proposals

After detailing and determining the degree of effectiveness afforded to the translation of the current understanding of the concept of sustainable development as primarily demonstrated by the SDGs, it is now essential to recognize the potentially available reforms of the regulatory facilitative mechanisms that would create better alignment with these SDGs. Without such scope for reform, the relationship between sustainable development and international investment law would become stagnant and fundamentally detrimental to each other's aims. When considering reforms, two features must always be acknowledged. The first feature being that of the most current understanding afforded to the concept. The second feature being that of the nature of the facilitative mechanisms adopted by this regime. Considering these features therefore, there are potentially two categories of reform that could be suitable to achieve this specific aim. These categories are of amendments and termination of treaties with subsequent renewal of similar (not identical) terms. Focus will solely be placed upon BITs and multilateral treaties, as opposed to voluntary international investment guidelines, as guidelines in international investment do not contain provisions for reform ability.

Although the two features identified above are important to the understanding of the nature of the reform proposals, also underlying the analysis of these specific reform proposals is the constant appreciation of the 'Guidelines for IIA Reform' as forwarded by the World Investment Report 2015[303], which provide:

> "1. Harness IIAs for sustainable development: The ultimate objective of IIA

[303] UNCTAD, 'Reforming the International Investment Regime: An Action Menu: Chapter IV, World Investment Report 2015: Reforming International Investment Governance' (2015), found at < https://unctad.org/en/pages/PublicationWebflyer.aspx?publicationid=1245 > accessed November 2019, 164.

reform is to ensure that the IIA regime is better geared towards sustainable development objectives while protecting and promoting investment.

2. Focus on critical reform areas: The key areas for reform are (i) safeguarding the right to regulate for public interest, (ii) reforming investment dispute settlement, (iii) strengthening the investment promotion and facilitation function of IIAs, (iv) ensuring investor responsibility, and (v) enhancing systemic coherence.

3. Act at all levels: The reform process should follow a multilevel approach and take place at the national, bilateral, regional, and multilateral levels, with appropriate and mutually supportive action at each level.

4. Sequence properly for concrete solutions: At each level, the reform process should follow a gradual, step-by-step approach, with appropriately sequenced and timed actions based on identifying the facts and problems, formulating a strategic plan, and working towards concrete outcomes that embody the reform effort"[304].

Indeed, the reform proposals outlined below will induce most of these important elements.

4.1 Amendment and Modification

The primary and least intrusive method of reform proposal can be found in the capacity to amend and modify provisions of international investment agreements[305], as outlined either within the provisions of the agreements themselves or by Article 39 – 41 of the Vienna Convention on the Law of Treaties[306]. As the international investment regime is dominated predominantly by obligations located within both BITs and multilateral investment agreements, the ability to enhance through negotiation particular provisions could be considered a valuable tool for the translation of the concept of sustainable development. When Shaw's view is given that "in contrast with the process of creating

[304] World Investment Report 2015: Reforming International Investment Governance: *ibid* 164.
[305] Malgosia Fitzmaurice and Panos Merkouris, *Treaties in Motion: The Evolution of Treaties from Formation to Termination* (2020) Chapter 5.
[306] Vienna Convention on the Law of Treaties (VCLT) (1980) 1155 UNTS 331; 8 ILM 679.

law through custom, treaties (or international conventions) are a more modern and deliberate method"[307], the contextual incorporation of the concept is a possibility. Although Bowman and Kritsiotis argue that "such instrument is ultimately dependent upon the co-existence of a supporting … body of norms"[308].

Amendments and the subsequent modifications can take the form of the addition, furtherance or removal of provisions that were originally included within the agreement. In other words, Fitzmaurice and Merkouris categorize this "motion"[309] as the "increase (*auxesis*), diminution (*meiosis*), or even alteration (*alloiosis*)"[310] of the agreement. For this particular argument, it must also be remembered that the focus of these amendments and modifications are not to directly relax or weaken the investment obligations and protections, as these are of principal focus. Instead, the amendments and modifications proposed below seek to better the alignment with the development agenda represented in the recent SDGs without detracting from the already heavily negotiated investment obligations and protections.

Before any discussion upon the realistic amendments and modifications that could beneficially be made, to utilize this important reform procedure, there must be the legal ability to carry out such an action located within the agreement. Both the relevant BITs and multilateral investment agreements do contain such recourse to action. In relation to BITs, for example, the Agreement Between the Government of the Republic of Serbia and the Government of the Republic of Kazakhstan on Reciprocal Promotion and Protection of Investments[311] provides:

> "This agreement may be amended by mutual written consent of the Parties, which come into force in the manner provided in paragraph 1 of Article 14 of this

[307] Malcolm N. Shaw, *International Law* (2021) 78. Please see also: Jan Klabbers, *International Law* (2020) Chapter 3; Duncan B. Hollis, *The Oxford Guide to Treaties* (2020); James Crawford, *Brownlie's Principles of Public International Law* (2019).
[308] Michael Bowman and Dino Kritsiotis, 'Introduction: The Interplay of Concept, Context and Content in the Modern Law of Treaties' in Michael J. Bowman and Dino Kritsiotis (Eds) *Conceptual and Contextual Perspectives on the Modern Law of Treaties* (2018) 2.
[309] M. Fitzmaurice and P. Merkouris: [n 305] 336.
[310] M. Fitzmaurice and P. Merkouris: *ibid* 337.
[311] Agreement Between the Government of the Republic of Serbia and The Government of The Republic of Kazakhstan on Reciprocal Promotion and Protection of Investments (Serbia – Kazakhstan BIT) (signed 07/10/2010, entered into force 07/12/2015).

> Agreement. **That amendments become an integral part of this Agreement**"[312]. [Emphasis added]

Correspondingly, multilateral investment agreements[313] do transpose this precise ability to amend and modify the provisions. ICSID[314] states:

> "If the Administrative Council shall so decide by a majority of two-thirds of its members, the proposed amendment shall be circulated to all Contracting States for ratification, acceptance or approval. Each amendment **shall enter into force** 30 days after dispatch by the depositary of this Convention of a notification to Contracting States that all Contracting States have ratified, accepted or approved the amendment"[315]. [Emphasis added]

From each of the examples above that incite the legal ability to make amendment and modification to the original agreement, it is important to recognise the repeated reference to the high degree of legality applied to the procedure itself. Despite these legality requirements, there are multiple uses of the amendment and modification procedure that can create better alignment to the sustainable development agenda and ultimately the SDGs.

One of the most fundamental practices of amendment and modification that can be applied to international investment agreements using the procedures outlined above are additions made to agreements that do not contain any reference at all to the concept of sustainable development. The amendments and modifications could implicate sustainable development into agreements that do not contain any reference within the purely influential preambular provisions. The Agreement Between the Government of the Republic of Singapore and the Government of the Republic of the Union of Myanmar on the Promotion and Protection of Investments is exemplary and ambiguously provides "[t]his Agreement, including its Annexes, may be amended"[316].

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[312] Serbia – Kazakhstan BIT: *ibid* Article 13.
[313] ECT: [n 122] Article 42; Mauritius Convention on Transparency: [n 116] Article 10.
[314] ICSID: [n 113].
[315] ICSID: *ibid* Article 66.
[316] Agreement Between the Government of the Republic of Singapore and the Government of the Republic of the Union of Myanmar on the Promotion and Protection of Investments (signed 24/09/2019) Article 32(1).

