INSIGHT

IS EU INVESTMENT POLICY FIT FOR PROMOTING SUSTAINABLE DEVELOPMENT? INSIGHTS FROM THE EU-ANGOLA SIFA

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ABSTRACT: In 2019 the EU Commission launched the ambitious so-called European Green Deal, a set of proposals aimed to revise and update EU legislation and to put in place new initiatives with the goal to ensure that EU policies are in line with climate and SDGs goals. To reach the targets set out by the EU institutions, a crucial role is attributed to private investments, which can mobilize the necessary capital to make feasible the green transition. In this regard, trade agreements are an important driver for sustainable growth both in the EU and in partner countries insofar as they promote private investments in strategic sectors while at the same time they contribute to sustainable development. While the EU Commission has already started to insert trade and sustainable development (TSD) chapters in its trade agreements, another possible path has been identified in the conclusion of new-generation bilateral investment agreements. This *Insight* examines the recently adopted EU-Angola Sustainable Investment Facilitation Agreement (EU-Angola SIFA) as the first of this new generation of investment agreements. Specifically, this *Insight* points out that, while the agreement is not yet in force and it will take several years to gauge whether it successfully serves as a stimulus to attract sustainable investments, it can already be considered a further attempt to balance the necessity to attract private capitals indispensable for the green transition with the preservation of States' regulatory powers.

KEYWORDS: sustainable development – European Union – investment agreements – SIFA – Agenda 2030 – European Green Deal.

I. INTRODUCTION

Climate change and environmental degradation are an existential threat to the European Union (EU) and the world. To tackle these issues, the EU Commission launched the so-called European Green Deal, a set of proposals aimed to revise and update EU legislation and to put in place new initiatives with the goal to ensure that EU policies are in line with the climate goals agreed by the Council and the European Parliament. Essentially, the European Green Deal will transform the EU into a modern, resource-efficient and competitive economy, ensuring: 1) no net emissions of greenhouse gases by 2050; 2) economic growth decoupled from resource use; 3) no person and no place left behind.[1]

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[1] European Commission, *Delivering the European Green Deal* commission.europa.eu.

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To reach such ambitious aims, a crucial role is attributed to strategic natural resources, such as raw materials, which are of fundamental importance for the energy transition. In this light, the EU needs to create a simpler, faster and more predictable framework, securing the volumes needed for raw materials, and ensuring users are able to benefit from the low costs of renewables. For these reasons, on 16 March 2023, the European Commission unveiled its proposal for a new Critical Raw Materials (CRMs) Act, which officially entered into force on 23rd May 2024.[2]

The focus of the CRMs Act is on raw materials that are important for the EU economy, the supplies of which are subject to a high level of supply risk. These critical raw materials are often indispensable inputs for a wide set of strategic sectors including renewable energy, the digital industry, the space and defence sectors and the health sector. At the same time, extraction and processing of CRMs can have negative environmental impacts, depending on the methods and processes used, as well as social impacts.

The Act establishes two lists of raw materials, critical raw materials and strategic raw materials. The list of strategic raw materials contains raw materials that are of high strategic importance, taking into account their use in strategic technologies underpinning the green and digital transitions or for defence or space applications, that are characterized by a potentially significant gap between global supply and projected demand, and for which an increase in production is relatively difficult, for instance due to long lead-times for new projects increasing supply capacity.[3]

In this regard, art. 1 of the CRMs Act sets several ambitious albeit non-binding targets to bolster domestic production of SRMs by 2030. These include: (i) extracting 10 per cent, (ii) processing and refining 40 per cent and (iii) recycling 15 per cent of its annual Strategic Raw Materials (SRMs) consumption. It also sets a non-binding target limiting imports of SRMs (at any stage of processing) from any single third country to 65 per cent of the EU's total annual imports.[4]

In light of the ambitious targets of the CRMs Act, the EU common commercial policy should serve the role of facilitating investment in strategic natural resources.[5] Within the common commercial policy, a pivotal role should be played by private investments, which can mobilize the necessary financial resources to foster the green transition. To favour the mobilization of private capitals, the EU Commission has concluded an impressive number of trade and investment agreements. According to the EU Commission, trade agreements are an important driver for sustainable growth both in the EU and in partner

[2] Regulation (EU) 2024/1252 of the European Parliament and of the Council of 11 April 2024 establishing a framework for ensuring a secure and sustainable supply of critical raw materials (thereafter 'CRMs Act'). For a comment, see P Leon, E Muller, T Svilanovic and A. Yolland, 'EU Critical Raw Minerals Act Highlights Intensifying Competition in Race to Net Zero' (2023) Global Energy Law and Sustainability 138.

[3] Art. 3 CRMs Act cit.

[4] Art. 1 CRMs Act cit.

