Exposé

A. Working title:

- The International Investment Policy of the European Union and Sustainable Development

B. Research Question (RQ):

- To what extent is the EU International Investment Policy compatible with the principle of sustainable development?

C. Contextualisation

It became clear right after the entry into force of the Lisbon Treaty in 2009 that the inclusion of the term foreign direct investment (FDI) into the Common Commercial Policy\(^1\) signifies important practical and legal challenges that would need to be overcome within the up-coming years in order to establish a functional EU International Investment Policy (IIP). These challenges have provoked a magnitude of legal contributions by scholars of EU law and international investment law.\(^2\) They in particular discussed the scope of EU competence over FDI,\(^3\) the organisation of the transition from Member States bilateral investment treaties (BITs) to EU international investment agreements (IIAs),\(^4\) as well as the repartition of roles and responsibilities between the EU and the Member States in the context of investor-state dispute settlement.\(^5\)

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1. Art. 207 TFEU.
4. The organisation of a smooth transition is a core practical challenge and regulated by Regulation n° 1219/2012.
5. Regulation n° 912/2014 establishes a framework on financial responsibilities linked to investor-state dispute settlement tribunals.
The emergence of a EU IIP has, next to those rather EU internal challenges, also generated broad discussions on the content and objectives of the EU IIP and EU IIAs. These discussions remain ongoing since the content and objectives of the IIP have just started to materialise through the negotiation and conclusion of EU IIAs based on article 207 TFEU.

In shaping the IIP, the EU has since the entry into force of the Lisbon Treaty, to take into account the general objectives of EU external relations. Among such principles can be found the promotion of human rights, democracy, peace, rule of law and sustainable development. Thus a broad set of objectives applies to the IIP and adds to the purely economic objectives of the Common Commercial Policy such as market access and liberalisation.

The European Commission has attached since the beginning of the IIP particular emphasis on the role of sustainable development as a guiding objective for law and policy making under the IIP. Today the Commission highlights the will of a “responsible” trade and investment policy taking into account sustainable development concerns in even more explicit terms. While the Common Commercial Policy including the IIP shall serve economic development of EU consumers, workers and companies, Trade Commissioner Malmström considers that purely economic interests do not require the EU to compromise on core principles such as sustainable development. The European Commission further states that the new approach to the law and policy making under the Common Commercial Policy aims to ensure that “economic growth goes hand in hand with social justice, respect for human rights, high labour and environmental standards, and health and safety protection” and that this applies “to external as well as internal policies, and so also includes trade and investment policy.”

The policy statements of the European Commission reflect the on-going international discussion on reforming the international investment law regime, where sustainable development gained a particular position if not to say became the new paradigm on which IIAs should be built upon. The integration of sustainable development into international investment law is part of a new awareness of necessity to broaden interests involved in the international investment regime responding to such tensions as possible “regulatory chill”, negative effects of FDI on development of host States

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6 Art. 21 (1) and (2) TEU.
8 European Commission, Communication, Trade for All – Towards a More Responsible Trade and Investment Policy, 2015.
9 Ibid., Foreword Cecilia Malmström.
10 Ibid., p. 22.
and the environment, as well as global commitment to promote sustainable development in every level of decision-making.”

As has been aptly set out by Professors A. Boyle and D. Freestone the issue of sustainable development presents “some of the most interesting challenges to international law making, while also offering innovative solutions to some of the systemic problems of the international legal order,” by developing “new concepts and new juridical principles, to the adaptation of traditional institutions and concepts to the needs of the twenty-first century.”

It is true that international investment law is among the fields of law affected by the issue of sustainable development, as FDI both serves its achievement, and can adversely affect it. For this reason a rebalancing of international investment law towards the achievement of sustainable development is required. However, sustainable development remains a debated idea in terms of its exact content, purpose, effectiveness and legal status. Without entering into the debate in detail, it has to be underlined that a normative content of the concept of sustainable development is widely accepted. Or in other words it can be affirmed that the concept has enough normative contours, which allows international law making that promotes sustainable development. As for international investment treaty making, there are indeed new emerging approaches as to how sustainable development concerns can be directly or indirectly integrated into IIAs.

A question that is less often debated is the legal status of sustainable development within the EU legal order. The EU has closely followed the international developments on sustainable development as they first occurred at the international level. Primary EU law incorporated the concept for the first time with the 1992 Treaty of Maastricht where the concept of sustainability was linked to the objectives of “economic and social progress” and “non-inflationary growth” of the EU. The term sustainable development as such was included into the provision on development cooperation having the policy specific objective of fostering “sustainable economic and social development of developing countries”. The 1995 Treaty of Amsterdam then made a “balanced and sustainable development” an overall objective of the EU.

