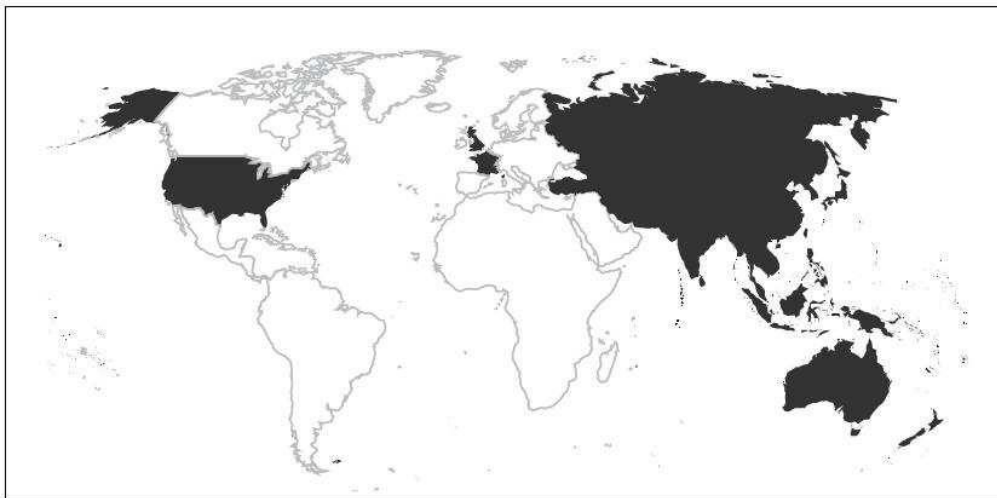


Sustainable development provisions in investment treaties

Prepared by Manjiao Chi



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SUSTAINABLE DEVELOPMENT PROVISIONS IN INVESTMENT TREATIES

**An empirical exploration of the sustainable development
provisions in BITs of Asia-Pacific LDCs and LLDCs**

Prepared for ARTNeT by Manjiao Chi



SUSTAINABLE DEVELOPMENT PROVISIONS IN INVESTMENT TREATIES

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Executive Summary

Foreign investment has been and still is an important factor for the economic development of many countries, especially developing countries. Transnational investment activities bring about the needed capital and technology to the host states, but they may also give rise to sustainable development concerns, such as environmental and labour rights concerns. To many developing countries, such concerns could be particularly profound.

Transnational investment activities are not only subject to the domestic laws of the host states, but they are also governed by a large number of international investment agreements (IIAs), especially bilateral investment treaties (BITs) and investment chapters in the free trade agreements (FTAs). In light of such a background, there appears a growing call that IIAs should be made sustainable development-oriented. In other words, IIAs should not only serve the purpose of protecting foreign investors and their investments, but they should also play a facilitative and promoting role for the contracting states in pursuing sustainable development. In recent years, many countries, especially developed countries and emerging economies, have put growing emphasis on sustainable development in negotiation of the IIAs.. While it is premature at this point of time to conclude that making sustainable development-oriented IIAs has become a global trend, it is natural for Asia-Pacific countries, including least developed countries (LDCs) and landlocked developing countries (LLDCs), to take note of this emerging trend in IIA-making.¹

In assessing whether and to what extent an IIA is sustainable development-oriented, the number, types and subtypes of sustainable development provisions (SDPs) contained in this IIA are analysed. To some extent, the number of SDPs contained in an IIA demonstrates whether the IIA incorporates any treaty norms that can be used in

¹ See also trends on negotiations of sustainable development provisions in a context of preferential trade covered in Baker, Paul, 2018. *Handbook on Negotiating Sustainable Development Provisions in Preferential Trade Agreements*, ESCAP and ARTNeT, available at <https://artnet.unescap.org/publications/books-reports/handbook-negotiating-sustainable-development-provisions-preferential>.

addressing sustainable development concerns; the types of SDPs show what kind(s) of sustainable development concerns the IIA can address; and the subtypes of SDPs further explains the practical effectiveness of the IIA in addressing sustainable development concerns.

While adopting the above-mentioned analytical approach, this report investigates, analyses and compares the SDPs incorporated in the selected 20 sample IIAs and those contained in the 340 BITs of eighteen Asia-Pacific LDCs and LLDCs. Such study reveals that the sustainability gap between the two groups of IIAs is substantial. Compared with the sample IIAs, BITs of Asia-Pacific LDCs and LLDCs not only contain smaller number of SDPs, but these SDPs are also of less types and subtypes. This suggests that BITs of Asia-Pacific LDCs and LLDCs are less sustainable development-oriented than the sample IIAs in general. Furthermore, the comparative study of the types and subtypes of the SDPs of the two groups of IIAs also suggests that, as BITs of Asia-Pacific LDCs and LLDCs contain less social SDPs and allow narrower access of non-state stakeholders to engage in investment governance, they appear less socialized and governance-oriented than the sample IIAs.

There could be various reasons to explain the sustainability gap between BITs of Asia-Pacific LDCs and LLDCs and the sample IIAs. This study reveals that Asia-Pacific LDCs and LLDCs in general adopt the traditional and original perspective of sustainable development. Though sustainable development traditionally and originally stands for a bi-dimensional paradigm of balancing economic growth and environmental protection, it has been materially expanded in recent years. Today, it is widely agreed that sustainable development has gained a third pillar, i.e. social development. The inclusion of a social dimension not only enriches the contents of sustainable development, but more importantly, it also helps transform sustainable development from a bi-dimensional paradigm to a multi-dimensional paradigm that tries to strike a proper balance among economic growth, environmental protection and social development. Reflected in IIA-making, the expansion of sustainable development implies that more types and subtypes of SDPs should be incorporated in IIAs.

While recognizing that concluding sustainable development-oriented IIAs is a sensible policy option and an emerging trend for countries in confronting sustainable development challenges, it does not necessarily mean that an IIA with a high level of sustainable development-orientation is suitable for all countries or that such an IIA can best serve the development goals of a country. As the survey result shows, Asia-Pacific LDCs and LLDCs not only face different levels and types of sustainable development challenges, they also have different policy preferences and national situations. Such differences imply that no one-size-for-all model of sustainable development-oriented IIA exist for all Asia-Pacific LDCs and LLDCs. Rather, these countries should formulate or improve their respective IIA-making strategy with a suitable level of sustainable development orientation. Such a strategy needs to be based on an assessment of their respective national situations and sustainable development challenges, with necessary reference made to the existing IIAs that are deemed sustainable development-oriented.

Acronyms

AAAA	Addis Ababa Action Agenda
BITs	bilateral investment treaties
BLEU	Belgium-Luxembourg Economic Union
ESCAP	Economic and Social Commission for Asia and the Pacific
ASEAN	Association of South East Asian Nations
ECT	Energy Charter Treaty
EU	European Union
FDI	foreign direct investment
FTA	free trade agreement
ICFD	International Conference on Financing for Development
ICSID	International Center for Settlement of Investment Disputes
IAs	international investment agreements
IISD	International Institute for Sustainable Development
LDCs	least developed countries
LLDCs	land-locked developing countries
RCEP	Regional Comprehensive Economic Partnership
SDGs	Sustainable Development Goals
SDPs	sustainable development provisions
TIT	trilateral investment treaty
TPP	Trans-Pacific Partnership
TTIP	Trans-Atlantic Trade and Investment Partnership
UNCED	United Nations Conference on Environment and Development
UNCHE	United Nations Conference on the Human Environment
UNCTAD	United Nations Conference on Trade and Development
UNEP	United Nations Environmental Program
USA	United States of America
USTR	United States Trade Representative
WCED	World Commission on Environment and Development
WSSD	World Summit on Sustainable Development

Acronyms of Sustainable Development Provisions

List of Acronyms of Types of SDPs

ATC	anti-corruption provision
ENV	environmental provision
GEN	general sustainable development provision
NES	national security provision
LHR	labour rights and human rights provision
RBP	responsible business practices provision
TRA	substantive transparency provision
TRL	procedural transparency provision

List of Acronyms of Subtypes of SDPs

AOI	anti-corruption obligations on foreign investors
AOS	anti-corruption obligations on states
COM	requirements of communication for law-making and policy-making
CON	confirmation of sustainable development obligations
DEC	declaration of the pursuit of sustainable development
ENG	engagement of stakeholders
EXP	exceptions that exempt states from the responsibilities
HER	transparency of arbitral hearings
NDG	non-derogation of sustainable development standards
PUB	publication of laws and regulations or arbitral documents
REF	reference to external sustainable development standards
ROI	obligations on investors for engaging in responsible business practices
ROS	obligations on states for ensuring or supervising responsible business practices
TPB	third party participation in investment dispute settlement proceedings
UTR	reference to UNCITRAL Transparency Rules

Unless otherwise indicated, all websites are last accessed as of 25 August 2018.

Table of Contents

Acknowledgement	i
Executive Summary	ii
Acronyms	v
Acronyms of Sustainable Development Provisions	vi
1. Introduction	1
2. The Evolution of Sustainable Development	4
3. Relevance of IIAs for Sustainable Development.....	12
3.1. The need to make sustainable development-oriented IIAs	12
3.2. Major types of SDPs.....	16
3.3. Major subtypes of SDPs.....	21
3.4. The nature of the obligations imposed by SDPs	24
4. Sustainable Development Provisions in the Sample IIAs	26
4.1. The distribution of SDPs.....	26
4.2. The types and subtypes of SDPs	29
4.3. Summary.....	34
5. Sustainable Development Provisions in BITs of Asia-Pacific LDCs and LLDCs.....	36
5.1. The landscape of the BITs.....	36
5.2. The SDPs in the BITs.....	37
5.3. Summary.....	44
6. The Sustainability Gap and Its Implications.....	46
6.1. The gap of availability and practical effectiveness of SDPs	46
6.2. The gap of socialization of SDPs.....	47
6.3. The gap of governance-orientation of SDPs.....	50
7. Major Findings of the Survey	53
7.1. IIAs and sustainable development to Asia-Pacific countries	53

7.2. Sustainable development concerns of Asia-Pacific countries	57
7.3. Options for making sustainable development-oriented IIAs	59
7.4. Major observations of the survey	60
8. Recommendations	62
References	64
Appendix A: List of Sample IIAs	69
Appendix B: List of Asia-Pacific LDCs and LLDCs	70
Appendix C: SDPs in Sample IIAs	71
Appendix D: SDPs in BITs of Asia Pacific LDCs and LLDCs	72
Appendix E: Questionnaire	73

Table of Figures

Figure 1. The distribution of SDPs in the sample IIAs.....	28
Figure 2. Types of SDPs in the sample IIAs	29
Figure 3. Number of BITs of Asia-Pacific LDCs and LLDCs	37
Figure 4. Distribution of SDPs in BITs of Asia-Pacific LDCs and LLDCs	38
Figure 5. Country distribution of SDPs in BITs of Asia-Pacific LDCs and LLDCs.....	39
Figure 6. Number of SDPs in BITs of Asia-Pacific LDCs and LLDCs	42
Figure 7. Types of SDPs in BITs of Asia-Pacific LDCs and LLDCs	43
Figure 8. Relevance of IIAs to economic development in Asia-Pacific countries	54
Figure 9. IIAs and sustainable development in Asia-Pacific countries	55
Figure 10. The rule of law of FDI in Asia-Pacific countries	56
Figure 11. Preference of IIA reform options for Asia-Pacific countries.....	59

Table of Tables

Table 1. List of eight major types of SDPs and their subtypes	17
Table 2. The nature of the obligations imposed by SDPs.....	25
Table 3. Countries with which Asia-Pacific LLDs and LLDCs have BITs.....	41
Table 4. Sustainable development concerns of Asia-Pacific countries.....	57
Table 5. Sectorial sustainable development challenges of Asia-Pacific countries.....	58

Table of Boxes

Box 1. The MDGs	6
Box 2. The ILA Sustainable Development Principles.....	8
Box 3. The AAAA-Identified Areas	8
Box 4. The SDGs	10

1. Introduction

Foreign investment, especially foreign direct investment (FDI), plays an important role in economic development at national and international levels.¹ Asia-Pacific countries are a major destination of global FDI.² While FDI helps promote the economic development of the recipient countries, transnational investment activities may also give rise to sustainable development challenges.³ Such challenges could be particularly profound in some developing countries that do not have a sound legal system, strong law enforcement and high level of investment governance. To many countries, how to reconcile and harmonize the two seemingly conflicting goals in investment governance, i.e. promoting transnational investment and pursuing sustainable development, has quickly become a pressing and outstanding issue.

IAs are widely deemed as a major source of legal norm for the existing global investment governance regime. IAs are composed of various types of international agreements or treaties, mainly including BITs, investment chapters of FTA and regional or international investment treaties, such as the Energy Charter Treaty (ECT), and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention). Broadly construed, IAs also include investment contracts concluded between foreign investors and the host states or state entities, which are often kept confidential.

¹ Alfaro, L., Chanda, A., Kalemliozcan, S., & Sayek, S, 2006. How Does Foreign Direct Investment Promote Economic Growth? Exploring the Effects of Financial Markets on Linkages, *HBS Working Paper Number: 07-013*, available <http://www.hbs.edu/research/pdf/07-013.pdf>.

² ESCAP, 2017. *Handbook on Policies, Promoting and Facilitation of Foreign Direct Investment for Sustainable Development in Asia and the Pacific*, available at <https://www.unescap.org/resources/handbook-policies-promotion-and-facilitation-foreign-direct-investment-sustainable-0>, p.17.

³ See, generally, Hindelang S. and Krajewski, M., eds., 2016. *Shifting Paradigms in International Investment Law: More Balanced, Less Isolated, Increasingly Diversified* (Oxford, Oxford University Press).

It is widely agreed that IIAs are not primarily designed to facilitate and promote sustainable development.⁴ Yet, given the cornerstone role of IIAs in global investment governance and the profound sustainable development challenges faced by the international community, there emerges a growing call that sustainable development should be integrated in investment policy-making and IIA-making. Indeed, making sustainable development-oriented IIAs has become a recent trend in global IIA-making. As observed by the United Nations Conference on Trade and Development (UNCTAD), IIAs concluded in 2017 have shown a clear sustainable development orientation, as these IIAs not only include a larger number of provisions explicitly referring to sustainable development issues, but many also incorporate general exceptions.⁵

Asia-Pacific region hosts a large number of countries of varying developmental levels. While some Asia-Pacific countries are developed countries, such as Australia, Japan and New Zealand, many are developing countries, including a number of LDCs and LLDCs. Many Asia-Pacific LDCs and LLDCs have a need of importing foreign investment to boost economic development, but they also face growing sustainable development challenges associated with transnational investment activities. In the meantime, as shown by Resolution 72/6 of the United Nations Economic and Social Commission for Asia and the Pacific (ESCAP), Asia-Pacific countries are committed to effectively implement the SDGs.⁶ One helpful way to confront such challenges is for these countries to make IIAs more sustainable development-oriented.

Against such a background, this report, adopting comparative and empirical study methods, tries to study whether and to what extent BITs of Asia-Pacific LDCs and LLDCs

⁴ See Vanduzer, J. A, 2016. Sustainable Development Provisions in International Trade Treaties: What Lessons for International Investment Agreements?, in Hindelang S. and Krajewski, M., eds., 2016. *Shifting Paradigms in International Investment Law: More Balanced, Less Isolated, Increasingly Diversified* (Oxford, Oxford University Press), p.143.

⁵ UNCTAD, 2018. Recent Developments in the International Investment Regime, *IIA Issue Note*, Issue 1, available at http://unctad.org/en/PublicationsLibrary/diaepcbinf2018d1_en.pdf, p.5.

⁶ ESCAP, "Committing to the effective implementation of the 2030 Agenda for Sustainable Development in Asia and the Pacific" (Document Number: E/ESCAP/RES/72/6), available at http://www.un.org/ga/search/view_doc.asp?symbol=E/ESCAP/RES/72/6.

are sustainable development-oriented, and how the countries could make sustainable development-oriented IIAs in the future. Admittedly, there is no uniform and fixed standards in determining the level of sustainable development-orientation of IIAs at national and international levels. In exploring this issue, this report adopts a three-aspect investigation method. First, the report examines the number (availability) of SDPs incorporated in the IIAs, as the availability of SDPs decides whether the IIA is capable of addressing sustainable development concerns. Second, the report examines the types of the SDPs, depending mainly on the relevance of the SDPs and sustainable development, as the types of the SDPs decide what kind(s) of sustainable development concerns the IIA can address. Third, the report examines the subtypes of the SDPs, depending mainly on the nature of the obligation imposed by the SDPs on the contracting states or foreign investors, as the subtypes of the SDPs to a large extent decides the practical effectiveness of the IIA in addressing sustainable development concerns. It should be noted that, in this report, each SDP is categorized into a certain subtype. In this sense, the subtypes of the SDPs also denote the number of SDPs.

This report is composed of eight parts. Part 1 is the introduction. Part 2 provides a brief analysis of the evolution of sustainable development. Part 3 discusses the relevance of IIAs for sustainable development. Part 4 examines the SDPs contained in the 20-selected sample IIAs, aiming to set a “benchmark” and “reference” of sustainable development-oriented IIAs. Part 5 studies the SDPs contained in the 340 BITs concluded by Asia-Pacific LDCs and LLDCs. Part 6 explores the sustainability gap between sample IIAs and BITs of Asia-Pacific LDCs and LLDCs. Part 7 explores the need for making sustainable development-oriented IIAs on a country-specific basis mainly through analysing a survey of Asia-Pacific countries. Part 8 puts forward several recommendations for Asia-Pacific LDCs and LLDCs to make sustainable development-oriented IIAs in the future.

2. The Evolution of Sustainable Development

The international community has been aware of the need of keeping a proper balance between economic development and environmental protection since a long time ago. Yet, sustainable development did not enter into the global development agenda until the recent decades.⁷ Ever since its initiation, sustainable development has been and still is an evolutive concept that is difficult to be precisely defined. The evolution of sustainable development has undergone several stages, mainly through various international organization resolutions, declarations, conventions and judicial decisions.⁸ For the purpose of this study, a brief introduction of the evolution of sustainable development is necessary.

In 1972, the United Nations Conference on the Human Environment (UNCHE) was held in Stockholm, also known as the Stockholm Conference. This conference heightened the global nature of environmental challenges and decided to take measures that lead to the general acceptance of sustainable development as a means of realizing the developmental needs of all people without sacrificing the earth's capacity to sustain life. Out of the Stockholm Conference, the United Nations Environmental Program (UNEP) was formed in Nairobi, Kenya, in 1972, with a mandate to promote development that is friendly towards the environment.