[5] Recital 55 CRMs Act cit.

countries insofar as they promote private investments in strategic sectors while at the same time they contribute to sustainable development.[6]

In this regard, this *Insight* aims to assess whether the EU investment legal policy can be considered as an effective tool for promoting sustainable development. In particular, this *Insight* examines the recently adopted EU-Angola Sustainable Investment Facilitation Agreement (EU-Angola SIFA) as a case study to gauge whether EU-concluded investment treaties can be considered as a way to promote private investment in sectors of strategic importance for sustainable development.[7]

The structure of the *Insight* is as follows. Section II examines the EU competence over foreign investment and the gradual integration of sustainable development objectives within EU trade and investment agreements. Section III focuses on the EU-Angola SIFA, recalling its history, the reasons behind its conclusion and its substantive provisions. Finally, section IV critically assesses the SIFA to gauge whether it can be considered an effective way to implement sustainable development objectives. In this regard, specific attention is devoted to the comparison between the SIFA and previous trade and investment agreements concluded by the EU to conclude whether the former can be considered a step forward for the promotion of sustainable investments.

II. EU approach to International Investment Law

II.1. EU competence over Foreign Direct Investment

Foreign direct investment has become an EU exclusive competence in 2009 after the entry into force of the Treaty of Lisbon. Since that moment, the EU Commission has started to publish a series of communications outlining the characteristics that the EU investment policy should have. Specifically, the Commission made clear that the Union's trade and investment policy has to fit with the way the EU and its Member States regulate economic activity within the Union and across our borders. This means that EU investment agreements should be consistent with the other policies of the Union and its Member States, including policies on the protection of the environment, decent work, health and safety at work, consumer protection, cultural diversity, development policy and competition policy.[8]

Moreover, the Commission recognized that the common investment policy shall also be guided by the principles and objectives of the Union's external action more generally, including the promotion of the rule of law, human rights and sustainable development. This is

[6] European Commission, *Sustainable Development in EU Trade Agreements*, policy.trade.ec.europa.eu.

[7] Decision 2024/829 of the Council of 4 March 2024 on the conclusion, on behalf of the Union, of the Sustainable Investment Facilitation Agreement between the European Union and the Republic of Angola.

[8] Communication COM (2010) 343 final from the Commission of 7 July 2010, Towards a Comprehensive European International Investment Policy, p. 8.

expressly codified in the EU treaties. While art. 207 TFEU provides that foreign direct investment has come under exclusive EU competence, art. 205 TFEU acknowledges that "the Union's action on the international scene shall be guided by the principles, pursue the objectives and be conducted in accordance with the general provisions laid down in Chapter 1 of Title V of the Treaty on European Union".[9] In the same vein, art. 21 TEU prescribes that "the Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law".[10]

Therefore, the EU, through its common investment policy, needs to balance the necessity of free trade and investment with the respect of, *inter alia*, the rule of law, the promotion of human rights and labour standards and the encouragement of sustainable investments.[11]

It bears noting that the EU competence over foreign investment does not cover all types of investments. On the contrary, the Court of Justice of the European Union (CJEU) has already ascertained that portfolio investments and, above all, investor-State dispute settlement (ISDS) provisions do not fall under the exclusive competence of the EU.[12] Rather, they are to be considered as mixed competences between the Union and its Member States, with the consequence that ratification of treaties which contain portfolio investments or ISDS provisions must be undertaken by all the 27 parliaments. Due to CJEU Opinion 2/15, ratification of the investment chapter of the Comprehensive Economic and Trade Agreement between Canada and the EU (CETA) is still pending[13], while the other parts of the agreement are applied provisionally. Because of the issue of mixed competences, the agreements concluded with Singapore and Vietnam are split into two: a trade agreement and an investment agreement.[14]

[9] Art. 205 TFEU.

[10] Art. 21 TEU.

[11] See C Vedder, 'Linkage of the Common Commercial Policy to the General Objectives for the Union's External Action' in M Bungenberg and C Herrmann (eds), *Common Commercial Policy after Lisbon* (Springer 2013) 120; T P Holterhus, 'Which it seeks to advance in the wider world - The EUs legal obligation to promote the rule of law in international investment law' in S W Schill and C J Tams (eds), *International Investment Protection and Constitutional Law* (Edgar Elgar 2022) 94, 109.

[12] Opinion 2/15 ECLI:EU:C:2017:376 paras. 244, 293.

[13] See Comprehensive Economic and Trade Agreement (CETA) of 14 January 2017 between Canada, of the one part, and the European Union and its Member States, of the other part.

[14] See Free trade agreement of 14 November 2019 between the European Union and the Republic of Singapore and Decision 2018/1676/EU of the Council of 15 October 2018 on the signing, on behalf of the European Union, of the Investment Protection Agreement between the European Union and its Member States, of the one part, and the Republic of Singapore, of the other part. Likewise, see Free trade agreement of 1 August 2020 between the Socialist Republic of Vietnam and European Union and Decision 2019/1096 of the Council of 25 June 2019 on the signing, on behalf of the Union, of the Investment Protection Agreement between the European Union and its Member States, of the one part, and the Socialist Republic of Viet Nam, of the other part.

