

Sustainable Development in Swiss International Investment Agreements

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This article outlines the sustainable development provisions (SDPs) found in international investment agreements (IIAs) in general, as well as explicitly concerning environment and labour provisions. In turn, we examine in detail Swiss IIAs and their sustainable development provisions, both as a single country, as well as part of the European Free Trade Association (EFTA), and compare them with the inclusion of these provisions in IIAs at a worldwide level. Considering that Switzerland is one of the leading countries in the negotiation and conclusion of IIAs, and simultaneously, it has made a strong public commitment to promote sustainable development, in the conclusion, we propose some recommendations for future negotiations or renegotiations of Swiss IIAs in order to include more sustainable developments provisions.

Keywords: sustainable development – environmental standards – labour standards – Swiss investment treaties – EFTA

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I. Introduction

A substantial investment gap exists to reach the Sustainable Development Goals (SDGs).¹ According to UNCTAD, to meet the SDGs by 2030, a total annual investment between \$3.3 trillion and \$4.5 trillion in relevant sectors in developing countries is needed.² Some estimate a yearly financing gap of around \$2.5 trillion between current funding and what is required to achieve SDGs in those countries.³

Foreign direct investment (FDI) can play an essential role in building and strengthening productive capacity and export growth, including developmental ob-

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1 United Nations General Assembly, «Transforming Our World: The 2030 Agenda for Sustainable Development. A/RES/70/1», <<https://sdgs.un.org/2030agenda>> accessed 24 February 2021.

2 UNCTAD, *World Investment Report 2014. Investing in SDGs: An Action Plan* (United Nations 2014) 140, <http://unctad.org/en/PublicationsLibrary/wir2014_en.pdf> accessed 2 February 2021.

3 DJENEBA DOUMBIA & MORTEN LYKKE LAURIDSEN, «Closing the SDG Financing Gap-Trends and Data», 73 EMCompass – International Finance Corporation (2019), 1–2.

jectives such as technology and skills transfer, employment generation, higher wages, and poverty eradication.⁴ Given the substantial investment gap in reaching the SDGs, it would be highly desirable if FDI flows would rise considerably in key areas critical for achieving the SDGs, particularly to developing countries, least developed countries (LDCs), and Landlocked Developing Countries (LLDCs).

However, the need for FDI does not mean that there is consensus on promoting, facilitating, or protecting foreign investment or if international instruments are fit for that purpose. Instead of a multilateral investment agreement, today, we have a network of more than three thousand international investment agreements (IIAs), including bilateral investment treaties (BITs) and other treaties with investment provisions (TIPs), primarily preferential trade agreements (PTAs) with investment chapters. In recent years, these treaties have been heavily contested, concerning the protection they provide to foreign investors, mainly through the mechanism of investor-state dispute settlement (ISDS).⁵ The evidence on whether aggregate FDI flows have increased due to IIAs remains inconclusive. While some find no clear or a limited link between treaty protections and investment, other research has focused on the conditions under which treaties may influence investment flows positively.⁶ At the same time, investment disputes touching on developing issues seem to be on the rise. For example, over the past few years, disputes have surged as some States engaged in the energy transition, including the phasing-out of nuclear and coal-fired power plants, the revocation or change of incentives regimes for renewable energies, and bans on oil, gas, and shale-gas projects.⁷

4 United Nations Committee for Development Policy (CDP), *Report on the Eighteenth Session (14–18 March 2016). Economic and Social Council Official Records, 2016. Supplement No. 13 E/2016/33* (United Nations 2016) 9, 14, <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/N16/096/70/PDF/N1609670.pdf?OpenElement>> accessed 20 February 2021.

5 See among many others: MICHAEL WAIBEL and others (eds.), *The Backlash Against Investment Arbitration: Perceptions and Reality*, Austin 2010; UNCTAD (ed.), *Reforming International Investment Governance* (United Nations 2015); UNCITRAL, «Working Group III: Investor-State Dispute Settlement Reform» (2021), <https://uncitral.un.org/en/working_groups/3/investor-state> accessed 2 February 2021.

6 JONATHAN BONNITCHA, LAUGE N SKOVGAARD POULSEN & MICHAEL WAIBEL, *The Political Economy of the Investment Treaty Regime*, Oxford 2017; JOACHIM POHL, «Societal Benefits and Costs of International Investment Agreements» [2018] OECD Working Papers on International Investment, 2018/01, <http://www.oecd-ilibrary.org/finance-and-investment/societal-benefits-and-costs-of-international-investment-agreements_e5f85c3d-en> accessed 27 January 2021; UNCTAD, «The Impact of International Investment Agreements on Foreign Direct Investment: An Overview of Empirical Studies 1998–2014.», [2014] IIA Issues Note <<http://investmentpolicyhub.unctad.org/Upload/Documents/unctadweb-diae-pcb-2014-Sep%2024.pdf>> accessed 2 February 2021; CHRISTIAN BELLAK, «Economic Impact of Investment Agreements», 200 Department of Economics Working Paper Series. WU Vienna University of Economics and Business (2015), Vienna, <<http://www.wu.ac.at/economics/forschung/wp/>> accessed 14 February 2021.

7 MAGALI GARIN RESPAUT, «Environmental Issues in ISD», *Jus Mundi*, 22 September 2020, <<https://jusmundi.com/en/document/wiki/en-environmental-issues-in-isd>> accessed 23 February 2021.

In that context, some voices have called for a reform and an alignment of IIAs with the SDGs,⁸ to include in these agreements more sustainable and balanced commitments,⁹ or considering the inclusion of labour rights and environmental protection commitments.¹⁰ Certain institutions, like the International Institute for Sustainable Development (IISD), the United Nations Conference on Trade and Development (UNCTAD), and the International Institute for Environment and Development (IIED), have developed models¹¹ or guidelines¹² in this regard.