At the very least of translatory amendment and modification, by simply citing an obligation within the preamble, for example, 'to recognise the aims of sustainable development' or 'to appreciate the demands of social, environmental and economic development', with no subsequent detailing of the specific aims could be incorporated. This broad approach, which does identify the three foundational pillars, could accommodate through wide discretion recognition of the MDGs and SDGs, and even perhaps any future proclamations attributed to the concept. Likewise, the Agreement Between the Government of the Republic of Cyprus and the Government of the Republic of Moldova for the Reciprocal Promotion and Protection of Investments (Cyprus – Moldova BIT)[317] contains no direct or indirect references to sustainable development within the preambular provisions. Therefore, the mere citation of the phrase 'sustainable development' within the preamble could achieve substantial improvement to the position of sustainable development as it currently stands by way of interpretation.

Amendment and subsequent modification of the preamble may not just be limited to the basic implication of sustainable development through reference to the general term or the basic foundational pillars. If one were to consider again the Cyprus – Moldova[318], amendment and modification could afford the concept an increased level of detail, which would further align the agreement to the most current understanding afforded to the sustainable development agenda. Detail similar to that which is given in, for example, NAFTA[319]. The application of the term 'sustainable development' alongside additional aspects is certainly beneficial, such as the recognition of the improvement in gender equality, decent work or the eradication of poverty, all of which have found representation in the SDGs. Although the preambular provisions only have an influential and interpretational accountability, this is still an important step forward in terms of reform. The degree of effectiveness could be considered marginally increased from the position where no reference was made at all.

Improvement in degree of effectiveness continues to be the metaphorical 'buzz-word' in the analysis of these reform proposals. As such, international investment agreements that

[317] Agreement Between the Government of the Republic of Cyprus and the Government of the Republic of Moldova for the Reciprocal Promotion and Protection of Investments (Cyprus – Republic of Moldova BIT) (signed 13/09/2007, entered into force 08/04/2008).
[318] Cyprus – Republic of Moldova BIT: *ibid.*
[319] NAFTA: [n 142] Preamble.

do already contain translations of sustainable development in the preamble could always progress the contextual alignment to sustainable development with the addition of more related detail. As an example, the Germany – Afghanistan BIT[320] provides in the Preamble that:

> "Recognizing that the encouragement and contractual protection of such investments are apt to stimulate private business initiative and to increase the prosperity of both nations"[321].

In a comparative light, the Agreement Between the Government of Canada and the Government of the Republic of Benin for the Promotion and Reciprocal Protection of Investments (Canada – Benin BIT)[322] stipulates:

> "Recognizing that the promotion and the protection of investments of investors of one Contracting Party in the territory of the other Contracting Party are conducive to the stimulation of mutually beneficial economic activity, the development of economic cooperation between both countries and the promotion of sustainable development"[323].

The offering afforded by the Germany – Afghanistan BIT in the statement of "to increase the prosperity of both nations"[324], as already discussed previously within this Chapter[325], could perhaps implicate the weakest reference to sustainable development through an indirect acknowledgement of economic, social and environmental development. Although this basic referral is important as a directional aid, the addition of perhaps the positive development of industry, innovation and infrastructure alongside the promotion of reduced inequalities could be realistic and which equally signpost the Goals of the SDGs. It is in my opinion that the inclusion of specific targets of these SDGs Goals would be unrealistic, for example it would be inappropriate to outline "by 2030, progressively achieve and sustain income growth of the bottom 40 per cent of the population at a rate

[320] Germany – Afghanistan BIT: [n 68].
[321] Germany – Afghanistan BIT: *ibid* Preamble.
[322] Agreement Between the Government of Canada and the Government of the Republic of Benin for the Promotion and Reciprocal Protection of Investments (Canada – Benin BIT) (signed 09/01/2013, entered into force 12/05/2015).
[323] Canada – Benin BIT: *ibid* Preamble.
[324] Germany – Afghanistan BIT: [n 68] Preamble.
[325] Chapter Four, Section Two.

higher than the national average"[326]. Whereas the Canada – Benin BIT does in comparison refer directly to "the promotion of sustainable development"[327] and therefore the supplement of more explicit attributes of the concept from the most recent understandings could turn general recognition into detailed measurement. A definite stride away from the basic assumption of economic, social and environmental development, to where focus can be precisely targeted. Therefore, through amendment and modification of the provisions, it has been shown in relation to preambular provisions of agreements the ability to infer sustainable development in provisions where none were present before alongside the ability of such reform to an extent where vague referrals are advanced by specific dictations outlined by the SDGs.

To enhance both the translation of the concept of sustainable development and in equal measure enhance the degree of effectiveness afforded, amendments and modifications could occur also in relation to the substantive provisions outside the remit of the dispute settlement provisions and relationship to other treaty provisions. As already demonstrated in a previous Section of this Chapter[328], there are certain instances where the concept of sustainable development can be implicated within the substantive provisions of the treaty, for example maintained through the exception and security provisions or non-derogation provisions or indirect expropriation provisions. However, outside the remit of these acknowledged clauses, and without the translation within the preambular provisions which would implicate sustainable development in interpretation, there are also present agreements that do not implicate the concept in any further manner within the substantive provisions. The Gambia – Netherlands BIT[329] is exemplary of this further lack of implication. In recognition of this detrimental fact, there are opportunities in which sustainable development could be imposed to better align the Treaty to the SDGs. Article 2 of the Gambia – Netherlands BIT requires:

> "Either Contracting Party shall, within the framework of its laws and regulations, promote economic cooperation through the protection in its territory of investments of nationals of the other Contracting Party. Subject to its right to

[326] SDGs: [n 9] Goal 10, Target 10.1.
[327] Canada – Benin BIT: [n 322] Preamble.
[328] Chapter Four, Section Two.
[329] Gambia – Netherlands BIT: [n 52].

exercise powers conferred by its laws or regulations, each Contracting Party shall admit such investments"[330].

Article 2 displays an objective-like approach to the application of the investment obligations and protections. There is the ability within this Article to incorporate, for example, to 'promote economic cooperation **and sustainable development** through the protection in its territory of investments'. The general inference of the phrase 'sustainable development' could implicate the SDGs and would subsequently place a silent nod to all the attributed Goals. There is also ability to integrate further and more specific acknowledgements to, for instance, respond to the relevant levels of gender equality or environmental protection, which would again improve alignment to the SDGs. The contextual inequalities between the two contracting parties of Gambia and the Netherlands could be represented which could and probably would support the Goals of the SDGs. The translation of sustainable development in provisions of a substantive nature would therefore increase the level of accountability from that of purely influence, as seen in the preambular provisions, to actions that would be answerable.

Indeed, other international agreements apply the concept of sustainable development in such an objective and ultimately positive manner. This action can enable the generation of a more in-depth acknowledgement of the sustainable development agenda within the substantive provisions. The weakest implication of sustainable development that can be found within the objective-like articles is that demonstrated within the ECT. Article 2 states "[t]his Treaty establishes a legal framework in order to promote long-term cooperation in the energy field, based on complementarities and mutual benefits, in accordance with the objectives and principles of the Charter"[331]. The ambiguous phrasing could translate the concept in a similar manner to which the phrase 'prosperity' allows. Alongside this interpretative phrasing, the reference to "the objectives"[332] could refer to the preambular provisions which do forward many aspects pertaining to the sustainable development agenda.

[330] Gambia – Netherlands BIT: *ibid* Article 2.
[331] ECT: [n 122] Article 2.
[332] ECT: *ibid* Article 2.