II.2. Integration of sustainable development into investment agreements

While there is no definition of sustainable development under customary international law, the concept usually is meant to comprise three dimensions, namely economic development, social development and environmental protection.[15] The principle of sustainable development has had a long genesis, starting from the 1972 Stockholm Declaration on the Human Environment[16] and the Report of the World Summit on Sustainable Development.[17] An important milestone was the 1992 Rio Declaration, adopted by the UN Conference on Environment and Development. The Declaration outlined the sustainable development principles and emphasized that social and economic welfare cannot be ensured in the long-term if the environment is not protected.[18] The legal validity of the principle of sustainable development has been recognized, although in rather nebulous terms, by the International Court of Justice (ICJ) in the Gabcikovo-Nagymaros case.[19] In that case, the Court reflected on the relationship between economic activities and nature. Specifically, the ICJ held that the need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development.[20]

The concept of sustainable development is currently made of several elements, principles or components. The International Law Association's Committee on Sustainable Development, while admitting a continued and genuine reluctance to formalize a distinctive legal status, has identified seven principles that are instrumental in pursuing the objective of sustainable development, namely:

> "1) the duty of States to ensure sustainable use of natural resources; 2) the principle of equity and the eradication of poverty; 3) the principle of common but differentiated responsibilities; 4) principle of the precautionary approach to human health, natural resources and ecosystems; 5) principle of public participation and access to information and justice; 6) the principle of good governance; and 7) the principle of integration and

[15] Legal scholarship about the concept of sustainable development is extremely vast. See, *e.g.*, N Schrijver, *The evolution of sustainable development in international law: inception, meaning and status* (Brill 2007); C Voigt, *Sustainable development as a principle of international law: resolving conflicts between climate measures and WTO law* (Martinus Nijhoff 2009); V Barral, 'Sustainable Development in International Law: Nature and Operation of an Evolutive Legal Norm' (2012) EJIL 377.

[16] United Nations Conference on the Human Environment, Declaration on the Human Environment of 15 December 1972.

[17] Report of the World Commission on Environment and Development: Our Common Future of October 1987.

[18] United Nations Conference on Environment and Development, Rio Declaration on Environment and Development of 3-14 June 1992, UN Doc A/CONF.151/26.

[19] ICJ *Gabčikovo-Nagymaros Project (Hungary v Slovakia)* (Merits) [25 September 1997].

[20] *Gabčikovo-Nagymaros* cit. para. 140.

interrelationship, in particular in relation to human rights and social, economic and environmental objectives".[21]

The concept of sustainable development has been included or linked with most of the treaties concerning the protection of the environment and the preservation of biodiversity.[22] References to sustainable development have been included also in the World Trade Organization (WTO) agreements and are explicitly mentioned in the Preamble to the 1994 Marrakesh Agreement Establishing the WTO.

By the same token, the EU treaties recognize the validity and importance of the principle of sustainable development. In the case of the EU, sustainable development means that the needs of the present generation should be met without compromising the ability of future generations to meet their own needs. Specifically, it aims at the continuous improvement of the quality of life and well-being for present and future generations.[23] Art. 3 TEU specifically mentions sustainable development as one of the objectives that shall inspire the Union's action.[24] In particular, art. 3(5) requires the EU that, it shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter.[25] Furthermore, art. 11 of the TFEU provides that 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.[26]

More recently, the recognition of the importance of sustainable development has been made with the adoption of the 2030 Agenda for Sustainable Development (Agenda

[21] International Law Association, New Delhi Declaration on the Principles of International Law Relating to Sustainable Development of 2-6 April 2002. See also T Gazzini, 'Bilateral Investment Treaties and Sustainable Development' (2014) JWIT 929, 931.

[22] See *e.g.*, Convention on the Conservation of Wetlands of International Importance Especially as Waterfowl Habitat [1971]; United Nations Convention on the Law of the Sea [1982]; Convention on Biological Diversity [1992].

[23] Note of the General Secretariat of the Council of the European Union to Delegates of 26 June 2006, Renewed EU Sustainable Development Strategy as Adopted by the European Council on 15/16 June 2006, Annex para 1.

[24] Art. 3(3) TEU: "The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment".

[25] Art. 3(5) TEU.

[26] Art. 11 TFEU.

2030).[27] The Agenda, adopted by the United Nations in September 2015, is the international community's response to global challenges and trends in relation to sustainable development. With its 17 Sustainable Development Goals (SDGs) at its core, the 2030 Agenda is a political declaration aiming to eradicate poverty and achieve sustainable development globally. It balances the economic, social and environmental dimensions of sustainable development, including the key issues of governance and peaceful and inclusive societies, recognizing the essential interlinkages between its goals and targets.[28]

After the adoption of the Agenda 2030, the EU Commission recognized the important role that trade and investment policies may have in promoting SGDs. According to the Commission, "trade policy, combined with development cooperation, is a powerful engine of growth in developing countries. The EU will continue its long-standing commitment to sustainable development in its trade policies, contributing to the newly agreed global sustainable development goals (SDGs) under the 2030 Agenda for Sustainable Development".[29]

Subsequent communications by the Commission endorsed this view. In 2016, for instance, the EU Commission further emphasized that "sustainable development requires a holistic and cross-sector policy approach to ensure that economic, social and environmental challenges are addressed together. Hence, ultimately sustainable development is an issue of governance and requires the right instruments to ensure policy coherence, across thematic areas as well as between the EU's external action and its other policies".[30]

However, while the EU wants to maintain an open investment environment to spur sustainable investment, there were concerns about the capacity of the current regulatory framework to address them. Some of these concerns were related to the unduly restriction of States' regulatory powers promoted by investment agreements. Essentially, through the conclusion of investment treaties, States usually undertake binding commitments to accord fair and equitable treatment, full protection and security and other standard of treatment to foreign investors. However, due to the fact that old-generation agreements contained vague standards of protection, provided rights only for investors and did not mention non-economic values, investors have usually complained that whatever the intent behind the measures, the enactment of States' regulations constitutes breach of an international investment agreement. This can be seen as an example of how new laws or regulations that have a detrimental impact on the foreign investors' assets,

[27] General Assembly, Transforming Our World: The 2030 Agenda for Sustainable Development of 25 September 2015, UN Doc A/Res/70/1.