In early 1980s, a decade after the Stockholm Conference, profound global environmental challenges and poverty problems remained, especially in developing states. The United Nations realized that there was a need to ally the states to pursue sustainable development together, and decided to set up the World Commission on Environment and Development (WCED) in 1984, chaired by Mr. Gro H. Brundtland, the Prime Minister of Norway. In 1987, the Commission released a landmark report, titled "Our Common

⁷ Schijver, N., 2007. The Evolution of Sustainable Development in International Law: Inception, Meaning and Status, *Recueil des cours*, 329, 238.

⁸ Barral, V., 2012. Sustainable Development in International Law: Nature and Operation of an Evolutive Legal Norm, *European Journal of International Law*, 23 (2), 377.

Future”, also known as the Brundtland Report.⁹ This report is widely deemed as the first attempt of the international community in incorporating sustainable development in the global development agenda. The Brundtland Report defines sustainable development as “development that meets the needs of the present without compromising the ability of future generations to meet their own needs”, and stresses that “the goals of economic and social development must be defined in terms of sustainability in all countries”.¹⁰ Such understanding of sustainable development essentially implies that development should be perceived beyond the mere dimension of economic growth, and that a proper balance should be struck between economic development and environmental protection.

In the 1990s, sustainable development became a primary focus of the international agenda. Global efforts of for developing an effective legal regime to address sustainable development began in Rio de Janeiro.¹¹ The United Nations Conference on Environment and Development (UNCED), mainly through the Rio Declaration on Environment and Development (Rio Declaration),¹² and Agenda 21,¹³ has made sustainable development a “leading concept of international environmental policy”.¹⁴ During this period, sustainable development remained largely limited to the context of environmental law, aiming chiefly at addressing the potential incompatibility between economic development and environmental protection.¹⁵

Since the new Millennium, with the unprecedented enhancement of global awareness of sustainable development, the evolution of sustainable development has entered into a

⁹ WCED, Our Common Future, available at www.un-documents.net/ocf-02.htm#1.

¹⁰ *Idem*, at para.1

¹¹ See Birnie, P., Boyle, A., Redgwell, C., 2009. *International Law and the Environment* (3rd edn.)(Oxford, Oxford University Press), p.53.

¹² UNCED, Rio Declaration on Environment and Development, available at www.un.org/documents/ga/conf151/aconf15126-1annex1.htm.

¹³ UNCED, *Agenda 21*, available at <https://sustainabledevelopment.un.org/outcomedocuments/agenda21>.

¹⁴ Birnie, P., Boyle, A. and Redgwell, C., 2009. *International Law and the Environment* (3rd edn.)(Oxford, Oxford University Press), p.50.

¹⁵ Chi, M., 2017. *Integrating Sustainable Development in International Investment Law: Normative Incompatibility, Systematic Integration and Governance Implications* (London & New York, Routledge), p.10.

new era. Sustainable development has evolved to a more comprehensive concept that captures not only the environmental dimension, but also the social dimension. Such a development profoundly expands the scope and enriches the contents of sustainable development. It also helps transform sustainable development from a bi-dimensional balancing paradigm (between economic growth and environmental protection) to a multi-dimensional paradigm (among economic growth, environmental protection and social development). Today, this multi-dimensional paradigm is widely deemed as the prevailing understanding of sustainable development.

In 2000, world leaders gathered at the United Nations Millennium Summit to shape a broad vision to fight poverty. The vision was translated into eight Millennium Development Goals (MDGs), as shown in Box 1.¹⁶ Though the MDGs were not proposed for the very purpose of promoting sustainable development, they clearly reflect the elements of the social dimension of sustainable development, such as poverty eradication and the protection of public health. Almost all states and a number of international organizations committed to achieve the MDGs.

Box 1. The MDGs

1. To eradicate extreme poverty and hunger
2. To achieve universal primary education
3. To promote gender equality and empower women
4. To reduce child mortality
5. To improve maternal health
6. To combat HIV/AIDS, Malaria, and other diseases
7. To ensure environmental sustainability
8. To develop a global partnership for development

¹⁶ United Nations, 2015. *The Millennium Development Goals Report*, available at <https://www.un.org/development/desa/publications/mdg-report-2015.html>, p.4.

In 2002, the World Summit on Sustainable Development (WSSD) adopted the Johannesburg Declaration on Sustainable Development (Johannesburg Declaration).¹⁷ This Declaration is a milestone document that clearly records the expansion of sustainable development from the environmental dimension to the social dimension. It not only recalls the evolution of sustainable development from Stockholm to Rio de Janeiro and to Johannesburg, but more importantly, it also clearly recognizes the three “interdependent and mutually reinforcing pillars of sustainable development”, namely economic growth, social development and environmental protection. The adoption of the Johannesburg Declaration demonstrates that sustainable development, though originally developed in the environmental discourse, is no longer intended only to “serve the needs of the environment”.¹⁸

Also in 2002, another milestone document was adopted in the evolution of sustainable development. The International Law Association (ILA) adopted a resolution, titled “the New Delhi Declaration of Principles of International Law Relating to Sustainable Development” (New Delhi Declaration),¹⁹ which identifies the following seven sustainable development-related principles, listed in Box 2.

¹⁷ WSSD, *Johannesburg Declaration on Sustainable Development*, available at <http://www.un-documents.net/jburgdec.htm>.

¹⁸ See Birnie, P. and Boyle, A., 2002. *International Law and the Environment* (2nd edn)(Oxford, Oxford University Press), p.45.

¹⁹ ILA, New Delhi Declaration of Principles of International Law Relating to Sustainable Development, *International Environment Agreements* 2, p.211.

Box 2. The ILA Sustainable Development Principles

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. The principle of the precautionary approach to human health, natural resources and ecosystems;
5. The principle of public participation and access to information and justice;
6. The principle of good governance;
7. The principle of integration and interrelationship, in particular in relation to human rights and social, economic and environmental objectives.

In July 2015, the third International Conference on Financing for Development (ICFD) adopted the Addis Ababa Action Agenda (AAAA), which was later endorsed by the United Nations General Assembly.²⁰

Box 3. The AAAA-Identified Areas

1. Delivering social protection and essential public services for all;
2. Scaling up efforts to end hunger and malnutrition;
3. Establishing a new forum to bridge the infrastructure gap;
4. Promoting inclusive and sustainable industrialization;
5. Generating full and productive employment and decent work for all and promoting micro, small and medium-sized enterprises;
6. Protecting our ecosystems for all;
7. Promoting peaceful and inclusive societies.

²⁰ ICFD, The Addis Ababa Action Agenda, available at <https://undocs.org/A/RES/69/313>.

The AAAA confirms that cohesive national sustainable development strategies, supported by integrated national financing frameworks, will be at the heart of the efforts in the pursuit of sustainable development. It recognizes a need for an ambitious, comprehensive, holistic and transformative approach with respect to the means of implementation, combining different means of implementation and integrating the economic, social and environmental dimensions of sustainable development. It further identifies several areas where sustainable development should be harnessed, which are listed in Box 3.

The latest notable event in the evolution of sustainable development is probably the adoption of the Sustainable Development Goals (SDGs). On 25 September 2015, the United Nations General Assembly formally adopted a universal, integrated and transformative sustainable development agenda, titled “Transforming Our World: the 2030 Agenda for Sustainable Development”, along with a set of 17 SDGs and 169 associated targets.²¹ The SDGs are listed in Box 4.

²¹ United Nations, Transforming Our World: The 2030 Agenda for Sustainable Development, available at <https://undocs.org/A/RES/70/1>.

Box 4. The SDGs

1. End poverty in all its forms everywhere;
2. End hunger, achieve food security and improved nutrition and promote sustainable agriculture;
3. Ensure healthy lives and promote well-being for all at all ages;
4. Ensure inclusive and equitable quality education and promote lifelong learning opportunities for all;
5. Achieve gender equality and empower all women and girls;
6. Ensure availability and sustainable management of water and sanitation for all;
7. Ensure access to affordable, reliable, sustainable and modern energy for all;
8. Promote sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all;
9. Build resilient infrastructure, promote inclusive and sustainable industrialization and foster innovation;
10. Reduce inequality within and among countries;
11. Make cities and human settlements inclusive, safe, resilient and sustainable;
12. Ensure sustainable consumption and production patterns;
13. Take urgent action to combat climate change and its impacts;
14. Conserve and sustainably use the oceans, seas and marine resources for sustainable development;
15. Protect, restore and promote sustainable use of terrestrial ecosystems, sustainably manage forests, combat desertification, and halt and reverse land degradation and halt biodiversity loss;
16. Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels;
17. Strengthen the means of implementation and revitalize the Global Partnership for Sustainable Development.

The adoption of the SDGs represents a universal call to action to end poverty, protect the planet and ensure that all people enjoy peace and prosperity. The SDGs address a wide range of sustainable development concerns in a balanced and integrated manner, including the economic, social and environmental dimensions of sustainable development. They also address some “newly targeted” issues pertaining to sustainable development, such as climate change, economic inequality, good governance, the rule of law, innovation, effective institutions, and peace and justice. Besides, unlike many previous instruments, the 2030 Agenda also sets forth a universal implementation and review mechanisms for the SDGs. It is fair to say that the SDGs represent a comprehensive and updated statement of the elements of sustainable development, though they do not constitute an exhaustive list of such elements.

Today, sustainable development has become an unavoidable paradigm underpinning almost all human actions and pervading the environmental, social, political, economic, and cultural discourses from the local through to the global level by both the public and private sectors.²² While sustainable development remains an “intrinsically evolutive” balancing paradigm in nature today,²³ now it aims at achieving a proper balance among economic growth, environmental protection and social development.

²² *Idem*

²³ Barral, V., 2012. Sustainable Development in International Law: Nature and Operation of an Evolutive Legal Norm, *European Journal of International Law*, 23 (2), 382.

3. Relevance of IIAs for Sustainable Development

Foreign investment has been and still is an indispensable factor for the promotion of economic development to many countries, especially developing countries. The legal framework for the governance of transnational investment activities is partly based on many IIAs, which furnish the major part of binding norms at the international law level. According to the UNCTAD, as of August 2018, countries around the world have concluded over 3,000 IIAs, including BITs, FTAs and some other forms of legal instruments.²⁴ To ensure that transnational investment activities is governed in a way consistent with and conducive to sustainable development, IIAs need to be made sustainable development-oriented. Such IIAs are expected to play a facilitative and promoting role in ensuring that transnational investment activities will not do harm to the environment and social development of the recipient countries, while contributing to the economic growth of these countries. This part tries to explore the relevance of IIAs for sustainable development, mainly through highlighting the necessity and possibility of making sustainable development-oriented IIAs and identifying the major types and subtypes of SDPs in IIAs.

3.1. The need to make sustainable development-oriented IIAs

Despite the positive role of foreign investment in promoting economic development, not all foreign investment leads to sustainable development in the host states.²⁵ In many parts of the world, it is frequently seen that transnational investment activities cause serious damages to the host states' environment and the local communities, and even give rise to international disputes and conflicts. It is particularly the case in countries with

²⁴ UNCTAD. International Investment Agreement Navigator, available at <http://investmentpolicyhub.unctad.org/IIA>.

²⁵ See, e.g., Schutter, D. O., Swinnen, J. and Wouters, J., eds, 2013. *Foreign Direct Investment and Human Development: The Law and Economics of International Investment Agreements* (Oxon, Routledge), p.1; Schill, S. W., Tams, C. J., and Hofmann, R., 2015. International investment law and development: Friends or foes?, in Schill, S. W., Tams, C. J., and Hofmann, R., 2015. *International Investment Law and Development: Bridging the Gap* (Cheltenham, Edward Elgar Publishing), pp.3-5.

vulnerable environment, unstable political and social situations, underdeveloped economy and weak governance.

The international community realizes that transnational investment activities are essential to the achievement of sustainable development, and that there is an urgent need to confront the sustainability challenges associated with such activities.²⁶ For instance, Agenda 21 highlights the significance of foreign investment in promoting sustainable development, stating that

“Investment is critical to the ability of developing countries to achieve needed economic growth to improve the welfare of their populations and to meet their basic needs in a sustainable manner, all without deteriorating or depleting the resource base that underpins development”.²⁷

Similarly, Agenda 2030 also highlights that increasing foreign investment is needed for promoting several SDGs, including poverty eradication, sustainable agriculture, gender equality, sustainable energy, country equality, and global partnership.²⁸ Furthermore, during the G20 Ministerial Meeting under China’s presidency, held in July 2016, trade ministers of the world’s largest economies have agreed on a set of non-binding Guiding Principles for Investment and Policymaking, aiming to “promote investment for inclusive economic growth and sustainable development.”²⁹

To reform the existing global investment governance regime to be sustainable development-oriented, it is necessary to reform the IIA system, since IIAs are a major supplier of legal norms for this regime. This is a challenging task. Since IIAs are designed

²⁶ See Segger, M. C. C., and Gehring, M. W. and Newcombe, A., eds, 2011. *Sustainable Development in World Investment Law* (Alphen aan den Rijn, Kluwer Law International), pp.4-5.

²⁷ Agenda 21, para.2.23.

²⁸ Agenda 2030, paras.20, 1.b, 2.a, 7.a, 10.b, 17.5 and 67.

²⁹ UNCTAD, 2016. UNCTAD facilitates G20 consensus on Guiding Principles for Global Investment Policymaking, available at <http://investmentpolicyhub.unctad.org/News/Hub/Home/508>; MOFCOM, 2016. Trade Minister Gao Hucheng Attends the G20 Ministerial Meeting Outcome Delivery Meeting, available at <http://www.mofcom.gov.cn/article/ae/ai/201607/20160701355815.shtml>.

primarily for protecting foreign investors and investments from discriminatory and arbitrary conducts of the host states,³⁰ it is doubtful whether they are an appropriate discourse to address sustainable development concerns. Also, the fragmentation of international law adds further difficulty for IIAs to be more responsive to sustainable development needs. For instance, it has been argued that sustainable development concerns should be addressed through specialized treaties, such as international environmental treaties (IETs) and international human rights treaties, instead of IIAs.³¹

Not all of the global rules and institutions relating to international investment have been designed and conceived through a sustainable development lens.³² Many IIAs, especially early ones, fail to address sustainable development concerns. For instance, ICSID case law implies that under the ICSID Convention, protected foreign investments are supposed to play a positive role in promoting the development of the host state.³³ However, when understanding this role, the drafters of the ICSID Convention seemed to have only considered economic development, but not sustainable development.³⁴

The lack of a sustainable development perspective in IIA-making could bring about difficulty for the making of sustainable development-oriented IIAs. Despite such difficulty, there emerges a growing call to make IIAs more helpful in facilitating states to achieve sustainable development. The need to reduce the “sustainability deficit” of IIAs becomes increasingly pressing. First, as many states face mounting sustainability challenges in global investment governance, there exists a compelling need for these states to ensure that foreign investment do not frustrate their legitimate rights to pursue sustainable development. Second, since many IIAs allow investor-state arbitration (ISA), foreign

³⁰ IISD Model BIT, at iii.

³¹ See, e.g., Schneiderman, D., 2011. Legitimacy and Reflexivity in International Investment Arbitration: A New Self-Restraint, *Journal of International Dispute Settlement* 2(2), 471–476.

³² IISD, Without Investment, Sustainable Development is Impossible, available at <https://www.iisd.org/topic/investment>.

³³ See, e.g., Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco (ICSID Case No. ARB/00/4), Decision on Jurisdiction, available at <http://www.italaw.com/sites/default/files/case-documents/ita0738.pdf>.

³⁴ See Chi, M., 2017. *Integrating Sustainable Development in International Investment Law: Normative Incompatibility, Systematic Integration and Governance Implications* (London & New York, Routledge), pp.17-18.

investors frequently challenge the host states' regulatory measures in international arbitration. Some high-profile ISA cases, such as *Vattenfall et al. v. Germany*,³⁵ and *Philip Morris v. Australia*,³⁶ clearly show how the “regulatory chill” effects of ISA could impede states' efforts in pursuing sustainable development. Third, many specialized treaties, such as international human rights treaties and IELs, and their implementation regimes, often appear insufficient and ineffective in addressing sustainable development concerns associated with transnational investment activities.³⁷

In light of this situation, making sustainable development-oriented IIAs is necessary. This essentially implies that IIAs should be allowed to “deviate” from its traditional purpose of investment protection to also cater for certain sustainable development concerns, such as environmental and social concerns. In recent years, many states have begun to put growing stress on sustainable development in IIA-making, especially developed states. This can be witnessed from the model BITs of these states, such as the US Model BIT of 2012 and the Dutch Model BIT of 2018. Prominent international organizations have also made model IIAs catering for sustainable development needs. For example, in 2004, the International Institute for Sustainable Development (IISD) put forward a Model International Investment Agreement for the Promotion of Sustainable Development, to serve as a template for states in IIA-making.³⁸ UNCTAD also issued the Investment Policy Framework for Sustainable Development in 2012,³⁹ which was updated in 2015, in light of the emergence of “new generation” investment policies”.⁴⁰ The UNCTAD Policy Framework proposes strategic guidelines and concrete suggestions for making IIAs and

³⁵ *Vattenfall AB and others v. Federal Republic of Germany* (ICSID Case No. ARB/12/12), available at <http://investmentpolicyhub.unctad.org/ISDS/Details/467>.

³⁶ *Philip Morris Asia Limited v. The Commonwealth of Australia* (PCA Case No. 2012-12), available at <http://investmentpolicyhub.unctad.org/ISDS/Details/421>.

³⁷ Chi, M., 2017. *Integrating Sustainable Development in International Investment Law: Normative Incompatibility, Systematic Integration and Governance Implications* (London & New York, Routledge), pp.156-157.

³⁸ IISD, 2004. A Model International Investment Agreement for the Promotion of Sustainable Development, available at <https://www.iisd.org/publications/model-international-investment-agreement-promotion-sustainable-development>.

³⁹ See UNCTAD, 2012. Investment Policy Framework for Sustainable Development, available at http://unctad.org/en/PublicationsLibrary/diaepcb2012d5_en.pdf.

⁴⁰ See UNCTAD, 2015. Investment Policy Framework for Sustainable Development, available at http://unctad.org/en/PublicationsLibrary/diaepcb2015d5_en.pdf.

policies more compatible with sustainable development at international, regional and national levels.

