7

Facilitation of Foreign Direct Investment through International Economic Law

Contribution to the Right to Development and SDGs

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7.1 Introduction

How can facilitation of foreign direct investment (FDI) through the World Trade Organization (WTO) contribute to fulfill the right to development (RtD) and realize relevant United Nation Sustainable Development Goals (SDGs)? We shall consider this question by focusing on the current and future roles of international trade law in promoting the transboundary flows of investment. Currently, the WTO Agreement contains important multilateral rules that *directly* open up markets for transboundary flows of FDI. These include rules on trade in services, in particular commitments concerning commercial presence in the context of market access and national treatment. In addition, the WTO Agreement includes commitments that more *indirectly* facilitate transboundary flows of FDI, a prominent example related to trade in goods being the Agreement on Trade-Related Investment Measures. One purpose of this chapter is to look closer at how new initiatives regarding investment facilitation interact with these existing mechanisms of the WTO in terms of facilitating FDI in light of the RtD and SDGs.

Rules that open countries to FDI inflows are a fairly new postcolonial phenomenon in international law, going back three to four decades. In addition to the WTO initiatives, regional and bilateral free trade agreements as well as some bilateral and multilateral investment agreements have included provisions with the purpose of facilitating flows of FDI among treaty parties. On a slightly longer timescale, the World Bank has played an operational role in terms of facilitating FDI through the promotion of investment legislation and funding of specific projects.

Any investigation of the potential consequences of new initiatives on investment facilitation in the WTO must be based on an analysis of these existing regimes. The key questions are as follows:

(1) In what ways and to what extent will the WTO Investment Facilitation for Development (IFD) Agreement facilitate flows of FDI among countries with the highest need of increased volumes of FDI?
(2) Based on an assessment of the regulatory consequences of the proposed investment facilitation measures, can we expect them to contribute to sustainable development?
(3) Which reforms to current proposals could increase their contribution to sustainable development?

Against this background, this chapter shall first explore the concept of FDI and the links between FDI, RtD, and SDGs (Section 7.2). Thereafter follow an overview of the current WTO regime for the promotion of FDI (Section 7.3) and a brief discussion of promoting FDI through international investment agreements and investment legislation (Section 7.4). The chapter will conclude by discussing whether and how proposals for a new investment facilitation framework within the WTO can contribute to the RtD and SDGs (Section 7.5).

7.2 The Relationship between FDI and Sustainable Development

7.2.1 The Concept of Foreign Direct Investment

At the core of the FDI concept are investment projects that involve all of the following four elements: contributions of assets or money originating from abroad, a certain duration of the project, an element of risk, and contribution to economic development in the host country.[1]

Whether and to what extent the four elements must be fulfilled in order for an investment to qualify as FDI are context dependent and remain contested in many situations. One example is the distinction that is frequently drawn between "direct" investment and "portfolio" investment. Short-term portfolio investment would not qualify according to

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

the four criteria. Nevertheless, it is clear that such investment is covered by many treaties that protect and/or promote FDI.

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

7.2.2 Sustainable Development

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

The link between FDI and sustainable development has been subject to significant attention since the Brundtland Commission brought the concept onto the political agenda in 1987.[5] During the first period after the

[2] OECD, 'Financing for Sustainable Development', online at: www.oecd.org/dac/stats/type-aid.htm (last accessed 13 June 2023).

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

[4] The adoption of the Rio Declaration on Environment and Development and Agenda 21 by the United Nations Conference on Environment and Development (UNCED) in Rio de Janeiro, 3–14 June 1992 forms a basic starting point, which has since been supplemented by the 8 Millennium Development Goals (2000–2015) and 17 Sustainable Development Goals (2015–2030).

[5] The World Commission on Environment and Development, *Our Common Future* (Oxford: Oxford University Press, 1987), at 85–87. The Commission paid little attention

"Washington Consensus," that is, during the late 1980s and the 1990s, it was argued that a basic distinction could be drawn between (1) FDI in manufacturing and assembly, which would most likely be beneficial, and (2) FDI in natural resources and infrastructure, which would most likely be harmful.[6] In more recent years, consensus seems to emerge that the relationship between FDI and sustainable development is more complex and context dependent. UNCTAD has taken the lead in establishing principles and guidelines for countries, intergovernmental organizations, and stakeholders. A separate chapter on an "investment policy framework for sustainable development" was included in its 2012 World Investment Report (chapter IV), and further elaborated in UNCTAD's "Investment Policy Framework for Sustainable Development" (2015). Of particular interest are the 10 Core Principles for Investment Policy-Making elaborated by the UNCTAD Secretariat. Their starting point is the overarching objective to promote investment for inclusive growth and sustainable development. While these principles build on UNCTAD's decades of experience with providing investment policy advice to developing countries, countries have only endorsed them implicitly or ad hoc.

In 2015, as the deadline for fulfilling the Millennium Development Goals (MDGs) expired, the United Nations General Assembly adopted the SDGs to be achieved by 2030.[7] While the MDGs did not specifically address FDI,[8] some of the targets of the SDGs are highly relevant. Target 17.5 calls for the adoption and implementation of investment promotion regimes for least developed countries (LDCs). Moreover, other targets concern the use of foreign investment as a means to end poverty and

to the role of FDI beyond references to the objective of ensuring responsibility for FDI of transnational corporations. M. Gehring and A. Newcombe, 'An Introduction to Sustainable Development in World Investment Law', in M.-C. Cordonier Segger, M. Gehring, and A. Newcombe (eds.), *Sustainable Development in Investment Law* (Alphen aan den Rijn: Kluwer Law International, 2011), at 3–6 provides an overview of the follow-up in relevant international policy documents.

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

[7] United Nations General Assembly, 'Resolution Adopted by the General Assembly on 25 September 2015', A/RES/70/1, 21 October 2015 (without a vote), online at: www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_70_1_E.pdf (last accessed 13 June 2023). These goals build on the Millennium Development Goals which were to be reached by 2015.

[8] The World Bank, 'Millennium Development Goal (MDG) 8 and the associated targets'. None of the MDG indicators referred to FDI, online at: http://mdgs.un.org/unsd/mdg/Host.aspx?Content=Indicators/OfficialList.htm (last accessed 13 June 2023).

hunger; achieve food security and improved nutrition; promote sustainable agriculture; ensure access to affordable, reliable, sustainable, and modern energy; and reduce inequality within and among countries.[9] Among the countries identified as being of particular concern are "least developed countries, African countries, small island developing States and landlocked developing countries."[10] Particular attention should also be paid to "countries in situations of conflict and post-conflict countries."[11] While the Declaration mentions the potential role of multinational enterprises,[12] it generally pays very limited attention to their potential to contribute FDI. There is some mention of the role of FDI in indicators established to monitor the achievement of the SDGs.[13] In essence, the targets and indicators emphasize the positive role that FDI may play and do not address the potential need to limit negative effects of FDI.

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

7.2.3 The Right to Development

The Declaration on the Right to Development addresses some issues of relevance to FDI. It underlines the right of peoples to exercise "full

[9] United Nations General Assembly, 'Resolution Adopted by the General Assembly on 25 September 2015', targets 1.a, 1.b, 2.a, 7.a, 7.b, 10.b, and 17.3.

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

[11] Ibid., para. 22.

[12] Ibid., paras. 41 and 67.

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

[14] United Nations General Assembly, 'Resolution Adopted by the General Assembly on 27 July 2015', A/RES/69/313, 17 August 2015 (without a vote), online at: www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_69_313.pdf (last accessed 13 June 2023).

[15] Ibid., paras. 35 and 45–46.

sovereignty over all their natural wealth and resources" (art. 1.2) and establishes that states shall ensure "equality of opportunity for all in their access to basic resources, education, health services, food, housing, employment and the fair distribution of income" (art. 8.2).[16] These are normative expectations regarding states' regulation of the activities of foreign investors and set a framework for foreign investors' legitimate expectations.

Recent initiatives to elaborate approaches to the RtD also contain statements regarding the relationship to FDI. In 2010, the High-Level Task Force on the Implementation of the Right to Development set out criteria and indicators to implement the RtD. These emphasize the need to secure stability of investment in order to reduce the risks of domestic financial crises, to ensure that trade rules regarding performance requirements and protection of intellectual property rights do not prevent developing countries from enjoying the benefits of science and technology, and to provide for fair sharing of the burdens of development by compensating for negative impacts of development investment and policies.[17] These three elements are of particular interest to the topics discussed in this chapter. However, the criteria and indicators exposed significant disagreement among states when considered by the Working Group on the Right to Development. The Working Group has so far (including its 20th session) been unable to conclude the process to revise the criteria.[18] There is disagreement regarding the status of the criteria,

[16] United Nations General Assembly, 'Declaration on the Right to Development', A/RES/41/128, 4 December 1986 (vote: 148 in favor, 1 against, 8 abstentions), online at: https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/496/36/IMG/NR049636.pdf?OpenElement (last accessed 13 June 2023).

[17] Human Rights Council, 'Report of the High-level Task Force on the Implementation of the Right to Development on Its Sixth Session', A/HRC/15/WG.2/TF/2/Add.2, 8 March 2010, at 8–13, in particular criteria 1(b), 1(g), and 3(b), online at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/G10/118/37/PDF/G1011837.pdf?OpenElement (last accessed 13 June 2023). Relevant documents from the task force are available online at: www.ohchr.org/EN/Issues/Development/Pages/HighLevelTask Force.aspx (last accessed 13 June 2023).