[28] For a detailed comment, see W Huck, *Sustainable Development Goals. Article-by-Article Commentary* (Baden-Baden 2022).

[29] Communication COM(2015) 497 final from the Commission of 14 October 2015 on Trade for All - Towards a More Responsible Trade and Investment Policy.

[30] Communication COM(2016) 739 final from the Commission of 22 November 2016 on Next steps for a sustainable European future - European action for sustainability, para. 3.1. See also S Schacherer, *Sustainable Development in EU Foreign Investment Law* (Brill Nijhoff 2021) 148-149.

even if adopted to protect the environment or human rights, may be in breach of international investment law and, therefore, oblige States to pay compensation.[31]

Overall, there is a fundamental ideological divide between those who view the international investment agreements (IIAs) network as promoting sustainable development through the provision of a supportive, stable, and predictable framework for investment planning and those who view it as trapping or strangling public sector sustainability measures by imposing inappropriate neoliberal disciplines.[32]

In this regard, the EU identified two possible solutions to render investment agreements more in line with the promotion of SDGs. The first solution was the modernization/replacement of old-generation investment agreements with comprehensive trade agreements while the second one regards the conclusion of new-generation bilateral investment treaties (BITs) focused on investment facilitation rather than investment protection.[33]

The inclusion of trade and sustainable development in all EU-concluded FTAs has represented a new feature in the investment legal landscape. Essentially, one can identify three key features of TSD Chapters, namely: 1) references to the right to regulate; 2) the relevance of non-economic agreements (such as ILO Conventions, multilateral agreements on the environment and the climate change conventions) and the commitment of the Parties to ratify and implement them; and 3) dispute settlement limited to State-State consultation. Clearly, the rationale behind TSD Chapters is to balance economic interests with non-economic values, reaffirming the State's right to regulate in the public interest.[34]

However, the inclusion of TSD Chapters in FTAs has been criticized for the lack of effectiveness of these Chapters. Specifically, the public debate has mainly focused on the alleged lack of an enforcement mechanism.[35] The CJEU itself, in Opinion 2/15, addressed

[31] See *e.g.*, M Sornarajah, *Resistance and change in the international law on foreign investment* (Cambridge University Press 2015); M Koskenniemi, 'It's not the Cases, It's the System' (2017) Journal of World Investment & Trade 343; G Van Harten, *The trouble with foreign investor protection* (Oxford University Press 2020).

[32] See MC Cordonier Segger, 'Innovative Legal Solutions for Investment Law and Sustainable Development Challenges' in Y Levashova, T Lambooy and I Dekker (eds), *Bridging the gap between International Investment Law and the Environment* (Eleven Publishing 2015) 7.

[33] Communication COM(2021) 66 final from the Commission of 18 February 2021 on Trade Policy Review - An Open, Sustainable and Assertive Trade Policy, p. 17. See also C Titi, 'International Investment Law and the European Union: Towards a New Generation of International Investment Agreements' (2015) EJIL 639.

[34] See European Commission Concept Paper of 19 May 2015, Investment in TTIP and beyond – the path for reform. Enhancing the right to regulate and moving from current ad hoc arbitration towards an Investment Court. See also Opinion 1/17 of 30 April 2019, para. 156, in which the CJEU considered the CETA as compatible with EU law insofar as it limits the discretionary powers of the CETA Tribunal and Appellate Tribunal not to call into question the level of protection of public interest determined by the Union following a democratic process.

[35] See European Commission, Non paper of the Commission services of 11 July 2017 on Trade and Sustainable Development (TSD) chapters in EU Free Trade Agreements (FTAs). For a comment, see D van 't Wout, 'The enforceability of the trade and sustainable development chapters of the European Union's free trade agreements' (2022) Asia Europe Journal 81.

some of these concerns stating that, in the exercise of its exclusive competence concerning the Common Commercial Policy, the EU may suspend, under art. 60 of the 1969 Vienna Convention on the Law of Treaties, the liberalization provided for in trade agreements if the other party does not respect the provisions on the social protection of workers and protection of the environment contained in the chapters on sustainable development.[36] While this possibility seems too extreme[37], the Commission itself recognized, in 2021, the necessity to strengthen the enforcement of trade and sustainable development commitments on the basis of complaints made to the Chief Trade Enforcement Officer.[38]

While other routes were explored, such as the inclusion of distinct chapters on renewable energy or energy and raw materials[39], new FTAs include modernized versions of TSD Chapters. The EU-New Zealand FTA was the first agreement to integrate the new TSD approach.[40] In particular, in instances of serious violations of core labour and climate commitments, such as the ILO fundamental principles and of the Paris Agreement, sanctions can be applied. These sanctions could take the form of compensation or even suspension of the application of obligations under the covered provisions. While it is too early to gauge whether or not this new version of TSD chapters will be effective in balancing trade and sustainable development, the Commission has meanwhile concluded the first-ever BIT totally focused on promoting sustainable investment, the EU-Angola Sustainable Investment Facilitation Agreement (EU-Angola SIFA).