For some, the object and purpose of investment treaties have changed from investment protection for economic prosperity to investment protection for sustainable development.¹³ Some Model BITs like the United States (US) Model BIT of 2012 and the Dutch Model BIT of 2018 now include sustainable development provisions.¹⁴ In recent years, most IIAs express reference to sustainable development, environment, labour, corporate social responsibility, or human rights in the preamble or the substantive provisions. However, the inclusion of such language is still rare if we consider the overall stock of IIAs.¹⁵

Switzerland is one of the most important actors in investment treaty-making. According to UNCTAD, it ranks after Germany and China as the third country

- 8 LISE JOHNSON, LISA SACHS & NATHAN LOBEL, «Aligning International Investment Agreements with the Sustainable Development Goals», 58 *Columbia Journal of Transnational Law* (2020), <<https://www.ssrn.com/abstract=3452070>> accessed 23 February 2021; BHUMIKA MUCHHALA, «International Investment Agreements and Industrialization: Realizing the Right to Development and the Sustainable Development Goals», Human Rights Council Working Group on the Right to Development Nineteenth session 2018, A/HRC/WG.2/19/CRP.5.
- 9 NATHALIE BERNASCONI and others, «Investment Treaties and Why They Matter to Sustainable Development: Questions and Answers», International Institute for Sustainable Development 2012, <https://www.iisd.org/system/files/publications/investment_treaties_why_they_matter_sd.pdf> accessed 23 February 2021.
- 10 J. ANTHONY VANDUZER, *Sustainable Development Provisions in International Trade Treaties: What Lessons for International Investment Agreements?*, Oxford 2016, <<https://oxford.universitypressscholarship.com/view/10.1093/acprof:oso/9780198738428.001.0001/acprof-9780198738428-chapter-8>> accessed 23 February 2021.
- 11 International Institute for Sustainable Development and others, «IISD Model International Agreement on Investment for Sustainable Development» <<http://www.iisd.org>>.
- 12 UNCTAD, *Investment Policy Framework for Sustainable Development (IPFSD) 2015*, <[http://unctad.org/en/Pages/DIAE/International%20Investment%20Agreements%20\(IIA\)/IIA-IPFSD.aspx](http://unctad.org/en/Pages/DIAE/International%20Investment%20Agreements%20(IIA)/IIA-IPFSD.aspx)> accessed 2 February 2021; LORENZO COTULA, *Foreign Investment, Law and Sustainable Development: A Handbook on Agriculture and Extractive Industries*, International Institute for Environment and Development, 2nd ed., London 2016.
- 13 FEDERICO ORTINO, «Investment Treaties, Sustainable Development and Reasonableness Review: A Case Against Strict Proportionality Balancing International Law and Practice», 30 *Leiden Journal of International Law* (2017), 71–91, at 75–83.
- 14 MANJIAO CHU, «Sustainable Development Provisions in Investment Treaties», (UNESCAP – ART-Net 2018) 15 <<https://www.unescap.org/sites/default/files/Sustainable%20Development%20Provisions%20in%20Investment%20Treaties.pdf>> accessed 21 February 2021.
- 15 ORTINO, *supra* n. 13, at 81.

with more IIAs concluded.¹⁶ Switzerland has signed 163 IIAs, with a total of 112 BITs and 51 TIPs, and the large majority of them (149) have been concluded with developing economies or economies in transition.¹⁷ One hundred forty-nine of these agreements are currently in force. It is thus, relevant to know where Switzerland stands concerning the inclusion of sustainable development provisions in its investment agreements.

This article is structured as follows. After this introduction, we outline in more detail the sustainable development provisions found in IIAs in general, as well as concerning environment and labour provisions. In a corresponding sub-section, we examine in detail Swiss IIAs and their sustainable development provisions. In the conclusions, we propose some recommendations for future negotiations or renegotiations of these agreements.

II. Sustainable Development Provisions on Investment Treaties

Some previous works have already mapped sustainable development provisions (SDPs) in IIAs. In 2014, based on a sample comprising 70% of all IIAs, the Organisation for Economic Co-operation and Development (OECD) estimated that only 12% contained a sustainable development-related reference.¹⁸ A report made for the United Nations Economic and Social Commission for Asia and the Pacific (UNESCAP) analysed and compared SDPs in a selected sample of 20 Model IIAs and 340 BITs of eighteen Asia-Pacific LDCs and LLDCs.¹⁹ UNCTAD's mapping of 2575 IIAs includes health and environment provisions, labour standards, and corporate social responsibility, among other topics.²⁰

Sustainable development is a broad, evolutive and multi-faceted concept.²¹ If we just consider the SDGs, we would have to examine 17 different goals and 169 targets.²² For that reason, in this section, we will take a more restrictive concept of sus-

16 UNCTAD, «International Investment Agreements Navigator», Investment Policy Hub, February 2021, <<https://investmentpolicy.unctad.org/international-investment-agreements>> accessed 23 February 2021.

17 For this purpose we follow the classification at *World Economic Situation and Prospects 2020*, United Nations 2020, <https://www.un.org/development/desa/dpad/wp-content/uploads/sites/45/WESP2020_Annex.pdf> accessed 26 April 2021.

18 KATHRYN GORDON, JOACHIM POHL & MARIE BOUCHARD, «Investment Treaty Law, Sustainable Development and Responsible Business Conduct: A Fact Finding Survey», Organisation for Economic Cooperation and Development 2014, OECD Working Papers on International Investment <<http://www.oecd-ilibrary.org/content/workingpaper/5jz0xvqx1zlt-en>> accessed 3 February 2021.

19 CHI, *supra* n. 14.

20 UNCTAD, «Mapping of IIA Content», *Investment Policy Hub*, February 2021, <<http://investmentpolicyhub.unctad.org/IIA/mappedContent#iiaInnerMenu>> accessed 2 February 2021.

21 VIRGINIE BARRAL, «Sustainable Development in International Law: Nature and Operation of an Evolutive Legal Norm», 23 *European Journal of International Law* (2012), 377–400.

22 United Nations General Assembly, *supra* n. 2.

tainable development, focused on provisions that generally refer to that topic or specifically concerning environmental protection and labour rights.