A stronger translation of the concept within the objective provision can be seen in the CBD, which provides in Article 1 that:

> "The objectives of this Convention, to be pursued in accordance with its relevant provisions, are the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources, including by appropriate access to genetic resources and by appropriate transfer of relevant technologies, taking into account all rights over those resources and to technologies, and by appropriate funding"[333].

Although the subject matter of the agreements is different, a similar contextual introductory provision could be beneficial to the translation of sustainable development.

It must also be acknowledged that although at present within the international investment regime there are occasions whereby sustainable development has been incorporated within the substantive provisions, as described above, there could be a significant improvement in these specific translations to apply the most current understanding of sustainable development. Article 10 of the Slovakia – Iran BIT[334] is an example. The subsequent Article 11 reaffirms aspects pertaining further to enhanced appreciation of economic, environmental and social development. From one perspective, it does seem that the recognition afforded to sustainable development is adequate and can be placed in great contrast to agreements that contain comparatively little reference to sustainable development within the substantive provisions. Though, to align with the SDGs, perhaps there is the ability to recognize further sustainable development by the dictation of the precise Goals. NAFTA affords a similar translation of the concept of sustainable development and subsequently there is a comparable opportunity for improvement of Article 104[335], Article 1101[336] and Article 1114[337] to generate a more intense alignment to the SDGs. The improvement of alignment of this sort could be considered rather unrealistic however as the provisions already afford great translation of the concept.

[333] CBD: [n 223] Article 1.
[334] Slovakia– Iran BIT: [n 90] Article 10.
[335] NAFTA: [n 142] Article 104.
[336] NAFTA: *ibid* Article 1101.
[337] NAFTA: *ibid* Article 1114.

The importance of the reform of the dispute settlement provisions also demonstrates the imperative enhancements that could potentially occur using amendments and modifications. Section Three[338] has already identified the essentially weak implication sustainable development has made into the consideration of arbitral decisions. The Agreement Between the Government of the Hellenic Republic and the Government of the Republic of Albania for the Encouragement and Reciprocal Protection of Investments[339] is exemplary to the extent of the implication. Article 9(6) provides:

> "The arbitration tribunal shall decide on the basis of respect for international law, including particularly the present Agreement and other relevant agreements existing between the two Contracting Parties and the generally acknowledged rules and principles of international law"[340].

Considering this significantly detrimental failing in the translation of concept of sustainable development therefore, there are obvious opportunities for the inclusion. To potentially translate sustainable development, perhaps the addition of the phrase 'generally acknowledged rules and principles of international law, including that of sustainable development' would be all that was required. Although the generality 'rules and principles of international law' could encompass that of the international agenda afforded by sustainable development, the specific indication of the phrase 'sustainable development' could reduce the level of detrimental discretion and generate an increased degree of certainty. Of course, there is ability to outline the specific goals of the SDGs also, however this depth would be extremely unrealistic.

The final improvement in the form of amendments and modifications that will be discussed in light of the translation of sustainable development into the international investment regime would be concerning the reference to other international agreements that they themselves contain strong aspects relating to sustainable development. There are international investment agreements upon occasion that, neither in the preamble nor the substantive body of the text, refer to other international agreements. This can be heavily contrasted with the Article 8 of the Principles for Responsible Investment in

[338] Chapter Four, Section Three.
[339] Agreement Between the Government of the Hellenic Republic and the Government of the Republic of Albania for the Encouragement and Reciprocal Protection of Investments (Greece – Albania BIT) (signed 01/08/1991, entered into force 04/01/1995).
[340] Greece – Albania BIT: *ibid* Article 9(6).

Agriculture and Food Systems[341], whereby the list of specific international agreements cited without doubt generates a strong translation of the concept of sustainable development. The Agreement Between the Government of the Islamic Republic of Pakistan and the Government of the State of Kuwait for the Encouragement and Reciprocal Protection of Investments[342] alongside the Mauritius Convention on Transparency[343], for example, negatively demonstrates the lacking extent of the incorporation or recognition of other international agreements that contain aspects pertaining sustainable development. The possible and simple inclusion of 'taking into account the international agreements already entered into by each Contracting Party…' in either agreement could attract focus upon the current agenda forwarded by the SDGs. Actual reference to named agreements, such as the Convention on Biodiversity[344] or the UN Convention Against Corruption[345], could further enlighten the concept within the terms of those Agreements.

On occasions whereby agreements do already stipulate reference other international agreements that do inherently contain sustainable development, for example NAFTA, the most advantageous improvement, alongside the increased reference to other named international agreements, is the precise reference to the MDGs or the SDGs themselves. The explicit nature of both Declarations would certainly lead to the appreciation of the most current understanding of the concept and could indirectly implicate the targets, which underpin the important Goals of both Declarations. Article 8 of the Principles for Responsible Investment in Agriculture and Food Systems refers to "The Outcome document on the UN Conference on Sustainable Development [and] The Future We Want"[346] and therefore the unambiguous citation of the SDGs would not be that different. This choice of inference could be deemed unrealistic however. It must be crucially remembered that these reform proposals are created solely with a significant alignment to the most current understanding of the concept of sustainable development in mind. As

[341] *Principles for Responsible Investment in Agriculture and Food Systems*: [n 210].
[342] Agreement Between the Government of the Islamic Republic of Pakistan and the Government of the State of Kuwait for the Encouragement and Reciprocal Protection of Investments (signed 14/02/2011, entered into force 01/03/2013).
[343] Mauritius Convention on Transparency: [n 116].
[344] CBD: [n 223].
[345] United Nations Convention Against Corruption (2003) (signed 31/10/2003, entered into force 14/12/2005) 2349 UNTS 41; Doc. A/58/422.
[346] *Principles for Responsible Investment in Agriculture and Food Systems*: [n 210] Article 8.

discussed within the Section One of this Chapter[347], the announcements of the SDGs in my opinion does represent the most recent and genuine depiction of the most current understanding of the sustainable development agenda and therefore to have direct citation within an agreement would allow for substantial influence.

4.2 Termination and Renewal

To reform the regulatory mechanisms used by international investment law and the regulation of FDI, predominantly that of BITs and multilateral investment agreements, the facilitative mechanisms themselves do create further abilities outside the remit of the amendment and modification procedure[348] alongside the "comprehensive set of rules"[349] provided by the VCLT[350]. Put simply by Bernasconi-Osterwalder, Brewin, Brauch and Nikiema:

> "How and when a state can terminate a BIT – and when that termination will become operational – is determined by customary international law as reflected in the Vienna Convention on the Law of Treaties …, as well as the provisions of the BIT itself"[351].

The ability to terminate the agreement as a whole and the subsequent opportunity to generate a new agreement could provide another significant possibility for the contextual translation of the concept of sustainable development. Voon, Mitchell and Munro have acknowledged that:

> "States parties have increasingly had reason to terminate their international investment agreements (IIAs), which exist in the form of bilateral investment treaties (BITs) as well as preferential trade agreements incorporating investment

[347] Chapter Four, Section One.
[348] Please see, for example: Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Lebanese Republic for the Promotion and Protection of Investments (signed 16/02/1999, entered into force 16/09/2001), Article 14(2).
[349] Christina Binder, 'The VCLT over the Last 50 Years: Developments in the Law of Treaties with a Special Focus on the VCLT's Rules on Treaty Termination' (2019) *Austrian Review of International and European Law*, Vol. 24, 90.
[350] VCLT: [n 306] Articles 54 – 70.
[351] Nathalie Bernasconi-Osterwalder, Sarah Brewin, Martin Dietrich Brauch and Suzy Nikiema, 'Terminating a Bilateral Investment Treaty' (2020) IISD Report, 2.

provisions. In some instances, pre-existing IIAs have been terminated in conjunction of a new comprehensive trade agreement including updated investment protections"[352].