III. EU-Angola SIFA

III.1. History of the agreement

At the 5th European Union-Angola Ministerial Meeting in September 2020, the EU and Angola confirmed their intention to start exploratory discussions on a bilateral investment agreement focused on investment facilitation. Among the African community of States, Angola was chosen as the first partner to conclude this new-generation BITs. While Angola is "only" the 47 partner of the EU, the flow of imports – especially raw materials –

[36] Opinion 2/15 cit. para 161.

[37] See C López-Jurado Romero de la Cruz and R Marín Aís, 'The rule of law in the reform of the European Union's common commercial policy' in LM Hinojosa Martínez and C Pérez Bernárdez (eds), *Enhancing the rule of law in the European Union's external action* (Edward Elgar Publishing Limited 2023) 237-238.

[38] Communication COM(2021) 66 final cit. p. 13.

[39] See *e.g.*, Agreement in principle of 21 April 2018 to modernize the Association Agreement between the European Union and its Member States, of the one part, and Mexico, of the other part. Given that this agreement has still not been concluded, the Commission published and announced its text: policy.trade.ec.europa.eu.

[40] Free Trade Agreement of 25 March 2023 between the European Union and New Zealand.

has dramatically increased in the last years.[41] The choice of an African country is not a coincidence. The EU Commission has already stated that the African community of States is an important partner insofar as the EU's dense network of trade agreements with these countries offer the prospect of closer economic integration and the development of integrated production and services networks.[42] Specifically, this would be part of a broader strategy to promote sustainable investment and improve the resilience of EU economies through diversified value chains and foster the development of trade in sustainable products, including in order to support the climate and energy transformation.

On 23 March 2021, the Commission adopted a recommendation for a Council Decision authorizing the opening of negotiations with Angola on an agreement on investment facilitation.[43] On 26 May 2021, the Council of the European Union authorized the opening of negotiations and gave its negotiating directives. On 22 June 2021, the EU and Angola launched negotiations on a Sustainable Investment Facilitation Agreement. The negotiations between the EU and Angola on this agreement were concluded on 18 November 2022.[44] On 16 June 2023, the Commission sent proposals on the signature and conclusion of the agreement to the Council.[45] On 9 October 2023, the Council adopted a decision on the signature of the sustainable investment facilitation agreement (SIFA) between the European Union and Angola, which was finalized on 17 November 2023.[46] On 4 March 2024, the Council finally adopted a decision on the conclusion of the agreement, which will enter into force on the first day of the second month following the date on which the Parties have notified each other of the completion of their respective internal procedures.[47]

[41] According to the EU Directorate-General for Trade, in the decade 2012-2022, imports from Angola have grown from 6,105 million euros in 2012 to 13,530 million euros in 2022, while exports have slightly been reduced (from 5,711 million euros in 2012 to 4,292 million euros in 2022). Specifically, imports of raw materials saw a dramatic surge, quadruplicating between 2019 and 2022 (from 3,308 million euros in 2019 to 12,756 million euros in 2022). See EU Commission, Trade in Goods with Angola webgate.ec.europa.eu.

[42] Communication COM(2021) 66 final cit. 18.

[43] Communication COM(2021) 138 final from the Commission of 23 March 2021 on the Recommendation for a Council Decision authorising the opening of negotiations with Angola for an agreement on investment facilitation.

[44] European Commission, *EU and Angola conclude first-ever Sustainable Investment Facilitation Agreement* ec.europa.eu.

[45] Communication COM(2023) 312 final from the Commission of 16 June 2023 on the Proposal for a Council Decision on the signing, on behalf of the European Union, of the Sustainable Investment Facilitation Agreement between the European Union and the Republic of Angola; Communication COM(2023) 313 final from the Commission of 16 June 2023 on the Proposal for a Council Decision on the conclusion of the Sustainable Investment Facilitation Agreement between the European Union and the Republic of Angola.

[46] Decision 2023/2209 of the Council of 9 October 2023 on the signing, on behalf of the Union, of the Sustainable Investment Facilitation Agreement between the European Union and the Republic of Angola.

[47] Art. 57 EU-Angola SIFA cit.

III.2. Substantive provisions of the EU-Angola SIFA

According to the EU-Angola SIFA preamble, its aim is to further strengthen the Parties' economic links and establish close and lasting relations based on partnership and cooperation with the aim to promote sustainable development. Specifically, there is the recognition that investment can support sustainable development, economic growth, diversification of economic activities, and can contribute to the achievement of the goals defined under the 2030 Agenda for Sustainable Development of the United Nations. While the preamble is not binding, it may have a pivotal role in the interpretation of the agreement thereof. In this case, it is clear that the objective of the SIFA is to promote the flux of sustainable investments within their territories. This is clearly reflected in art. 5.6 of the Agreement, which affirms that, "in accordance with their commitment to enhance the contribution of investment to the goal of sustainable development, the Parties shall facilitate and encourage investment in sustainable production and consumption, in environmental goods and services, and investment of relevance for climate change mitigation and adaptation".[48]

Surprisingly, the only classic standard of treatment contained in the EU-Angola SIFA is the Most Favoured Nation Clause (MFN). According to art. 4, "each Party shall accord immediately and unconditionally to investors of the other Party and their investments treatment no less favourable than that it accords, in like situations, to investors of any other country and their investments, with respect to the application of provisions set out in this Agreement in its territory".[49] Paragraph 3 explicit clarifies that, "provisions included in other international agreements concluded by a Party do not in themselves constitute 'treatment' as referred to in paragraph 1 and thus cannot be taken into account when assessing a breach of this Agreement".[50] This paragraph bars the import of both substantive – such as the fair and equitable treatment standard – and procedural provisions – such as investor-State dispute settlement (ISDS) provisions – from other investment agreements.