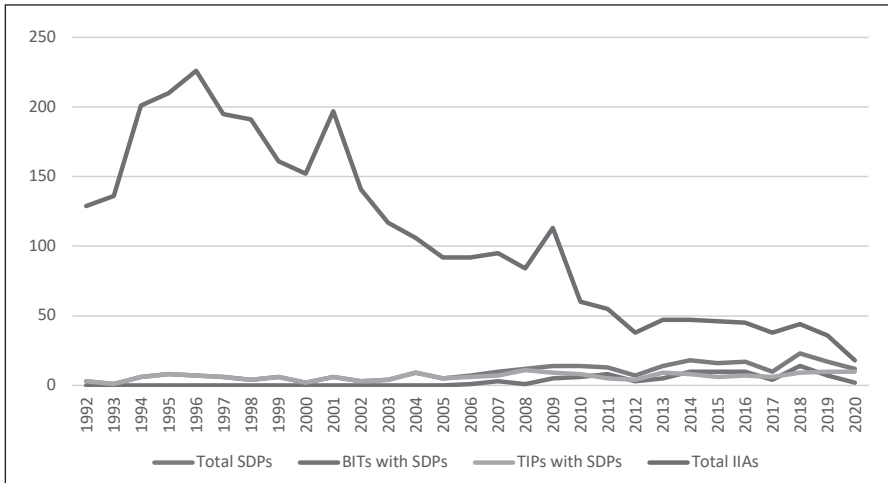
To identify sustainable development provisions in existing IIAs, we have used the Electronic Database of Investment Treaties (EDIT) that currently includes the text of 3529 IIAs, being 3120 BITs and 406 other IIAs.²³ We mapped both the provisions that generally refer to sustainable development and those including some keywords and expressions directly connected to that notion on the three specific topics mentioned above.

A. General sustainable development provisions

1. Overall IIAs

We have identified at least 275 IIAs with sustainable development provisions (SDPs), concluded from 1992 onwards. The large majority of them are TIPs with investment chapters or provisions (180 agreements) and only 90 BITs. The proportion of SDPs in IIAs has increased over time. For example, while only 1% of the IIAs concluded in 2000 contain references to sustainable development, ten years later, that proportion augmented to 23%. In 2020, around two-thirds of the agreements concluded that year included such provisions.

Figure 1. Sustainable Development Provisions in IIAs



23 Electronic Database of Investment Treaties (EDIT) is a comprehensive, full text, and machine-readable database of IIAs from the World Trade Institute – University of Bern, <<https://edit.wti.org/>>. See WOLFGANG ALSCHNER, MANFRED ELSIG & RODRIGO POLANCO, «Introducing the Electronic Database of Investment Treaties (EDIT): The Genesis of a New Database and Its Use», 20 *World Trade Review* (2021), 73–94.

The majority of these agreements (212 IIAs) include such references in the preamble, 128 TIPs and 84 BITs.

Concerning TIPs, the earliest Agreement, including sustainable development mentions in the preamble, is the preamble of the 1992 Agreement Establishing the European Economic Area (EC-EFTA).²⁴ In the case of BITs, explicit mention of 'sustainable development' as one of the BIT goals appeared first in the 2006 Canada – Peru BIT preamble.²⁵ As mentioned, the year before, IISD had published its model agreements on investment for sustainable development.²⁶

However, over time other sub-types of SDPs have emerged in IIAs. One is the general confirmation of sustainable development commitments under international law. We find at least 32 IIAs, including such provisions. Several of them refer to specific environmental or labour obligations that will be developed later in this article, like the Agenda 21 of the United Nations Conference on Environment and Development (UNCED) of 1992 and the International Labour Organisation (ILO) Declaration on Fundamental Principles and Rights at Work of 1998, among others.²⁷

Another sub-type of SDPs are cooperation commitments. The Treaty Establishing the European Economic Community, after the amendments introduced by the Treaty of Maastricht in 1992 (and renamed since then and the Treaty Establishing the European Community – TEC), was the first one to include a mention to «sustainable economic and social development of the developing countries, and more particularly the most disadvantaged among them» as one of the cooperation activities that the Community shall foster.²⁸

We find one more sub-type of SDPs in the recent trade agreements between the EU and the United Kingdom to close its Brexit process. It considers the consultation to civil society groups to discuss the implementation of the Agreement:

1. Each Party shall consult on issues covered by this Agreement and any supplementing agreement its newly created or existing domestic advisory group or groups comprising a representation of independent civil society organisations including non-governmental organisations, business and employers' organisations, as well as trade unions, active in economic, sustainable development,

24 EC-EFTA (1992), Preamble: «DETERMINED to preserve, protect and improve the quality of the environment and to ensure a prudent and rational utilization of natural resources on the basis, in particular, of the principle of sustainable development, as well as the principle that precautionary and preventive action should be taken».

25 Canada – Peru BIT (2006), Preamble: «RECOGNIZING that the promotion and the protection of investments of investors of one Party in the territory of the other Party will be conducive to the stimulation of mutually beneficial business activity, to the development of economic cooperation between them and to the promotion of sustainable development».

26 ALSCHNER, ELSIG & POLANCO, *supra* n. 23, at 91.

27 See for example, the EU Agreements with Mexico (2001), Korea (2010), Colombia-Ecuador-Peru (2013), Canada (2016), Singapore (2018) and Vietnam (2019); Canada – Korea FTA (2014); China – Korea FTA (2015); Brazil – Chile FTA (2018); and in the UK Agreements with the EU (2020), Moldova (2020), Japan (2020), Ukraine (2020), Georgia (2019) and Korea (2019), among others.

28 Art. 130u TEC.

social, human rights, environmental and other matters. Each Party may convene its domestic advisory group or groups in different configurations to discuss the implementation of different provisions of this Agreement or of any supplementing agreement.²⁹

2. Swiss IIAs

We have identified only 29 IIAs to which Switzerland is a party that include sustainable development provisions. Only four are BITs, and 25 are TIPs, mostly PTAs with investment chapters. Interestingly, from the latter group, 23 are agreements concluded by the European Free Trade Association (EFTA). Only two are PTAs concluded directly by Switzerland, with China (2013) and Japan (2009). All these agreements have been signed between 1992 and 2018, being the first, the 1992 EC-EFTA Agreement referred above.

In 27 of these 29 agreements, the references to sustainable development are found in the preamble. Several EFTA agreements include a confirmation of sustainable development commitments, like the 1992 Agenda 21 of UNCED and the 1998 ILO Declaration on Fundamental Principles and Rights at Work, among others.³⁰

It is worth noting that the latest Agreement PTAs by the EFTA include a novel provision on sustainable economic development (Art. 8.4):

Article 8.4. Sustainable Economic Development

1. The Parties recognise that trade is an engine for inclusive economic growth and poverty reduction, and contributes to the promotion of sustainable development in all its dimensions.
2. The Parties shall strive to facilitate and promote investment, trade in, and dissemination of, goods and services that contribute to sustainable development, such as environmental technologies, sustainable renewable energy, as well as goods and services that are energy efficient or subject to voluntary sustainability schemes.
3. The Parties agree to exchange views and may consider, jointly or bilaterally, cooperation in this area.