Such developments show that there is a growing global consensus of making national investment policies and IIAs more sustainable development-oriented. Against such a background, Asia-Pacific LDCs and LLDCs should not stay estranged from this emerging trend, but need to find appropriate ways to make sustainable development-oriented IIAs on the basis of their national situations and needs.

3.2. Major types of SDPs

While investment protection remains a central purpose of IIAs, it is increasingly accepted today that IIAs could and should be made to also cater for sustainable development needs. This could be achieved by harnessing the SDPs in IIAs. To identify SDPs, the present study primarily relies on the “subject matter” test, that is to say, an IIA provision is deemed as an SDP if its subject matter reflects or embodies one or more elements of sustainable development. As sustainable development is a comprehensive concept with a broad coverage, touching upon a wide range of elements, including natural resources, environmental protection, poverty elimination, gender equality, climate change, public interest, labour and human rights, and the rule of law and good governance, to list some, SDPs are also divided into various types accordingly. The types of SDPs indicate the corresponding kind of sustainable development concerns the SDPs are to address. Following this method, this study identifies the following eight major types of SDPs in IIAs (table 1).

Table 1. List of eight major types of SDPs and their subtypes

<ol style="list-style-type: none">1. General sustainable development provisions (GENs)<ol style="list-style-type: none">a. Declaration of the pursuit of sustainable development (DEC)2. Anti-corruption provision (ATC)<ol style="list-style-type: none">a. Declaration of the pursuit of sustainable development (DEC)b. Anti-corruption obligations on states (AOS)c. Anti-corruption obligations on foreign investors (AOI)3. Environmental provision (ENV)<ol style="list-style-type: none">a. Non-derogation of sustainable development standards (NDG)b. Confirmation of sustainable development obligations (CON)c. Exceptions that exempt states from the responsibilities (EXP)4. Labour rights and human rights provision (LHR)<ol style="list-style-type: none">a. Reference to external sustainable development standards (REF)b. Non-derogation of sustainable development standards (NDG)c. Confirmation of sustainable development obligations (CON)d. Exceptions that exempt states from the responsibilities (EXP)5. Substantive transparency provision (TRL)<ol style="list-style-type: none">a. Publication of laws and regulations or arbitral documents (PUB)b. Requirements of communication for law-making and policy-making (COM)c. Engagement of stakeholders (ENG)6. Procedural transparency provision (TRA)<ol style="list-style-type: none">a. Publication of laws and regulations or arbitral documents (PUB)b. Transparency of arbitral hearings (HER)c. Third party participation in investment dispute settlement proceedings (TPB)d. Reference to UNCITRAL Transparency Rules (UTR)7. National security provision (NES)<ol style="list-style-type: none">a. Exceptions that exempt states from the responsibilities (EXP)8. Responsible business practices (RBPs)<ol style="list-style-type: none">a. Reference to external sustainable development standards (REF)b. Obligations on states for ensuring or supervising responsible business practices (ROS)c. Obligations on investors for engaging in responsible business practices (ROI)

The first type, “general sustainable development provisions” (**GENs**). Such provisions often appear in the preambles of IIAs. It is also possible to be in the form of a standalone IIA provision entitled “sustainable development”. GENs aim at addressing sustainable

development concerns in a general manner, instead of focusing on a specific sustainable development element, such as environmental protection.

The second type, anti-corruption provisions (**ATCs**). Anti-corruption is widely deemed as an important part of public policy and a core element of good governance at both international and national levels. ATCs are helpful in preventing and combating corruptions associated with transnational investment activities, and could play a helpful role in providing access to justice for all and build effective, accountable and inclusive institutions, as elaborated in the SDGs.

The third type, environmental provisions (**ENVs**). ENVs are the traditional and probably the most frequently seen type of SDPs in modern IIAs. They have also been subject to intense study in recent years. In the present study, the term “environment” should be understood broadly to cover not only the natural environment and resources, but also human, animal and plant life, public health and safety. ENVs aim at addressing concerns over the protection of the environment in the broad sense. They clearly reflect the environmental dimension and certain elements of the social dimension of sustainable development.

The fourth type, labour rights and human rights provisions (**LHRs**).⁴¹ LHRs mainly aim at addressing concerns over the protection of labour rights and human rights associated with transnational investment activities. The scope of labour rights or human rights could be construed broadly or narrowly, depending on the specific IIAs. Generally speaking, LHRs not only cover the basic labour rights, such as the core labour rights recognized by the International Labour Organization (ILO), but also encompass a broader range of social rights relating to human rights, such as gender equality, poverty eradication,

⁴¹ Strictly speaking, labour rights and human rights are different, each has a different regulatory focus and approach. Human rights are rights inherent to all human beings that are universal and inalienable, while labour rights refer to entitlements that relate specifically to the role of being a worker. Some labour rights are recognized in human rights conventions and can be protected as human rights. For the purpose of the present study, the two terms are used interchangeably. See, e.g., Khalfan, A., International Investment Law and Human Rights, in Segger, M. C., Gehring, M. W. and Newcombe, A., eds., 2011. *Sustainable Development in World Investment Law* (Alphen aan den Rijn, Kluwer Law International), p.53.

education and employment. LHRs clearly reflect the various elements of the social dimension of sustainable development.

The fifth type, substantive transparency provisions (**TRLs**). TRLs mainly deal with the publication of investment-related laws, regulations, policies and practices at local, national and international levels. They may also deal with the way such laws and policies are contemplated and made. As transparency of law is an essential element of good governance, it reflects an important element of the social dimension of sustainable development.

The sixth type, procedural transparency provisions (**TRAs**). TRAs refer to provisions dealing with the transparency of investment dispute settlement proceedings, particularly ISA. Depending on IIAs, TRAs may deal with a wide range of procedural issues, such as publishing arbitration documents, such as arbitral awards and written submissions, providing public access to the arbitration proceedings, especially hearings, and allowing third parties to participate in the arbitration proceedings in an appropriate manner, especially through submitting written briefs in the capacity of *amicus curiae*. Nowadays, as the public law nature of ISA is increasingly revealed and widely accepted, TRAs are increasingly highlighted in IIA-making for good governance purpose.

The seventh type, national security provisions (**NES**). NES aims at protecting the essential security interests of the host states, especially in exceptional circumstances. Given that national security is widely deemed as public interest of a state or the international community, and that such security is highly relevant with the well-being of a state, it plays an important role in ensuring sustainable development of the state. For such reason, NES may also deem as a typical SDP in IIAs.

The eighth type, responsible business practices (**RBP**s) or corporate social responsibility provisions (CSRs). Broadly understood, RBP address a pressing and sensitive issue of foreign investor obligations in IIAs. Investors, particularly multinational enterprises (MNEs), are key players of transnational investment activities, and major stakeholders of the global investment governance regime. They could provoke profound sustainable

development concerns, but they could also contribute to sustainable development in the host states, especially in certain economic sectors.⁴² While it is true that the conducts of investors remain primarily regulated by the domestic laws of the host states, it also makes sense for IIAs to impose certain obligations on investors as well. RBPs are linked with sustainable development because they could not only help host states better address sustainable development concerns, but also the core elements of RBPs, such as respect for human rights and commitment to environmental protection, directly reflect the elements of the environmental and social dimensions of sustainable development.

Finally, a few extra points should be mentioned. First, although the above types of SDPs are typical in IIAs, they do not constitute an exhaustive list of all SDPs in modern IIAs. Second, the various types of SDPs have different subject matters, which also decides the nature and function of the SDPs to some extent. Some types of SDPs, such as ENVs, GENs and NES, are made to cater for certain “traditional” types of sustainable development concerns, such as the protection of the environment and national security; other types of SDPs have a focus on various social aspects of sustainable development, such as labour rights and human rights protection and the rule of law in global investment governance. These SDPs can be categorically deemed as “social SDPs”, mainly covering ATCs, LHRs, TRAs, TRLs and RBPs. Third, given that the concept of sustainable development remains evolving, it is likely that future IIAs incorporate certain “novel” types of SDPs. For instance, the human society is experiencing rapid technological advancements today, and data security has recently become a growingly important and outstanding issue for states and individuals. Though the exact impacts of such technological advancement on global investment governance remain insufficiently clear at the present day, it should not be surprising that future IIAs may incorporate provisions to deal with this issue.

⁴² See UNCTAD, 2014. World Investment Report 2014 (Investing in the SDGs: An Action Plan), available at http://unctad.org/en/PublicationsLibrary/wir2014_en.pdf, at 140-149.

3.3. Major subtypes of SDPs

Whether and to what extent an IIA is sustainable development-oriented not only depends on the availability and types of SDPs contained in the IIA, but also relies on the practical effectiveness of the SDPs. The practical effectiveness of the SDPs is assessed mainly through their subtypes. In this study, each and all SDPs is categorized in a specific subtype, depending mainly on the nature of the obligations imposed by the SDPs. The subtypes of SDPs are explained in the following.

GENs are often of declaratory in nature (**DEC**), which often appear in the preambles of IIAs. Under the 1969 Vienna Convention on the Law of Treaties (VCLT), treaty preambles can play an assistive role in interpreting treaty clauses as “context” under Article 31, and in ascertaining the objects and purpose of the treaty under Article 18 and Article 60.⁴³ Such assistive functions have been confirmed by arbitration practice in a number of ISA cases, such as *Siemens v. Argentine*,⁴⁴ and *Vivendi v. Argentine*.⁴⁵ Despite their assistive role, treaty preambles in general do not confer contractual rights or obligations on the contracting parties, though they may reflect rules of customary law and form an integral part of a treaty.⁴⁶ In this sense, GENs only have limited practical effectiveness as they cannot oblige the contracting states or foreign investors to take measures for sustainable development purpose.

ATCs can be further classified into three subtypes. The first subtype is declaratory (**DEC**), mainly calling on the contracting states and investors not to engage in corruptive conducts. The second type imposes an obligation on the contracting states (**AOS**), either to take anti-corruption measures or not to refrain from engaging in corruptive conducts. The third

⁴³ Villiger, M. E., 2008. *Commentary on the 1969 Convention on the Law of Treaties* (The Hague: Martinus Nijhoff), p.44.

⁴⁴ *Siemens A.G. v. The Argentine Republic* (ICSID Case No. ARB/02/8), *Decision on Jurisdiction of 3 August 2004*, available at <http://www.italaw.com/cases/1026>, at para.81.

⁴⁵ *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic* (ICSID Case No. ARB/97/3), *Award of 20 August 2007*, available at <http://www.italaw.com/cases/309>, at para.7.4.4.

⁴⁶ See generally Fitzmaurice, G., 1957. *The Law and Procedural of the International Court of Justice 1951-1954*.33, *British Year Book of International Law* 229.

type relates directly to foreign investors (**AOI**), either obliging the investors not to engage in corruptive conducts, or providing for punishment on the investors for corruptive conducts.

ENVs are the major type of SDPs in modern IIAs, which can be further classified into three subtypes. The first subtype stands for non-derogation obligation on the contracting states (**NDG**), essentially requiring the states not to lower their environmental laws or standards in investment governance, to avoid “race to the bottom” in environmental protection. The second subtype o mainly aims at confirming or recognizing that the contracting states shall bear obligations to take necessary measures in protecting the environment, human, animal or plant life and public safety and health under national or international laws (**CON**). The third subtype is exceptive in nature (**EXP**), exempting the contracting states of their state responsibility for taking environmental measures that are otherwise inconsistent with their IIA obligations.

LHRs have become increasingly popular in IIAs today, which can be further classified into four subtypes. The first subtype is a reference to external human rights or labour rights standards (**REF**), such as the ILO core labour standards or standards in other international human rights instruments. Such reference does not necessarily incorporate the external standards as a binding part of the IIA. The second subtype is non-derogation obligation (**NDG**), requiring the contracting states not to lower their human rights or labour rights standards in investment governance. The third subtype aims at confirming or recognizing that the contracting states shall bear primary obligations in protecting human rights or labour rights (**CON**). The fourth subtype is exceptive (**EXP**), exempting the contracting states of their state responsibility for taking human rights or labour rights measures that are otherwise inconsistent with their IIA obligations.

TRLs are increasingly seen in trade and investment treaties in recent years, as transparency of laws and government conducts is widely deemed as a key factor of the rule of law and good governance. TRLs in IIAs can be further classified into three subtypes. The first subtype imposes an obligation on the contracting states to publish

investment-related laws and regulations (**PUB**), which is also the traditional and typical subtype of TRLs. Such TRLs are often explicitly titled as “transparency” in some IIAs. The second subtype requires the contracting states to communicate in an appropriate manner with regard to their investment-related laws, regulations, policies and practices, especially when the partner states have relevant inquiries or concerns (**COM**). The main purpose of such TRLs is to enhance the contracting states’ understanding of each other’s investment regulatory systems for better investment governance. The third subtype essentially requires the contracting states to allow stakeholders to engage in the making of an investment-related law or policy in an appropriate way (**ENG**). Typical such TRLs allow the public to make comments during the law-making or policy-making process.

TRAs get popular in recent years as transparency of ISDS has become a highly contentious issue and an important aspect of the ongoing ISDS reform. An increasing number of IIAs incorporate TRAs. TRAs in IIAs can be further classified into four subtypes. The first subtype deals with the publication of various sorts of arbitration documents, such as the pleadings of the disputants and the arbitral awards (**PUB**). The second subtype deals with the public access or opening of the arbitration hearings, essentially allowing the public to observe the arbitration proceedings in an appropriate manner (**HER**). The third subtype deals with the contentious issue of non-disputing third party participation in the arbitration proceedings (**TPB**), often in the form of the third party submitting written briefs as *amicus curiae*. The fourth subtype is a reference to the UNCITRAL Transparency Rules (**UTR**). As these Rules have only been adopted in 2014, they have not been widely referred to in IIAs and states have different views on these rules.

NES forms a critical part to many trade and investment treaties. The protection of national security relies primarily on the state. Almost all NES are exceptive in nature, aiming at exempting the states of their state responsibility for taking regulatory measures for the protection of essential national security or international peace and security that are otherwise inconsistent with their IIA obligations (**EXP**).

RBPs seem to be a comparatively “novel” type of SDPs. The international community has come to realize that investors’ conducts may give rise to profound sustainable development concerns, and RBPs have gradually penetrated into IIAs to help address such situation, though they remain infrequently seen in IIAs in general. Existing RBPs are typically contained in some recent IIAs of developed countries. RBPs can be further classified into three subtypes. The first subtype is a reference to an external code of conducts (**REF**), such as the OECD Guideline for Multinational Enterprises. Such reference does not necessarily create a binding obligation on the investors. The second subtype is for an IIA to impose certain obligations on the contracting states to encourage or supervise investors to engage in responsible conducts (**ROS**). The third subtype is that an IIA imposes certain obligations on the investors directly to require them to engage in responsible investment activities (**ROI**).

3.4. The nature of the obligations imposed by SDPs

As mentioned, the level of sustainable development-orientation of an IIA is mainly decided by the number, types and subtypes of SDPs contained in the IIA. Roughly speaking, the number of SDPs contained in an IIA shows whether the IIA contains any (or sufficient) treaty norms that can be used in addressing sustainable development concerns. The types of SDPs demonstrate what kind(s) of sustainable development concerns this IIA can be expected to address. The subtypes of SDPs further show the extent of practical effectiveness to which this IIA can address sustainable development concerns. As Table 2 shows, regardless of the multiple types and subtypes of SDPs, the obligations imposed by the SDPs can be declaratory, obligatory or exceptive in nature.

Declaratory SDPs are in essence a statement or a mere confirmation that the contracting states shall promote or take measures for sustainable development under their domestic law or other international law rules. A typical type of declaratory SDPs is a statement of achieving sustainable development in the preamble of an IIA. Such SDPs do not impose obligations on the states, though they may reflect the objective of the IIA. In this sense, the practical effectiveness of such SDPs is weak. Typical such subtypes of SDPs include DEC (of GENs and ATCs), CON (of ENVs and LHRs), and REF (of LHRs and RBPs).

Table 2. The nature of the obligations imposed by SDPs

	G E N	ATC			ENV			LHR				TRL			TRA				N E S	RBP		
	D E C	D E C	A O S	A O I	N D G	C O N	E X P	R E F	N D G	C O N	E X P	P U B	C O M	E N G	P U B	H E R	T P B	U T R	E X P	R E F	R O S	R O I
Declaratory	◆	◆				◆		◆		◆											◆	
Obligatory			◆	◆	◆							◆	◆	◆	◆	◆	◆	◆			◆	◆
Exceptive							◆			◆									◆			

Obligatory SDPs impose obligations on the contracting states to take affirmative measures or restrain from committing a conduct for sustainable development. The majority of SDPs are obligatory in nature. Such SDPs typically require the contracting states of an IIA to take measures for various sustainable development purpose. Typical such SDPs include NDG (of ENVs and LHRs), AOS (of ATCs and RBPs), PUB, COM, ENG, TPB, HER and UTR (of TRLs and TRAs). Recently, a growing number of IIAs also begin to incorporate provisions that directly impose obligations on foreign investors, especially with regard to corporate social responsibility. Typical such subtypes of SDPs include AOI (of ATCs) and ROI (of RBPs).

Exceptive SDPs in general aim at preserving regulatory right of the contracting states for taking measures for sustainable development purpose, by way of exempting the states of their responsibility for taking regulatory measures that are otherwise inconsistent with their IIA obligations. Exceptive SDPs have the strongest practical effectiveness, at least in theory. Typical such SDPs are EXP (of ENVs, LHRs and NES).

4. Sustainable Development Provisions in the Sample IIAs

This part provides a panoramic study of the SDPs contained in the 20-selected sample IIAs. These sample IIAs are selected for several reasons. First, the contracting states of these IIAs cover the major geographical regions of the world, including Asian, American and European countries. Second, the contracting states of these IIAs are also at different developmental levels, including developed countries, developing countries as well as LDCs and emerging economies. Third, all but one sample IIA (NAFTA Investment Chapter) are concluded in the new millennium, thus they are widely deemed to reflect the latest trend of IIA-making at the global level. Fourth, the sample IIAs are influential not only at bilateral and multilateral levels. The “mega-regional FTAs”, such as TPP and TTIP (investment chapters) are deemed to furnish “golden standards” for global trade and investment governance.⁴⁷ Given the representativeness of the sample IIAs, the SDPs incorporated in the IIAs not only sets up a benchmark for assessing the SDPs contained in the IIAs of Asia-Pacific LDCs and LLDCs, but also offers a helpful example and reference for these countries in their future IIA-making. A list of the sample IIAs is provided in Appendix A.