A similar beneficial adaptation could occur with the termination of an agreement that does not contain an effective or relatively less effective translation of sustainable development. The idea of "motion"[353] within treaties as directed by Fitzmaurice and Merkouris continues to be relevant. The conceivable reform of provisions shown above in relation to amendments and modifications do adequately highlight the extent of these opportunities available within the provisions themselves. It is shown that this can be achieved without derogation from the importantly negotiated investment obligations and protections, although it must be recognized that the other obligations and protections within the agreement will not be impacted to an extent.

The changes to the provisions themselves will not be repeated within this reform proposal discussion. However, a less piecemeal approach to the progression in translation of treaties is available within this reform proposal. The use of amendments and modifications due to their nature could generate a rather fragmented and disconnected approach to reform, concentrating on specific areas, for example the non-derogation provisions or indirect expropriation provisions, as opposed to the consideration of the agreement as a whole and appreciating the inter-linked capabilities of the translation of sustainable development.

The World Investment Report 2015[354] does further add importance to the progression of the concept of sustainable development through termination and renewal of treaties as the Report acknowledges that "[b]etween 2014 and 2018, more than 1,500 BITs will reach the stage where they can be terminated at any time"[355]. This is an important consideration as the international investment regime is dominated by individual BIT formation. The level of negotiation and amount of time required to process such progression would be substantial, especially when it is asserted that many countries have more than one BIT in force at any time. Although many BITs and multilateral investment agreements do

[352] Tania Voon, Andrew Mitchell and James Munro, 'Parting Ways: The Impact of Mutual Termination of Investment Treaties on Investor Rights' (2014) *ICSID Review*, Vol. 29, No. 2, 451.
[353] M. Fitzmaurice and P. Merkouris: [n 305] 336.
[354] World Investment Report 2015: Reforming International Investment Governance: [n 303].
[355] World Investment Report 2015: Reforming International Investment Governance: *ibid* 166.

advance a positive translation of sustainable development, an equal or greater number of agreements do maintain a rather negative and detrimental approach to sustainable development. The extent of amendment and modification required could be considered vast. Therefore, the ability to terminate these agreements and replace with a more targeted approach to sustainable development is highly desirable in terms of reform. However, it must also be recognized that the renewal of the treaties lies solely in the political will of the contracting parties involved, termination of an agreement does not automatically mean that another agreement will be generated.

5. Conclusion

This Chapter has demonstrated a tripartite argumentation. The first essential Section determined the degree of effectiveness in translation of the concept of sustainable development has within the field of international investment law. In assessing the effectiveness, the predominant facilitative mechanisms are discussed independently. The facilitative mechanisms examined were those that have been explored within the previous Chapters. To further assess the degree of effectiveness in the translation of sustainable development, the second Section explored the natural inter-linkages afforded by the facilitative mechanisms. Due to the full examination of effectiveness of the translation of the concept, the final Section discussed the potential reforms that are required to expedite effective translation. If the full extent of the effectiveness were not determined, then the ability to propose reforms would be unsuccessful as the degree of remedy would not be known.

The analysis provided in this Chapter directly answers the research question posed as the title of this Thesis. It has been demonstrated the extent to which the translation of the concept of sustainable development within international investment law could be considered mutually beneficial. With equal effort, it has also been shown the natural inter-linkages that are present within the regulatory regime that could add further consideration to the extent of whether the relationship is mutually beneficial. Considering these findings, ultimately the most appropriate reform proposals are reflected upon which strive to enhance the extent to which one could consider the translation of sustainable development mutually beneficial. The early determination of what is considered effective

framed the response provided. Likewise, the brief outline of what the current understanding of the concept of sustainable development entails and the realistic transposition of detail enabled a convincing capacity to determine effectiveness. Overall, although there is much translation already, still more translation through regulatory reform needs to occur to achieve a more positive progression of the concept within treaties.

Chapter 5: Conclusion

Emily Charlotte Jameson

1. Introduction

After having presented the substantive Chapters, it is now reasonable to formulate an overall conclusion to the question of whether the current understanding afforded of the concept of sustainable development has or could have an effective facilitation within the field of international investment law and more specifically within the regulation of FDI. Ultimately seeking to determine the degree to which the field of international investment law can be described "as a tool to foster development"[1]. Carefully, to conclude this task, both the central claims and results of the research gathered will be summarized.

2. Research Problem and Contextual Relevance

The appreciation of the research problem addressed and the precise context in which the research is delivered is vital to reiterate as without such critical acknowledgement, the extent of the research undertaken could be undermined and at the same time possibly be deemed irrelevant to the community in which it serves. Additionally, contextualization suggests an ongoing problem that has the capability of being improved, thereby endorsing the significance in the specific presentation of the research. In this way, the research obtained provided a targeted response from a defined perspective. Chapter One[2] detailed this issue of contextualization in great depth, however this Section will therefore simply observe the chief argumentations employed in conjunction with an assessment of the relevant developments in the international legal ether.

The research question that directed each Chapter was clear and dictated:

[1] Yannick Radi, '*International Investment Law and Development: A History of Two Concepts*' (2014) Grotius Centre Working Paper 2015/045 - IEL, 1.
[2] Chapter One, Section Two.

'Rethinking international development: to what extent can the practical interaction of sustainable development and the field of international investment law be considered mutually beneficial in the light of modern advances?'

From the outset, it was obvious only a general hypothesis was existent from a primary reading of the research question. An assumption was initially made as to the indefinite and changing nature of the concept of sustainable development alongside an appreciation of the rather unique characteristics of the field of international investment law and the regulation of FDI. This ultimately allowed for a rudimentary hypothesis that stated there would be much variance in the translation of sustainable development within the confines of a fragmented international legal regime. After much consideration of the research gathered and presented, I believe this hypothesis to be fundamentally correct. Both the premises, central claims and results discussed subsequently would affirm such an assertion.

Turning to the specific content of the research question provided, the question contains multiple constituent premises that were addressed in the arguments deployed. These multiple constituent premises together formed the response to the research question posed and infer many of the important and defining methodological decisions outlined within Chapter One. The constituent premises included that of:

- Rethinking international development.
- The concept of sustainable development.
- The field of international investment law.
- The extent of the beneficial relationship dictated by the practical interaction.
- In light of modern advances.

As the constituent premises of the research question have been briefly summarized, it seems now appropriate to concentrate upon the important legal advances that have had

and can have a significant bearing upon the research presented. Since the undertaking of the research for the Thesis, four significant developments have now occurred:

- The 2015 Sustainable Development Goals (SDGs)[3].

- The departure of the United Kingdom (UK) from the European Union (EU) or 'Brexit'.

- President Donald Trump's renegotiation of the North American Free Trade Agreement (NAFTA)[4].

- The World Trade Organisation (WTO) Appellate Body.

Regarding the SDGs, in 2015 the United Nations declared a series of goals adopted within a Resolution titled *Transforming Our World; the 2030 Agenda for Sustainable Development*[5]. The reasoning behind the adoption of the Resolution was made clear, the Preamble of the Resolution provides:

> "This Agenda is a plan of action for people, planet and prosperity. It also seeks to strengthen universal peace in larger freedom. We recognize that eradicating poverty in all its forms and dimensions, including extreme poverty, is the greatest global challenge and an indispensable requirement for sustainable development"[6].