Several EFTA agreements also include provisions on promoting investment favouring sustainable development, including environmental technologies, sustainable renewable energy, energy-efficient and eco-labelled goods and services.³¹

29 EU-UNITED KINGDOM Trade and Cooperation Agreement (2020), Art. 7.

30 See EFTA agreements with Indonesia (2018), Ecuador (2018), Georgia (2016), Costa Rica (2013), Bosnia and Herzegovina (2013), Montenegro (2011), Albania (2009).

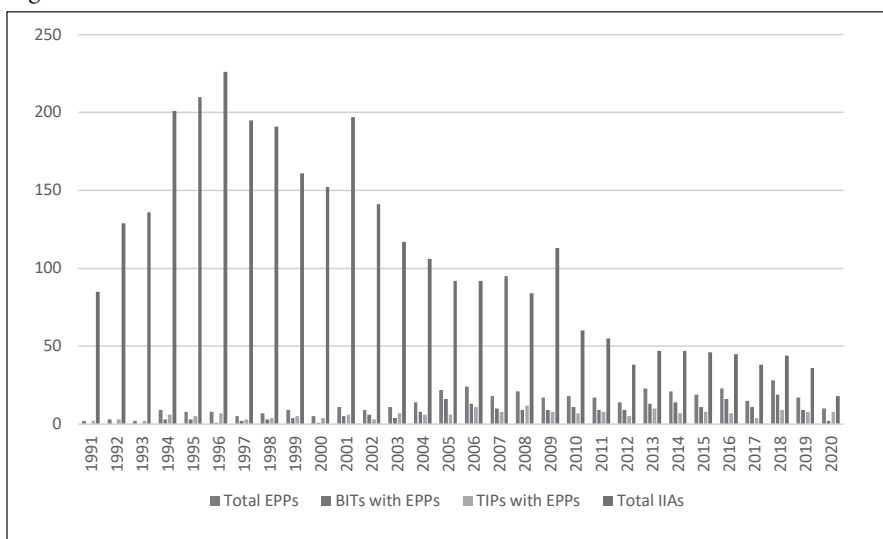
31 See Albania – EFTA FTA (2009), Art. 37; EFTA – Montenegro FTA (2011), Arts. 37; Bosnia and Herzegovina – EFTA FTA, Art. 39; EFTA – Costa Rica – Panama FTA (2013), Art. 9.7; EFTA – Georgia FTA (2016), Art. 10.8; and Ecuador – EFTA FTA (2018), Art. 8.7.

B. Environmental protection provisions

1. Overall IIAs

We have identified at least 412 IIAs with environmental protection provisions (EPPs) concluded from 1991 onwards. The majority of them are BITs (223 agreements), and the rest are TIPs with investment chapters or provisions (189 agreements). The proportion of EPPs in IIAs has increased over time. For example, while only 2% of the IIAs concluded in 1991 contain references to environmental protection, ten years later, that proportion augmented to 6%, then to 31% in 2011. In 2020, around 56% of the agreements concluded that year included such provisions.

Figure 2. Environmental Protection Provisions in IIAs



The majority of these agreements (234 IIAs) include general environmental references in the preamble, 135 BITs and 99 TIPs.³²

There are five other important sub-types of EPPs in IIAs. The first are «non-derogation obligations»³³ or «balancing clauses»,³⁴ essentially requiring contracting states not to lower or relax their environmental laws or standards to promote foreign

32 Only two agreements include mentions in the preambular text to a specific environmental concern: biodiversity. Central America – EU Association Agreement (2012); Andean Community – EC Political Dialogue and Co-operation Agreement (2003).

33 CHI, *supra* n. 14, at 17, 22.

34 ALESSANDRA ASTERITI, «Waiting for the Environmentalists: Environmental Language in Investment Treaties», in: Rainer Hofmann & Christian J. Tams (eds.), *International Investment Law and Its Others*, Baden-Baden 2012.

investment to avoid a «race to the bottom» in environmental protection. We find at least 121 agreements with such provisions.

The earliest example of these provisions is found in the 1992 North America Free Trade Agreement (NAFTA):³⁵

Article 1114. Environmental measures

(...)

2. The Parties recognize that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures. Accordingly, a Party should not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such measures as an encouragement for the establishment, acquisition, expansion or retention in its territory of an investment of an investor. If a Party considers that another Party has offered such an encouragement, it may request consultations with the other Party and the two Parties shall consult with a view to avoiding any such encouragement.

Subsequent agreements including such clauses have kept a wording quite similar to the abovementioned NAFTA provision, with the minor variation than in some instances it does not include a consultation process if one of the contracting states considers that the other state has provided that encouragement.³⁶

Another variation of this sub-type of provision adds that «The Parties will endeavour not to derogate from, waive or relax measures as an encouragement for the expansion, retention or disposition in its territory of an investment of an investor of the other Party».³⁷

The second sub-type of EPPs are exception clauses designed to relieve the state from its IIAs obligations³⁸ or state responsibility for taking environmental measures otherwise inconsistent with their IIA obligations.³⁹ These provisions are partially modelled on Article XX of the General Agreement on Tariffs and Trade (GATT),⁴⁰ and consider exceptions «necessary to protect human, animal or plant life or health» (equivalent to GATT, Art. XX(b)); or «relating to the conservation of exhaustible natural resources» (equivalent to GATT, Art. XX (g)). We find at least 387 IIAs with these exceptions. The earliest example of IIAs including such provisions, is the Australia – Papua New Guinea Trade Agreement (1976).⁴¹ The first proper BIT including similar exceptions is the China – Singapore BIT (1985), but using a slightly different wording:

35 NAFTA (1992), Art. 1114(2).

36 See for example, Georgia – Japan BIT (2021), Art. 20; Japan – Morocco BIT (2020), Art. 19; Argentina – Japan BIT (2018), Art. 22; Japan – Jordan BIT (2018), Art. 19; Lithuania – Turkey BIT (2018), Art. 17; and Canada – Moldova BIT (2018), Art. 15, among others.