[18] The issue was a main issue on the agenda of the Working Group during its annual sessions since 2010, online at: www.ohchr.org/EN/Issues/Development/Pages/WGRightToDevelopment.aspx (last accessed 13 June 2023). The stalemate of these discussions are in stark contrast to the work on indicators for SDG targets, which has been endorsed by the United Nations General Assembly, 'Resolution Adopted by the General Assembly on 6 July 2017', UNGA resolution A/RES/71/313, 6 July 2017 (without a vote) and is carried out under the auspices of the UN Statistical Commission, see online at: https://unstats.un.org/sdgs/iaeg-sdgs/ (last accessed 13 June 2023).

the relative roles of states, international institutions and private actors in taking measures to realize the RtD, and the substantive content of the criteria, including the elements mentioned earlier.

The Human Rights Council launched an alternative approach to the challenge of progressing in the implementation of the RtD in September 2018. A divided Council decided to request the Working Group to "commence the discussion to elaborate a draft legally binding instrument on the right to development through a collaborative process of engagement, including on the content and scope of the future instrument."[19] A first draft instrument set out several provisions addressing the duties of foreign investors, international institutions, and investors' home states relating to the RtD.[20]

7.2.4 Concluding Remarks

The evolving consensus among countries on goals for (sustainable) development stands in contrast to the significant disagreement among countries on how to approach the RtD. The diverging approaches to FDI may possibly be one explanatory factor for why progressing with the RtD has divided countries, while the MDGs and SDGs have gathered consensus. In light of the lack of consensus among countries on how to proceed with criteria for the RtD, countries are likely to have diverging opinions on UNCTAD's Core Principles for Investment Policy-Making. There is

[19] Human Rights Council, 'Resolution Adopted by the Human Rights Council on 27 September 2018', Human Rights Council resolution 39/9, 5 October 2018 (vote: 30 in favor [Afghanistan, Angola, Brazil, Burundi, Chile, China, Congo, Côte d'Ivoire, Cuba, Ecuador, Egypt, Ethiopia, Iraq, Kenya, Kyrgyzstan, Mongolia, Nepal, Nigeria, Pakistan, Peru, Philippines, Qatar, Rwanda, Saudi Arabia, Senegal, South Africa, Togo, Tunisia, United Arab Emirates, Venezuela]. 12 against [Australia, Belgium, Croatia, Georgia, Germany, Hungary, Slovakia, Slovenia, Spain, Switzerland, Ukraine, United Kingdom], 5 abstentions [Iceland, Japan, Mexico, Panama, Republic of Korea]), online at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/296/49/PDF/G1829649.pdf?OpenElement (last accessed 13 June 2023).

[20] Human Rights Council, 'Draft Convention on the Right to Development', A/HRC/WG.2/21/2, 17 January 2020, (the text of the draft Convention) online at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/G20/011/04/PDF/G2001104.pdf?OpenElement (last accessed 13 June 2023) and Human Rights Council, 'Draft Convention on the Right to Development, with Commentaries', A/HRC/WG.2/21/2/Add.1, (the text with commentaries), 20 January 2020, online at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/G20/014/69/PDF/G2001469.pdf?OpenElement (last accessed 13 June 2023). Relevant provisions are arts. 7, 10(a) and (b), 11(b) and (c), 12, 13(2), (3) and (4), 15(2), 19(1), 23(2), and 33.

need for further clarification of the relationship between rules and institutions involved in the rights and duties of foreign investors as well as their host and home countries. Such clarification may facilitate progress in identifying the contexts in which the relationship between the SDGs, the RtD, and FDI is synergistic or conflictual. A key question in the following is how the existing WTO agreements and investment law, both international and domestic, affect the policy space for developing countries to take measures to fulfill the RtD and achieve SDGs.[21]

7.3 The WTO and Flows of FDI

7.3.1 Investment and Trade in Services

There are multiple links between FDI and trade in goods and services. The most direct link is where FDI is a condition for trade to occur. In many service sectors, delivery is to varying degrees dependent on some form of commercial presence, in other words FDI, in the importing country. This includes services in SDG-relevant sectors such as health, education, water and sanitation, energy, and construction and engineering.

Most of the LDCs (35 of 46) are members of the WTO.[22] In general, these have undertaken few commitments in SDG-relevant services sectors. However, there is significant variation among LDCs in this regard (see Table 7.1). Some LDCs have committed to provide market access and national treatment for commercial presence in SDG-relevant sectors (see arts. XVI and XVII of GATS). A significant majority of these have accepted broad commitments, that is, not listed limitations in their schedules of commitment, for example, in terms of access to public funding or share of foreign ownership. Afghanistan, Cambodia, and Laos are examples of LDCs with extensive commitments.

[21] For a thorough discussion of policy space and associated concepts and their relationship to the RtD, see M. Kanade, *The Multilateral Trading System and Human Rights: A Governance Space Theory on Linkages* (Oxford: Routledge, 2018). On such issues as related to international investment law, see T. Broude, Y. Z. Haftel, and A. Thompson, 'The Trans-Pacific Partnership and Regulatory Space: A Comparison of Treaty Texts' (2007) 20 *Journal of International Economic Law* 397–402, and T. Broude, Y. Z. Haftel, and A. Thompson, 'Who Cares about Regulatory Space in BITs? A Comparative International Approach', in A. Roberts et al. (eds.), *Comparative International Law* (Oxford: Oxford University Press, 2018), at 535–540.

[22] World Trade Organization (WTO), 'Least-Developed Countries', online at: www.wto.org/english/thewto_e/whatis_e/tif_e/org7_e.htm (last accessed 13 June 2023).

Table 7.1 *LDCs–Commercial presence commitments in selected SDG-relevant services sectors*

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

Source: Data gathered from the WTO Services Database, http://i-tip.wto.org/services/Search.aspx (March 2019).

The commitments made by LDCs mean that they have opened the sectors to FDI and limited their ability to take restrictive policy measures controlling foreign services providers.

Other important links between trade in services and FDI, which to a larger extent overlap with the IFD Agreement, include art. VI of GATS on domestic regulations. The significant resistance among WTO members in terms of moving forward with negotiations on detailed disciplines on domestic regulations, both in the context of sector-specific and general negotiations,[23] is indicative of the sensitivity of these issues

[23] As a follow-up of art. VI:4 of GATS, the Council for Trade in Services adopted disciplines on domestic regulation for the accountancy sector on 14 December 1998 after three-and-a-half years of negotiations in the Working Party on Professional Services (see WTO doc. S/WPPS/4). In April 1999, the Council established the Working Party on Domestic Regulation with a mandate to "develop any necessary disciplines to ensure that measures relating to licensing requirements and procedures, technical standards and qualification requirements and procedures do not constitute unnecessary barriers to trade in services."

in terms of countries' policy space. Since the negotiations essentially failed in 2011, development issues have been prominent on the agenda of the Working Party on Domestic Regulations.[24]

In recent years, some members have chosen to negotiate a "Joint Initiative on Services Domestic Regulation." These negotiations have resulted in agreement among sixty-seven WTO members to amend their services schedules of commitments to include specified disciplines, as well as an invitation to other members of the WTO to join the Declaration and undertake corresponding commitments.[25] The sixty-seven members include all EU and OECD members, but no LDCs or countries classified by the World Bank as low-income economies.[26] A comparison based on the OECD FDI Regulatory Restrictiveness Index of 2020 shows that a selection of nonparticipating members has markedly higher scores for the restrictiveness of regulations within their services ("tertiary") sectors than participating members.[27] With a few

The Working Party was to "develop generally applicable disciplines", but could also "develop disciplines as appropriate for individual sectors or groups thereof (WTO doc. S/L/70 paras. 2 and 3). In 2001 the Council decided that the "aim should be to complete negotiations under Articles VI:4 . . . prior to the conclusion of negotiations on specific commitments" (WTO doc. S/L/93 para. 7). The Working Party worked its way slowly towards various versions of a draft text that was discussed from 2008 until mid-2011.

24 After a round of intense negotiations, the draft text was abandoned, and subsequent negotiations started more or less from scratch (see WTO docs. S/WPDR/14 and S/WPDR/15). Subsequent negotiations have shifted to being sector-oriented, and addressing development perspectives and transparency issues. These negotiations have not had substantive results, see the annual reports of the Working Party, online at: www.wto.org/english/tratop_e/serv_e/s_coun_e.htm (last accessed 13 June 2023).

25 See WTO, 'Declaration on the Conclusion of Negotiations on Services Domestic Regulation', WT/L/1129, 2 December 2021, online at: https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/L/1129.pdf&Open=True (last accessed 13 June 2023).

26 Beyond EU and OECD members, the WTO members participating include Albania, Argentina, Bahrain, Brazil, China, Chinese Taipei, Kazakhstan, Liechtenstein, Mauritius, Moldova, Montenegro, North Macedonia, Paraguay, Peru, Philippines, Russia, Saudi Arabia, Singapore, Thailand, Uruguay. Among these, only three countries are classified as lower middle-income economies by the World Bank: El Salvador, Nigeria, and Ukraine.

27 See OECD, 'FDI Regulatory Restrictiveness Index', online at: https://stats.oecd.org/Index.aspx?datasetcode=FDIINDEX (last accessed 13 June 2023). The Index measures statutory restrictions on foreign direct investment in twenty-two economic sectors across sixty-nine countries or regions. It covers fifty-six of the members participating in the Joint Initiative (not covered: Bahrain, El Salvador, Bulgaria, Chinese Taipei, Cyprus, Malta, Hong Kong SAR, Liechtenstein, Mauritius, Nigeria, Paraguay). Average score for these WTO members was 0.096 in 2020. Other WTO members included in the Index are the following 18 countries: Armenia, Brunei Darussalam, Cambodia, Egypt, Georgia,

noteworthy exceptions,[28] these characteristics of participating and non-participating WTO members support the hypothesis that concerns regarding regulatory space in sensitive sectors have been a main reason for the inability of WTO members to negotiate disciplines on domestic regulations within the WTO.