This statement acknowledges essentially that the 'plan of action', as set out in the 17 goals with individual targets attached to each, is directly related to the ascertainment of sustainable development. Although this action plan is of soft-law orientation, the goals and targets contained do generate an enhanced understanding of the concept in terms of actions to be carried out. Affirmation of the continued importance of the direction of these SDGs can be found in the extremely recent 'COP26 Sustainability Governing Principles'[7]. The similarity present between these Governing Principles and the SDGs is

[3] United Nations General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development* (SDGs) (2015) A/RES/70/1.
[4] North American Free Trade Agreement (NAFTA) (1993) 32 ILM 289, 605.
[5] SDGs: [n 3].
[6] SDGs: *ibid* Preamble.
[7] UN Climate Change Conference UK 2021, 'Sustainability', found at < https://ukcop26.0rg/the-conference/sustainability/ > accessed February 2021.

evident, and ultimately encourages a favourable outlook upon the longevity of the SDGs through the decrease in the "impacts from climate change"[8] as expounded by the UN Climate Change Conference in 2021[9]. For example, Governing Principle 3 provides "encourage healthy living"[10] which would directly correlate with SDG 3.

When it is considered historically that the understanding of sustainable development has been rather vague, which could even include the understanding found in the eight goals given by the MDGs[11] of 2000, the deliverance of the SDGs is profound. Thereby, because of the enhanced outline given to sustainable development, the delivery of the SDGs (for the purpose of this Thesis) does create an ability to have a more enhanced analysis of the effectiveness of the translation of sustainable development within the facilitative regulatory mechanisms utilised by international investment. Chapter Two of this Thesis dissected the most current understanding of the concept, which ultimately generated an extremely approachable mechanism for comparison and effectiveness in Chapter Four when detailing the precise nature of the translation.

In a comparatively different manner of contextualisation, the UKs decision to depart the EU places a significant degree of importance upon the response presented in this Thesis. In June 2016, the UK held a referendum concerning the departure of the UK from the EU, and simultaneously the European Atomic Energy Community, to which the citizens of the UK voted with a slim majority in favour of this action. After a considerable temporal membership of the EU, the UK ultimately decided to withdraw from this membership and the official date of leaving was the 31st January 2020. The UK is the first community member to leave the EU after joining in 1973. With this expected departure, the UK Government brought into force The European Union (Withdrawal) Act[12] in 2018 and was stated to be "[a]n Act to repeal the European Communities Act 1972 and make other provision in connection with the withdrawal of the United Kingdom from the EU"[13]. This

[8] David B. Hunter, James E. Salzman and Durwood Zaelke. *Glasgow Climate Summit: Cop26* (2021) UCLA School of Law, Public Law Research Paper No. 22-02, 2021, 1.
[9] United Nations Climate Change Conference (2021) Conference of the Parties, Glasgow.
[10] UN Climate Change Conference UK 2021, 'Sustainability': [n 7].
[11] United Nations General Assembly, United Nations Millennium Declaration, Resolution Adopted by the General Assembly (MDGs) (2000) A/RES/55/2.
[12] The European Union (Withdrawal) Act (2018) Chapter 16.
[13] The European Union (Withdrawal) Act: *ibid* Introductory Text.

Act essentially "converts the body of exiting EU law into domestic law"[14] with the subsequent recognition that "[t]he Act preserves EU law where it stands at the moment before we leave EU. Parliament … will then be able to decide which elements of that law to keep, amend or repeal"[15].

Due to this appreciation, the impact of 'Brexit' upon governance of FDI in terms of regulatory arrangements and the subsequent FDI flows must be considered. Fundamentally, the UKs leaving of the EU Single Market and Customs Union would mean "that the UK will no longer benefit from the EU's 56 free trade agreements (FTAs), which provide better access to markets outside of the EU …[t]his may mean that UK exporters face higher tariffs and other trade barriers in these markets"[16]. This scenario leads to the acceptance that "Brexit now means that the competence to negotiate investment treaties is set to return to the UK Government"[17] and that "[w]hile the UK still can continue to negotiate BITs with third countries, it now has to consider the framework of the EU investment policy"[18]. It is this broad negotiation freedom that would then ultimately generate new regulatory and regime arrangements with both the EU itself and those states, or markets, that the EU have arrangements.

This new and great ability to generate new regulations pertaining to FDI places further scrutiny on the translation of sustainable development within these regulations and therefore could provide substantial implications for the concept. It has been suggested in negotiations concerning environmental protection, which is a significant pillar of the concept of sustainable development, that "the EU has been consistently clear in its desire to preserve the existing level playing field. It wants detailed and enforceable commitments on non-regression to be inserted into the text of the final agreement with the UK. The UK has stated that it does not intend to regress its standards"[19]. Regarding

[14] Chartered Institution of Water and Environmental Management, 'Leaving the European Union: Implications for the Environment' (October 2019) found at < Brexit_Briefing_October_FINAL_1.pdf (ciwem.org) > accessed March 2021, 6.
[15] Chartered Institution of Water and Environmental Management: *ibid* 7.
[16] Daniel Thornton, 'Leaving the EU Customs Union: What is Involved?' (July 2016) Institute for Government, found at <www.instituteforgovernment.org.uk/blog/leaving-eu-customs-union-what-inviolved > accessed January 2021.
[17] Ondrej Svoboda and Jan Kunstyr, 'What Can We Expect from Post-Brexit United Kingdom's Investment Policy?' (2018) *Czech Yearbook of Public & Private Law*, Vol. 9, 353.
[18] O. Svoboda and J. Kunstyr: *ibid* 355-357.
[19] Andrew Jordan, Viviane Gravey, Brendan Moore and Colin Reid, 'Research Paper on The Level Playing Field, EU-UK trade relations: why environmental policy regression will undermine the level playing field and what the UK can do to limit it' (2020) Brexit and Environment, found at < BE-

both economic and social development, Bachtler and Begg have stated that "leaving the … EU will involve the most extensive upheaval for decades in British economic and social policy"[20] and ultimately believes that "economic development and social policy at sub-national level in the UK will have more to lose than to gain from Brexit"[21]. However, Svoboda and Kunstyr succinctly outline the potentially detrimental degree of flexibility in the core issue, "one often hears discussion about how ambitious free trade agreements should be negotiated and with whom and what kind of future relationship will be struck outside the EU Single Market?"[22].

In specific regards to overall FDI flow forecast, Dhingra, Huang, Ottaviano, Sampson and Van Reenan state that:

> "The UK has an FDI stock of over £1 trillion, about half of which is from other members of the European Union (EU). Part of the UK's attractiveness for foreign investors is that it brings easy access to the EU's Single Market. After Brexit, higher trade costs with the EU would be likely to depress FDI"[23].

A negative prediction which is shared by many academics who all adopt different perspectives[24]. Therefore, the initial impact of the departure from the EU on FDI flows could be extremely disadvantageous. However, again in relation to the relevance of this Thesis, the new regulatory arrangements may accommodate these foresights and could react beneficially to overcome the decrease in FDI flows, for example, by introducing more favorable investment environments, which could also include some form of

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report_the-level-playing-field-and-policy-regression.2020_final-version.pdf (brexitenvironment.co.uk)> accessed January 2021, 3.