4.1. *The distribution of SDPs*

Appendix C shows the detailed information with regard to the number and types of SDPs as well as their distribution among the sample IIAs. Without going to the details, one may have a general impression that all but one sample IIAs contain multiple SDPs. In this sense, one may say that all sample IIAs seem to be sustainable development-oriented. In the same time, however, one should also find that the distribution of the different types

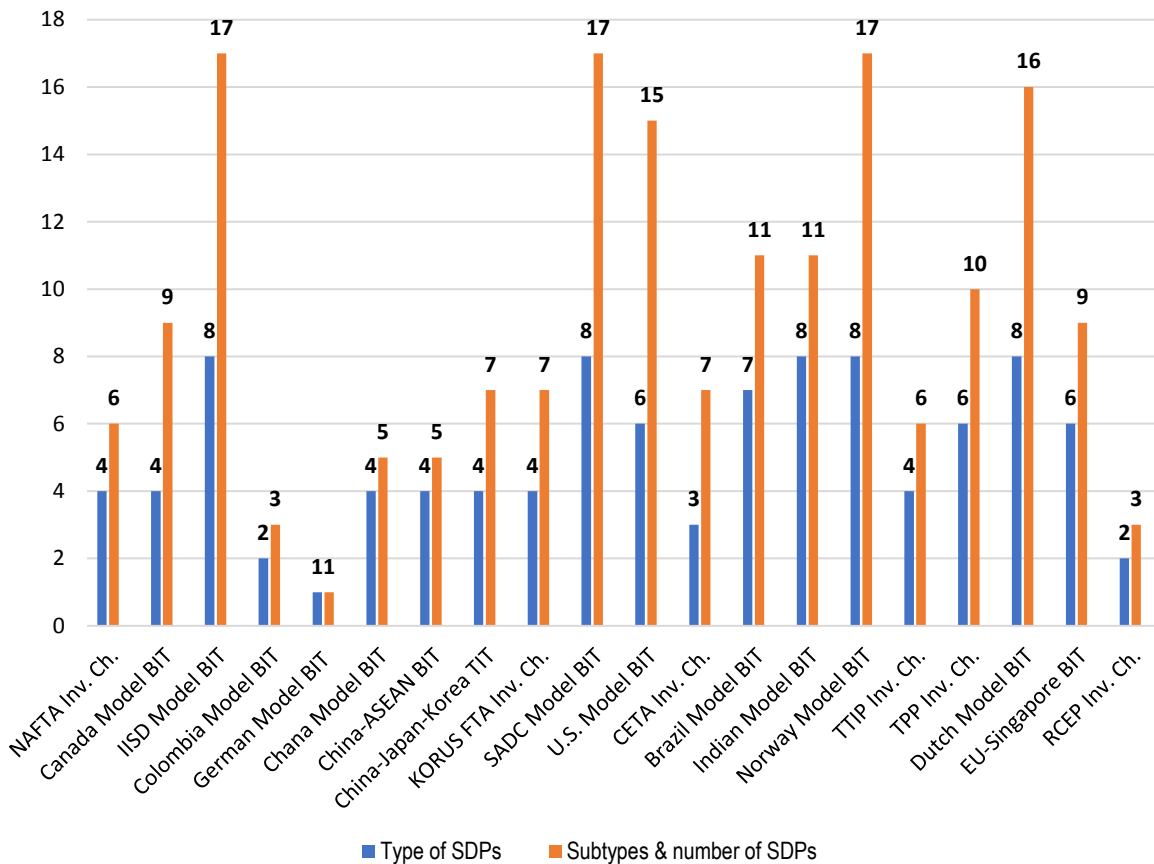
⁴⁷ See, e.g., Alschner, W. and Skougarevskiy, D., 2016. The New Gold Standard? Empirically Situating the Trans-Pacific Partnership in the Investment Treaty Universe. *Journal of World Investment and Trade*, 17 (3), 339-373; Stoll, P. T. and Holterhus, T. P., *The ‘Generalization’ of International Investment Law in Constitutional Perspective*, in Hindelang S. and Krajewski M., eds, 2017. *Shifting Paradigms in International Investment Law: More Balanced, Less Isolated, Increasingly Diversified* (Oxford: Oxford University Press), p.342; Alvarez, J. E., 2016. Is the Trans-Pacific Partnership’s Investment Chapter the New “Gold Standard”?, *IILJ Working Paper 2016/3*, available at https://wp.nyu.edu/megareg/wp-content/uploads/sites/3134/2016/03/Alvarez_IILJ-MegaReg_2016-3.pdf.

of SDPs among the sample IIAs is quite uneven. This helps reveal that some sample IIAs are more sustainable development-oriented than others.

Figure 1 shows the types and subtypes (numbers) of SDPs contained the sample IIAs. From the perspective of types of SDPs, German Model BIT only contain one type of SDP (NES), while the IISD, SADC, Indian, Norway and Dutch Model BITs each contains all eight types of SDPs. The rest sample IIAs contain different numbers of types of SDPs. From the perspective of subtype (number) of SDPs, the difference among the sample IIAs is more profound. German Model BIT remains at the bottom, containing only one SDP. In comparison, the IISD, SADC and Norway Model BITs each contains 17 SDPs, the largest number of SDPs of a sample IIA.

Considering both the types and subtypes (numbers) of SDPs, it seems safe to conclude that, on one hand, the sample IIAs appear sustainable development-oriented, as all of them contain at least one SDP. On the other hand, despite this general finding, the level of sustainable development-orientation of the sample IIAs are quite diverse. The IISD, SADC and Norway BITs appear more sustainable development-oriented than others. These IIAs not only contain the largest number of SDPs, but the SDPs in these IIAs are also of the most types. In general, these IIAs could be deemed to represent an “example” of sustainable development-oriented IIAs at the international level. In contrast, the German Model BIT seems to be the least sustainable development-oriented, as it only contains one SDP.

Figure 1. The distribution of SDPs in the sample IIAs



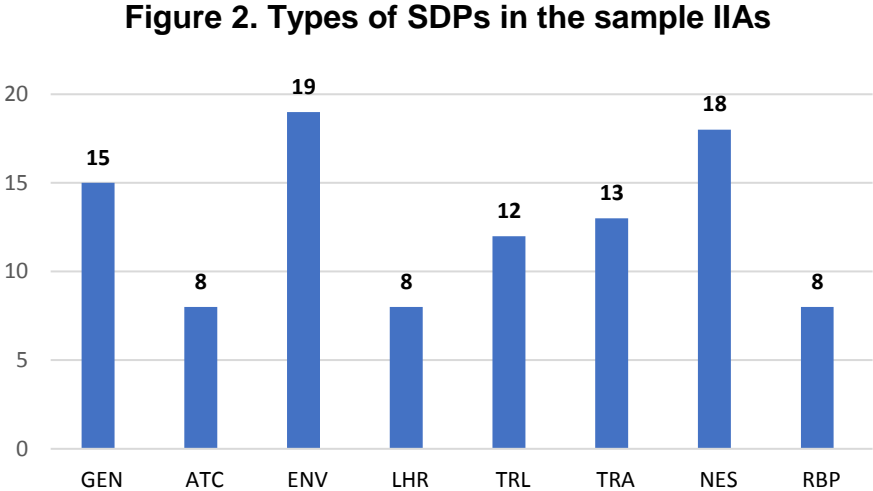
Here, it is of interest to note that almost all IIAs with strong sustainable development-orientation are model BITs. Although model BITs are not binding, as they serve as the template or reference in IIA-making, they send out a clear signal that IIAs should and could be made more sustainable development-oriented in the future. Compared with these model BITs, some sample FTA investment chapters, including TTIP and TPP investment chapters,⁴⁸ contain smaller numbers and fewer types of SDPs. However, this does not necessarily mean that these FTA investment chapters are less sustainable

⁴⁸ The negotiation of TTIP have come to a halt since October 2016, after 15 rounds of negotiations between the EU and the US. TPP was signed by 12 countries in February 2016, but the US withdrew in February 2018. The remaining 11 countries signed the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) in March 2018.

development-oriented. A reasonable explanation seems to be that these FTAs also incorporate various SDPs in other chapters, thus there is little need to repeat the SDPs in the investment chapters. For instance, in addition to the preamble, TPP contains several standalone chapters addressing a wide range of sustainable development topics, such as labour rights, the environment, development, transparency and anti-corruption.⁴⁹ These chapters are parallel to the investment chapter, which could help address sustainable development concerns that may otherwise be addressed by the SDPs in TPP investment chapter. Similarly, TTIP also deals with a number of sustainable development-related issues in other chapters, such as the environment, transparency, labour rights, anti-corruption and competition.⁵⁰

4.2. The types and subtypes of SDPs

As mentioned, the types and subtypes of SDPs are important indicators of the types of sustainable development challenges an IIA could address and the level of practical effectiveness of the IIA. As shown in Appendix C, the 20 sample IIAs incorporate a total number of 182 SDPs, covering all eight types and 22 subtypes of SDPs.



⁴⁹ TPP, at Chapters 19, 20, 23 and 26.

⁵⁰ USTR, T-TIP Issue-by-Issue Information Center, available at <https://ustr.gov/trade-agreements/free-trade-agreements/transatlantic-trade-and-investment-partnership-t-tip/t-tip>.

Figure 2 shows the distribution of the types of SDPs in the sample IIAs. The fact that these IIAs cover all eight types of SDPs suggests that the IIAs can potentially address a wide range of sustainable development concerns associated with transnational investment activities. On the other hand, the distribution of the eight types of SDPs in the sample IIAs appears unbalanced. An ENV is contained in 19 IIAs; an NES is contained in 18 IIAs, a GEN is contained in 15 IIAs; a TRA is contained in 13 IIA; a TRL is contained in 12 IIAs; an ATC, LHR and RBP are each contained in eight IIAs.

Such distribution suggests that the SDPs in the sample IIAs have a clear focus on certain traditional sustainable development concerns, such as environmental protection and national security protection. Though the sample IIAs concluded in recent years have a tendency of incorporating an increasing number of social SDPs, such as ATCs, LHRs, TRAs and RBPs, the appearance of social SDPs in the sample IIAs is largely a recent phenomenon.

Here, further analysis of the subtypes of SDPs is needed, as the subtypes of SDPs dictates the practical effectiveness of the SDPs to a large extent. As shown in Appendix C, the distribution of the subtypes of SDPs in the sample IIAs is unbalanced. First, it seems that incorporation of a GEN in IIAs have become almost a standard IIA-making practice of many countries. In total, a GEN is incorporated in 15 sample IIAs, with Colombia and German Model BITs, CETA, TTIP and RCEP Investment Chapters as exceptions. It is noteworthy that, while most of the GENs in sample IIAs is a simple declaratory statement, one of the most recent sample IIAs, EU-Singapore BIT, clearly recognizes the three dimensions of sustainable development. The preamble of this BIT states that that the contracting parties are determined “to strengthen their economic, trade, and investment relations in accordance with the objective of sustainable development, in its economic, social and environmental dimensions”.⁵² This conforms to the above finding that the sample IIAs concluded after 2012 incorporate more social SDPs than earlier ones.

⁵² The Preamble, the EU-Singapore BIT.

It also seems to show that the international community now pays growing attention to the social dimension of sustainable development.

Second, incorporation of ATCs in IIAs seems to be a recent IIA-making practice. Except the IISD Model BIT, all sample IIAs that include an ATC are concluded after 2012. ATCs in the sample IIAs can be both declaratory and obligatory. Most sample IIAs concluded after 2012 incorporate an ATC in one subtype or another. (i) A DEC is contained one sample IIA, i.e. the Norway Model BIT, which states that the contracting states are “determined to prevent and combat corruption, including bribery, in international trade and investment”.⁵³ No other sample IIAs contain a DEC. (ii) An AOS is contained in five sample IIAs, imposing an obligation on the contracting states to combat corruption. These IIAs include the IISD, SADC, Brazil, Norway and Dutch Model BITs. In these BITs, the AOS could be either general or specific. A general AOS requires the contracting states to “adopt measures and make efforts to prevent and fight corruption”;⁵⁴ while a specific AOS requires, for instance, that the contracting states’ abusive treatment of investors, such as harassment, coercion, abuse of power, corrupt practices or similar bad faith conduct, should be deemed as “violation of fair and equitable treatment of the investors”.⁵⁵ (iii) An AOI is contained in six sample IIAs, including the IISD, SADC, Indian, Dutch Model BITs, CETA and TTIP investment chapters. In these sample IIAs, the AOIs could be either affirmative or punitive. A typical affirmative AOI requires that “Investors and their Investments shall not be complicit in any corruptive act” and a breach of such obligation shall be deemed “to constitute a breach of the domestic law of the Host State Party concerning the establishment and operation of an investment”.⁵⁶ A typical punitive AOI provides that “claims involving corruptive investment activities will not be allowed to be submitted to international arbitration”.⁵⁷ A few sample IIAs concurrently incorporate both

⁵³ See, e.g., the Preamble, the Norway Model BIT.

⁵⁴ See, e.g., Article 15 (1), the Brazilian Model BIT.

⁵⁵ See, e.g., Article 9 (2)(e), the Dutch Model BIT.

⁵⁶ Article 10 (2) and (3), the SADC Model BIT.

⁵⁷ See, e.g., Article 6, TTIP Investment Chapter; Article 18 (3), CETA Investment Chapter, Article 13 (4), the Indian Model BIT, and Article 16 (2), the Dutch Model BIT.

an AOS and an AOI, such as the IISD, SADC and Dutch Model BITs. This practice is necessary since in reality corruptive conducts are often committed in confidential between state entities or officials and foreign investors.

Third, ENVs are the traditional and major representative of SDPs in IIAs. They are present in all sample IIAs, except the German Model BIT. Among these IIAs, an NDG is contained in nine IIAs; a CON is contained in 13 IIAs and an EXP is contained in 19 IIAs. It is almost unanimous that the sample IIAs choose to incorporate an EXP to help preserve state regulatory rights for environmental protection purpose.

Fourth, incorporation of an LHR in IIAs is also a relatively recent development in IIA-making. In total, an LHR is present in eight sample IIAs. All of these IIAs, with the only exception of the IISD Model BIT, were concluded after 2012. It should be noted that the subtypes of the LHRs vary dramatically among the sample IIAs. A REF is contained in six IIAs, referring to various kinds of standards, mostly the ILO core labour standards. An NDG is contained in six IIAs, a CON is contained in seven IIAs, and an EXP is only contained in two IIAs. It should be noted that the US and Dutch Model BITs each contain all four subtypes of LHRs, which seem to be the friendliest towards labour rights and human rights protection.

Fifth, TRLs are frequently seen in many trade and investment treaties. It is unsurprising to find that TRLs are present in 12 sample IIAs. More specifically, a PUB is contained in all 12 IIAs; a COM is contained in eight IIAs; and an ENG is contained in two IIAs. This seems to suggest that TRLs in the sample IIAs remain largely state-oriented, i.e. aiming at imposing certain obligations on the contracting states to improve regulatory transparency. In contrast, the lack of an ENG in the sample IIAs shows that stakeholders of transnational investment activities other than states have no or little access to the standard setting in IIA-making. This seems to suggest that the democratic-deficit in IIA-making receives insufficient attention.

Sixth, an increasing number of IIAs incorporate TRAs nowadays. TRAs are present in 14 sample IIAs. To be specific, a PUB is present in 12 sample IIAs, an HER is present in ten

IAs, a TPB is contained in 12 IAs and a REF is present in four IAs. All REFs make clear reference to the UNCITRAL Transparency Rules, despite that these Rules were quite recently adopted. This seems to suggest that the sample IAs in general are friendly towards third party participation in ISDS, which conforms to the “transparency trend” of ISDS today. However, it should be noted that a reference to the UNCITRAL Transparency Rules could be both positive and negative. A positive reference can be found in the Dutch Model BIT, providing that the “UNCITRAL Transparency Rules shall apply to disputes under this Section”.⁵⁸ A negative reference excludes the application of the Rules instead. For instance, RCEP Investment Chapter provides that the UNCITRAL Transparency Rules shall not be applied unless the disputing parties agree otherwise.⁵⁹ In this regard, the statistics shows that all sample IAs concluded after 2012, excluding RCEP Investment Chapter, boast a high standard of procedural transparency of ISDS.

Seventh, an NES is widely present in sample IAs, and is mostly exceptive in nature. Except for CETA and RECP Investment Chapters, an NES is present in all remaining 18 sample IAs.

Eighth, RBPs, similar to ATCs and LHRs, enjoy a relatively recent presence in IAs. In total, RBPs are present in eight sample IAs. (i) A REF is included in four sample IAs, mostly referring to the OECD Guideline for Multinational Enterprises. It should be noted that such reference does not necessarily impose an obligation on investors. (ii) A ROS is available in five sample IAs. ROS obligation is often “best-effort” in nature. A typical example is the Norway Model BIT, which provides in relevant part that the contracting states shall “encourage investors to conduct their investment activities in compliance with the OECD Guidelines for Multinational Enterprises and to participate in the United Nations Global Compact”.⁶⁰ (iii) A ROI is present in five sample IAs. ROI obligation is also “best-effort” in nature. For instance, the Indian Model BIT provides that “Investors and their

⁵⁸ Article 20 (11), the Dutch Model BIT.

⁵⁹ Article 29 (8), the RCEP Investment Chapter.

⁶⁰ Article 32, the Norway Model BIT.

enterprises operating within its territory of each Party shall endeavour to voluntarily incorporate internationally recognized standards of corporate social responsibility in their practices and internal policies”.⁶¹ The SADC Model BIT is probably an exception as the ROI obligation imposed in this BIT is affirmative in nature. Article 13 provides that “Investors or their Investments shall comply with environmental and social assessment screening criteria and assessment processes applicable to their proposed investments prior to their establishment, as required by the laws of the Host State for such an investment”. However, as admitted by the drafters of this BIT, this obligation is not self-contained as it depends largely on the rules of the national law of the contracting states.⁶²

4.3. Summary

The above study shows that, on one hand, SDPs have become a standard component of all sample IIAs. It is particularly the case as to the traditional types of SDPs, such as GENs, ENVs and NES. In this sense, the sample IIAs all appear sustainable development-oriented. On the other hand, the level of sustainable development-orientation of the sample IIAs are different. It is obvious that model BITs, recent IIAs, and IIAs concluded by developed countries appear more sustainable development-oriented than earlier sample IIAs or IIAs concluded by developing countries.