7.3.2 Trade-Related Investment Measures

In the field of trade in goods, the most significant rules in terms of investment can be found in the Agreement on Trade-Related Investment Measures (TRIMs). Such measures are frequently referred to as "performance requirements" or "local content requirements" and have often been used by countries as part of their development strategies.[29] The procedures to negotiate or impose performance requirements could be covered by both the TRIMs Agreement and the IFD Agreement. Article 2 of the TRIMs Agreement prohibits the use of such measures as a basis for quantitative restrictions on imports and discrimination between domestic and foreign products. The annex to the Agreement contains an illustrative list of measures that are unlawful, including requirements that enterprises buy "products of domestic origin or from any domestic source" and restrictions on enterprises' use of imported products. As an acknowledgment that developing countries might need to resort to such measures as part of their development strategies, art. 4 of the Agreement allows such members to "deviate temporarily" from art. 2. Moreover, art. 5 provides a flexible transition period for developed (two years), developing (five years with a possibility

India, Indonesia, Jordan, Kyrgyzstan, Laos, Malaysia, Mongolia, Morocco, Myanmar, South Africa, Tajikistan, Tunisia and Viet Nam. In 2020 their average score was almost the double: 0.181.

[28] Participating countries with particularly high scores include Philippines (0.409), Russia (0.351), Thailand (0.33), Saudi Arabia (0.273), China (0.254) and New Zealand (0.233). Non-participating countries with particularly low scores include Kosovo (0.002), Georgia (0.019), Armenia (0.038), Bosnia & Herzegovina (0.05), Serbia (0.067), Mongolia (0.07), Morocco (0.072) and Cambodia (0.081).

[29] The Columbia Center for Sustainable Investment has conducted a survey of the local content frameworks of a number of countries within the mining and petroleum sectors, the results of which is made available on a country-by-country basis, online at: http://ccsi.columbia.edu/work/projects/local-content-laws-contractual-provisions/ (last accessed 13 June 2023). LDCs that have been surveyed include Angola, Tanzania, Uganda and Zambia.

of extension), and least developed members (seven years with a possibility of extension).

The flexibility applies only to measures that have been notified. If we take a look at notifications submitted according to art. 5.1 (i.e., the duty to notify measures "that are not in conformity with the provisions of this Agreement"), we find that currently, 28 WTO members have notified art. 5.1 measures, of which five (Bolivia, Chile, Cuba, Cyprus, and Poland) have notified that they no longer have relevant measures in force. Another five members (Honduras, Mauritius, Slovenia, Switzerland, and Zambia) are no longer on the list. Among the only LDCs that have made such notifications, Uganda remains on the list and Zambia is no longer listed. Many of the twenty-three countries that remain listed with measures that might be incompatible with the TRIMs Agreement can hardly be regarded as developing countries, and only two countries have joined the WTO after 2000.[30] This indicates that the implementation of the TRIMs Agreement has been of limited concern to developing countries.

One proxy for the effectiveness and impact of the TRIMs Agreement is the extent to which countries bring cases to the WTO Dispute Settlement Mechanism (DSM) in which they rely on the Agreement. Less than 5 percent of the cases formally registered with the WTO DSM mention the Agreement, and the number of cases has varied significantly and might seem to follow a downward trend (see Figure 7.1).

None of the cases were initiated by or against LDCs. Nevertheless, approximately two-thirds of the cases were initiated by countries with significantly higher levels of human development[31] than the respondents, and some of these concluded that violation of the TRIMs Agreement

[30] The remaining countries include Argentina, Barbados, Colombia, Costa Rica, Dominican Republic, Ecuador, Egypt, India, Indonesia, Kazakhstan (joined the WTO in 2015), Malaysia, Mexico, Nigeria, Pakistan, Peru, Philippines, Russia (joined the WTO in 2012), Romania, South Africa, Thailand, Uganda, Uruguay and Venezuela, see 'The Annex to Report (2021) of the Committee on Trade-Related Investment Measures', G/TRIMS/11, 13 October 2021, online at: https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=289943,289946,289106,283241,283242,277794,277214,277222,277213,267031&CurrentCatalogueIdIndex=5&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True (last accessed 13 June 2023).

[31] Here, "level of human development" ranking on the Human Development Index. A separate score and ranking has been calculated for the EU based on a population-based weighing of the scores of the twenty-seven EU members (score 0.9045, ranking 25). As of 2021, see online at: https://hdr.undp.org/ (last accessed 13 June 2023).

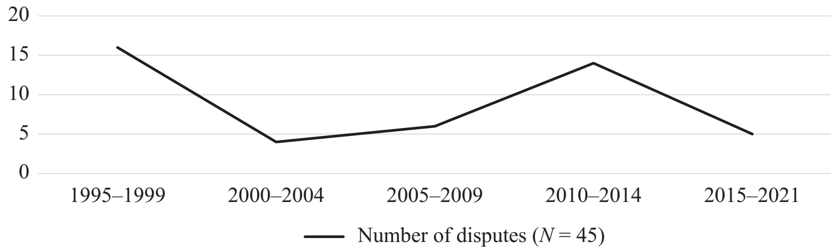

Figure 7.1 Number of cases invoking provisions of the TRIMs Agreement.
Source: Author, based on WTO, "Disputes by agreement (as cited in request for consultations)," online at: www.wto.org/english/tratop_e/dispu_e/dispu_agreements_index_e.htm?id=A25#selected_agreement (last accessed 13 June 2023).

had occurred.[32] In contrast, some cases were initiated by countries with significantly lower levels of human development than respondent countries, but none of these resulted in any finding of such violation.[33] Moreover, a very significant number of cases (more than one-third of the total) has been initiated by WTO members with well-established automotive industries against members with such industries that are less well established.[34] Finally, a significant number of recent cases contest measures concerning renewable energy and recycling of materials.[35]

In sum, the rules and practices under the TRIMs Agreement do not seem to have promoted development or developing country perspectives

[32] WT/DS64 (Japan against Indonesia); WT/DS456 (United States against India); WT/DS472 (the EU against Brail); and WT/DS497 (Japan against Brazil).

[33] WT/DS27 (Ecuador, Guatemala, Honduras, Mexico and the United States against the EU); WT/DS105 (Panama against the EU); WT/DS224 (Brazil against the United States); WT/SD443 and DS459 (Argentina against the EU); WT/DS446 (Mexico against Argentina); WT/DS452 (China against the EU); WTDS476 (Russia against the EU); WT/DS510 (India against the United States); and WT/DS563 (China against the United States).

[34] See WT/DS51, 52, 54, 55, 59, 64, 65, 81, 139, 142, 146, 175, 185, 339, 340, 342. All except one were initiated by the United States, the EU or Japan (the remaining case was initiated by Canada), and the respondents were Brazil, Canada, China, India, Indonesia and the Philippines.

[35] See WT/DS412 (Japan against Canada), WT/DS426 (the EU against Canada), WT/DS443 and DS459 (Argentina against the EU), WT/DS452 (China against the EU); WT/DS456 (United States against India), WT/DS497 (Japan against Brazil), WT/DS510 (India against the United States) and WT/DS563 (China against the United States) – all concerning renewable energy, including biodiesel, and WT/DS462 and DS463 (the EU and Japan against Russia – both concerning recycling fee for motor vehicles.

to any significant extent. While there is no definitive evidence that the TRIMs Agreement has limited the policy space of LDCs, we may nevertheless question whether practice under the Agreement indicates that it has restricted developing countries' policy space. On the one hand, the practice associated with the notification of measures inconsistent with the TRIMs Agreement indicates significant flexibility with regard to its implementation, and thus that the Agreement is unlikely to have limited countries' policy space to any significant degree. On the other hand, countries' use of the DSM indicates that the Agreement might deter or undermine efforts to promote sustainable development.

7.3.3 Trade-Related Intellectual Property Rights

The WTO has become a significant factor to consider in the context of developing countries' access to technology and know-how, a topic addressed by SDG targets 17.6 to 17.8. In particular, the Agreement on Trade-Related Intellectual Property Rights (TRIPs) contains detailed minimum requirements concerning protection of patents (arts. 27–34). Article 8 of the Agreement acknowledges the need to take measures to "protect the public interest in sectors of vital importance to their socio-economic and technological development" and to prevent the abuse of intellectual property rights in ways that "adversely affect the international transfer of technology." However, it also states that such measures have to be in compliance with the requirements of the Agreement. The initial flexibilities during the transition period admitted to LDCs (art. 66, ten years with a possibility of extension) as well as developing countries and countries transforming to a "market, free-enterprise economy" (art. 65, four years with a limited possibility of extension) have expired for most members.

Making FDI conditional on transfer of technology and providing local producers with opportunities to learn from and copy foreign investors have traditionally played important roles in countries' development strategies.[36] However, while the early years of the WTO saw a large number of disputes invoking the TRIPs Agreement, the number of such disputes seems to have

[36] See, for example, N. Kumar, 'Use and Effectiveness of Performance Requirements: What Can Be Learnt from the Experiences of Developed and Developing Countries?', In UNCTAD, *The Development Dimension of FDI: Policy and Rule-Making Perspectives* (New York: UNCTAD, 2003), at 59–78, and C. Henry and J. E. Stiglitz, 'Intellectual Property, Dissemination of Innovation and Sustainable Development' (2010) 1 *Global Policy* 237–251.