37 Argentina – United Arab Emirates BIT (2018), Art. 12(2).

38 ASTERITI, *supra* n. 31.

39 CHI, *supra* n. 14, at 17, 22.

40 General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194.

41 Australia – Papua New Guinea Trade Agreement (1976), Art. 8.

The provisions of this Agreement shall not in any way limit the right of either Contracting Party to apply prohibitions or restrictions of any kind or take any other action which is directed to the protection of its essential security interests, or to the protection of public health or the prevention of diseases and pests in animals or plants.⁴²

The third subtype of EPPs confirms environmental commitments under international or national law.⁴³ When IIAs include this sub-type of provisions, they usually refer to international obligations or principles. Concerning the former, while some references are made only at the preamble,⁴⁴ around 30 IIAs make explicit references to international law, the large majority of them concluded by the EU. These include the Rio Declaration on Environment and Development of 1992, the Agenda 21 on Environment and Development of the same year, and the Johannesburg Plan of Implementation on Sustainable Development of 2002.⁴⁵ Around 11 IIAs mention the Millennium Development Goals (MDGs).⁴⁶

When references are made to national laws, they usually refer to the contracting state's right to define their environmental protection level. When found in PTAs, the agreements tend to follow NAFTA Article 1114 (1): «1. Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.» Some BITs also include similar provisions. For example, the Lithuania – Turkey BIT (2018) recognises: «the right of each Contracting Party to establish its own level of environmental protection and its own sustainable development policies and priorities, and to adopt or modify its environmental laws and regulations, each Contracting Party shall ensure that its laws and regulations provide for appropriate levels of environmental protection and shall strive to continue to improve those laws and regulations».⁴⁷

In several IIAs, this principle is further expanded as a part of a country's «right to regulate», to adopt and apply their laws and regulations that regulate economic

42 China – Singapore BIT (1985), Art. 11.

43 CHI, *supra* n. 14, at 17, 22.

44 See Mexico – EC Economic Cooperation Agreement (2012), Preamble; EU – SADC Economic Partnership Agreement (2016), Preamble.

45 See Albania – EFTA FTA (2009), Art. 31, EU – Korea FTA (2010), Art. 131; Colombia – Ecuador – EU – Peru FTA (2013), Art. 267, among others.

46 See for example, Central America – EU Association Agreement (2012), Art. 1; Eastern and Southern Africa States – European Union EPA (2009), Art. 2; ECOWAS Supplementary Act on Investments (2008), Art. 16.

47 Lithuania – Turkey BIT (2018), Art. 17(2). Similar wording is included in Slovakia – United Arab Emirates BIT (2016), Art. 12(2); and Iran – Slovakia BIT (2016), Art. 10(2).

activity in the public interest. We find at least 88 IIAs with this type of provision, most of them PTAs (69 agreements).⁴⁸

The fourth subtype of EPPs clarifies the notion of «indirect expropriation». At least 87 IIAs stipulate that non-discriminatory regulatory actions designed and applied to protect legitimate public welfare objectives, such as public health, safety and the environment, do not constitute an expropriation, except in «rare circumstances». ⁴⁹ However, few of these agreements clarify what is understood by such circumstances. For example, when a measure or a series of measures is extremely severe or disproportionate in light of its purpose.⁵⁰

Environmental cooperation commitments are a fifth sub-type of EPPs. Although, as mentioned above, cooperation clauses are standard clauses when referring to sustainable development in general, specific cooperation activities are less common in IIAs. We find at least 22 IIAs with such provisions, usually in PTAs with investment chapters. One of the few BITs, including such provisions, is the recently announced EU – China Comprehensive Agreement on Investment (CAI).⁵¹

2. Swiss IIAs

We have identified twenty-one IIAs to which Switzerland is a party, including environmental protection provisions. These references are primarily found in the preamble of PTAs with investment chapters.⁵²

Twenty of these IIAs include EPPs in the main text of the Agreement. One is a BIT between a group of EFTA countries (minus Norway) and South Korea. Another is a multilateral investment agreement – the 1994 Energy Charter Treaty (ECT). The rest are PTAs with investment chapters. Two were concluded directly by Switzerland, with China (2013) and Japan (2009), and seven are PTAs concluded by the EFTA.

From all these agreements, the one with a more detailed clause concerning environmental aspects is the ECT. The Agreement includes an article according to which contracting states shall strive to minimise harmful environmental impacts occurring

48 See for example, EU – Viet Nam Investment Protection Agreement (2019), Art. 2.2; Brazil – Chile FTA (2018), Art. 172; Argentina – United Arab Emirates BIT (2018), Art. 11, among others.

49 See for example, Georgia – Japan BIT (2021), Art. 11(4); China – Mauritius FTA (2019), Ch. 8, Annex B; Armenia – Singapore Agreement on Trade in Services and Investment (2019), Annex 3-A; Myanmar – Singapore BIT (2019), Annex II.

50 Japan – Morocco BIT (2020), Annex; South Korea – Uzbekistan BIT (2019), Annex I; Chile – Hong Kong SAR Investment Agreement (2016), Annex I.

51 EU – China CAI, Art. 3: «Dialogue and Cooperation on Investment-related Labour Issues. The Parties agree to dialogue and cooperate as appropriate on investment-related labour issues of mutual interest arising under this Section in a manner complementary to the efforts under existing bilateral and multi-lateral mechanisms».

52 Only five Swiss BITs include EPPs in the preamble. These are the agreements with Georgia (2014), Kosovo (2011), Trinidad and Tobago (2010), Egypt (2010), Serbia and Montenegro (2005).

either within or outside contracting states' area from all operations within the energy cycle. This policy should consider contracting states' obligations under those international agreements concerning the environment to which are a Party, pursuing sustainable development, taking proper account of safety, and in an economically efficient and cost-effective manner. Furthermore, the provision also recognises the precautionary and polluter-pays principles.⁵³ Although some have praised the ECT for clearly recognising the sustainability dimension in the «energy trilemma» (energy security, economic development and environmental protection),⁵⁴ it has also been criticised for serving as a basis to ISDS claims after states' decision to phase out coal and nuclear power plants, off-coast oil and gas projects, among others.⁵⁵

In contrast, the BIT with South Korea merely includes «non-derogation obligations» and exception clauses EPPs, in similar terms than in NAFTA.⁵⁶