With the above general impression in mind, one may draw a few further observations. First, there seems to be a positive relevance between the concluding time of the sample IIAs and the level of sustainable development-orientation of these IIAs. The general trend seems to be that more recent IIAs contain larger number and more types of SDPs than earlier IIAs. IIAs concluded after 2012 appear to have a strong emphasis on sustainable development, with the exception of the RCEP Investment Chapter, while IIAs signed before 2012 in general contain less SDPs, with the IISD Model BIT as an exception. This trend is not surprising given that the international community has greatly enhanced the awareness of sustainable development over the past decade. Such a pro-sustainable

⁶¹ Article 12, the Indian Model BIT.

⁶² Commentary to Article 13, the SADC Model BIT.

development trend is likely to be maintained. In this sense, one has reason to expect that future IIAs will be made more sustainable development-oriented.

Second, it seems that making sustainable development-oriented IIAs has become a shared aspiration of countries regardless of their developmental levels and geographic locations. While developed countries remain the major supporters of sustainable development-oriented IIAs, some developing countries and LDCs have also become supporters of sustainable development-oriented IIAs. Such IIA-making paradigm shift could be an important piece of evidence to show the erosion of the traditional North-South division in IIA-making. This phenomenon can be sensed from the SADC, Indian and Brazilian Model BITs. For instance, SADC is composed of 15 southern African countries, most of which are developing countries and LDCs. While these countries are in pressing need of foreign investments to boost national economy, especially in natural resource industries, they explicitly set sustainable development as an objective of SADC.⁶³

Third, a close reading of the types and subtypes of the SDPs in the sample IIAs also reveals that there appears a recent trend of “socialization” of SDPs and of IIAs. As can be seen, the recent sample IIAs not only contain a larger number of SDPs, but these SDPs are also in greater diversity. While the sample IIAs concluded before 2012 mostly contain GENs, ENVs and NES, recent sample IIAs incorporate an increasing number of social SDPs, such as LHRs, ATCs, TRAs and RBPs. The incorporation of social SDPs in IIAs seems to suggest that many countries positively respond to the recent expansion and evolution of sustainable development, and pay more emphasis on the social dimension of sustainable development in IIA-making. In this sense, one could argue that the expansion of sustainable development enriches the diversity of SDPs in IIAs and could foster a new trend in IIA-making. This could also help illustrate the dynamic relationship between sustainable development and investment governance.

⁶³ SADC, SADC Overview, available at <https://www.sadc.int/about-sadc/overview/>.

5. Sustainable Development Provisions in BITs of Asia-Pacific LDCs and LLDCs

Since its founding in 1947, the membership of ESCAP has grown to 53 members and 9 associate members up to August 2018.⁶⁴ These members are of varying developmental levels and diverse internal situations. Some Asia-Pacific countries are developed countries, such as Australia, Japan, and New Zealand, a few countries are deemed as emerging powers, such as China and India, and the majority are developing countries. Among ESCAP member countries, there are 12 LDCs⁶⁵ and 10 LLDCs⁶⁶, with four overlaps. While adopting similar research methods as in the previous part, this part examines the SDPs contained in the BITs of the 18 Asia-Pacific LDCs and LLDCs. A list of these 18 countries is provided in Appendix B.

5.1. *The landscape of the BITs*

According to UNCTAD, up to August 2018, Asia-Pacific countries have concluded around 1500 IIAs in total, including around 1200 BITs and around 300 FTAs, roughly occupying 40 percent of the world's total IIAs.⁶⁷ The large number of IIAs concluded by Asia-Pacific countries seem to suggest that these countries in general are active in IIA-making. It also implies that IIAs could play an important role in the investment policy-making and foreign investment governance in Asia-Pacific countries.

Also, according to UNCTAD, the 18 Asia-Pacific LDCs and LLDCs host 459 IIAs (excluding terminated IIAs) in total, 364 are in force. Among these IIAs, 340 are BITs, with 266 in force. As can be seen from figure 3, the distribution of the 340 BITs among the 18 Asia-Pacific LDCs and LLDCs is uneven. In general, northern and central Asian countries

⁶⁴ A list of Asia-Pacific countries is available at <http://www.unescap.org/about/member-states>.

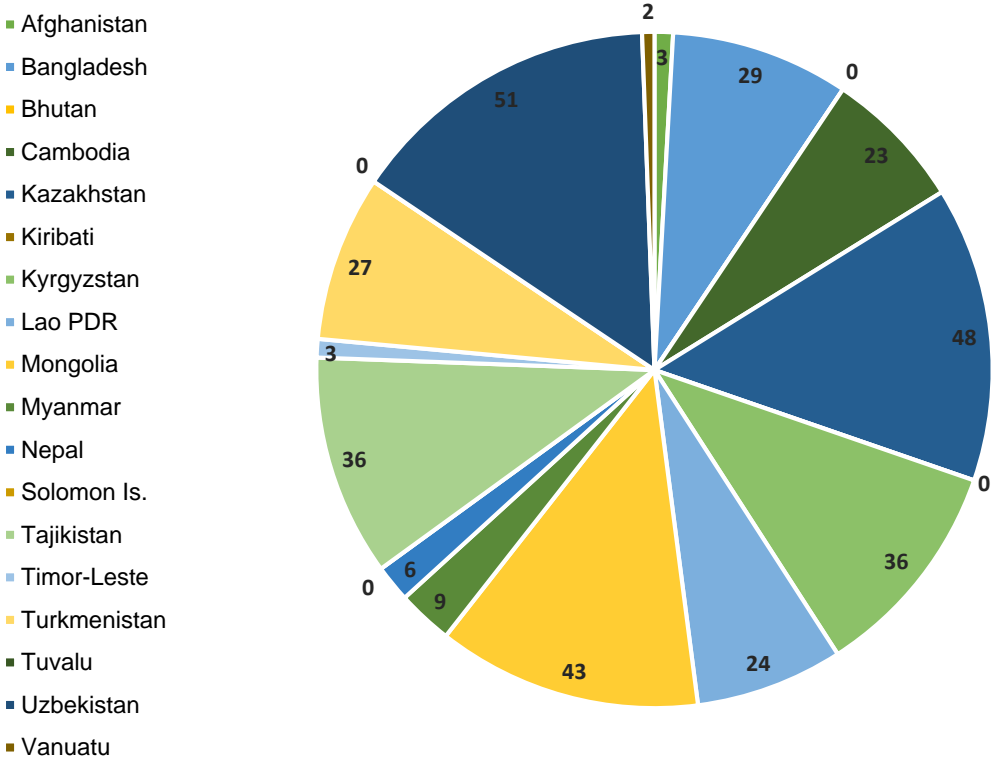
⁶⁵ A list of LDCs is available at https://www.un.org/development/desa/dpad/wp-content/uploads/sites/45/publication/lcd_list.pdf.

⁶⁶ A list of LLDCs is available at <http://unohrlls.org/about-lllcs/country-profiles/>.

⁶⁷ A list of these IIAs is available at <http://investmentpolicyhub.unctad.org/IIA/IIAsByCountry#iialInnerMenu>.

host more BITs, and the Pacific island countries host much less. Specifically, Uzbekistan hosts the largest number of BITs, with a number standing at 51. In contrast, four countries, namely Bhutan, Kiribati, Solomon Islands and Tuvalu, have concluded only a few FTAs, with no BITs, up to the present. All remaining 12 Asia-Pacific LDCs and LLDCs have BITs of various numbers.

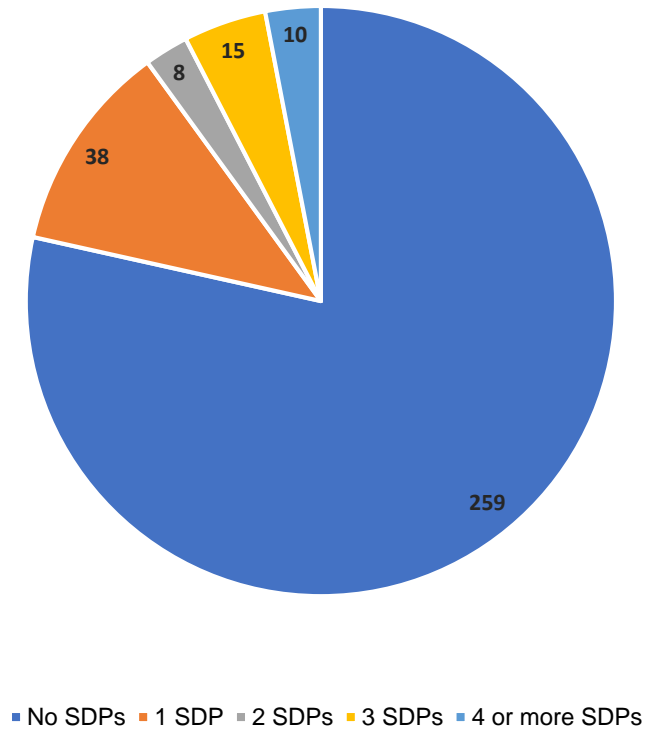
Figure 3. Number of BITs of Asia-Pacific LDCs and LLDCs



5.2. The SDPs in the BITs

Asia-Pacific countries are major destinations of foreign investment. Though many Asia-Pacific LDCs and LLDCs show a strong interest in importing foreign investment to boost national economic development, they have different policy preferences in IIA-making due to their different national social and economic situations. Appendix D provides detailed information with regard to the number and type of SDPs contained in BITs of Asia-Pacific LDCs and LLDCs.

Figure 4. Distribution of SDPs in BITs of Asia-Pacific LDCs and LLDCs

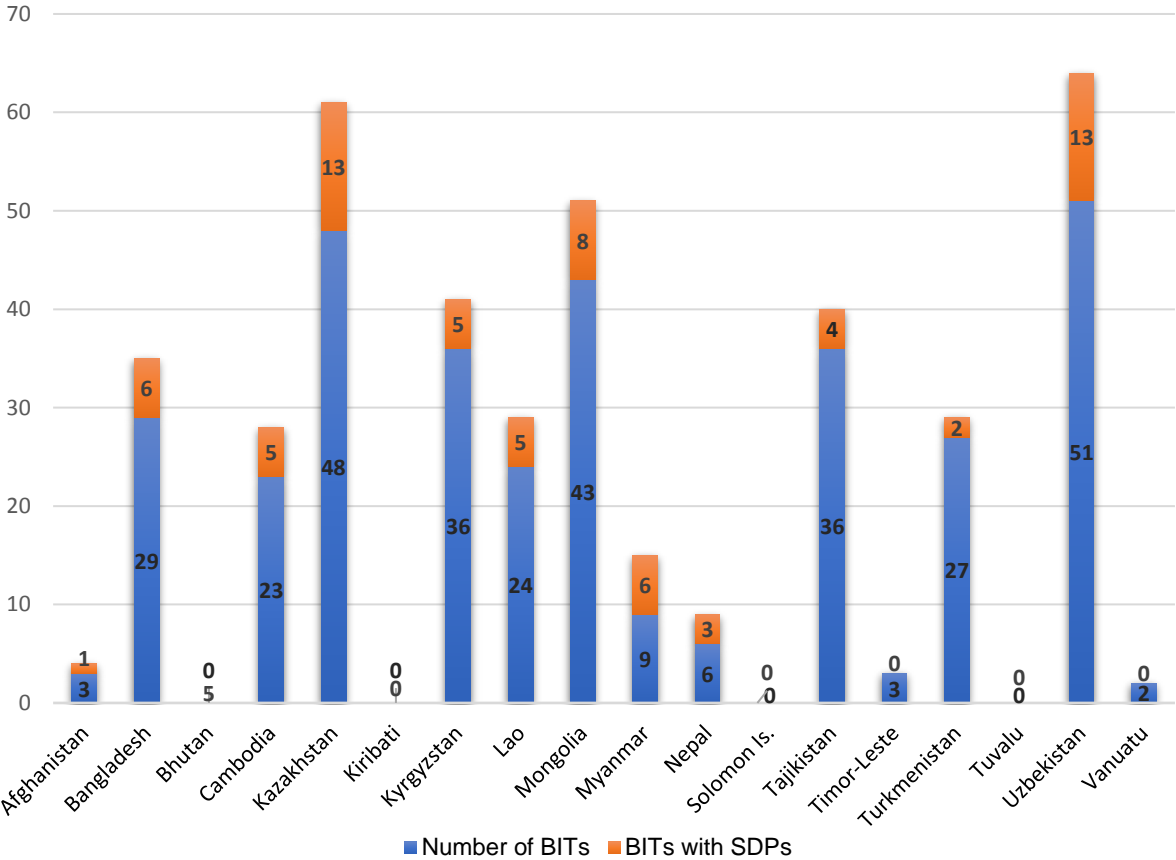


First and foremost, as suggested in figure 4, the general impression is that, despite the fact that Asia-Pacific LDCs and LLDCs host 340 BITs in total, the majority of these BITs do not contain any SDP. To be specific, only 71 BITs contain one or more SDPs, roughly representing 19% of the total BITs. In contrast, 259 BITs or 81% of these BITs do not contain an SDP. Figure 4 also shows the concentration of the SDPs in BITs of Asia-Pacific LDCs and LLDCs. While a small percentage of these BITs contain SDPs, only a very small fraction of them host multiple SDPs. As can be seen, out of the 71 BITs with SDPs, 38 BITs contain only one SDP, eight BITs contain two SDPs, 15 BITs contain three SDPs, and only 10 BITs contain four or more SDPs.

Second, as shown in Figure 5, even at country-specific level, it seems to be a common phenomenon that, to each and all Asia-Pacific LDC and LLDC, only a small percentage of their BITs contain SDPs, while the majority of the BITs of these countries do not contain

SDPs. This phenomenon is especially outstanding in central Asian countries. Although in comparison, central Asian countries host more BITs than other Asia-Pacific LDCs and LLDCs, only a fraction of their BITs contain SDPs. More specifically, while Turkmenistan hosts 27 BITs, only two BITs contain an SDP each, and 25 BITs do not contain any SDPs; Tajikistan hosts 36 BITs, only four BITs contain SDPs, while 32 BITs do not contain any SDPs; Uzbekistan hosts 51 BITs, only 13 of them contain SDPs, while 38 BITs do not have any SDPs; Kyrgyzstan has 36 BITs, with only 5 BITs containing SDPs, while the rest 31 BITs do not contain any SDPs.

Figure 5. Country distribution of SDPs in BITs of Asia-Pacific LDCs and LLDCs



Admittedly, the reasons for the lack of SDPs in BITs of Asia-Pacific LDCs and LLDCs are various and complicated. However, given that BITs are made on a bilateral basis, it is of interest to explore what role the BIT counterpart countries play in making sustainable

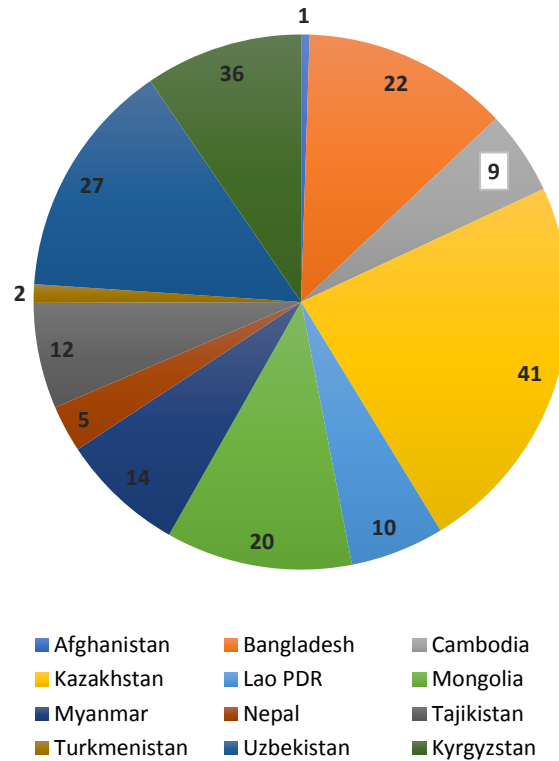
development-oriented BITs with these countries. Table 3 shows the counterpart countries with which Asia-Pacific LDCs and LLDCs maintain BITs that contain one or more SDPs. As can be seen, all these BITs are signed with 36 countries. To be specific, Austria, Japan, Singapore and USA each has concluded five BITs with SDPs with Asia-Pacific LDCs and LLDCs; Finland, Indonesia and Russia each has four BITs; Turkey and UAE each has three BITs; China, India, Korea, the Netherlands, Switzerland and the U.K. each has two BITs; and the remaining 21 countries each has one BIT with SDPs. Almost all of the above counterpart countries are Asian, North American and European countries, most of which are developed countries or emerging economies. In comparison, BITs of Asia-Pacific LDCs and LLDCs concluded with developing countries and African and South American countries often do not incorporate SDPs.

This finding should not be a coincidence. As developed countries in general have higher sustainable development standards, they tend to have larger number and more types of SDPs in BITs. In recent years, some developed countries have made sustainable development an objective in their trade treaty-making. This could further suggest that, to some extent, Asia-Pacific LDCs and LLDCs may have not formed a coherent strategy for making sustainable development-oriented IIAs, and the incorporation of SDPs in their BITs depends on the demand of their counterpart countries, and are determined on a case-by-case basis.