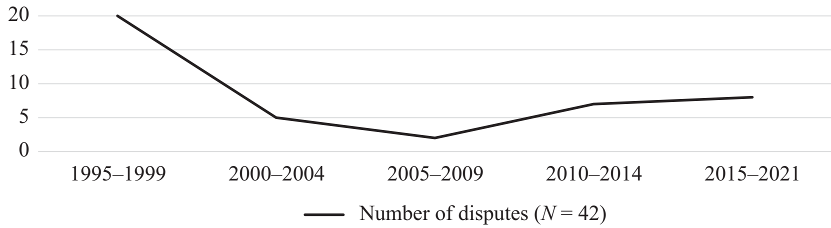

Figure 7.2 Number of cases invoking provisions of the TRIPs Agreement.
Source: Author, based on WTO, "Disputes by agreement," online at: www.wto.org/english/tratop_e/dispu_e/dispu_agreements_index_e.htm?id=A26#selected_agreement (last accessed 13 June 2023).

stabilized at a low number (see Figure 7.2) and remains at less than 5 percent of the cases brought to the WTO DSM. This, taken together with the fact that no cases have involved LDCs, may indicate that restrictions on developing countries' policy space flowing from the TRIPs Agreement have been limited in practice, but it could also be due to compliance of LDCs with their obligations under the Agreement.

While more than half of the DSM cases involve countries with similar levels of human development, two WTO members (the EU and the United States) have initiated twelve cases against countries with significantly lower levels of human development, of which a significant group of cases concerns patent protection in sensitive sectors such as pharmaceutical products and agricultural chemicals.[37] On the other hand, three main cases were initiated against WTO members with significantly higher levels of human development,[38] including against United States' patent legislation, the EU seizure of generic drugs in transit, and the Australian tobacco plain packaging legislation. But none of these cases

[37] WT/DS36 (United States against Pakistan); WT/DS50 and 79 (United States and EU against India); WT/DS46 (United States against Argentina) and WT/DS583 (the EU against Turkey). Other cases include WT/DS59 (United States against Indonesia); WT/DS196 (United States against Argentina); WT/DS199 (United States against Brazil); WT/DS362 (United States against China); WT/DS372 (the EU against China); WT/DS542 (United States against China); and WT/DS549 (the EU against China). Three of these cases resulted in findings of violation of the TRIPS Agreement, and five were settled or terminated.

[38] See WT/DS64 (Japan against Indonesia), WT/DS456 (United States against India), WT/DS472 (the EU against Brail), and WT/DS497 (Japan against Brazil).

were successful.[39] The practice of the DSM indicates that this enforcement mechanism is more likely to promote the interest of countries with high levels of human development than the interests of countries with lower levels of such development. The DSM has so far been of very limited importance from the perspective of LDCs in the context of TRIPs.

Under the TRIPs Agreement, developing countries' access to medicines has been particularly controversial. At the Ministerial Conference in Doha in 2001, WTO members agreed that the Agreement "does not and should not prevent members from taking measures to protect public health." Of particular importance are statements regarding the interpretation of art. 31 (compulsory licenses) and art. 73 (security exceptions). The Declaration states that members have "the right to grant compulsory licenses and the freedom to determine the grounds upon which such licenses are granted" and "the right to determine what constitutes a national emergency or other circumstances of extreme urgency, it being understood that public health crises . . . can represent a national emergency or other circumstances of extreme urgency."[40]

However, this decision did not address the problem that many developing countries would be unable to benefit from compulsory licenses and emergency measures due to lack of technological ability. Therefore, in 2003, the WTO General Council adopted a waiver that allowed countries to export pharmaceutical products that had been subject to compulsory licensing.[41] Continuing discussions of this issue resulted in the addition of a provision allowing the exportation of pharmaceutical products that have been subject to compulsory licensing to LDCs and other countries having notified the WTO (TRIPs

[39] WT/DS224 (Brazil against the United States: remaining in consultations); WT/DS408 and 409 (India and Brazil against the EU: remaining in consultation); and WT/DS434, 435, 441, 458 and 467 (Ukraine, Honduras, Dominican Republic, Cuba and Indonesia against Australia: no violation of the TRIPS Agreement).

[40] WTO Ministerial Council, Doha, 'Declaration on the TRIPS Agreement and Public Health', WT/MIN(01)/DEC/2, 20 November 2001, paras. 4 and 5, online at: https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=35766&Current CatalogueIdIndex=0&FullTe (last accessed 13 June 2023).

[41] Ibid., para. 6, and WTO, 'Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health', WT/L/540, 02 September 2003, online at: https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?CatalogueIdList=51809,2548,53071,70701&CurrentCatalogueIdIndex=1 (last accessed 13 June 2023) and Corr.1.

Agreement, art. 31 bis and annex).[42] The amendment was adopted in 2005 and did finally enter into force in 2017. By the end of 2021, as many as one-third of the WTO LDC members had not yet accepted the amendment.[43] Moreover, fifteen years after the adoption of the waiver, there had been only one case in which the new export opportunity had been notified – a case involving export of AIDS medicines from Canada to Rwanda.[44] The carefully circumscribed mechanism established by the waiver and made permanent through the TRIPs amendment therefore seems to be an example of extensive diplomatic efforts and negotiations resulting in reforms of very limited value to the most vulnerable countries and populations. This seems to confirm views that the procedures and conditions imposed were too cumbersome as well as predictions that the initiative would have limited effects.[45] Similar problems have emerged in the context of the lengthy and so far unsuccessful efforts to adopt a waiver for the production of COVID-19 vaccines.[46]

Other issues regarding access to and transfer of technology have received much less attention under the TRIPs Agreement. According to art. 66.2, developed countries undertake to "provide incentives to enterprises and institutions in their territories for the purpose of promoting and encouraging technology transfer to least-developed country

[42] Members other than LDCs must make a notification 'to the Council for TRIPS of its intention to use the system' (Annex para. 1(b)).

[43] This include Afghanistan, Angola, Chad, Congo, Djibouti, Guinea-Bissau, Haiti, Liberia, Mauritania, Mozambique, Solomon Islands and Yemen, see online at: www.wto.org/english/tratop_e/trips_e/amendment_e.htm (last accessed 13 June 2023).

[44] See WTO, 'Notification under Paragraph 2(A) of the Decision of 30 August 2003 on the Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health', IP/N/9/RWA/1, 19 July 2007, online at: https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=67527&CurrentCatalogueIdIndex=0&FullTextSearch= (last accessed 13 June 2023), and WTO, World Intellectual Property Organization, and World Health Organization, *Promoting Access to Medical Technologies and Innovation: Intersections between Public Health, Intellectual Property and Trade* (Geneva: WTO Secretariat, 2012), at 177–180. In addition, Bolivia made a notification regarding import of COVID-19 vaccines in May 2021 (IP/N/9/BOL/1), but this notification remains without any corresponding notification from exporting countries as of the end of 2021.

[45] M. Z. Abbas and S. Riaz, 'Compulsory Licensing and Access to Medicines: TRIPS Amendment Allows Export to Least-Developed Countries' (2017) 12 *Journal of Intellectual Property Law & Practice* 451–452.

[46] World Trade Organization, Negotiations were still ongoing as of March 2022, see 'Director-General Okonjo-Iweala Hails Breakthrough on TRIPS COVID-19 Solution', 16 March 2022, online at: www.wto.org/english/news_e/news22_e/dgno_16mar22_e.htm (last accessed 13 June 2023).

members in order to enable them to create a sound and viable technological base." As a follow-up to this provision, the Council for TRIPs decided to require developed countries to report annually on their implementation of art. 66.2.[47] However, also this initiative seems to have been unsuccessful from the perspective of LDCs. As justification for a proposal to revisit the effectiveness of art. 66.2, Cambodia made the following statement on behalf of the LDCs in 2018.

> Notwithstanding mechanisms and processes introduced in the TRIPs Council, LDCs have observed the continued lack of clarity in notifications on the nature of incentives and whether such incentives sufficiently result in technology transfer to LDCs, fostering the creation of a sound and viable technological base for least developed countries. Many notifications continue to demonstrate that incentive programs identify recipients that are not LDCs, and where LDCs are identified, incentives do not result in transfer of technology. Some developed members claim that it is difficult for governments to ensure technology transfer because technology is the subject of private contracts and rights.[48]

7.3.4 Concluding Remarks

WTO rules regarding trade in services and goods and the protection of intellectual property rights can limit the policy space of LDCs and developing countries in terms of designing measures to ensure that FDI contributes to fulfilling the RtD and achieving the SDGs. So far, there are some indications that these rules have had such effects. The longer-term and indirect effects, including "regulatory chill," are harder to trace and may be more significant.[49] So far, reform efforts to make the existing

[47] See 'Implementation of Article 66.2 of The Trips Agreement', IP/C/28, 20 February 2003, online at: https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=11737&CurrentCatalogueIdIndex=0&FullTextSearch= (last accessed 13 June 2023).

[48] See 'Proposal on the Implementation of Article 66.2 of the Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement: Communication From Cambodia on Behalf of the LDC Group', IP/C/W/640, 16 February 2018, online at: https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=243589,243337,243336,243182,243183,243179,243200,241809,240388,239456&CurrentCatalogueIdIndex=6&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True (last accessed 13 June 2023).