53 ECT, Art. 19. According to the same provision Contracting Parties shall: «(a) take account of environmental considerations throughout the formulation and implementation of their energy policies; (b) promote market-oriented price formation and a fuller reflection of environmental costs and benefits throughout the Energy Cycle; (c) (...) encourage co-operation in the attainment of the environmental objectives of the Charter and co-operation in the field of international environmental standards for the Energy Cycle, taking into account difference in adverse effects and abatement costs between Contracting Parties; (d) have particular regard to Improving Energy Efficiency, to developing and using renewable energy sources, to promoting the use of cleaner fuels and to employing technologies and technological means that reduce pollution; (e) promote the collection and sharing among Contracting Parties of information on environmentally sound and economically efficient energy policies and Cost-Effective practices and technologies; (f) promote public awareness of the Environmental Impacts of energy systems, of the scope for the prevention or abatement of their adverse environmental impacts, and of the costs associated with various prevention or abatement measures; (g) promote and co-operate in the research, development and application of energy efficient and environmentally sound technologies, practices and processes which will minimize harmful Environmental Impacts of all aspects of the Energy Cycle in an economically efficient manner; (h) encourage favourable conditions for the transfer and dissemination of such technologies consistent with the adequate and effective protection of Intellectual Property rights; (i) promote the transparent assessment at an early stage and prior to decision, and subsequent monitoring, of Environmental Impacts of environmentally significant energy investment projects; (j) promote international awareness and information exchange on Contracting Parties' relevant environmental programmes and standards and on the implementation of those programmes and standards; and (k) Participate, upon request, and within their available resources, in the development and implementation of appropriate environmental programmes in the Contracting Parties».

54 PETER VAJDA & VARVARA ALEKSIC, «Article 19. Environmental Aspects», in: Rafael Leal-Arcas (ed.), *Commentary on the Energy Charter Treaty*, Cheltenham 2018; AAPO HEINÄSMÄKI, «The Environmental Aspects of the Energy Charter Treaty and Their Significance in Litigation», Master of Laws, University of Helsinki 2020, <https://helda.helsinki.fi/bitstream/handle/10138/318641/Heinas-maki_Aapo_Master%27s%20Thesis_2020.pdf?sequence=2&isAllowed=y> accessed 1 March 2021.

55 BENJAMIN HOURTICQ, «How the Little-Known Energy Charter Treaty Is Holding Environmental Policy Hostage», *Equal Times*, 7 September 2020, <<https://www.equaltimes.org/how-the-little-known-energy-charter-treaty-make-or-break-moment-sustainable-climate-friendly-energy>> accessed 1 March 2021; MARTIN DIETRICH BRAUCH, «Modernizing the Energy Charter Treaty: A Make-or-Break Moment for Sustainable, Climate-Friendly Energy Policy», *International Institute for Sustainable Development*, 13 November 2019, <<https://www.iisd.org/articles/modernizing-energy-charter-treaty-make-or-break-moment-sustainable-climate-friendly-energy>> accessed 1 March 2021.

56 Iceland, Liechtenstein and Switzerland – South Korea BIT (2005), Art. 9.

The seven EFTA agreements include EPPs reaffirming their environmental commitments under international and national law. Concerning international law, they acknowledge multilateral environmental agreements to which they are a party and their adherence to environmental principles reflected in the international instruments for the effective implementation in their laws and practices. For example, they all explicitly recall the 1992 Rio Declaration and Agenda 21 and the 2002 Johannesburg Plan of Implementation. These agreements also include provisions on the promotion of investment favouring sustainable development and on the «right to regulate» on environmental matters, recognising the importance, when preparing and implementing these measures, of taking account of scientific, technical and other information, and relevant international standards, guidelines and recommendations. They also consider «non-derogation obligations» in similar terms than in NAFTA and cooperation in international fora on investment and environmental issues of mutual interest.⁵⁷

Interestingly, a different group of EFTA agreements also include provisions on the «right to regulate», although they do not explicitly refer to environmental matters.⁵⁸

The non-EFTA Swiss PTAs follow different patterns. While the 2013 China – Switzerland FTA includes similar provisions to those referred above for EFTA agreements, without considering provisions on the right to regulate,⁵⁹ the 2009 Japan-Switzerland FTA only includes environmental references applicable to investments in the preamble.⁶⁰

C. Labour protection provisions

1. Overall IIAs

We have identified at least 336 IIAs with labour protection provisions (LPPs) mainly concluded from 1999.

The majority of these agreements are BITs (216 agreements), and the remainder are TIPs with investment chapters or provisions (120 agreements), but historically

57 See Albania – EFTA FTA (2009), Arts. 31, 33, 34, 36 and 38; EFTA – Montenegro FTA (2011), Arts. 31, 33, 34, 36, and 38; Bosnia and Herzegovina – EFTA FTA, Arts. 33, 35, 36, 38 and 40; EFTA – Costa Rica – Panama FTA (2013), Arts. 9.1, 9.3, 9.4, 9.6 and 9.9; EFTA – Georgia FTA (2016), Arts. 10.1, 10.3, 10.4, 10.7 and 10.9; Ecuador – EFTA FTA (2018), Art. 8.1, 8.3, 8.4, 8.6 and 8.12; and EFTA – Indonesia FTA (2018), Art. 8.1, 8.2, 8.3, 8.7 and 8.11.

58 See EFTA – Mexico FTA (2000), Arts. 25 and 35; Chile – EFTA FTA (2003), Art. 36; Colombia – EFTA FTA (2008), Art. 56; EFTA – Ukraine FTA (2010), Art. 48; EFTA – Peru FTA (2010), Art. 5.6; EFTA – Hong Kong FTA (2011), Art. 46. We also find that provision in the Georgia – Switzerland BIT (2014), Art. 9.

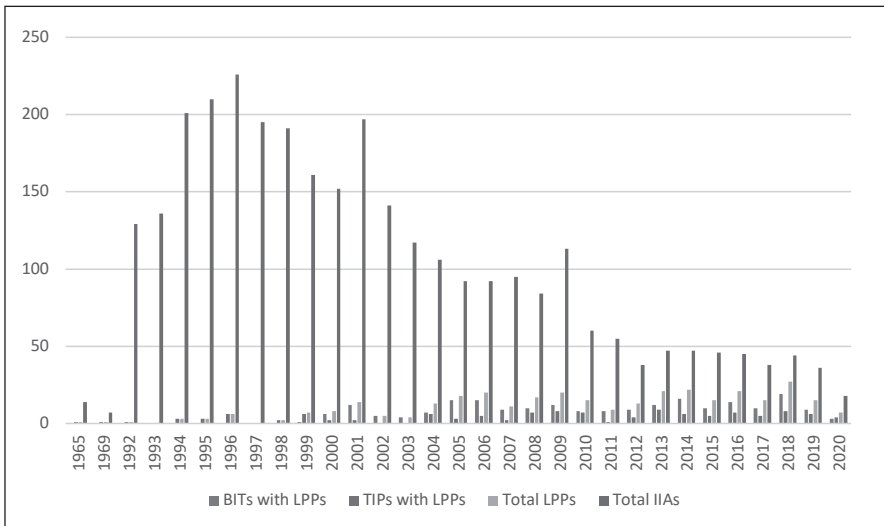
59 China – Switzerland FTA (2013), Arts. 121, 122 and 123.