14 Dubava (note 11), p. 2
15 Ibid.
18 Cordonier Segger MC et al. (eds.), Sustainable Development in World Investment Law, Global Trade Law Series, Kluwer Law International, 2011. See also UNCTAD IPFSD.
The Treaty of Amsterdam also prescribed the integration of environmental protection requirements into “community policies with a view to promote sustainable development”. The Treaty of Lisbon maintains these provisions but distinguishes in Article 3 TEU between the internal (article 3 (3)) and external (article 3 (5)) dimension of the objective of sustainable development. Furthermore, environmental protection has been included in the EU Charter of Fundamental Rights (article 37), which became through the Lisbon Treaty part of primary EU law.\(^\text{19}\)

As mentioned at the beginning, the Treaty of Lisbon gave sustainable development an even stronger role to play within the framework of EU external action including the IIP. The objective can thus be found in articles 3 (5) and 21 TEU. Article 3 (5) TEU states inter alia that “the EU shall contribute to the sustainable development of the Earth”. Article 21 TEU adopts a twofold approach to sustainable development. Firstly it links the objective to EU development cooperation: “foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty”\(^\text{20}\). Secondly, the concept is linked to environmental protection by stating that the EU shall “help develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development”.\(^\text{21}\) Consequently, both of these aspects (development cooperation and environmental protection) are linked to the IIP.

The evaluation of the legal status and impact of the above-mentioned provisions requires more research in particular with respect to the position of the Court of Justice of the EU regarding such provisions. What can be said at this stage is that sustainable development is enshrined in EU primary law and not merely in numerous political action plans of the EU, which leads to the assumption that under EU law, the concept certainly has a normative content. The extent and legal implication of this normative content requires further assessment.\(^\text{22}\)

Against this background the present research project seeks to analyse the linkage between the EU IIP and sustainable development in greater detail. It will in particular

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\(^{19}\) Art. 6 (1) TEU.

\(^{20}\) Article 21 (2) (d) TEU.

\(^{21}\) Article 21 (2) (f) TEU. See also article 11 TFEU “Environmental protection requirements must be integrated into the definition and implementation of the Union’s policies and activities, in particular with a view to promoting sustainable development.” Environmental Protection has also be included in the EU Charter of Fundamental Rights, article 37, “A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development.”

\(^{22}\) Larik compares EU foreign policy objectives (article 21 TEU) with discourses elaborated in the context of nation state policy objectives such as the German “Staatszielbestimmung” or the French “objectif de valeur constitutionnelle”. See Larik J., Foreign policy objectives in European constitutional law, Oxford: OUP 2016.
question to what extent the IIP is compatible with the principle of sustainable development.²³

The present research project will tackle the issues through three main research blocks:

1) Sustainable Development (SD) an Integral Part of EU Investment Law Making
   a. SD in the EU legal order
   b. SD and the Common Commercial Policy
   c. Implementation of SD in International Investment Agreements of the EU
      i. Sustainability Impact Assessment in the course of negotiation
      ii. Sustainable development chapters in EU IIAs
      iii. Sustainable development in the preamble and as general objective

2) SD Promotion through EU Investment Law Making
   a. The special case of EU development cooperation
   b. Fostering social and environmental responsibility of investors
   c. Promoting investments in the Green Economy

3) Preserving the Policy Space for national and EU SD Legislation
   a. Greater precision in the drafting of substantive investment protection provisions of EU IIAs
   b. Accommodating sustainable development in investment dispute settlement under EU IIAs

²³ It is often argued that the EU plays a central role in fostering new international investment rules that take into account sustainable development concerns, see Dubava (note 11), Nowrot K., ‘How to include Environmental Protection, Human Rights and Sustainability in International Investment Law?’ Journal of World Investment & Trade 15 (2014) p. 643, and Hoffmeister F., ‘The Deep and Comprehensive Free Trade Agreements of the European Union – Concept and Challenges’ in: Cremona M. / Takacs T., Trade Liberalisation and Standardisation – New Directions in the ‘Low Politics’ of EU Foreign Policy, EUI Working Papers AEL 2014/1, p.15: “Being the world’s first exporter and largest importer, it is also clear that the strategic directions of Union policy in the area of sustainable development are of tremendous importance for global trade”.