[49] See, with further references, T. L. Berge and A. Berger, 'Do Investor-State Dispute Settlement Cases Influence Domestic Environmental Regulation? The Role of Respondent State Bureaucratic Capacity' (2021) 12 *Journal of International Dispute*

WTO rules more conducive to sustainable development have been slow and of limited significance.

New initiatives regarding investment facilitation in the WTO should take into account the lessons learned from efforts to enhance the contribution of existing WTO rules to sustainable development, in particular the reform of the TRIPs Agreement. Moreover, the negotiation of an investment facilitation regime must avoid undermining reforms to establish synergies between the WTO rules discussed earlier and sustainable development.

7.4 Promotion of FDI through International and Domestic Investment Law

In addition to establishing protection of foreign investors and their investment, many international investment agreements (IIAs) and domestic investment laws establish rules and institutions to facilitate FDI. Some of these elements overlap with elements of the WTO IFD Agreement and others are otherwise closely related in terms of their functions or objectives. Hence, when considering the potential contribution of the WTO IFD Agreement to sustainable development, it is essential to explore how the Agreement can supplement and interact with the existing IIAs and domestic investment laws. In the following, the aim is only to establish some starting points for such an exploration by identifying the basic features of IIAs and domestic investment legislation in terms of their contribution to sustainable development.

7.4.1 International Investment Agreements

For a long period, researchers from several disciplines have been debating whether there is empirical evidence that IIAs in practice have generated increased flows of FDI. So far, studies that trace the extent to which IIAs affect flows of FDI show varying results. While evidence indicates that IIAs can lead to increased FDI flows, the extent and conditions under which they do so remain disputed. A main distinction can be drawn between studies that focus on dyadic relationships – exploring whether

Settlement 1–41; P. Milsom, R. Smith, S. Moeketsi, and H. Walls, 'Do International Trade and Investment Agreements Generate Regulatory Chill in Public Health Policymaking? A Case Study of Nutrition and Alcohol Policy in South Africa' (2021) 17 *Globalization and Health* 134–153.

IIAs influence the flow of FDI among the parties to specific treaties,[50] and studies on the impact that the signing and ratification of IIAs have for the flow of FDI into countries.[51] Studies also focus on the differences between ratified and non-ratified IIAs.[52] Studies concern the flow of FDI into developing countries generally,[53] into certain regions,[54] or into certain sectors.[55] There also exist studies of how subsequent investment treaty arbitration affects FDI.[56] To what extent and in which ways such studies control for other factors that influence FDI differ significantly,[57]

[50] P. Egger and V. Merlo, 'The Impact of Bilateral Investment Treaties on FDI Dynamics' (2007) 30 *World Economy* 1536–1549.

[51] D. L. Swenson, 'Why Do Developing Countries Sign BITs?' (2005) 12 *UC Davis Journal of International Law & Policy* 131–155;T. Büthe and H. V. Milner, 'Bilateral Investment Treaties and Foreign Direct Investment: A Political Analysis', in K. Sauvant and L. Sachs (eds.), *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows* (Oxford: Oxford University Press, 2009), at 171–224.

[52] P. Egger and M. Pfaffermayr, 'The Impact of Bilateral Investment Treaties on Foreign Direct Investment' (2004) 32 *Journal of Comparative Economics* 788–804;Y. Z. Haftel, 'Ratification Counts: US Investment Treaties and FDI Flows into Developing Countries' (2020) 17 *Review of International Political Economy* 348–377.

[53] E. Neumayer and L. Spess, 'Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing Countries?' (2005) 33 *World Development* 1567–1585; J. L. Tobin and S. Rose-Ackerman, 'When BITs Have Some Bite: The Political-Economic Environment for Bilateral Investment Treaties' (2011) 6 *The Review of International Organization* 1–32. For a literature review, see UNCTAD, *The Role of International Investment Agreements in Attracting Foreign Direct Investment to Developing Countries* (New York: UNCTAD, 2009).

[54] R. Grosse and L. J. Trevino, 'New Institutional Economics and FDI Location in Central and Eastern Europe', in K. Sauvant and L. Sachs (eds.), *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows* (Oxford: Oxford University Press, 2009), at 273–294; J. Dixon and P. A. Haslam, 'Does the Quality of Investment Protection Affect FDI Flows to Developing Countries? Evidence from Latin America' (2016) 39 *The World Economy* 1080–1108.

[55] L. Colen, D. Persyn, and A. Guariso, 'Bilateral Investment Treaties and FDI: Does the Sector Matter?' (2016) 83 *World Development* 193–206.

[56] T. Allee and C. Peinhardt, 'Contingent Credibility: The Impact of Investment Treaty Violations on Foreign Direct Investment' (2011) 65 *International Organization* 401–432.

[57] See, e.g., Z. Elkins, A. T. Guzman, and B. A. Simmons, 'Competing for Capital: The Diffusion of Bilateral Investment Treaties' (2006) 60 *International Organization* 811–846; A. Kerner, 'Why Should I Believe You? The Costs and Consequences of Bilateral Investment Treaties' (2009) 53 *International Studies Quarterly* 73–102; M. Busse, J. Königer, and P. Nunnenkamp, 'FDI Promotion through Bilateral Investment Treaties: More than a BIT?' (2010) 146 *Review of World Economics* 147–177; E. Aisbett, 'Bilateral Investment Treaties and Foreign Direct Investment: Correlation versus Causation', in K. Sauvant and L. Sachs (eds.), *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows* (Oxford: Oxford

and in the exceptional cases where replication of previous studies has been carried out, findings indicate that previous conclusions may have limited robustness.[58]

One interesting study suggests classifying FDI according to the motivations of investors, distinguishing between "four types of FDI: resource-seeking FDI, market-seeking FDI, efficiency-seeking FDI, and asset-seeking FDI."[59] Among these, resource- and efficiency-seeking FDI seem particularly relevant in the context of achieving SDGs. The study proposes to distinguish between "three main types of resource-seeking FDI: FDI seeking physical resources, FDI seeking unskilled or semi-skilled labor, and FDI to firms seeking technological capabilities, management of marketing expertise, and organizational skills."[60] These distinctions could be helpful when analyzing the potential role of IIAs in promoting FDI that contribute to achieving the SDGs, but space does not permit further elaboration here.

From an investment facilitation perspective, we shall focus on the ways in which IIAs directly promote the flow of investment by including provisions relevant to the right of establishment of foreign investors or limit countries' opportunities to restrict flows of FDI. UNCTAD's mapping of the content of IIAs indicates that approximately 14.7 percent of IIAs contain provisions that call for investment promotion activities.[61] Some IIAs also contain operational clauses that protect the rights of investors to establish in the contracting parties. According to data from UNCTAD, approximately 8.1 percent of IIAs include provisions that prohibit discrimination in the preestablishment phase, which means that

University Press, 2009), at 395–435; A. Berger et al., 'Do Trade and Investment Agreements Lead to More FDI? Accounting for Key Provisions Inside the Black Box' (2013) 10 *International Economics and Economic Policy* 247–275.

[58] J. Yackee, 'Do BITs Really Work? Revisiting the Empirical Link between Investment Treaties and Foreign Direct Investment', in K. Sauvant and L. Sachs (eds.), *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows* (Oxford: Oxford University Press, 2009), at 379–394.

[59] E. Bierman and H. Bezuidenhout, 'FDI in the Economic Transformation of the Post-Civil War Economies of Angola and Mozambique', in V. Ibokwe, N. Turner, and O. Aginam (eds.), *Foreign Direct Investment in Post Conflict Countries: Opportunities and Challenges* (London: Adonis & Abbey Publishers, 2010), at 229–268.

[60] Ibid., at 246.

[61] Data from UNCTAD's IIA Mapping Project as of end of 2021. For relevant coding, see p. 17 of the Project's Codebook, see https://investmentpolicy.unctad.org/uploaded-files/document/Mappingpercent20Projectpercent20Descriptionpercent20andpercent20Methodology.pdf. Of the 2,574 IIAs mapped, 1,900 were in force, and of these, 279 contain investment promotion clauses.

Table 7.2 *IIA relationships according to World Bank income groups*

	High-income	Upper-middle-income	Lower-middle-income	Low-income
High-income	706 (1830) *38.6%*	1009 (3599) *28.0%*	603 (2867) *21.0%*	205 (1891) *10.8%*
Upper-middle-income		282 (1711) *16.5%*	329 (2773) *11.9%*	137 (1829) *7.5%*
Lower-middle-income			126 (1081) *11.7%*	166 (1457) *11.4%*
Low-income				75 (465) *16.1%*

Source: Data regarding BITs are in essence based on UNCTAD's International Investment Agreements Navigator (ibid.), updated until the end of 2018.[62]

foreign investors enjoy the same right of establishment as do domestic investors.[63] These figures indicate that IIAs only to a limited extent operationalize investors' rights to establish in other countries.[64]

In order to further explore the potential for IIAs to facilitate FDI, we need knowledge about the extent to which countries that have fallen behind in terms of sustainable development have joined IIAs. Table 7.2

[62] Where there is overlap between agreements, IIA relationships are counted only once. All multilateral IIAs have been mapped according to the bilateral relationships they establish. There were 3,649 unique IIA relationships out of a theoretical number of 19,306 such relationships (based on the number of potential countries being 197). Each entry in the table contains the following information: number of IIA relationships, potential number of IIA relationships (within parentheses), and saturation of IIA relationships – 100 being complete saturation. World Bank Income Groups as classified in 2018. For further details, see D. Behn, O. K. Fauchald, and M. Langford, 'The International Investment Regime and Its Discontents', in D. Behn, O. Fauchald, and M. Langford (eds.), *The Legitimacy of Investment Treaty Arbitration. Empirical Perspectives* (Cambridge: Cambridge University Press, 2022), at 41–49.