60 Japan – Switzerland FTA (2009), Preamble.

TIPs started including labour provisions before BITs. Already in 1965, the Common Convention on Investments in the States of the Customs and Economic Union of Central Africa (CEMAC) established that foreigners should benefit from labour and Social Welfare legislation under the same conditions as the nationals of the States of the Union. In the 1990s, treaties like NAFTA (1992) and the Canada-Chile FTA (1996) included a side agreement on Labour Cooperation.

The proportion of LPPs in IIAs has also increased over time, although less than sustainable development and environmental provisions and not in a linear way. In 2000 we find eight IIAs with LPPs, representing 5% of the IIAs concluded in that period. Ten years later, there were fifteen IIAs with such provisions, representing 25% of the IIAs that year. The proportion augmented importantly only in the past five years, being 2018 the year with more LPPs (twenty-seven, representing 61% of the IIAs concluded that year).

Figure 3. Labour Protection Provisions in IIAs



The majority of these agreements (207 IIAs) include general labour references in the preamble, 134 BITs and 73 TIPs.⁶¹

61 Only two agreements include mentions in the preambular text to a specific environmental concern: biodiversity. Central America – EU Association Agreement (2012); Andean Community – EC Political Dialogue and Co-operation Agreement (2003).

There are four other important sub-types of LPPs in IIAs.⁶² The first are non-derogation provisions, requiring the contracting states not to waive or derogate from its labour laws to encourage the establishment, acquisition, expansion or retention of an investment or an investor in its territory. We find at least 126 IIAs including such clauses, often together with the corresponding commitment of non-lowering environmental standards, in similar terms than in NAFTA.⁶³

The second subtype are provisions referring to international labour rights standards like we described above concerning EPPs, but without necessarily incorporating those standards as a binding part of the IIA. For example, we find 53 IIAs that explicitly refer to ILO's standards, like the Declaration on Fundamental Principles and Right to Work and its Follow-Up.⁶⁴ The earliest IIAs where we find such provisions is the Cotonou Agreement (2000).⁶⁵

A third subtype are exception clauses, exempting the contracting states of their responsibility for taking labour rights measures that are otherwise inconsistent with their IIA obligations, usually as part of the general exceptions. One of the most common provisions in this regard are those considering exceptions relating to prison labour products, in similar terms to Art. XX (e) GATT. These clauses are more common in PTAs with investment chapters and rarely found in BITs. We find at least 27 IIAs with such LPPs.⁶⁶

The fourth subtype of LPPs are provisions that confirm or recognise that the contracting states bear primary obligations to protect labour rights. One typical example of these provisions is that each contracting Party shall not «fail to effectively enforce its labour laws, through a sustained or recurring course of action or inaction, in a

62 Here we largely follow the typology described at CHI, supra n. 14, at 22.

63 For example, the Hungary – Kyrgyzstan BIT (2020), provides that: «7. The Contracting Party shall not encourage investment by lowering domestic environmental, labour or occupational health and safety legislation or by relaxing core labour standards. Where a Contracting Party considers that the other Contracting Party has offered such an encouragement, it may request consultations with the other Contracting Party and the two Contracting Parties shall consult with a view to avoiding any such encouragement.»

64 These include: a) Freedom of association and the effective recognition of the right to collective bargaining; b) The elimination of all forms of forced or compulsory labour; c) The effective abolition of child labour; and d) The elimination of discrimination in respect of employment and occupation.

65 Cotonou Agreement (2000), Art. 50: «1. The Parties reaffirm their commitment to the internationally recognised core labour standards, as defined by the relevant International Labour Organisation (ILO) Conventions, and in particular the freedom of association and the right to collective bargaining, the abolition of forced labour, the elimination of worst forms of child labour and non-discrimination in respect to employment».

66 For example, Art. 153 of the Trans-Pacific Partnership (TPP) stipulates that: «1. Subject to the requirement that the measure is not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between Parties where the same conditions prevail, or a disguised restriction on international trade between the Parties, nothing in this Chapter shall be construed to prevent a Party, including its procuring entities, from adopting or maintaining a measure: (...) (d) relating to the good or service of a person with disabilities, of philanthropic or not-for-profit institutions, or of prison labour».

manner affecting trade between the Parties». We find such provision in at least 11 IIAs, being the earliest the Jordan – US FTA (2000).⁶⁷

Cooperation on labour matters is a fifth sub-type of LPPs. As mentioned above, cooperation provisions are often found when referring to sustainable development in general, and specific labour cooperation clauses are less common in IIAs. Again, one of the few IIAs including such provisions is the recently announced EU – China CAI.⁶⁸

2. Swiss IIAs

We have identified nineteen IIAs to which Switzerland is a party, including labour protection provisions. These references are primarily found in the preamble of PTAs with investment chapters.⁶⁹

Only nine Swiss IIAs include LPPs in the main text of the Agreement, being largely EFTA agreements. These treaties usually have three sub-types of LPPs: a) those recalling their obligations deriving from its membership of the ILO and the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up, and seeking to ensure that its laws, policies and practices provide for and encourage high levels of labour protection, consistent with international standards, principles and agreements;⁷⁰ b) those committing not fail to enforce its labour laws effectively, regulations or standards in a manner affecting trade or investment between the Parties;⁷¹ and c) those committing not weaken or reduce the level of labour protection provided by its laws, regulations or standards, waive or otherwise derogate from, or offer to waive or otherwise derogate from them, with the sole intention to encourage investment from another Party or to seek or to enhance a competitive trade advantage of producers or service providers operating in its territory.

The remaining non-EFTA Swiss IIAs include different LPPs. The FTA with Japan (2009) considers a non-derogation provision, recognising that it is inappropri-

67 Jordan – US FTA (2000), Art. 6: «4. (a) A Party shall not fail to effectively enforce its labor laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the Parties, after the date of entry into force of this Agreement».