[20] John Bachtler and Iain Begg, 'Cohesion policy after Brexit: the economic, social and institutional challenges' (2017) *Journal of Social Policy*, Vol. 46, Special Issue 4: Brexit Special Issue, 745.

[21] J. Bachtler and I. Begg: *ibid* 763.

[22] O. Svoboda and J. Kunstyr: [n 17] 353.

[23] Swati Dhingra, Hanwei Huang, Gianmarco Ottaviano, Joao Paulo Pessoa, Thomas Sampson and John Van Reenen, 'The Costs and Benefits of Leaving the EU' (April 2017) CEP Discussion Paper No 1278, 2.

[24] Please see: Nigel Driffield and Michail Karoglou, 'Brexit and Foreign Investment in the UK' (2016), found at < http://dx.doi.org/10.2139/ssrn.2775954> accessed March 2021; Matthew Ward, 'Foreign Investment in UK Companies in 2018 and the Effect of Brexit' (2020), found at< https://commonslibruary.parliament.uk/foreign-investment-in-uk-companies-in-2018-and-the-effect-of-brexit/ > accessed January 2021; Maria C. Latorre, Zoryana Olekseyuk and Hidemichi, 'Trade and Foreign Direct Investment-Related Impacts of Brexit' (2019) *The World Economy*, Vol. 43, Issue 1; Lulia Siedschlag and Manuel Tong Koecklin, 'The Impact of the UK's EU Exit on its Attractiveness to FDI and Associated Job Creation Effects' (2019) Research Report, Department for the Economy, Northern Ireland; Ellen McGrattan and Andrea Waddle, 'The Impact of Brexit on Foreign Investment and Production' (2017) NBER Working Paper Np. W23217.

translation of sustainable development. The determination of effectiveness as outlined within Chapter One and Four of this Thesis would become a useful tool to determine the extent of such translation.

Similarly, President Donald Trump's renegotiation of NAFTA in the form of the Agreement Between the United States of America, the United Mexican States, and Canada (USMCA)[25] could have further implications for the translation of sustainable development within international investment law parameters. The President's reasons for renegotiating were clear:

> "The America that existed when NAFTA was signed is not the America that we see today. Some Americans have benefited from new market access provided by the Agreement …
>
> But NAFTA also created new problems for many American workers. Since the deal came into force in 1994, trade deficits have exploded, thousands of factories have closed, and millions of Americans have found themselves stranded, no longer able to utilize the skills for which they had been trained"[26].

Specifically, within the list of objectives of USMCA, it is extremely obvious of the significance the renegotiating will have upon the translation of the concept of sustainable development. In the document, it is given broadly that there are clear intentions, amongst many others, to "bring the environment provisions into the core of the Agreement rather than in a side agreement"[27], to "[e]stablish strong and enforceable environment obligations that are subject to the same dispute mechanism that applies to other enforceable obligations of the Agreement"[28] and to "[p]romote sustainable fisheries management and long-term conservation of marine species"[29]. Again, the research presented within Thesis will not only allow for the most current understanding of the

[25] Agreement Between the United States of America, the United Mexican States, and Canada (USMCA) (signed 30/11/2018).
[26] Office of the United States Trade Representative and Executive Office of The President, 'Summary of Objectives for the NAFTA Renegotiation' (2017), found at < https://ustr.gov/sites/default/files/files/Press/Releases/NAFTAObjectives.pdf > accessed November 2019, 2.
[27] Office of the United States Trade Representative: *ibid* 13.
[28] Office of the United States Trade Representative: *ibid* 13.
[29] Office of the United States Trade Representative: *ibid* 14.

concept of sustainable development, but at the same time, with the formula to determine the degree of effectiveness, this translation can be beneficially analysed.

Regarding the WTOs Appellate Body, a similar degree of transition can also be found. Within the field of international investment law, it has been demonstrated the significance of the dispute settlement mechanisms[30], chiefly arbitrations held under the International Convention for the Settlement of Investment Disputes (ICSID)[31] regime, and their essential functioning within the regulation of FDI in terms of the "foreign investors interests to resolve disputes with host States and to recover losses caused by States' action"[32]. In a comparable manner to international investment law, international trade law's reliance upon a dispute settlement mechanism is as vital, as Van den Bossche and Zdouc have observed, "the WTO Members do not always agree on the correct interpretation and application of these rules. In fact, Members frequently argue about whether or not a particular law or practice constitutes a violation of a right or obligation provided for in a WTO agreement"[33] . Significance is increased when it has again been observed that the WTO regime does cover some aspects of the FDI regime[34]. Unlike the choice of dispute settlement mechanism available in international investment law however, under the WTO regime there is no such choice as "Article 23 of the [Understanding on Rules and Procedures Governing the Settlement of Disputes] DSU mandates exclusive jurisdiction in favor of the DSU for WTO violations"[35]. Article 23(1) provides:

> "When Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements, they

[30] Chapter Two, Section Two; Chapter Four.
[31] Convention on the Settlement of Investment Dispute Between States and Nationals of Other States (ICSID) (1965) 17 UST 1270, TIAS 6090, 575 UNTS 159.
[32] Yusuf Caliskan, 'Dispute Settlement in International Investment Law' in Yusuf Aksar's Eds, *Implementing International Economic Law: Through Dispute Settlement Mechanisms* (2011) 123.
[33] Peter Van den Bossche and Werner Zdouc, *The Law and Policy of the World Trade Organization: Text, Cases and Materials* (2013) 157.
[34] Chapter Two, Section Two.
[35] Kyung Kwak and Gabrielle Marceau, 'Overlaps and Conflicts of Jurisdiction Between the WTO and RTAs' (2002) Executive Summary, Conference on Regional Trade Agreements WTO, 3.

shall have recourse to, and abide by, the rules and procedures of this Understanding"[36].

Additionally, as is directed by Article 6(1):

> "If the complaining party so requests, a panel shall be established at the latest at the [Dispute Settlement Body] DSB meeting following that at which the request first appears as an item on the DSB's agenda, unless at that meeting the DSB decides by consensus not to establish a panel"[37].

After a Panel has been constituted and a decision made, a WTO Member may appeal this decision, which is governed by Article 17, which states:

> "A standing Appellate Body shall be established by the DSB. The Appellate Body shall hear appeals from panel cases. It shall be composed of seven persons, three of whom shall serve on any one case. Persons serving on the Appellate Body shall serve in rotation. Such rotation shall be determined in the working procedures of the Appellate Body"[38].

It is this "Appellate Review"[39] procedure that has gained recent controversy. Lo *et al* have stated that this procedure "was usually referred to as the Jewel in the Crown. In particular, the Appellate Body was the shinning focal of the jewel, due to its high-quality work and its professional and authoritative interpretation of the WTO agreements as well as its trustworthy decisions"[40]. The Appellate Body currently does not have the required "seven persons"[41] due to a "progressive reduction in membership of the [Appellate Body] AB"[42]. A complete standstill has occurred and appeals are not able to be heard with the WTO Website currently declaring that "the Appellate Body is unable to review appeals given

[36] Agreement Establishing the World Trade Organization, Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Annex 2, 1869 U.N.T.S. 401, 33 I.L.M. 1226 (1994), Article 23(1).
[37] DSU: *ibid* Article 6(1).
[38] DSU: *ibid* Article 17(1).
[39] DSU: *ibid* Article 17(1).
[40] Chan-fa Lo, Junji Nakagawa and Tsai-fang Chen, 'Introduction: Let the Jewel in the Crown Shine Again' in Chang-fa Lo, Junji Nakagawa and Tsai-fang Chen Eds, *The Appellate Body of the WTO and Its Reform* (2020) 4.
[41] DSU: [n 36] Article 17(1)
[42] Bernard M. Hoekman and Petros C. Mavroidis, 'Burning Down the House? The Appellate Body in the Centre of the WTO Crisis' (2019) EUI Working Paper RSCAS 2019/56, 1.

its ongoing vacancies"[43]. The causation of such a disturbance has emanated from the United States ability to obstruct the appointment of Appellate Body members on the grounds of dissatisfaction with this procedure[44]. Therefore, as a result, "a WTO member state that receives an adverse panel decision (and therefore prevent it from becoming binding) by filing an appeal, safe in the knowledge that there is no Appellate Body to hear the dispute"[45]. This essentially has the effect of causing a prolonging of the dispute and when it is repeated the significance of such a procedure for the regulation of trade and to a lesser extent investment, the description of the "biggest governance crisis"[46] like situation for the WTO regime is rather suitable. Although, this is not to say that there have been suggestions in which such a standstill can be somewhat rectified[47].