[63] Ibid., at 9–10. Among the coded treaties in force (1,900), 139 of the IIAs had both national treatment (NT) clauses that cover pre-establishment. In addition, 15 IIAs had MFN clauses that cover pre-establishment, bringing the total IIAs containing relevant investor rights to 154.

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

shows that countries classified as low-income economies by the World Bank have on average low levels of participation in IIAs that provide consent to investor–state dispute settlement, ranging from a saturation level of only 7.5 percent of potential bilateral treaties with upper-middle-income economies to 16.1 percent among low-income economies. Similarly, lower-middle-income economies have on average the second-lowest level of participation in IIAs, with saturation levels ranging from 11.4 percent to 21 percent. These two groups of countries are presumably those with the highest need for incentives to attract FDI to achieve their SDGs. Against this background, it is relatively clear that the current structure of IIAs is unlikely to assist countries with the highest need for FDI to fund their achievement of SDGs.

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

7.4.2 Promotion of FDI through Investment Legislation

Given the limited participation of LDCs in IIAs, we may assume that investment legislation has a particularly important role to play in promoting investment for this group of countries. The World Bank has had a key function in this respect through its focus on national legislation and policies in its long-term program to improve the "investment climate" of developing countries. In particular, the World Bank has provided country-by-country advice through its Facility for Investment Climate Advisory Services (former Foreign Investment Advisory Service) since 1985.[65] As part of this program, the World Bank issued guidelines in 1992 and a handbook in 2010.[66] Given the lack of focus on FDI in the

[65] The World Bank Group, *Annual Review 2015: FIAS Celebrating 30 Years of Partnership* (Washington, DC: World Bank Group, 2016), online at: https://documents.worldbank.org/en/publication/documents-reports/documentdetail/283811468179662281/annual-review-2015-fias-celebrating-30-years-of-partnership (last accessed 13 June 2023) at 6. See also T. L. Berge and T. St John, 'Asymmetric Diffusion: World Bank "Best Practice" and the Spread of Arbitration in National Investment Laws' (2021) 28 *Review of International Political Economy* 584–610.

[66] I. F. Shihata, *Legal Treatment of Foreign Investment: 'The World Bank Guidelines'* (Dordrecht: Martinus Nijhoff, 1993); The World Bank Investment Climate Advisory

MDGs, it is perhaps not surprising that the 2010 handbook does not contain any references to the MDGs. However, the handbook hardly mentions the concept of sustainable development and is primarily focused on improving the investment climate from the perspective of foreign investors.

One fundamental question is why developing countries should adopt general investment legislation. In his introduction to the handbook, Joseph Battat, the former Manager of the World Bank's Investment Climate Advisory Services, answers this question by emphasizing that investment laws contribute to "the quality and characteristics of the investment climate" and "provide in one place a succinct coverage of much of the investment policy of a country and its legal underpinning, as well as a signal that the government is welcoming investment."[67]

Very few OECD countries have general investment laws; such legislation is a phenomenon mainly found in developing countries, and in particular in the LDCs (Figure 7.3).[68] Moreover, sustainable development is the least frequently mentioned objective in the investment legislation of LDCs (see Figure 7.3).

There are generally few conditions or restrictions on FDI in the investment legislation of LDCs.[69] According to UNCTAD's coding, no LDC law is classified as "FDI Screening laws" and only a few contain other conditions or restrictions on investment (see Figure 7.4).

In recent years, as exemplified by its data collection and work on investment policies and sustainable development, UNCTAD has focused more extensively on domestic investment legislation. UNCTAD has also provided country-by-country advice, *inter alia*, through its Investment Policy Review program established in 1999.[70] To date, 20 LDCs have

Services, World Bank Group, *Investment Law Reform: A Handbook for Development Practitioners* (Washington, DC: World Bank, 2010).

67 The World Bank Investment Climate Advisory Services, World Bank Group, *Investment Law Reform*, at ix.

68 According to UNCTAD's Investment Laws Navigator (online at: https://investmentpolicyhub.unctad.org/InvestmentLaws (last accessed 13 June 2023), which provides information on investment laws of 109 countries (as of March 2019), only 6 of 36 OECD countries have general investment laws (Chile, Iceland, Lithuania, Mexico, Spain and Turkey), and 37 of 47 LDCs have such legislation.

69 None of the 42 LDC investment laws coded by UNCTAD is classified as "FDI Screening laws", ibid.

70 See UNCTAD, *The Investment Policy Reviews: Shaping Investment Policies around the World* (Geneva: UNCTAD, 2012).

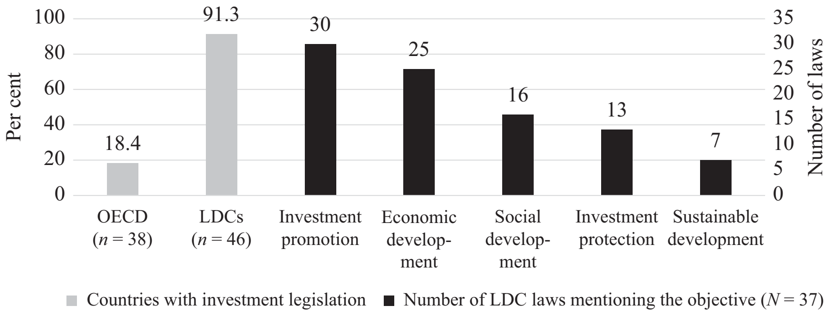

Figure 7.3 Frequency of investment legislation within OECD and LDCs and stated objectives in LDCs investment law.

Note: UNCTAD distinguishes between "investment laws" and "FDI Screening laws." The legislation of 120 countries is classified as "investment laws," in 22 countries it is classified as "FDI Screening laws," and in 7 it is classified as both. These numbers include EU Regulation 2019/452 of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union (counted as one).

Source: Author, based on UNCTAD's Investment Laws Navigator, online at: https://investmentpolicy.unctad.org/investment-laws (last accessed 13 June 2023), which provides coding investment-related legislation of 149 countries (as of January 2022).

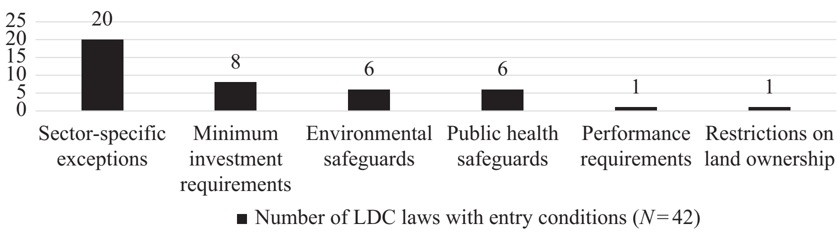

Figure 7.4 Entry conditions for FDI in LDC laws.

Source: Author, based on UNCTAD's Investment Laws Navigator, online at: https://investmentpolicy.unctad.org/investment-laws (last accessed 13 June 2023).

gone through the review process.[71] However, these data do not indicate that the review process has had a significant impact on the incidence of sustainable development-related clauses in the legislation of LDCs or low-income countries.

[71] See overview of countries covered to date, online at: https://unctad.org/en/Pages/DIAE/Investmentpercent20Policypercent20Reviews/Investment-Policy-Reviews.aspx (last accessed 13 June 2023).

7.4.3 Concluding Remarks

When considering the relative importance of IIAs and investment laws for the role of FDI as a potential contributor to sustainable development, these findings show that investment laws are by far the most important. IIAs have had limited importance so far, in particular for LDCs and low-income economies, while investment laws are likely to remain key instruments for increased contribution of FDI to sustainable development. However, these findings indicate that such countries have used investment laws to promote sustainable development only to a limited degree. One key question is therefore whether initiatives to facilitate investment within the WTO are likely to enhance or undermine countries', in particular LDCs', ability to use investment laws more actively to promote sustainable development.

7.5 Investment Facilitation for Sustainable Development

7.5.1 Promotion of FDI – The Relative Roles of Host and Home Countries

According to SDG target 17.5, countries should "adopt and implement investment promotion regimes for least developed countries." The indicator for this target is the number of countries that have adopted investment promotion regimes, and UNCTAD has the task of monitoring relevant actors' efforts to achieve the target.[72] In its 2014 report on investment in SDGs, UNCTAD estimated that given the current level of investment in SDG-relevant sectors, "developing countries alone face an annual gap of US$2.5 trillion" and that the "role of private sector investment will be indispensable" to fill the gap.[73]

However, when we look closer at the specific SDG targets associated with the funding of SDG-relevant sectors, we find that the focus of their related indicators is on official development assistance and that they pay limited attention to the role of FDI. Only three indicators refer directly to FDI.[74]

[72] See Work Plan for Tier III Indicators, online at: https://unstats.un.org/sdgs/tierIII-indicators/ and https://unstats.un.org/sdgs/tierIII-indicators/files/Tier3–17-05-01.pdf (last accessed 13 June 2023).

[73] UNCTAD, *World Investment Report 2014. Investing in the SDGs: An Action Plan* (New York: UNCTAD, 2014), at xi.