While investors' protection is limited to the MFN clause, the other provisions of the EU-Angola SIFA concern the establishment of a predictable and transparent legal environment. In this regard, art. 9 provides that "each Party shall make available via electronic means such as a website and, where practicable accessible through a single portal, and update to the extent possible and as appropriate, information on investment incentives such as laws and regulations specifically addressing investment restrictions and conditions applying to investment and contact information of relevant competent authorities involved in the authorization of investment".[51]

A similar commitment exists also under art. 22 of the EU-Angola SIFA, which prescribes that each Party shall maintain or establish appropriate mechanisms, referred to

[48] *Ibid.* art. 5.6.
[49] *Ibid.* art. 4.
[50] *Ibid*.
[51] *Ibid.* art. 9.

as "investment facilitation focal points", for serving as first points of contact for investors regarding the measures affecting investment covered by this Agreement.[52]

Importantly, the EU-Angola SIFA provides for voluntary impact assessments of major measures of general application. In this regard, art. 25 SIFA recognizes the importance of an effective, consistent, transparent and predictable regulatory framework for investment. For these reasons, each Party is encouraged to carry out, in accordance with its respective rules and procedures, an impact assessment of major measures of general application it is preparing which fall within the scope of this Agreement. The Parties acknowledge that, when conducting such impact assessments, the potential impact of the proposed measure on micro, small and medium enterprises and on sustainable development should be taken into account.[53]

Like most new-generation investment agreements, the EU-Angola SIFA contains several exceptions to protect the State's right to regulate and other non-investment treaties. The EU-Angola SIFA is an example of a facilitation-focused IIA that, while broad in coverage, effectively preserves the parties' regulatory space, *inter alia* to pursue the SDGs, through general exceptions. In this regard, art. 47 provides that:

> "Nothing in this Agreement shall be construed to prevent the adoption or enforcement by either Party of measures: (a) necessary to protect public security or 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 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".[54]

In addition to the general exception clause, the agreement contains several references to the right to regulate. For instance, art. 2(2) states that "the Parties retain the right to regulate within their territories to achieve legitimate policy objectives, such as the protection of public health, social services, public education, safety, the environment including climate change, public morals, social or consumer protection, privacy and data protection, or the promotion and protection of cultural diversity".[55] Likewise, art. 29 provides that "the Parties recognise the right of each Party to determine its sustainable development policies and priorities, to establish the levels of domestic environmental and labour protection it deems appropriate and to adopt or modify its relevant laws and policies.

[52] *Ibid.* art. 22.
[53] *Ibid.* art. 25.
[54] *Ibid.* art. 47.
[55] *Ibid.* art. 2(2).

Such levels, laws and policies shall be consistent with each Party's commitments to the internationally recognised standards and agreements referred to in this Chapter".[56]

Interestingly, the EU-Angola SIFA recognizes the importance of further commitments by the parties to facilitate investment in a way consistent with environmental, social and development goals. For this purpose, the Agreement expressly cited other international treaties that the Parties have ratified. Art. 30, for instance, affirms the commitment of the Parties to promote the development of investment in a way that is conducive to decent work for all, as expressed in the ILO Declaration on Social Justice for a Fair Globalization of 2008. In accordance with the ILO Declaration, "each Party shall respect, promote and effectively implement throughout its territory, including in 'export processing zones' and other 'special economic zones', the internationally recognised core labour standards as defined in the fundamental ILO Conventions, and effectively implement further ILO Conventions that Angola and the Member States of the European Union have respectively ratified".[57]

Similarly, the EU-Angola SIFA recognizes the importance of environmental agreements. In this regard, art. 31 obliges each Party to effectively implement the multilateral environmental agreements (MEAs), protocols and amendments that it has ratified.[58] Furthermore, the Parties affirm their commitment to promote the development of investment in a way that is conducive to a high level of environmental protection. Among all environmental treaties, special weight is attributed to the UN Framework Convention on Climate Change (UNFCCC) as well as the purposes and goals of the Paris Agreement.[59]

Finally, art. 34 addresses the theme of corporate social responsibility (CSR). While there is the recognition of the importance of investors implementing due diligence to identify and address adverse impacts, such as on the environment and labour conditions in their operations, the agreement does not contain binding obligations upon investors. Rather, the EU-Angola SIFA prescribes that the Parties shall promote the uptake by enterprises and investors of CSR with a view to contributing to sustainable development and responsible investment. In this light, the Parties shall support the dissemination and use of relevant internationally agreed instruments that have been endorsed or are supported by the Parties, such as the UN Guiding Principles on Business and Human Rights and the OECD Guidelines for Multinational Enterprises and related due diligence guidance.[60]