3. Central Claims

From the research analyzed, initially there are multiple and organic central claims that can be subsequently deduced. These claims are principally related to the answering of the research question posed as the title of this Thesis and should fundamentally be separated from the results.

3.1 Understanding of Sustainable Development

The concept of sustainable development has gained an increased international presence and has recently culminated in the announcement of the 2015 SDGs, which contain 17 goals with adjoining targets. Chapter Two has shown the continued uncertain and

[43] World Trade Organization Website, *Appellate Body Members*, found at < https://www.wto.org/english/tratop_e/dispu_e/ab_members_desrp_e.htm> accessed March 2021.
[44] Please see: Clifford Chance, 'The WTO Appellate Body Crisis- A Way Forward?' (2019), found at < https://www/clifforfchance.com/content/dam/cliffordchance/briefings/2019/11/the-WTO-appellate-body-crisis-a-way-forward.pdf > accessed March 2021,3-5; Jens Lehne, 'Crisis at the WTO: Is the Blocking of Appointments to the WTO Appellate Body by the United States Legally Justified?' in Daniel Hurlimann and Marc Thommen Eds, *Sui Generis* (2019).
[45] Clifford Chance: *ibid* 2. Please also see: Geraldo Vidigal, 'Living Without the Appellate Body: Multilateral, Bilateral and Plurilateral Solutions to the WTO Dispute Settlement Crisis' (2019) *The Journal of World Investment & Trade*, Vol. 20, Issue 6.
[46] Ernst-Ulrich Petersmann, 'How Should WTO Members React to WTO Crises?' (2019) *World Trade Review*, Vol. 18, Issue 3, 503.
[47] Please see: G. Vidigal: [n 45]; Bernard Hoekman, 'WTO Dispute Settlement and the Appellate Body Crisis: Back to the Future?' (2020) Working Paper 18/03/2020.

indefinite nature of the concept in terms of the functioning and inclusive elements. Due to this realization, it was decided the SDGs would be the most appropriate yardstick for the comparative judgement to determine the extent of the translation within the facilitative mechanisms of international investment law. To aid in this process and to further organize the multiple SDGs into categories which would later support in the observation of the translation, the extremely useful categorization arrangement provided by the ILA New Delhi Principles[48] was employed. Additionally, it must be observed that although the SDGs contain rather specific targets, the precise translation of these targets within facilitative mechanisms was deemed rather unrealistic and so a more generalized recognition was adopted in interpretation.

3.2 Parameters of International Investment Law

The methodology provided within Chapter One provided and subsequently narrowed the definition of what would constitute a facilitative mechanism for the purposes of the translation of the concept of sustainable development within the field of international investment law and the regulation of FDI. Indeed, alongside this important decision, was the fundamental assertion that the facilitative mechanisms are those strictly employed only in the regulation of FDI and not other forms of international investment. From the outset, it was acknowledged the fragmented nature of the regime and stemming from this recognition, it was determined that facilitative mechanisms of a continual textual nature would be utilized due to the ability to directly compare both the degree of content and accountability, which ultimately excluded arbitral decisions and customary international law, although there was recognition that these sources of law maintained a purpose within this regime. Considering this recognition therefore, the principal facilitative mechanisms employed were chosen subsequently based on coverage and scope within the international regime and include that of BITs, multilateral investment treaties (both regional and sectoral) and international investment-related voluntary guidelines.

[48] International Law Association, *New Delhi Declaration of Principles of International Law Relating to Sustainable Development* (ILA New Delhi Principles) (2002) A/Conf.199/8.

3.3 Impact of Governance Strategy

The role of international governance strategy was discussed and shown to have important influence and significant implications upon the translation of the concept of sustainable development within the field of international investment law. Chapter Three initially detailed international governance and the subsequent governance strategy, which was immediately distinguished from the term 'government'. The appreciation of these actions importantly allowed a wider appreciation of the translation. It was subsequently also provided both the benefits and detriments of the governance strategy adopted by international investment law and the regulation of FDI, which began to identify issues as to translation that were predominantly uncovered in Chapter Four. For example, the election of hard or soft sources of law and the choice of placement within the preambular or substantive provisions.

3.4 Determination of Effectiveness

The establishment of the degree of effectiveness must be ascertained, which was considered to be the most appropriate way to determine 'mutually beneficial' as dictated by the research question posed as the title of this Thesis. The methodological understanding discussed in Chapter One outlined in depth the definition of effectiveness and concluded that to determine effectiveness, both degree of content alongside accountability of the provision must be gained. Without reference to both measurements, the determination of effectiveness would have been classed as insufficient. To aid in this determination of effectiveness, a visual formula was provided alongside four principal categorizations. These were given to assist in the application of the uniform approach to analysis and the four categorical perspectives were detailed in such a manner as to prescribe an increasing consideration of effectiveness, starting from the weakest and moving towards the strongest. Both extremes were included within the categorization as this would cover all forms of effectiveness in translation encountered within the international investment regime.

4. Results of the Research

Considering and essentially utilizing these claims, alongside the research presented most comprehensively within Chapter Four, the results can be determined as such.

4.1 Translation

Broadly, the translation of the concept of sustainable development within the facilitative mechanisms of BITs, multilateral treaties and international voluntary guidelines can be divided into either forms of direct, i.e., obvious, or indirect, i.e., implicating, content translations. Using the predetermined and all-encompassing interpretative methodology as discussed within Chapter One, this translation has been seen to range from the direct usage of the term 'sustainable development' or the reference to the three fundamental pillars of the concept, through to the rather indirect application of the term 'prosperity' or 'public interest'. Therefore, it has been demonstrated that when solely assessing content translation, both a broad and narrow interpretive methodology must be employed. This act subsequently takes in consideration the difficult nature of the concept.

4.2 Accountability

With a similar degree of appreciation and again referring to an extremely general assertion, the translation of the concept of sustainable development in terms of location can also be further divided into either legally non-accountable and interpretative provisions or legally accountable and substantive provisions. This division can be seen, for example, in the difference between the preambular provisions and those within the main body of multilateral treaties, or even in the distinguishment between international voluntary guidelines and the substantive provisions within a BIT. The methodological discussion alongside the effects of the governance strategy employed as provided within Chapter Three highlight both the divergence in and employments of both locations of translation.