[74] United Nations General Assembly, 'Resolution Adopted by the General Assembly on 6 July 2017', UNGA resolution A/RES/71/313, 6 July 2017, online at: https://ggim.un.org/documents/a_res_71_313.pdf (last accessed 13 June 2023) as amended through E/CN.3/

Moreover, only one addresses the role of investors' home countries; indicator 17.5.1 maps the number of countries that adopt and implement investment promotion regimes for developing countries, including the least developed countries. However, rather than focusing on the extent to which developed countries promote investment into developing countries' SDG-relevant sectors, UNCTAD initially focused on the extent to which LDCs establish mechanisms to attract FDI. For example, in 2016, UNCTAD noted that 81 percent of LDCs had established an investment facilitation agency.[75] Subsequently, UNCTAD has paid some attention to instruments for promoting outward investment into other countries, defined as follows:

> . . . investment guarantees, financial or fiscal support for outward investors as well as the conclusion of international investment agreements between the home and the host country of the investor. Besides these legal instruments, countries often also provide information and other advisory services for their outward investors.[76]

As of the end of 2020, UNCTAD concluded, "Promotion tools targeted specifically at supporting investment in LDCs could not be identified,

2021/2 (indicators referring to FDI highlighted): indicators 2.a.2 (total official flows (official development assistance plus other official flows) to the agriculture sector), 3.b.2 (total net official development assistance to medical research and basic health sectors), 4. b.1 (volume of official development assistance flows for scholarships by sector and type of study), 6.a.1 (amount of water- and sanitation-related official development assistance that is part of a government-coordinated spending plan), 9.a.1 (total official international support (official development assistance plus other official flows) to infrastructure), 10.b.1 (total resource flows for development, by recipient and donor countries and type of flow (e.g. official development assistance, foreign direct investment and other flows)), 15.a.1 and b.1 ((a) official development assistance on conservation and sustainable use of biodiversity; and (b) revenue generated and finance mobilized from biodiversity-relevant economic instruments), 17.2.1 (net official development assistance, total and to least developed countries, as a proportion of the Organisation for Economic Co-operation and Development (OECD) Development Assistance Committee donors' gross national income (GNI)), 17.3.1 (foreign direct investment, official development assistance and South-South cooperation as a proportion of gross national income), and 17.5.1 (number of countries that adopt and implement investment promotion regimes for developing countries, including the least developed countries).

[75] UNCTAD, *Development and Globalization: Facts and Figures* (Geneva: United Nations Conference on Trade and Development, 2016), at 165–166, online at: https://stats.unctad.org/dgff2016/dgff2016.pdf (last accessed 13 June 2023). UNCTAD identifies "four broad categories: investment facilitation; 'investment incentives'; special economic zones (SEZ) and other."

[76] 'SDG Indicator Metadata', Indicator 17.5.1, at 2, http://unstats.un.org/sdgs/metadata/files/Metadata-17–05-01.pdf (last accessed 13 December 2022).

nevertheless a limited number of countries promote outward investment in selected developing or transition economies." It also observed,

> A complete direct measure of SDG indicator 17.5.1 is not yet available. Instead, in addition to the data presented above, investment promotion regimes put in place by LDCs themselves, or other outward investment promotion measures directed to LDCs, can be examined. LDCs' own investment promotion regimes play an important role in attracting FDI.[77]

The approaches chosen when implementing the SDGs illustrate a significant dilemma regarding investment in SDG-relevant sectors. On the one hand, developing countries in general and LDCs in particular have very large funding gaps in these sectors, and FDI could contribute significantly to fill the gaps. On the other hand, most SDG-relevant sectors are sensitive in the sense that public authorities need to ensure fair and effective distribution of benefits. Consequently, public authorities need to retain significant flexibility to adopt relevant policy measures within such sectors. The dilemma emerges due to the emphasis within the WTO as well as within domestic and international investment law on host country measures to attract FDI into these sectors. Due to lack of funding, the main way in which these LDCs and many other developing countries can attract such FDI is by offering favorable conditions to investors, including high return on the investment and low political risk. The latter, which host countries can achieve through investment treaties and legislation,[78] limits public authorities' ability to take policy measures if they experience negative consequences or nonfulfillment of expected benefits.[79]

[77] UNCTAD, 'SDG Pulse 2021', at 104 and 108, online at: https://unctad.org/webflyer/sdg-pulse-2021 (last accessed 13 June 2023).

[78] See, e.g., T. Betz and A. Kerner, 'The Influence of Interest: Real US Interest Rates and Bilateral Investment Treaties' (2016) 11 *The Review of International Organizations* 419–448.

[79] The trade-off between international commitments and loss of policy space was acknowledged in 'Resolution Adopted by the General Assembly on 22 September 2010', UNGA resolution A/65/RES/1, 22 September 2010 (without a vote), para. 37, online at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/N10/512/60/PDF/N1051260.pdf?OpenElement (last accessed 13 June 2023). On the evolving view on the benefits of such commitments in UNGA resolutions, see H. M. Haugen, 'Trade and Investment Agreements. What Role for Economic, Social, and Cultural Rights in International Economic Law?', in E. Riedel, G. Giacca, and C. Golay (eds.), *Economic, Social, and Cultural Rights in International Law* (Oxford: Oxford University Press, 2014), at 234–236.

This dilemma is also reflected in UNCTAD's Core Principles for Investment Policy-Making. On the one hand, principle 5 states that host countries have "the sovereign right to establish entry . . . conditions for foreign investment, subject to international commitments, in the interest of the public good and to minimize potential negative effects." Principle 8 adds, "investment promotion and facilitation should be aligned with sustainable development goals and designed to minimize the risk of harmful competition for investment."[80] On the other hand, principles 6 and 10 state, "In line with each country's development strategy, investment policy should establish open, stable and predictable entry conditions for investment" and "[c]ollective efforts should also be made to avoid investment protectionism."

So far, the WTO, IIAs, and investment legislation have focused on improving host countries' ability to attract FDI. In recent years in particular, UNCTAD has paid some attention to the contribution of FDI to SDGs. The role of investors' home countries in strengthening their investors' contribution to SDGs in relevant host countries has in essence been absent in these instruments. Nevertheless, some relevant elements in this regard do exist, including examples that IIAs and investment legislation refer to investors' responsibility for human and environmental harm associated with their investment, and provisions that make investor privileges and investment protection dependent on compliance with SDG-related standards.

7.5.2 The WTO IFD Agreement – Contributing to Sustainable Development?

The aforesaid analyses show that existing international rules, policy documents, and institutions for promoting FDI into SDG-relevant sectors rely heavily on limiting developing countries' policy space. When considering whether investment facilitation initiatives in the WTO contribute to sustainable development, we shall therefore distinguish according to whether such initiatives (1) focus on measures to be taken by host countries, (2) focus on measures to be taken by home countries, or (3) are neutral in the sense that measures involve both host and home countries. The underlying hypotheses are as follows: (1) If the

[80] UNCTAD, *Investment Policy Framework for Sustainable Development* (Geneva: UNCTAD, 2015), at 27 ff, online at: https://unctad.org/system/files/official-document/diaepcb2015d5_en.pdf (last accessed 13 June 2023).

WTO IFD Agreement essentially reinforces the existing emphasis on limiting the policy space of developing countries, it is likely to undermine developing countries' achievement of the SDGs. (2) If the WTO IFD Agreement essentially provides incentives to home countries to promote investment into SDG-relevant sectors, it is likely to contribute to developing countries' achievement of SDGs.

Based on publicly available information about the status of the negotiations at the end of 2021,[81] the negotiations of the IFD Agreement contained three sections that concern measures to be taken by host countries, that is, section II on transparency of investment measures, section III on streamlining and speeding up administrative procedures, and section IV, *inter alia*, on domestic regulatory coherence. Some of these elements are potentially sensitive from a policy space perspective. On the one hand, increased transparency of investment measures may improve FDI's contribution to SDGs. On the other hand, creating single information portals may incentivize host countries to oversimplify procedures that need to take into account complex causalities and indirect effects associated with long-term investment projects, and thus undermine achievement of SDGs. Similarly, domestic regulatory coherence is an objective to which most would subscribe, but if such coherence is prioritized over the need to find workable solutions to complex social or environmental challenges, the pursuit of coherence may negatively affect the long-term fulfillment of SDGs. From a sustainable development perspective, the call for streamlining of administrative procedures is potentially the most restrictive proposal in terms of its effect on host countries' policy space. Such streamlining is likely to reduce the reliance of public authorities on thorough impact assessments and public scrutiny of investment projects when issuing permits to investors. These elements of the IFD Agreement therefore risk affecting host countries' attainment of SDGs negatively. Negotiations on these issues should therefore consider how to mitigate or reduce such risks.

Section IV of the IFD Agreement also contains a provision on "home state obligations" based on a proposal "aimed at recognizing the role of home States in facilitating outward sustainable investment, by encouraging members to adopt or maintain, and make publicly available, appropriate measures to facilitate outward investment in areas such as investment

[81] The following text is based on the information provided in WTO, Investment Facilitation for Development in the WTO, Fact sheet November 2021, as well as information contained in available summaries of discussion.

guarantees, insurance, investor support services and fiscal measures." The discussions of this proposal was met with arguments that it was outside the scope of the Agreement since its focus should be on "inward investment" and that "the adoption of measures to facilitate outward investment should be at Members' discretion."[82] This seems to be a divisive issue among the members and unlikely to generate significant home country duties.