Alongside the standard of protection, the other interesting part of the EU-Angola SIFA concerns the dispute settlement procedure. In this regard, the SIFA provides for consultation, mutually agreed solution or arbitration. About this latter option, it bears noting that the Agreement does not provide for ISDS procedures. Rather, arbitration is limited to State-State disputes. Furthermore, the EU-Angola SIFA reserves the parties' consent to

[56] *Ibid.* art. 29.
[57] *Ibid.* art. 30.
[58] *Ibid.* art. 31.
[59] *Ibid.* art. 32.
[60] *Ibid.* art. 34.

inter-State arbitration, so that it needs to be given separately for each specific dispute. In fact, art. 38 states that:

> "Where the parties are unable to reach a mutually agreed solution within 120 days from the request for consultations, or where the mutually agreed solution is not implemented within the time period foreseen under paragraph 2, the Party that requested consultations under art. 6.1 may request to resort to a State-to-State arbitration to resolve the dispute. The Party to which the request for arbitration is made shall accept or reject that request within 30 days. In the absence of a response, the request shall be deemed to have been rejected".[61]

In case the request for arbitration was rejected by the Party to which the request was made, or in case of non-compliance with the panel report, the Party that requested arbitration may take measures within the scope of this Agreement that are proportionate to the failure to fulfil the specific obligations.

IV. Is the EU-Angola SIFA a step forward towards the promotion of sustainable investments?

IV.1. Differences with other IIAs

While the EU has concluded several FTAs with investment chapters, the EU-Angola SIFA is the first of this new-generation agreements focused solely on investment promotion and protection. This section examines the differences and the similarities between the EU-Angola SIFA, on the one hand, and four comprehensive trade agreements with investment chapters, namely the CETA, the EU-Singapore, the EU-Vietnam and the EU-New Zealand agreements, on the other hand.

As far as the similarities are concerned, both the EU-Angola SIFA and the four abovementioned agreements contain the MFN clause. In the Commission's eyes, the MFN clause, as expression of the non-discrimination principle, is the cornerstone of the EU investment policy insofar as it ensures a level-playing field between the EU and its commercial partners.

Alongside the MFN clause, the other cornerstone of the EU investment policy is the continuous reaffirmation of the right to regulate. As stated above, EU institutions consider the preservation of regulatory space a *conditio sine qua non* for a sound investment policy capable of reaching a balance between investment protection and the States' ability to regulate in the public interest.[62]

Finally, a similarity can be sketched out between the EU-Angola SIFA and, this time, TSD Chapters. In fact, both agreements heavily refer to other non-investment agreements in

[61] *Ibid.* art. 38.

[62] See *e.g.*, art. 8.9(1) CETA cit., arts. 9.3(3), 13.1 EU-Singapore FTA, cit.; arts 1(2), 13*bis*(2) EU-Vietnam FTA cit.; arts. 10.1(2), 19.2 EU-New Zealand FTA cit.

their texts. While the EU-Angola SIFA and TSD chapters usually contain only obligations of best efforts, it is notable that the EU-New Zealand FTA provides for the possibility to sanction serious violations of core labour and climate commitments, through the form of compensation or suspension of the application of obligations (see *supra*, section II.2).

As regards the differences between the EU-Angola SIFA and comprehensive trade and investment agreements, first of all, contrary to the vast majority of all BITs, the EU-Angola SIFA contains only one standard of treatment, namely the MFN clause. This characteristic renders the EU-Angola SIFA a quite unique BIT within the legal landscape of international investment law. This is particularly true if one considers the standards of treatment contained in FTAs concluded by the EU, which grant investors a considerable higher degree of protection. The CETA, for instance, contains several standards of treatment such as FET, albeit with a closed list of breaches, full protection and security as well as protection against expropriation.[63] In the same vein, the EU-Singapore Investment Protection Agreement and the EU-Vietnam Investment Protection Agreement provides for the same level of protection embedding the FET standard, full protection and security and protection against expropriation.[64] Here again, the EU-New Zealand is more similar to the EU-Angola SIFA than to the other FTAs. In fact, Chapter 10 on investment of the EU-New Zealand agreement contains only three standards of treatment, namely National Treatment, MFN clause and Performance Requirements.[65] All in all, it seems that the EU is significantly reducing the presence of standards of treatment within its trade and investment agreements. This holds particularly true for the most controversial standards, such as FET and expropriation.

The other main differences between the EU-Angola SIFA and the other FTAs concerns the settlement of disputes. As stated above, the EU-Angola SIFA does not contemplate the possibility to institute ISDS proceedings. On the contrary, dispute settlement is limited to state-state (SSDS) proceedings, with the further peculiarity that it reserves the parties' consent to inter-State arbitration, so that it needs to be given separately for each specific dispute. This represents a radical shift away from the ambitious project of the EU to set up a permanent tribunal tasked with the resolution of ISDS disputes (investment court system, hereinafter ICS). This project, proposed in great style by the then Commission, was integrated, *inter alia*, in the CETA, in EU-Singapore Investment Protection Agreement and in the EU-Vietnam Investment Protection Agreement. However, the project has never been practically implemented due to the lack of ratification by national parliaments of those investment chapters. Therefore, there seems to be an implicit renounce by the EU Commission to push for the inclusion of the ICS in modern investment agreements.