Table 3. Countries with which Asia-Pacific LLDs and LLDCs have BITs

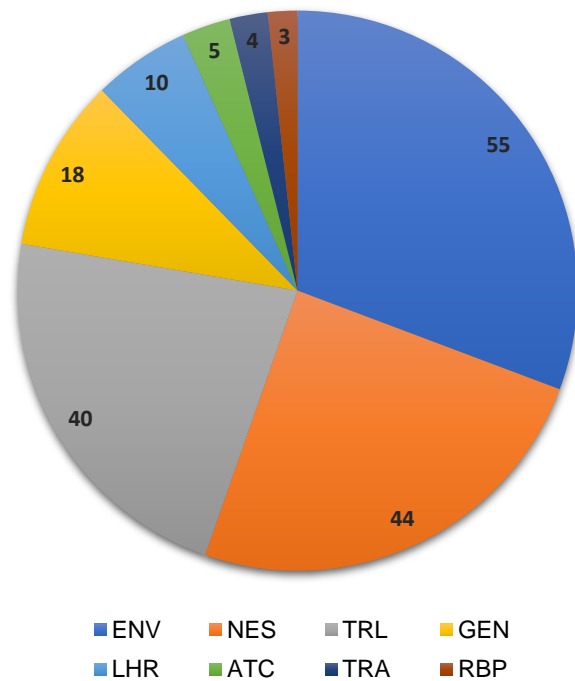
Country	A F G	B A N	C A M	K A Z	K G Z	L A O	M G L	M Y A	N E P	T J K	T K M	U Z B	Total
Austria		X		X	X					X		X	5
Australia						X							1
Azerbaijan				X									1
BLEU										X			1
Canada							X						1
China				X								X	2
Croatia			X										1
Estonia				X									1
Finland				X	X		X		X				4
France			X										1
Germany	X												1
Greece												X	1
India						X			X				2
Indonesia					X	X	X					X	4
Israel												X	1
Japan			X	X		X		X				X	5
Jordan				X									1
Kazakhstan												X	1
Korea								X				X	2
Lao PDR								X					1
Latvia				X									1
Philippines								X					1
Portugal												X	1
Qatar							X						1
Macedonia				X									1
Netherlands		X										X	2
Romania				X									1
Russia				X		X					X	X	4
Singapore		X				X	X					X	5
Spain												X	1
Switzerland		X										X	2
Thailand						X							1
Turkey		X		X						X			3
UAE					X		X				X		3
UK		X							X				2
US		X		X	X		X					X	5
TOTAL	1	7	3	13	5	7	7	4	3	3	2	15	

Figure 6. Number of SDPs in BITs of Asia-Pacific LDCs and LLDCs



Second, BITs of Asia-Pacific LDCs and LLDCs in total contain an amount of 179 SDPs. Figure 6 shows that the distribution of the SDPs in these BITs is unbalanced. The three countries with the largest number of SDPs in their BITs are Kazakhstan, Uzbekistan and Bangladesh. Specifically, 41 SDPs are contained in Kazakhstani BITs; 27 SDPs are in Uzbekistani BITs; and 22 SDPs are in Bangladeshi BITs. The three countries with the smallest number of SDPs in their BITs are Afghanistan, Turkmenistan and Nepal, hosting one, two and five SDPs in their respective BITs.

Figure 7. Types of SDPs in BITs of Asia-Pacific LDCs and LLDCs



Third, the types of SDPs contained in BITs of Asia-Pacific LDCs and LLDCs also appear quite diverse. As shown in Figure 7, major SDPs in these BITs are, in descending order, ENVs (55), NES (44), TRLs (40) and GENs (18), LRHs (10), ATCs (5), TRAs (4) and RBPs (3), respectively representing 30.7%, 24.6%, 22.3%, 10%, 5.6%, 2.8%, 2.2% and 1.7% of the total SDPs.

As can be seen, ENVs, NES, TRLs and GENs are the major types of SDPs in BITs of Asia-Pacific LDCs and LLDCs. This is similar to the situation of the sample BITs. In comparison, social SDPs, such as ATCs, LHRs, TRAs and RBPs are very limited in number in AP BITs. The lack of social SDPs in AP BITs could be further supported by the fact that, while the SDPs of BITs of Asia-Pacific LDCs and LLDCs cover a wide range of subtypes, some subtypes of SDPs are missing. The missing subtypes are mainly AOI (of ATCs), EXP (of LHRs), ENG (of TRLs) and ROI (of RBPs). All of these subtypes of social

SDPs. Besides, it is of special interest to note that BITs of Asia-Pacific LDCs and LLDCs do not contain any AOI and ROI. This implies that no SDPs in these BITs imposes obligations on foreign investors directly. Consequently, the investors' activities should be mainly subject to the national laws of the host states.

5.3. Summary

As can be seen, SDPs in BITs of Asia-Pacific LDCs and LLDCs have some distinct features, especially when compared with those contained in the sample IIAs. These features not only help define BITs of Asia-Pacific LDCs and LLDCs with regard to their sustainable development-orientation, but also reveal the profound sustainability gap between the sample IIAs and BITs of Asia-Pacific LDCs and LLDCs.

First, while Asia-Pacific LDCs and LLDCs increasingly realize the importance of sustainable development in BIT-making, their perceptions of sustainable development remain largely confined to the original and traditional concept of sustainable development. In other words, Asia-Pacific LDCs and LLDCs primarily focus on the environmental dimension of sustainable development, and less focus is put on the social dimension thereof. Such perception and IIA-making practice insufficiently reflect the reality that sustainable development has expanded to a multi-dimensional balancing paradigm among economic development, environmental protection and social development. Reflected in IIA-making, such perception dictates that SDPs in BITs of Asia-Pacific LDCs and LLDCs largely cater for the need of environmental protection. As mentioned earlier, ENVs form the majority of SDPs in these BITs, while various types of social SDPs are less frequently incorporated. Consequently, BITs of Asia-Pacific LDCs and LLDCs appear insufficient in confronting various types of social concerns associated with transnational investment activities.

Second, BITs of Asia-Pacific LDCs and LLDCs seem to have a strong focus on balancing the state-investor relationship. As can be seen, the major types of SDPs in these BITs, including GENs, EVNs, TRLs and NES, mainly serve a purpose of striking a proper balance between the two seeming conflicting goals in global investment governance, i.e.

the protection of foreign investments and the preservation of host state regulatory rights. Reflected in IIA-making, the SDPs in BITs of Asia-Pacific LDCs and LLDCs either confirm that the contracting states bear obligations to take necessary measures for sustainable development purpose, or exempt the states' responsibility for taking measures that are otherwise inconsistent with BIT obligations. Indeed, such IIA-making practice largely conforms to the call for reforming the existing IIA system through balancing the state-investor relationship enshrined in IIAs. However, as SDPs in BITs of Asia-Pacific LDCs and LLDCs seldom take into consideration the role that non-state parties could play in global investment governance, such as foreign investors, NMEs in particular, it is unclear how sufficient they could address sustainable development challenges in the era of global governance.

Third, the incorporation of SDPs in BITs of Asia-Pacific LDCs and LLDCs also seems to be conditional on the counterpart countries to some extent. The majority of SDPs are contained in BITs concluded between Asia-Pacific LDCs and LLDCs and developed countries and emerging economies. In contrast, SDPs are seldom seen in BITs conclude among Asia-Pacific LDCs and LLDCs or with developing countries. For instance, almost all of the existing social SDPs, though small in number, are contained in BITs with Austria, Japan and the US. Such conditionality of SDPs seems to suggest that Asia-Pacific LDCs and LLDCs do not have adequate incentives or IIA-making capacity in making sustainable development-oriented IIAs, and the main driving force for making such IIAs probably comes from the demand of their IIA counterpart countries.

6. The Sustainability Gap and Its Implications

The previous parts discuss SDPs incorporated in the sample IIAs and BITs of Asia-Pacific LDCs and LLDCs. As mentioned, the study of the SDPs in the sample IIAs may serve two purposes: it offers a “benchmark” for assessing SDPs in BITs of Asia-Pacific LDCs and LLDCs, and it also provides an “example” (of best practice) for Asia-Pacific LDCs and LLDCs in BIT-making. This part explores and analyses the major differences between the SDPs in the sample IIAs and those in BITs of Asia-Pacific LDCs and LLDCs, with a purpose to identify the “sustainability gap” of the two groups of IIAs. This would have profound implications for future IIA-making at regional and global levels.

6.1. The gap of availability and practical effectiveness of SDPs

Compared with the sample IIAs, BITs of Asia-Pacific LDCs and LLDCs in general seem much less sustainable development-oriented. This is not only shown from the difference in the total numbers of SDPs in the two groups of IIAs, but is also demonstrated from the difference in the practical effectiveness of the SDPs as reflected by their types and subtypes.

On one hand, the amount of SDPs contained in an IIA determines the availability of treaty norms in addressing sustainability concerns associated with transnational investment activities under the IIA. In this connection, BITs of Asia-Pacific LDCs and LLDCs contain, in average, a much smaller number of SDPs than sample IIAs. While the 20 sample IIAs contain 182 SDPs in total, 340 BITs of Asia-Pacific LDCs and LLDCs contain only 179 SDPs. This difference is striking. It suggests that BITs of Asia-Pacific LDCs and LLDCs face an insufficiency in providing necessary treaty norms for global investment governance for sustainable development. Besides, all sample IIAs contain multiple SDPs, except the German Model BIT. This is not the case with BITs of Asia-Pacific LDCs and LLDCs. Only a small fraction of these BITs contains multiple SDPs, while the majority contain no SDPs at all. This observation applies to both all BITs of Asia-Pacific LDCs and LLDCs as a whole, and to BITs of any specific Asia-Pacific country individually.

On the other hand, even to BITs of Asia-Pacific LDCs and LLDCs that contain SDPs, limited in number though, SDPs in these BITs are of less types and subtypes. The most prominent difference probably lies in the amount of TRAs in the sample IIAs and BITs of Asia-Pacific LDCs and LLDCs. While TRAs seem to have become a standard SDP in the sample IIAs, especially in those concluded after 2012, they are seldom incorporated in BITs of Asia-Pacific LDCs and LLDCs. Besides, some subtypes of SDPs, especially social SDPs, are missing in BITs of Asia-Pacific LDCs and LLDCs. This is in sharp contrast to the sample IIAs. Almost all sample IIAs contain multiple types of SDPs, and some even contain all eight types. This situation implies that SDPs in BITs of Asia-Pacific LDCs and LLDCs in general could address a narrower scope of sustainability concerns. This restrains the practical effectiveness of these BITs.

Considering that SDPs in BITs of Asia-Pacific LDCs and LLDCs are limited in number and lack practical effectiveness, further IIA-making efforts should be made by Asia-Pacific LDCs and LLDCs in the future. It seems necessary to reconfirm the need for further consensus building among these countries of making sustainable development-oriented IIAs. While almost all Asia-Pacific LDCs and LLDCs clearly realize the importance of sustainable development in trade and investment policy-making, such awareness need to be further strengthened, and should be translated to IIA-making practice. Towards this end, Asia-Pacific LDCs and LLDCs need, based on their specific national situations, to identify the major sustainable development challenges and the best IIA-making practice in addressing such challenges. With such knowledge, these countries may further improve and formulate their IIA-making strategy to be coherent and consistent with sustainable development.

6.2. *The gap of socialization of SDPs*

The difference in the numbers, types and subtypes of SDPs among the sample IIAs and BITs of Asia-Pacific LDCs and LLDCs seems to show that Asia-Pacific LDCs and LLDCs and developed countries have different perceptions of sustainable development in trade and investment policy-making and IIA-making. Sustainable development in nature is a balancing paradigm. While this paradigm in its traditional and original sense tries to strike

a proper balance between economic development and environmental protection, it has evolved and expanded today to include social development. It is thus fair to say that this balancing paradigm today seeks to strike a proper balance among economic growth, environmental protection and social development.

While reflecting such a three-pillar paradigm of sustainable development, many IIAs begin to incorporate SDPs that could help address various social concerns, such as anti-corruption, labour rights and human rights protection and business conducts of foreign investors. This trend helps socialize SDPs and even IIAs in the broad sense. In IIAs, these SDPs are mainly enshrined in ATCs, LHRs, TRA and RBPs. In this sense, incorporation of social SDPs in IIAs may materially help these IIAs in achieving sustainable development in global investment governance.

With regard to incorporation of social SDPs, BITs of Asia-Pacific LDCs and LLDCs and the sample IIAs bear substantive differences. As demonstrated by the subtypes of SDPs, social SDPs have been routinely included in the sample IIAs concluded after 2012. There are in total 12 ATCs, 21 LHRs and 14 RBPs contained in the sample IIAs. However, it remains a rare occurrence for BITs of Asia-Pacific LDCs and LLDCs to incorporate social SDPs. The total number of ATC, LHRs and RBPs in these BITs standing at five, ten and three respectively. Further, the sample IIAs have subtypes of SDPs that impose obligations on both foreign investors and the contracting states, while BITs of Asia-Pacific LDCs and LLDCs do not contain social SDPs that directly impose obligations on foreign investors, such as AOS and ROS. This seems to imply that BITs as a policy tool could play a limited role in regulating the business conducts of foreign investors in Asia-Pacific LDCs and LLDCs.

The need of socializing SDPs and IIAs becomes increasingly pressing. Recent IIA-making in some countries, especially developed countries, shows a clear preference of incorporating social SDPs. In this regard, the Dutch Model BIT is a good example. While this BIT contains multiple SDPs, it is the first and probably the only IIA up to the present that incorporates a standalone section explicitly titled as “Sustainable Development”. This

section contains an article of “Sustainable Development” and one of “Corporate Social Responsibility”.⁶⁸ Especially, the former article appears comprehensive, as it is a combination of various types and subtypes of SDPs. It confirms that the contracting states shall bear an obligation to adopt laws and policies to encourage high-level protection of the environment and labour rights in investment governance. Then, this BIT imposes specific requirements on the contracting states, including affirmative obligations that require the states to take certain actions, and prohibitive obligations that require the states not to abuse their regulatory rights that could constitute unjustifiable discrimination or a disguised restriction on trade. Further, from institutional perspective, this BIT also requires the contracting states to cooperate on sustainable development matters relating to investment governance. Obviously, these SDPs are designed also for the purpose of addressing the emerging social concerns associated with transnational investment activities. At this point of time, it is unclear whether inserting a standalone and comprehensive sustainable development clause in IIAs has become a fresh trend in IIA-making at the global level, but it seems undoubted that the Dutch Model BIT has set up an example in making sustainable development-oriented IIAs.

Admittedly, to many countries, including Asia-Pacific LDCs and LLDCs, incorporating social SDPs in IIAs remains to be a contentious question. It is contentious not only because there exists disagreement as to whether IIAs are a proper discourse in addressing social concerns, but also because these countries may have different national situations and developmental policies with regard to social issues. Considering that Asia-Pacific LDCs and LLDCs sometimes rely on the BIT templates of their counterpart countries in IIA-making, SDPs contained in the model BITs of developed countries could play a key role in BIT-making of Asia-Pacific LDCs and LLDCs. As social SDPs are becoming increasingly incorporated in model BITs, it is highly likely that Asia-Pacific LDCs and LLDCs would face increasing pressure of socializing SDPs in their future IIA-making.

⁶⁸ Section 3, the Dutch Model BIT.

6.3. The gap of governance-orientation of SDPs

The gap between SDPs in the sample IIAs and those in BITs of Asia-Pacific LDCs and LLDCs may also be observed from their different levels of governance-orientation. The world has entered an era of global governance. Though global governance is difficult to be precisely defined, some of its features have been widely recognized. A fundamental feature is that the role of various types of non-state and sub-state actors in the law-making and law-enforcement processes becomes increasingly prominent. For instance, many non-governmental organizations (NGOs) are playing an important role in global standard setting and enforcement. In addition, states no longer monopolize the law-making power, and soft-law instruments and private standards emerge as rules regulating global affairs.⁶⁹

The globalization of governance has profound impacts on global investment governance, including IIA-making and enforcement. At normative level, such impacts can be sensed from four main subtypes of SDPs in IIAs. (i) An increasing number of IIAs nowadays grant access for non-disputant third parties to participate in arbitration proceedings, through opening hearings to the public or allowing third parties to submit briefs in the capacity of *amicus curiae*. This can be reflected by the appearance of HERs and TPBs (of TRAs) in IIAs. Broadly speaking, these SDPs also reflect the growing tendency of enhancing the rule of law in global investment governance. (ii) Some IIAs include provisions that impose obligations on foreign investors directly, which can be shown by the ROIs (of RBPs) and AOIs (of ATCs) in IIAs. This is often made in the context of correcting the structural imbalance of IIAs, aiming at striking a better balance between the preservation of state regulatory rights and the protection of foreign investment. (iii) Some IIAs clearly make reference to non-binding external standards, such as the ILO core labour standards and the OECD Guidelines for Multinational Enterprises, which can be shown by the REFs (of LHRs and RBPs). Such reference, though in most cases do not create binding obligations on the contracting states, does provide the opportunity for many soft law rules to be

⁶⁹ See Benvenisti, E., 2013. The Law of Global Governance, *Recueil des cours*, 368, 47.

considered and applied for the purpose of global investment governance. (iv) Some IIAs also provide opportunities for the general public to take part in the making of standards that are relevant to public interest. This can be shown by the ENGs (of TRLs) in IIAs. In general, the above subtypes of SDPs provide opportunities for non-state actors including but not limited to foreign investors to play a role in global investment governance. In this sense, these SDPs positively respond to the trend of global governance.

A good example of enhancing the governance-orientation of IIAs could be incorporation of ATCs in some recent IIAs, such as the SADC and Dutch Model BITs. For instance, Article 10 of the SADC Model BIT provides for “Common Obligation against Corruption”. This article not only prohibits foreign investors from engaging in corruptive conducts, but also requires the states to prosecute any individuals for such conducts on the ground of breaching the domestic law of the states. Similarly, the Dutch Model BIT also contains enforceable provisions for anti-corruption purpose. This BIT not only provides that investors’ claims involving corruptive conducts are not admissible to international arbitration, but it also stipulates that the contracting states’ abusive treatment of investors, including corruption shall be deemed as a violation of the FET provision, constituting a breach of the BIT or international law. Further, it is particularly noteworthy that the Dutch Model BIT also includes a standalone clause titled “Rule of Law”,⁷⁰ laying down certain general requirements on the administrative conducts of the contracting states. It is obvious that these provisions go beyond the traditional purpose of investment protection and liberalization. They echo and reflect the shift of the balancing paradigm of sustainable development. The incorporation of these SDPs clearly demonstrates growing governance-orientation of the SADC and Dutch Model BITs.

If one adopts a governance perspective, one would note that the SDPs contained in BITs of Asia-Pacific LDCs and LLDCs and those in the sample IIAs bear substantial differences. The general impression is that the sample IIAs contain all of the above types of governance-oriented SDPs, such as AOIs, HERs, TPBs, ROIs, REFs and ENGs. In

⁷⁰ Article 5, the Dutch Model BIT.

comparison, these SDPs are largely absent in BITs of Asia-Pacific LDCs and LLDCs. As discussed, BITs of Asia-Pacific LDCs and LLDCs only contain two REFs (each of LHR and of RBP) and one HER (of TRA) in total. The lack of governance-oriented SDPs in BITs seems to suggest that Asia-Pacific LDCs and LLDCs in general do not adopt a governance perspective in IIA-making. This not only potentially restricts the ability and reach of these countries in enhancing the rule of law in national and global investment governance, but also makes them vulnerable in confronting sustainable development challenges in the long run.