4.3 BITs

BITs are the most prevalent regulatory facilitative mechanism utilized by the field of international investment law, with UNCTAD stating that there are currently 2844 BITs signed, with 2290 BITs in force[49]. This is a relatively high number and adds weight to the determination of the international investment regime being fragmented in nature. The examination upon the translation of sustainable development has generated a somewhat mixed view, with much variance in the degree of effectiveness in the translation to be found. There are still numerous BITs in force that have no reference to the concept, either directly or indirectly, within the preambular provisions. Even recently negotiated BITs disappointingly fall under this category and essentially removes the further translation of the concept by way of significant interpretation into the substantive provisions.

To continue the degree of disappointment, when translation is present, most BITs contain only preambular references to the concept sustainable development, without further specific reference in the enhanced accountable and substantive provisions of the main body of text, like that which would be found within an initial objective-like provision. Within these preambular provisions, it has been demonstrated the variance in the extent of translation of the concept, demonstrating a basic and indirect reference to a more robust and obvious reference.

However, a wholly negative view of the translation of sustainable development within BITs would be an unfair portrayal. There could be more positive translations, in terms of degree of effectiveness, of the concept within the substantive provisions by way of the right to regulate, non-derogation, security and exception, and indirect expropriation provisions and the interpretative scope of the uniformly ambiguous phrasing adopted. Such a characteristic was seen to be commonly applied within provisions of international investment and the insertion of the concept within these vague provisions could be somewhat applied or enhanced with the reference to sustainable development within the previous preambular provisions.

[49] UNCTAD Website, International Investment Agreements Navigator, *Investment Policy Hub*, found at < https://investmentpolicy.unctad.org/international-investmenty-agreements > accessed July 2021.

4.4 Multilateral Investment Treaties

Multilateral investment treaties, both sectoral and regional in nature, are present within the regulation of FDI, however this is not to the same numerical extent as BITs. These multilateral treaties have again demonstrated the differential variance afforded to the effectiveness of translation of the concept of sustainable development in a similar manner as has been demonstrated in relation to BITs.

Initially, there are treaties present within the regime, such as ICSID, that maintain no connection in translation to sustainable development either in the preambular provisions or the main body of text. Therefore, in relation to these treaties and the determination of effectiveness, no degree of effectiveness is present.

Again, like that seen with BITs, in comparison there are multilateral treaties that expound the concept, either directly or indirectly, within the preambular provisions that enable a further interpretive translation within the subsequent substantive provisions. Alongside this opportunity, there is the presence of provisions such as non-derogation or the right to regulate provisions which could also translate the concept through a methodologically broad interpretative analysis. As a note of distinguishable contrast to the translation of sustainable development within BITs, it must be stated, for example, that it is unlikely that preambular provisions within BITs match the level of correspondence to the concept than that which is provided within NAFTA or such an objective like environmental obligation found within Article 19 of the ECT[50]. In this regard, it could be stated that the translation and subsequent effectiveness found within these multilateral treaties could be described as somewhat enhanced compared to that provided within the observed BITs.

4.5 International Voluntary Guidelines

International investment-related voluntary guidelines could be described overall to have demonstrated the closest alignment to the sustainable development agenda and ultimately the SDGs in terms of content delivered, however there are important examples of where no translation in content, direct or indirect, of the concept of sustainable development can

[50] Energy Charter Treaty (ECT) (1995) 2080 UNTS 95; 34 ILM 360.

be found. Within this appreciation, these guidelines can be divided into ones of a general mandate and those of more of a specific direction.

Fundamentally, it must be stated that due the nature of these secondary sources of law, the determination of effectiveness can only be categorized between the first and second stage of determination of effectiveness due to only their interpretative authority. The third and fourth stages of determination of effectiveness will never be reached, like the accountability afforded to the preambular provisions, as these guidelines equally maintain no legal accountability. There is an extensive use of passive language utilized in the phrasing of the observed guidelines. Therefore, the extent of variance in the degree of effectiveness within these guidelines can be heavily differentiated from that within BITs and multilateral investment treaties.

4.6 Reference to Other Treaties

The research presented has also recognized the incorporation and subsequent translation of the concept of sustainable development within these facilitative mechanisms via references to other international treaties that observably maintain a connection to the sustainable development agenda. It must be recognized that all the facilitative mechanisms described above demonstrate a varied approach to these references to other international treaties, which must be handled on a case-by-case basis, and that there is no overall obligation to include such provision.

At first, it is demonstrated the mechanisms which do not contain any reference to other international treaties, then it is highlighted examples of where there is an indirect implication without naming specific treaties and finally occasions where specific treaties are named. In disseminating this research, interpretation, location of citation and specific content is again important for the determination of effectiveness. For example, if the treaty announces a general relationship to other international treaties that all contractual parties are members and that the preambular provisions highlight a significant translation of the concept of sustainable development, the interpretation of such substantive provisions would occur which would consider the dictations of the preamble. It must also be remembered that in the reference to other international treaties, such incorporation

must not weaken the obligations and protections within the initial investment treaty or guideline.

4.7 Dispute Settlement Provisions

Another indirect incorporation of the concept of sustainable development can be found in the dispute settlement provisions that determine the content of arbitral decisions in instances of dispute, which are phrased similarly in both BITs and multilateral investment treaties. It must be reiterated that due to the precise choice of facilitative mechanisms chosen, case law itself is not within the methodological boundaries adopted by this Thesis, however the provisions that determine the extent of these cases within the investment treaties are relevant.

Again, much variance in both content and accountability can be found within treaties as to translation of the concept within these provisions. The least degree of translation has been demonstrated in treaties that contain no reference within the specific provisions alongside no interpretative inclusion of the concept in the preambular provisions. It is then shown whereby treaties incorporate vague language within these provisions that may incite the concept without any interpretative ability and relationship to sustainable development provided within the preamble. Alternatively, it is highlighted the inference of sustainable development via interpretation into these provisions which contain no direct or indirect implication of the concept. Finally, it is demonstrated an indirect translation of the concept of sustainable development within the dispute settlement provisions alongside increasing translation of the concept found within the preambular provisions. In general, it is recognized that the clearer and more direct the content of interpretation, the higher the potential opportunity for transposition. No observed treaties refer directly to the concept within the dispute settlement provisions.

4.8 Reform Proposals

Due the varying extent of the translation of the concept of sustainable development as summarized above within the field of international investment law and the regulation of FDI, consequential reform proposals are seen to be required to improve the translation and ultimately the degree of effectiveness. This stems from the recognition that the practical interaction of sustainable development within international investment law is currently not wholly mutually beneficial.

The reform proposals chiefly comprise of the ability to either amend and modify the provisions within the treaties or terminate the treaty and renewal of non-identical terms. The purpose of such actions is clear, to improve the effectiveness of the translations via the improvements of both degrees of content and accountability. There is also the demonstration that although many facilitative mechanisms utilized do generate a rather more positive translation of sustainable development, even these translations could be improved upon in line with the most modern understanding of the meaning of the concept of sustainable development as forwarded by the SDGs. Indeed, alignment with the most current understanding afforded to the concept of sustainable development has been shown to be the principal aim of such an exercise.

5. Conclusion

Due to the summarization of the results, in direct relation to the research question posed, it is in my opinion that the answer to this question is rather broad and not able to be answered directly. There are reasons to both have a positive and negative outlook regarding the practical interactions and the determination of effectiveness. In either case, there is ample scope for reform to better translate, in terms of content and the required amount of accountability, the concept of sustainable development. Ultimately however, the translation of the concept has much irregular presence across all forms of the principal regulation facilitative mechanisms adopted by international investment law and the regulation of FDI.

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