Section VI of the draft, under the heading "sustainable investment," includes measures to be taken by home countries regarding responsible business conduct and corruption. The proposed provision regarding responsible business conduct addresses "the issue of how governments could encourage investors to voluntarily incorporate RBC standards."[83] As such, it would be of limited added value besides already existing commitments to promote such standards.[84] The OECD Guidelines for Multinational Enterprises and associated practice show that investors' home states can play a very important role in preventing corporate practices that undermine achievement of SDGs in host countries. According to the Guidelines, home countries undertake to "encourage" their enterprises "to observe the Guidelines wherever they operate, while taking into account the particular circumstances of each host country."[85]A review of the 518 cases initiated before National Contact Points during the period from 2000 to the end of 2021 shows that 87 cases (16.8 percent) involve eighteen LDCs and that more than a third of the cases concerns one host country – the Democratic Republic of Congo.[86] The mining sector is by far the most important sector (30), followed by manufacturing (17) and wholesale and retail sale (13). The IFD Agreement should build on the practice of the OECD.

[82] Summary of the negotiation meetings September 7–8 and October 4–5, 2021 (WTO docs. INF/IFD/R/26 and 27), para. 5.1.

[83] WTO, 'WTO Structured Discussions on Investment Facilitation for Development: Negotiating Meeting Held on 12 and 13 July 2021: Summary of Discussions by the Coordinator', INF/IFD/R/25, 15 October 2021, para. 3.1, online at: https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/INF/IFD/R25.pdf&Open=True (last accessed 13 June 2023).

[84] In particular, the UN Guiding Principles on Business and Human Rights and the OECD Guidelines on Multinational Enterprises.

[85] OECD Investment Committee, *Amendment of the Decision of the Council on the OECD Guidelines for Multinational Enterprises* (Paris: OECD Publishing, 2011), section II, para. 4, online at: www.oecd.org/daf/inv/mne/48004323.pdf (last accessed 13 June 2023). See also Procedural Guidance, section I.C, para. 3(c).

[86] See OECD, Database of specific instances, online at: http://mneguidelines.oecd.org/database/ (last accessed 13 June 2023).

Measures relating to corruption can be particularly important when taken by home countries in cases where host countries have limited ability to enforce strict standards vis-à-vis foreign investors or to prosecute corruption. Widespread corruption associated with FDI has the potential of significantly undermining developing countries' achievement of SDGs (SDG 16). As shown in Figure 7.5, it is clear that while LDCs suffer from high levels of corruption, the main home countries (here illustrated by OECD members) have correspondingly low levels of corruption. Political corruption increased within LDCs from 1970 until 1994, stayed very high for almost two decades, and has been on a downward trend since 2012. Corruption in OECD countries has been on a downward trend during the whole period.

The UN Convention against Corruption (2003) has almost universal adherence.[87] It sets out rules of particular interest to FDI regarding bribery of foreign officials (art. 16), liability of legal persons (art. 26), extent of national jurisdiction (art. 42), international cooperation during prosecution of crimes (part IV), and recovery of assets that have been lost due to corruption (part V). In this context, it should be noted that the UN General Assembly has identified the rules on asset recovery as particularly important in relation to the RtD.[88] This is a recognition that foreign investors' home countries have a duty to ensure that benefits achieved by their investors in other countries through corruption or bribery are returned to such countries. Such a duty is of particular importance in relation to those countries that have limited means to combat corruption.

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

> Each Party shall take such measures as may be necessary to establish that it is a criminal offense under its law for any person intentionally to offer,

[87] As of March 2019, the Convention has 186 parties. Non-parties include Andorra, Barbados, Eritrea, Monaco, North Korea, Saint Kitts and Nevis, Saint Vincent and the Grenadines, San Marino, Somalia, Suriname, Syria and Tonga.

[88] United Nations General Assembly, 'Resolution Adopted by the United Nations General Assembly on 19 December 2017', A/RES/72/167, 18 January 2018, para. 41, online at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/N17/455/66/PDF/N1745566.pdf?OpenElement (last accessed 13 June 2023).

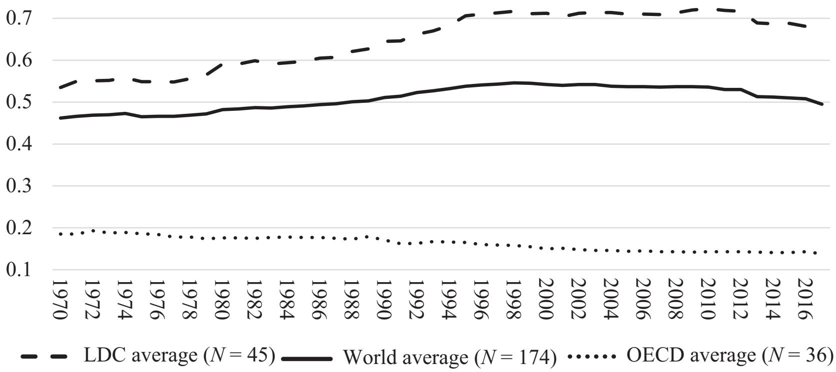

Figure 7.5 Political corruption, 1970–2017.
Note: 'Section 4.0.19: The corruption index includes measures of six distinct types of corruption that cover both different areas and levels of the polity realm, distinguishing between executive, legislative, and judicial corruption', V-Dem Codebook V8. See also K. M. McMann et al., "Strategies of Validation: Assessing the Varieties of Democracy Corruption Data," 23 V-Dem Working Paper Series 23 (2016).
Source: Author, based on V-Dem data.

> promise, or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business.

With important reservations, this duty extends to "legal persons" (art. 2). Under this Convention, data are collected on the extent to which the parties (all OECD countries and eight other countries) prosecute cases of bribery of foreign public officials. By the end of 2020, 16 of 44 parties to the Convention had not reported any relevant cases. Germany (360) and the United States (278) alone had prosecuted almost 70 percent of the 684 individuals and 245 legal persons that reportedly had received criminal sanctions for foreign bribery.[89] Moreover, while Germany and the United States reported very few acquittals (only 6), Austria, Belgium, and Finland reported far more acquittals than sanctions.[90] These are

[89] OECD Working Group on Bribery, '2020 Enforcement of the Anti-Bribery Convention', 23 December 2021, at 2–5, online at: www.oecd.org/daf/anti-bribery/oecd-anti-bribery-convention-enforcement-data-2021.pdf (last accessed 13 June 2023).

[90] Ibid., Austria sanctioned 7 and acquitted 15, Belgium sanctioned 10 and acquitted 21, and Finland sanctioned none and acquitted 22.

clear signs that the implementation of the Convention varies significantly among parties, despite the fact that it has been in force for more than two decades.

While there are signs that corruption in LDCs is on a downward trend, the differences in the level of corruption between LDCs and OECD members as well as between LDCs and the world average have remained significantly higher since the end of the 1990s than during the previous period. This illustrates the ability and the need for investors' home countries to take measures to control their investors. Against this background, there should be significant opportunities for the IFD Agreement to support and complement the UN and OECD conventions. However, negotiations so far indicate that such an outcome is unlikely.[91]

7.6 Concluding Remarks

International rules governing trade and investment for the promotion of FDI do not address the responsibility of investors' home countries to ensure that outward FDI contributes to fulfill the RtD and achieve SDGs in host countries. Moreover, international trade and investment rules limit host countries' policy space, including the policy space needed to fulfill the RtD and achieve SDGs.

The status of the Doha Round of multilateral trade negotiations indicates that WTO reforms in the context of TRIMs, TRIPs, or GATS are unlikely to provide any significant contribution to improve the contribution of FDI to SDGs. Negotiations in UNCITRAL[92] and UNCTAD's Investment Policy Framework for Sustainable Development (2015) might lead to reforms of international investment law that improve its contribution to sustainable development. However, the UNCITRAL reform process focuses on procedural aspects and is unlikely to lead to significant reforms of substantive provisions in IIAs. Moreover, LDCs remain marginalized in international investment law and are unlikely to benefit significantly from reforms in the short term.

[91] See WTO, 'WTO Structured Discussions on Investment Facilitation for Development Negotiating Meeting Held on 2 and 3 November 2021: Summary of Discussions by the Coordinator', INF/IFD/R/28, 10 December 2021, para. 2.2, online at: https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=279429&CurrentCatalogueIdIndex=0&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True (last accessed 13 June 2023).

[92] See United Nations Commission on International Trade Law, online at: www.uncitral.org/uncitral/en/commission/working_groups/3Investor_State.html (last accessed 13 June 2023).

Investment legislation is widespread among LDCs and is therefore likely to have a significant impact on host countries' policy space. Countries have significant freedom to amend their investment legislation, and reforms may therefore more effectively increase the policy space needed to achieve SDGs. The lack of focus on issues concerning SDGs in such legislation so far indicates that reform initiatives are available. The implementation of UNCTAD's Investment Policy Framework for Sustainable Investment is currently the most important initiative in this regard, but it seems to have had limited results so far. Recent changes in the sources and destinations of FDI underline the importance of this issue. One such change is the increasing use of unilateral and multilateral sanctions against investors and investment. Another is the emergence of new countries as major sources of FDI, in particular for investment into LDCs. Yet another is the increasing role of a broad variety of institutional investors, in particular sovereign wealth funds. Significant changes in FDI actors, stocks, and flows represent both challenges and opportunities for reforms of national regulatory regimes.

While the WTO IFD Agreement could have the potential to contribute to promote sustainable FDI, the trajectory of negotiations follows the well-trodden path of measures to be taken by host countries toward inbound FDI. This trajectory is likely to limit the policy space of host countries and thereby undermine their ability to take effective measures to achieve SDGs. The IFD Agreement seems to be heading toward limited support among developing countries. It would thereby follow the path of the Joint Initiative on Services Domestic Regulation and the amendment of the TRIPs Agreement to facilitate access to medicines. It would also expose the inability of WTO members to agree on reforms to fulfill the aspirations regarding sustainable development and LDCs as announced in the preamble of the WTO Agreement.