7. Major Findings of the Survey

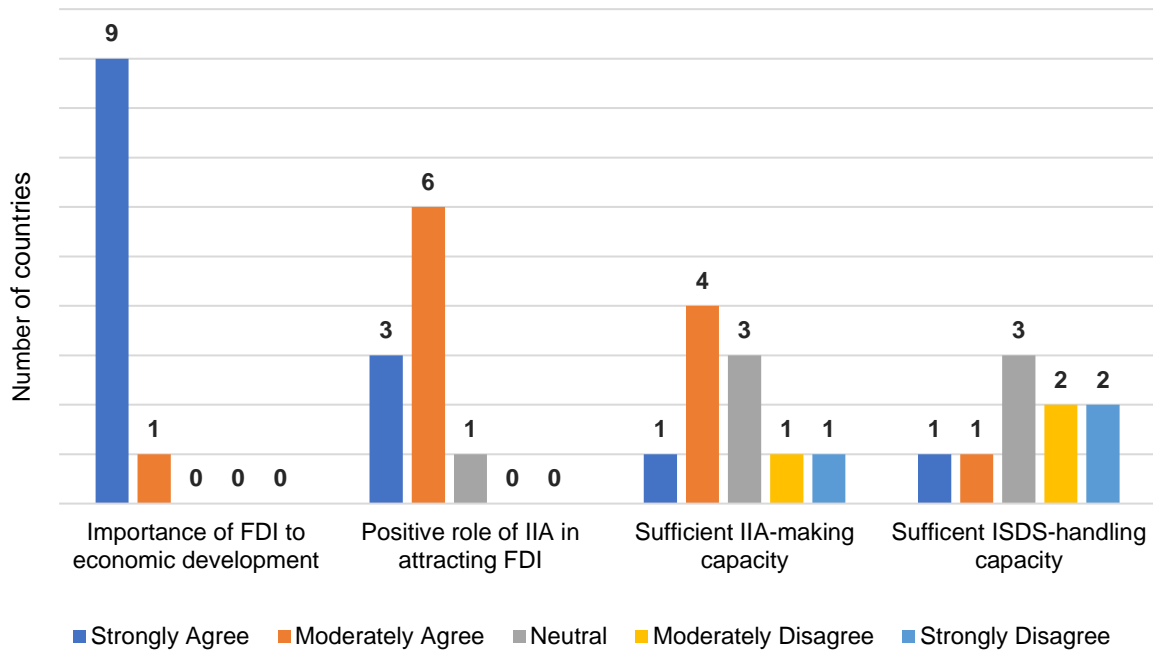
The international community is facing sustainable development challenges. It makes sense for countries, including Asia-Pacific LDCs and LLDCs, to make sustainable development-oriented IIAs. However, there is no one-size-for-all model IIA that is suitable for all Asia-Pacific countries. The extent to which the IIAs of a country should be made sustainable development-oriented depends on the specific national situations and needs of this country. This part, based on the result of a survey of some Asia-Pacific countries, roughly analyses the national situations and needs of these countries for making sustainable development-oriented IIAs. The questionnaire for the survey is attached in Appendix E.

The questionnaire was sent to all Asia-Pacific countries. Ten valid replies were received by the extended deadline. These ten countries are Armenia, Bangladesh, Bhutan, Cambodia, Iran, Mongolia, Myanmar, Nepal, New Caledonia and Turkey. It should be mentioned that the ten countries are not entirely identical to Asia-Pacific LDCs and LLDCs whose BITs are investigated in this study. Specifically, there are six overlaps, i.e. Bangladesh, Bhutan, Cambodia, Mongolia, Myanmar and Nepal. While the other four Asia-Pacific countries are not investigated for their BITs. Despite such discrepancy, it remains helpful to take the replies of all ten countries into consideration without drawing further distinctions.

7.1. IIAs and sustainable development to Asia-Pacific countries

At the outset, it is necessary to see how the ten Asia-Pacific countries understand the relevance of IIAs for FDI and economic development. This helps set the scene for the ensuing discussions. On these relevant issues, these Asia-Pacific countries have different opinions.

Figure 8. Relevance of IIAs to economic development in Asia-Pacific countries

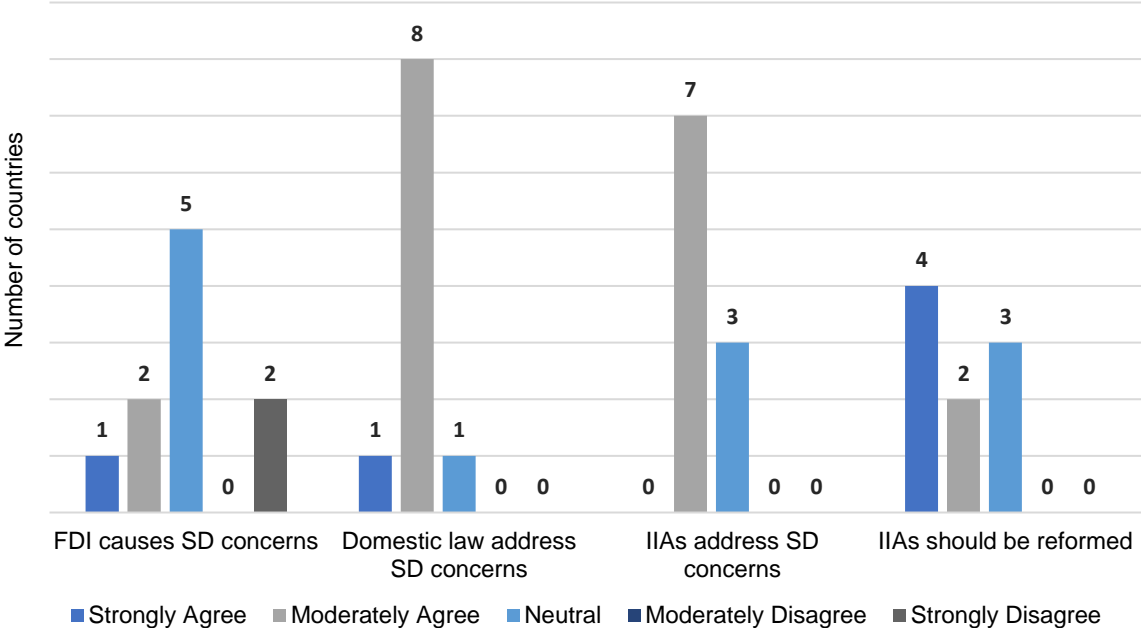


First, as figure 8 shows, the ten Asia-Pacific countries in general share the consensus that FDI is an important factor in promoting economic development. Nine countries strongly agree that FDI generally plays a supportive role in economic development, with only one country moderately agree to this assertion. In the meantime, three countries strongly agree that IIAs play a supportive role in attracting FDI, and six countries moderately agree to this, and no country disagree with this assertion. Besides, figure 8 also shows the IIA-making and ISDS-handling capabilities of the ten Asia-Pacific countries. On these issues, the opinions of these countries appear split. Five countries strongly or moderately agree that they have sufficient IIA-making capacity. In rough comparison, Asia-Pacific countries appear to have less capacity in ISDS-handling. Only two countries strongly or moderately agree that they have sufficient ISDS-handling capacity, three countries are neutral, and four countries moderately or strongly agree that they do not have sufficient capacity in handling ISDS cases. Some Asia-Pacific countries have been involved in ISDS cases, and a few Asia-Pacific countries have not encountered any ISDS cases up to the present.

The observation drawn from figure 8 could be that, while all ten Asia-Pacific countries agree that FDI may promote economic development and that IIAs are important in attracting FDI flow, not all of them have sufficient IIA-making and ISDS-handling capacities. Such finding suggests that there is an urgent need for Asia-Pacific countries to enhance their capacities with regard to IIA-making and ISDS-handling.

Second, as almost all Asia-Pacific countries recognize the importance of IIAs in global investment governance, it seems natural to analyse how they perceive the relevance of IIAs for sustainable development. As shown in figure 9, on this categorical issue, the ten Asia-Pacific countries have split opinions and different practices.

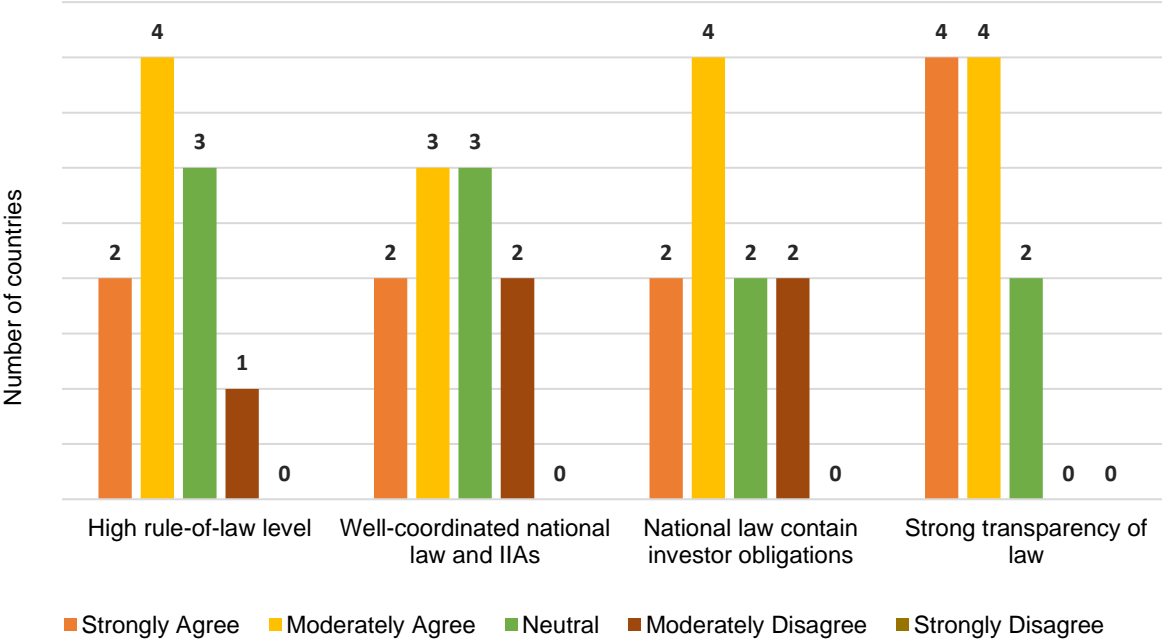
Figure 9. IIAs and sustainable development in Asia-Pacific countries



It seems that Asia-Pacific countries are split on whether FDI causes sustainable development concerns. Three countries strongly or moderately agree, five countries are neutral, and two countries strongly disagree to the assertion that FDI causes sustainable development concerns. This finding seems to show that Asia-Pacific countries are facing different levels of sustainable development challenges. Despite such difference, there

seems to be a consensus among these countries that sustainable development should be integrated in national law-making and IIA-making. Nine countries put attention on sustainable development in their domestic law- and policy-making, and six countries address sustainable development concerns in IIA-making. Furthermore, Asia-Pacific countries seem to agree that IIAs should be a suitable tool for addressing sustainable development concerns associated with transnational investment activities. Six countries strongly or moderately agree that IIAs should be reformed to be more sustainable development-oriented, and no countries disagree to this assertion. Such finding is of practical importance to a number of Asia-Pacific countries, as they are active in concluding new IIAs and updating their existing IIAs.

Figure 10. The rule of law of FDI in Asia-Pacific countries



Third, it is of interest to note that Asia-Pacific countries in general show a high level of confidence in the level of the rule of law of the governance of transnational investment activities in their countries. Figure 10 explains the various aspects of this issue. Six countries strongly or moderately agree that the rule of law situation, especially the law enforcement situation in their countries is excellent. Five countries strongly or moderately

agree that their national laws and policies are well coordinated with IIAs. Six countries state that their domestic laws contain rules with regard to investor obligations. Eight countries strongly or moderately agree that the transparency of their investment-related laws and policies is strong. In all of these four categories, negative replies are rarely seen.

7.2. Sustainable development concerns of Asia-Pacific countries

It seems largely true that the international community as a whole faces profound sustainable development challenges. Yet, from a country-specific perspective, Asia-Pacific countries face varying levels and different types of sustainable development challenges. As explained in Figure 9 above, in answering the question “whether FDI causes sustainable development concerns to your country”, two countries (Armenia and Turkey) strongly disagree, one country (Iran) keeps neutral. The rest seven countries strongly or moderately agree to this assertion. To the seven countries, it is necessary to further discuss their respective types and levels of sustainable development challenges.

As shown in Table 4, Asia-Pacific countries confront a low level of sustainable development challenges in general. Among the various types of challenges, it seems that environmental concern is the major type, as four countries rank this concern high or moderate. Public health and safety concern and state regulatory rights concern are present in some Asia-Pacific countries. In comparison, Asia-Pacific countries in general do not deem labour rights or human rights, irresponsible investor conducts and national security concerns as major types of sustainable development concerns.

Table 4. Sustainable development concerns of Asia-Pacific countries

Types of SD Challenge	High	Moderate	Low	No	No Comments
Environmental	1	3	2	0	1
Labour/human rights	1	1	4	0	1
Public health and safety	1	2	2	1	1
State regulatory rights	1	2	2	1	1
National security	1	1	4	0	1
Irresponsible investor conducts	0	2	3	1	1

The above finding could give rise to some interesting thoughts if one considers the IIA-making practice of Asia-Pacific countries. As discussed earlier, the major types of SDPs in BITs of Asia-Pacific LDCs and LLDCs are ENVs, NESs and TRLs, while social SDPs, such as LHRs and TRAs, RBPs and ATCs are less frequently seen in their BITs. Here, on one hand, it is no surprising to note ENVs are the major type of SDPs in BITs of Asia-Pacific LDCs and LLDCs, as Asia-Pacific countries have shown the gravest level of concern over environmental protection. On the other hand, it is of interest to note that while NES is a major type of SDPs in their BITs, Asia-Pacific countries do not deem national security as a major type of sustainable development concern. A reasonable explanation could be that NES in the BITs of these countries is probably incorporated upon the demand of the counterpart countries.

Table 5. Sectorial sustainable development challenges of Asia-Pacific countries

Types of SD Challenge	High	Moderate	Low	No	No Comments
Mining and mineral processing	2	2	1	0	2
Natural resource processing	1	2	2	0	2
Agriculture and food processing	0	4	2	0	1
High-technology industry	1	1	2	1	2
Chemical processing	0	3	2	1	1
Services industry	1	3	1	1	1
Textile and clothing industry	1	1	3	1	1
Light industry	0	2	3	1	1
Heavy machinery industry	0	3	3	0	1

Here, it is of interest to further explore the sustainable development challenges to Asia-Pacific countries on an economic sectorial basis. Such knowledge is important since it could help Asia-Pacific countries integrate IIA-making strategy in the broader strategy of national economic development. As Table 5 shows, Asia-Pacific countries have diverse sustainable development concerns, deriving from different economic sectors. This is understandable as the national economies of these countries rely on different industries. Overall, it seems that Asia-Pacific countries face a moderate or low level of sustainable development challenges in almost all economic sectors. Yet, agricultural and food

industry, and mining and mineral processing industry seem to generate a higher level of challenges than other industries.

7.3. Options for making sustainable development-oriented IIAs

As mentioned earlier, Asia-Pacific countries in general share the consensus that IIAs should be made more sustainable development-oriented. Given such a background, it is of further interest to observe how these countries select the available IIA reform options and rate the attractiveness of these options.

Figure 11. Preference of IIA reform options for Asia-Pacific countries

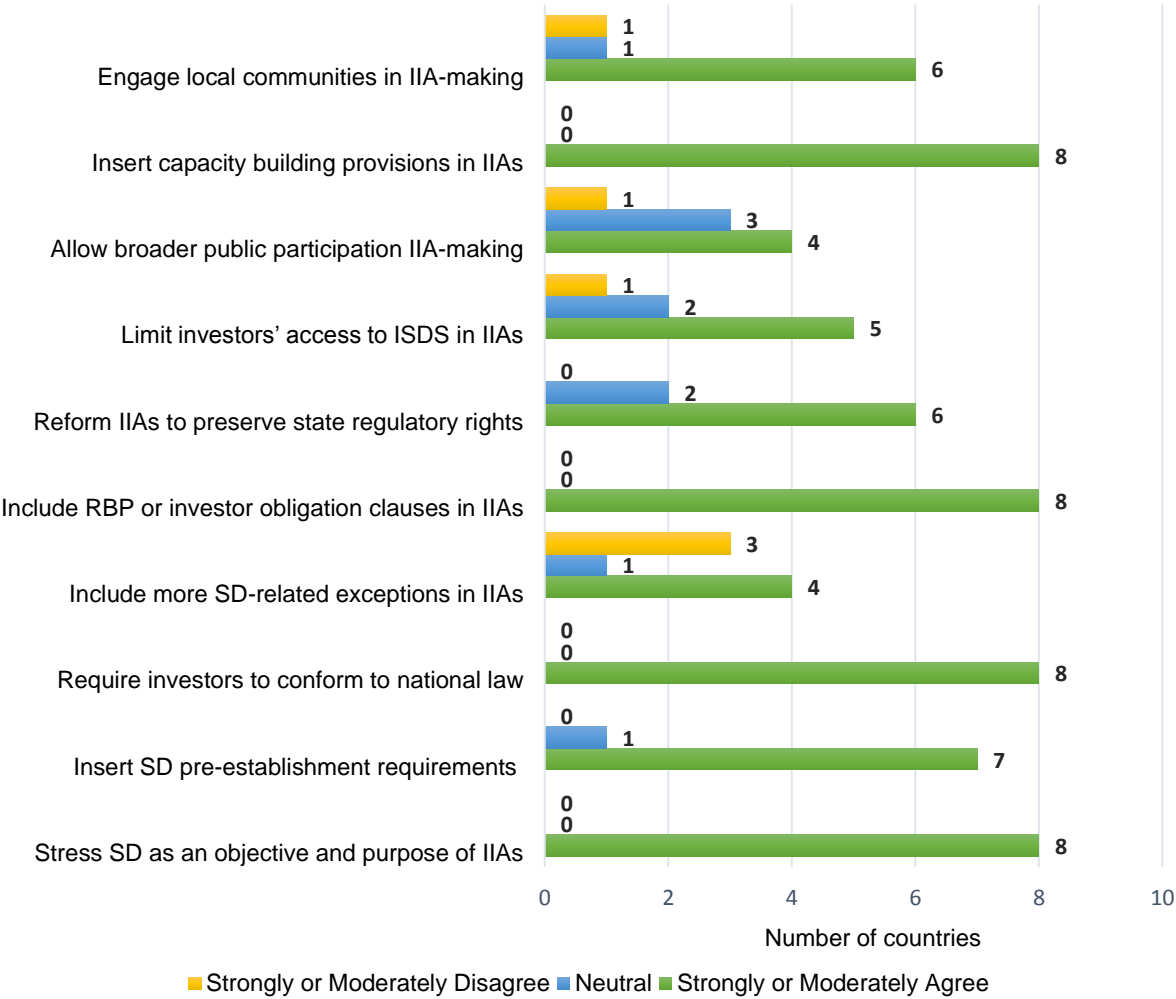


Figure 11 lists a number of IIA reform options. These options are mainly drawn on the basis of UNCTAD recommendations for IIA reform, and they are not an exhaustive list of all possible alternatives for IIA reform. Asia-Pacific countries have different preferences to these options. Generally speaking, the most preferred options for Asia-Pacific countries include (i) incorporate capacity-building clauses in IIAs; (ii) include RBP or investor obligation clauses in IIAs; (iii) require foreign investors to conform to national law; and (iv) stress sustainable development goals as an objective and purpose of IIAs. All of these four options are strongly or moderately agreed by Asia-Pacific countries. Besides, seven countries agree that sustainable development-related pre-establishment requirements should be included in IIAs.