[63] Arts 8.10, 8.12 and Annex 8-A CETA cit.

[64] Arts 2.4, 2.6, Annexes 1-2-3 EU-Singapore Investment Protection Act cit.; arts. 2.5, 2.7, Annexes 3-4 EU-Vietnam Investment Protection Act cit.

[65] Arts 10.6, 10.7, 10.9 EU-New Zealand FTA cit.

This is further confirmed by the exclusion of the ICS project in the EU-New Zealand FTA, which contains only SSDS procedures model after the WTO dispute settlement mechanism.[66] Overall, it may be said that the EU-Angola SIFA is an investment agreement which combines elements from both investment and TSD chapters in trade agreements previously concluded by the EU. While the EU-Angola SIFA is not yet into force and there will take several years to gauge whether it successfully serves as a stimulus to attract sustainable investments, some conclusions may be formulated.

IV.2. An effective way to implement SGDs?

The EU-Angola SIFA is a completely different investment agreement which is more focused on investment facilitation than protection. In this regard, the EU-Angola SIFA is much more similar to the Cooperation and Facilitation Investment Agreements (CFIAs) concluded by some countries, first and foremost Brazil.[67] The almost-total absence of investment protection may contribute to countering the narration of investment law as a form of neo-imperialism.[68] In this sense, the lack of standards such as FET or full protection and security, the continuous references to the right to regulate and the absence of ISDS provisions may contribute to dispel the idea that countries from the Global North grant their companies the possibility to take control of resources from countries of the Global South. Furthermore, the exclusive focus on sustainable investments runs counter to the idea that investment law is an enemy of environmental protection, human rights prevention or climate change mitigation.[69]

Clearly, there is the other side of the coin. Since there are almost no standards of protection, the biggest interrogative remains whether this new type of agreement will

[66] The project of an ICS has not been included in the EU-Japan FTA (also because Japan vehemently rejects the ICS) nor is it part of the EU-New Zealand FTA and neither is it on the table for the FTA negotiations with Mercosur. However, ICS appears to have been included in the updated EU-Chile FTA (2022) and EU-Mexico FTA (2018).

[67] Brazil issued a new model BIT in 2015 named the Cooperation and Facilitation Investment Agreement (CFIA). Brazil and Mozambique signed the first CFIA on 30 March 2015. Brazil has also signed CFIAs with Chile (2015), Morocco (2019), UAE (2019) and India (2020). See NMP Potin, C Brito de Urquiza, 'The Brazilian Cooperation and Facilitation Investment Agreement: Are Foreign Investors Protected?' (29 December 2021) Kluwer Arbitration Blog arbitrationblog.kluwerarbitration.com.

[68] See *e.g.*, K Miles, 'International Investment Law: Origins, Imperialism and Conceptualizing the Environment' (2010) ColoJIntlEnvtlL&Pol 1; E Prieto-Ríos, 'Systemic violence of the law: colonialism and international investment' (Rowman & Littlefield 2021); D Schneiderman, *Investment law's alibis: colonialism, imperialism, debt and development* (Cambridge University Press 2022); S Das, 'Fine Balance: Empire, Neoliberalism, and the Fair and Equitable Treatment Standard in International Investment Law' (2023) Journal of World Investment & Trade 659.

[69] *E.g.*, the debate that has surrounded the modernization of the Energy Charter Treaty and that has led to its demise. See Client Earth, *The EU must withdraw from the Energy Charter Treaty* clientearth.org; C Skidmore, 'Britain must leave the Energy Charter Treaty' (March 2023) The Financial Times ft.com; International Institute for Sustainable Development, *Press Release: EU's historic Energy Charter Treaty vote will boost energy transition* iisd.org.

contribute to significantly incentivize the creation of an investment-prone environment capable of attracting foreign investors. However, it shall be considered that the presence of investment agreements is only one of the elements of a more complex picture of the motives that stand behind the decision to invest in a determinate country. In this light, it would be of particular interest to seeing how the absence of investors' protection as well as ISDS provisions will influence investors' decisions.

V. Conclusion

Sustainable investment facilitation agreements are, according to the EU Commission, the new generation of BITs based on good governance and cooperation with the objective to promote sustainable investment. The EU-Angola SIFA, when into force, will be the first of this generation of BITs aimed at fostering private investments capable of implementing Agenda 2030 SDGs. From a legal point of view, the EU-Angola SIFA is a completely different investment agreement which is more focused on investment facilitation than protection. Specifically, the EU-Angola SIFA does not include controversial standards of protection – such as the FET or provisions against expropriation – and reaffirms the state right to regulate in the public interest. Essentially, through the conclusion of this BIT, the EU is trying to address the main criticisms towards international investment law. In fact, while the agreement is not yet into force and there will take several years to gauge whether it successfully serves as a stimulus to attract sustainable investments, it can already be considered a further attempt to balance the necessity to attract private capitals indispensable for the green transition with the preservation of States' regulatory powers. It remains to be seen if the EU-Angola SIFA model will really be reproduced in the future to achieve strategic investment partnerships with third countries.