In contrast, some other options receive less welcome by Asia-Pacific countries. There are four options strongly or moderately disagreed by some Asia-Pacific countries, to different extent though. These options include (i) include sustainable development-related exceptive clauses in IIAs; (ii) limit investors' access to ISDS in IIAs; (iii) allow broader public participation in IIA-making; and (iv) engage local communities in IIA-making. Especially, three countries strongly disagree that IIAs should incorporate sustainable development-related exceptive clauses. These countries do not provide further and detailed explanation for their choices. However, it should be reasonably understood that the choices of Asia-Pacific countries are based on their respective national situations and policy preferences.

7.4. Major observations of the survey

The survey explores whether Asia-Pacific countries face sustainable development challenges in global investment governance, and how they could make IIAs sustainable development-oriented to help confront such challenges. The survey result shows that, in general, Asia-Pacific countries agree that foreign investment plays an important role in national economic development, and that IIAs could play a positive role in attracting foreign investment. Importantly, these countries in principle agree that IIAs could be a helpful tool in addressing sustainable development concerns associated with transnational investment activities. They also show strong preference of a number of IIA-

reform options. Such findings seem to suggest that Asia-Pacific countries share a consensus of making IIAs more sustainable development-oriented.

In the meantime, however, Asia-Pacific countries are different with regard to the types and levels of sustainable development challenges and to their IIA-making capacity and ISDS-handling capacity. Such difference explains that Asia-Pacific countries may have different priorities and expectations in IIA-making, especially when negotiating IIAs with different types of counterpart countries. It is thus advisable that Asia-Pacific countries should design their strategies of making sustainable development-oriented IIAs with due regards paid to their specific national situations and needs.

With regard to how to make IIAs more sustainable development-oriented in the future, Asia-Pacific countries show different preferences. On one hand, the preferred options seem to show that Asia-Pacific countries share a consensus of incorporating investor obligation clauses in IIAs, such as RBPs or provisions that require foreign investors to comply with national laws of the host states. This seems to imply that Asia-Pacific countries may enhance the presence of certain social SDPs in IIAs, such as RBPs and ATCs. On the other hand, Asia-Pacific countries seem reluctant to grant broader opportunities for non-state actors, such as foreign investors and local communities, to play a more constructive and active role in global investment governance, such as participation in ISDS and IIA-making. This implies that Asia-Pacific countries tend to favour a formalistic and state-centralist approach in global investment governance. This approach is not wrong, but it seems insufficiently conforming to the emerging trend of making IIAs more governance-oriented.

8. Recommendations

Despite that Asia-Pacific countries, including LDCs and LLDCs, face sustainable development challenges to different extents and of different types, they share a growing consensus that making sustainable development-oriented IIAs is a necessary and possible way in addressing sustainable development challenges associated with transnational investment activities. In light of the empirical study of SDPs contained in the 20 sample IIAs and BITs of Asia-Pacific LDCs and LLDCs, and considering the result of the survey, the following recommendations are put forward:

- There is no one-size-for-all model of sustainable development-oriented IIA. Asia-Pacific LDCs and LLDCs should carefully assess their specific national situations and needs in IIA-making.
- Sustainable development-oriented IIAs should strike a proper balance among economic growth, environmental protection and social development. It is necessary for Asia-Pacific LDCs and LLDCs to adopt a broad and updated understanding of sustainable development, and conduct a country-specific benefit-cost analysis to decide whether and how social SDPs should be incorporated in IIAs.
- IIAs are becoming increasingly governance-oriented. Asia-Pacific LDCs and LLDCs need to consider this emerging trend in IIA-making. Especially, they need to consider the role of non-state stakeholders and soft law rules in the existing IIA system.
- The practical effectiveness of SDPs in IIAs not only relies on the SDPs themselves, but also depends on the national law standards and the rule-of-law situation of a country. Thus, the SDPs in IIAs could be harnessed if Asia-Pacific LDCs and LLDCs also improve sustainable development standards at national and regional levels.
- Capacity building, inter-state cooperation and stakeholder engagement are getting

increasingly important in making sustainable development-oriented IIAs. Asia-Pacific LDCs and LLDCs should carefully consider these factors in light of their specific national situations and needs.

- In addition, it is also suggested that Asia-Pacific LDCs and LLDCs consider the following further recommendations in future IIA-making:
- As FTAs also address sustainable development concerns, Asia-Pacific LDCs and LLDCs need to properly deal with the interrelations between BITs and FTAs in IIA-making, especially with regard to the application of FTA chapters on investment issues.
- Despite the fact that many ISDS cases provoke sustainable development concerns, SDPs in IIAs are seldom applied in practice. Asia-Pacific LDCs and LLDCs need to keep observing the development with regard to the interpretation and application of SDPs in IIAs.

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Appendix A: List of Sample IIAs

1. 1994 NAFTA Investment Chapter
2. 2004 Canada Model BIT
3. 2005 IISD Model BIT
4. 2008 Colombia Model BIT
5. 2008 German Model BIT
6. 2008 Ghana Model BIT
7. 2009 China-ASEAN Investment Agreement
8. 2012 China-Japan-Korea TIT
9. 2012 KORUS (Korea-U.S.) FTA Investment Chapter
10. 2012 SADC Model BIT
11. 2012 U.S. Model BIT
12. 2014 CETA Investment Chapter
13. 2015 Brazil Model BIT
14. 2015 India Model BIT
15. 2015 Norway Model BIT
16. 2015 TTIP Investment Chapter (leaked EU version)
17. 2016 TPP Investment Chapter
18. 2018 Dutch Model BIT
19. 2018 EU-Singapore BIT
20. 2018 RCEP Investment Chapter (leaked China version)

Appendix B: List of Asia-Pacific LDCs and LLDCs

LDCs

1. Afghanistan *
2. Bangladesh
3. Bhutan *
4. Cambodia
5. Lao People's Democratic Republic (the) *
6. Kiribati
7. Timor-Leste
8. Myanmar
9. Nepal *
10. Solomon Islands
11. Tuvalu
12. Vanuatu

LLDCs

1. Afghanistan *
2. Bhutan *
3. Kazakhstan
4. Kyrgyzstan
5. Lao People's Democratic Republic (the) *
6. Mongolia
7. Nepal *
8. Tajikistan
9. Turkmenistan
10. Uzbekistan

Note: Countries with "*" are overlapping.

Appendix C: SDPs in Sample IIAs

Sample IIAs	Year	GEN	ATC			ENV			LHR				TRL			TRA				NES	RBP		
			D E C	A O S	A O I	N D G	C O N	E X P	R E F	N D G	C O N	E X P	P U B	C O M	E N G	P U B	H E R	T P B	U P R		R E F	R O S	R O I
NAFTA Inv. Ch.*	1994	X				X		X							X		X		X				
Canada Model BIT	2004	X				X		X				X	X		X	X	X		X				
IISD Model BIT	2005	X		X	X	X	X	X	X	X	X			X	X	X			X	X	X		
Colombia Model BIT	2008						X	X											X				
German Model BIT	2008																		X				
Ghana Model BIT	2008	X					X	X											X			X	
China-ASEAN Inv. Agreement	2009	X						X				X	X						X				
China-Japan-Korea TIT	2012	X					X	X				X	X	X					X				
KORUS FTA Inv. Ch. *	2012	X				X		X							X	X	X		X				
SADC Model BIT	2012	X		X	X	X	X	X	X	X				X	X	X			X	X	X		
U.S. Model BIT	2012	X				X	X	X	X	X	X	X	X	X	X	X			X				
CETA Inv. Ch. *	2014				X		X	X						X	X	X	X						
Brazil Model BIT	2015	X		X		X	X	X		X	X			X	X				X			X	
India Model BIT	2015	X			X			X		X				X	X	X			X			X	
Norway Model BIT	2015	X	X	X		X	X	X	X	X	X			X	X	X			X	X			
TTIP Inv. Ch. (leaked) *	2015				X		X	X								X	X		X				
TPP Inv. Ch. *	2016	X				X	X	X				X	X		X	X	X		X			X	
Dutch Model BIT	2018	X		X	X	X	X	X	X	X	X					X	X		X	X			
EU-Singapore BIT	2018	X				X	X	X	X					X	X	X			X				
RCEP Inv. Ch. (leaked) *	2018						X							X			X-						
Sub Total		15	1	5	6	10	13	19	6	6	7	2	12	8	2	12	10	13	4	18	4	5	5
Total & Subtype	182	15	12			42			21				22			39				18	14		

Appendix D: SDPs in BITs of Asia Pacific LDCs and LLDCs

Country	No. of BIT	No. of SDPs	GEN	ATC			ENV			LHR				TRL			TRA				NES	RBP			
				D E C	A O S	A O I	N D G	C O N	E X P	R E F	N D G	C O N	E X P	P U B	C O M	E N G	P U B	H E R	T E R	T R A		U P B	R E B	R E F	R O S
Afghanistan	3	1							1																
Bangladesh	29	22	1				2	3	3				3	2								8			
Bhutan	0	0																							
Cambodia	23	9		1			1	1	1					1	2							2			
Kazakhstan	48	41	2		1		3	10	4		1	2		7					1			10			
Kiribati	0	0																							
Kyrgyzstan	36	17	2	1			2	1	1		1	1		4							1	3			
Lao PDR	24	10	1		1		1		2					2								3			
Mongolia	43	20	2				2		2					3	1		1	1				7		1	
Myanmar	9	14			1		1	1	4					2								5			
Nepal	6	5	2				1							1								1			
Solomon Island	0	0																							
Tajikistan	36	12	1				2	2	1	1	1			1								2		1	
Timor-Leste	3	0																							
Turkmenistan	27	2												2											
Tuvalu	0	0																							
Uzbekistan	51	27	7				3	1			2			2	8							3		1	
Vanuatu	2	0																							
Subtotal	340	179	18	2	3	0	18	19	18	1	5	3	1	29	11	0	1	1	1	1	44	1	2	0	
Total & Subtype			18	5	55	10	40	4	44	3															

Appendix E: Questionnaire

Note for the Survey-takers:

Dear survey-takers,

Thank you for spending time in answering the questionnaire. This survey is designed to facilitate the research titled “Promoting and Facilitating FDI for Sustainable Development”, commissioned by ESCAP. The research will be presented and used as the basis for discussions at the 8th Meeting of the Asia-Pacific FDI Network, 25-26 September 2018, in Bangkok, Thailand. The research has a special focus on the least developed countries (LDCs) and land-locked development countries (LLDCs) of the Asia and Pacific region. Your participation is extremely helpful for the researchers in achieving the right policy proposals.

Section I is profile. Section II of the survey is consisted of general questions. Section III explores the sustainable development challenges to foreign direct investment from country-specific perspective. Section IV explores sustainable development challenges of the existing investor-state dispute settlement regime from country-specific perspective. Section V invites you to put down any further comments on making IIAs SD-supportive from your country’s perspective, if any. Please mark the description that you believe best matches the situation of your country, in light of the global change of the investment governance regime. If you have other comments, please specify. Please do not change the format of the questionnaire.

The terms “sustainable development”, “international investment agreements”, “investor-state dispute settlement”, “responsible business practices” and “alternative dispute resolution” are respectively shortened as “SD”, “IIAs”, “ISDS”, “RBP” and “ADR”.

Thank you for your support in advance and we look forward to receiving your reply.

Section I: Profile of Survey-taker

Name:

Country:

Job title & Organization:

Section II: General Questions

Questions	Strongly Agree	Moderately Agree	Neutral	Moderately Disagree	Strongly Disagree
1. FDI generally plays a supportive role in national economic development in my country					
2. FDI causes concerns over the SD in my country *					
3. IIAs' plays a supportive role in attracting FDI inflow					
4. My country faces profound SD challenges nowadays					
5. My country addresses SD goals in national FDI and related law/policy-making					
6. My country addresses SD goals in IIA-making					
7. My national laws contain sufficient provisions on RBP/investor obligations					
8. My country has sufficient capacity of IIA-making					
9. My country has sufficient capacity in handling ISDS (and potential) cases					
10. IIA-making and FDI and related law/policy-making in my country are well-coordinated					
11. The transparency of FDI and related law and policy of my country is strong					
12. The rule of law level in my country, especially law enforcement, is excellent					
13. My country prefers ISDS to national courts or other ADR in settling investment disputes					
14. My country senses that IIAs should be reformed to address SD concerns *					
15. My country senses it necessary to reform the existing ISDS mechanism *					

Section III: Country-specific SD challenges

1. If your answer to Question No.2 is positive (strongly or moderately agree), please specify the type and level of the SD challenges in FDI governance:

Tyles/Levels	High	Moderate	Low	No	No comment
1. FDI causes environmental concerns					
2. FDI causes labour/human rights concerns					
3. FDI causes public health and safety concerns					
4. ISDS threatens the state regulatory power					
5. FDI causes national security concerns					
6. FDI brings about irresponsible investor conducts in my country					
7. Other type of challenges (please specify)					

2. If your answer to Question No.2 is positive (strongly or moderately agree), please specify the economic sectors of your country that face SD challenges:

Sectors/Levels	High	Moderate	Low	No	No comment
1. Mining and mineral processing					
2. Natural resource processing (e.g. water, lumber)					
3. Agriculture and food processing industry					
4. High-technology industry (e.g. IT, telecom)					
5. Chemical processing (e.g. pharmaceutical)					
6. Services industry (e.g. tourism, transportation, education, finance)					
7. Textile and clothing industry					
8. Light industry (e.g. daily utensil production)					
9. Heavy machinery industry					
10. Other sectors (please specify)					

3. If your answer to Question No.14 is positive (strongly or moderately agree), please specify how IIAs can be made helpful in addressing SD concerns from the perspective of your country:

Types/Levels	Strongly Agree	Moderately Agree	Neutral	Moderately Disagree	Strongly Disagree
1. Stress SDGs (or SD related goals) as an object and purpose of IIAs					
2. Introduce more SD related pre-establishment requirements (e.g. environmental assessment) in IIAs					
3. Requiring investors to conform to national laws in IIAs					
4. Include more SD-related exceptions (e.g. environmental, labour rights, general exceptions) in IIAs					
5. Include RBP or investor obligation clauses in IIAs					
6. Reform investment protection clauses to preserve state regulatory power (e.g. expropriation, FET)					
7. Limit investors' access to ISDS in IIAs					
8. Allow broader public participation in ISDS in IIAs					
9. Insert capacity building provisions in IIAs					
10. Engage local/indigenous communities in IIA-making					
11. Others (please specify)					

Section IV: Country-specific SD challenges to ISDS

4. If you answer to Question 15 is positive (strongly or moderately agree), please briefly answer the following questions before answering questions.

(1) Which government organ(s) in your country is in charge of IIA-making (Ministry)?(_____).

(2) Has your country experienced any ISA cases (please use "X")? Yes / No

(3) To my knowledge, my country has be sued in (____) ISDS cases (as Respondent) / I do not know (____).

(4) To my knowledge, there are (____) ISDS cases initiated relying on my countries IIAs / I do not know (____).

5. If your answer to Question No.14 is positive (strongly or moderately agree), please specify how IIAs can be made helpful in addressing SD concerns from the perspective of your country:

Types/Levels	Strongly Agree	Moderately Agree	Neutral	Moderately Disagree	Strongly Disagree
12. Stress SDGs (or SD related goals) as an object and purpose of IIAs					
13. Introduce more SD related pre-establishment requirements (e.g. environmental assessment) in IIAs					
14. Requiring investors to conform to national laws in IIAs					
15. Include more SD-related exceptions (e.g. environmental, labour rights, general exceptions) in IIAs					
16. Include RBP or investor obligation clauses in IIAs					
17. Reform investment protection clauses to preserve state regulatory power (e.g. expropriation, FET)					
18. Limit investors' access to ISDS in IIAs					
19. Allow broader public participation in ISDS in IIAs					
20. Insert capacity building provisions in IIAs					
21. Engage local/indigenous communities in IIA-making					
22. Others (please specify)					

Section V: Country-specific SD challenges to ISDS

6. If you answer to Question 15 is positive (strongly or moderately agree), please briefly answer the following questions before answering questions.

(5) Which government organ(s) in your country is in charge of IIA-making (Ministry)?(_____).

(6) Has your country experienced any ISA cases (please use "X")? Yes / No

(7) To my knowledge, my country has be sued in (____) ISDS cases (as Respondent) / I do not know (____).

(8) To my knowledge, there are (____) ISDS cases initiated relying on my countries IIAs / I do not know (____).

7. From the perspective of my country, possible ISDS reform should include:

Types/Levels	Strongly Agree	Moderately Agree	Neutral	Moderately Disagree	Strongly Disagree
1. Controlling the cost of ISDS for host states					
2. Setting high ethical requirements for arbitrators					
3. Improving the efficiency of ISDS process					
4. Limiting investors' access to ISDS					
5. Screening sensitive cases from being submitted to ISDS					
6. Introducing pre-arbitration requirements (e.g. negotiation)					
7. Allowing states to intervene in ISDS (e.g. treaty interpretation)					
8. Allowing broader public participation in ISDS					
9. Introducing an appeals facility					
10. Creating a standing international investment court					
11. Replacing ISDS by inter-state arbitration					
12. Replacing ISDS by national courts (local remedies in host state)					
13. Providing necessary legal and financial aid to host states					
14. Others (please specify)					

Section V: Further comments on making IIAs SD-supportive from your country's perspective (if any):



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