68 EU – China CAI, Art. 3: «Article 3. Dialogue and Cooperation on Investment-related Labour Issues. The Parties agree to dialogue and cooperate as appropriate on investment-related labour issues of mutual interest arising under this Section in a manner complementary to the efforts under existing bilateral and multilateral mechanisms.».

69 Only the Georgia – Switzerland BIT (2014), include LPPs in the preamble.

70 See Albania – EFTA FTA (2009), Arts. 33 and 35; EFTA – Montenegro FTA (2011), Arts. 33 and 35; Bosnia and Herzegovina EFTA FTA (2013), Arts. 35 and 37; EFTA – Georgia FTA (2016), Arts. 10.3 and 10.5; EFTA – Ecuador FTA (2018), Arts. 8.3 and 8.5; EFTA – Indonesia FTA (2018), Arts. 8.2 and 8.6.

71 See Albania – EFTA FTA (2009), Art. 34; EFTA – Montenegro FTA (2011), Art. 34; Bosnia and Herzegovina EFTA FTA (2013), Art. 36; EFTA – Georgia FTA (2016), Art. 10.4; EFTA – Ecuador FTA (2018), Art. 8.4; EFTA – Indonesia FTA (2018), Art. 8.3.

ate to encourage investment activities by lowering labour standards. «To this effect, each Party should not waive or otherwise derogate from such measures and standards as an encouragement for establishment, acquisition or expansion of investments in its Area».⁷² In contrast, the FTA with China (2013) only include cooperation commitments on labour and employment.⁷³

Finally, the only Swiss BIT including LPPs, the Agreement with Georgia (2014), stipulates that parties are not prevented from adopting or maintaining or enforcing any measure consistent with the Agreement in the public interest, including measures relating to labour. In as much as they are not applied arbitrarily or unjustifiably and do not constitute a disguised restriction on investments of investors of the other Contracting Party.⁷⁴

III. Conclusion

We have identified an increasing number of sustainable development provisions in IIAs, including those that refer to sustainable development in general terms and specific terms like environmental and labour provisions. Among them, the most frequently seen type of SDPs in IIAs are environmental provisions. This trend is particularly notable in the past decade. However, it should also be noted that the number of investment agreements concluded in the same period has reduced considerably compared to preceding years.

Switzerland is one of the leading countries in the negotiation and conclusion of investment agreements. Simultaneously, it has made a strong public commitment to promote sustainable development and achieve the SDGs. According to the most recent version of the Sustainable Development Strategy 2030, Switzerland promotes a reliable legal framework for sustainable and responsible investments. It supports the implementation of high ecological, social and economic standards. It plans to increase its commitment to mobilise the private sector for climate-friendly investments in developing countries. Within the framework of trade agreements, it aims to ensure

72 Japan – Switzerland FTA (2009), Art. 101.

73 China – Switzerland FTA (2013), Art. 135: «Cooperation on labour and employment. The Parties shall enhance their cooperation on labour and employment according to the Memorandum of Understanding between the Ministry of Human Resources and Social Security of the People’s Republic of China and the Federal Department of Economic Affairs of the Swiss Confederation regarding Cooperation on Labour and Employment Issues signed in Bern on 15 June 2011 and the Agreement on Labour and Employment Cooperation between the Ministry of Human Resources and Social Security of The People’s Republic of China and the Federal Department of Economic Affairs, Education and Research of the Swiss Confederation signed in Beijing on 6 July 2013».

74 Georgia – Switzerland BIT (2014), Art. 9.

market access or investment protection for renewable energies and environmentally friendly products.⁷⁵

However, few Swiss international investment agreements include sustainable development provisions (primarily as part of EFTA). When they do, these are mainly part of these treaties' preamble and not directly binding obligations. Only 18% of overall Swiss IIAs include general sustainable development provisions. 13% of these agreements have explicit environmental commitments, and 12% include clear labour commitments. Although this is in line with the worldwide average of these provisions in IIAs (8% SDPs, 12% EPPs, and 10% LPPs), the numbers are considerably lower if we consider the agreements concluded by Switzerland outside EFTA (only 4% SDPs, 5% EPPs and 2,5% LPPs).

This does not mean that in recent years Switzerland has not made improvements. In 2012 an internal government working group developed provisions to strengthen the coherence of BITs with sustainable development objectives. In a report made public on 7 March 2016, the State Secretariat for Economic Affairs (SECO) declared that the work carried out by the working group resulted in the insertion in the negotiation approach of provisions aiming to implement, in a coherent manner, the economic, social and environmental dimensions of sustainable development. The preamble of the BITs has been expanded with references to sustainable development, anti-corruption, human rights, corporate social responsibility standards and principles, and the indication that these policy areas are mutually supportive. Also, new clauses on non-derogation of standards and the right to regulate have been developed. The drafting group reviewed the provisions designed in 2012 to determine whether they should be amended or additional provisions should be added. It concluded that these provisions are still current, and no adjustments are needed.⁷⁶ According to the same report, these provisions have been used in all of Switzerland's IIAs negotiations since 2012. Still, now they only appear in the BIT with Georgia in force since 17 April 2015.

Another example in the same direction is the EFTA – Indonesia FTA (2018), the latest Swiss IIA concluded as party of EFTA, which among several environmental provisions included one on sustainable management of the vegetable oils sector,⁷⁷ one of the critical issues that subjected that Agreement to a referendum on 7 March

75 Federal Department of Foreign Affairs, «Sustainable Development Strategy» (5 November 2020), 11, 12, 18, <<https://www.eda.admin.ch/agenda2030/en/home/strategie/strategie-nachhaltige-entwicklung.html>> accessed 15 March 2021.

76 State Secretariat for Economic Affairs SECO, «Switzerland's Investment Treaty Policy», 20 April 2016, <https://www.seco.admin.ch/seco/en/home/Aussenwirtschaftspolitik_Wirtschaftliche_Zusammenarbeit/Wirtschaftsbeziehungen/Internationale_Investitionen/Vertragspolitik_der_Schweiz.html> accessed 15 March 2021.

77 EFTA – Indonesia FTA (2018), Art. 8.10.

2021. Although the FTA was finally approved, the short margin (51,65%) provides a good idea of the Swiss society interest in sustainable development topics.⁷⁸

In fact, just because these provisions are predominantly not found in Swiss IIAs does not mean that they cannot be incorporated in other ways, precisely because of the strong interest of civil society in these issues. For example, we find only eleven Swiss IIAs, including provisions on corporate social responsibility, representing 4% of the country's total number of agreements.⁷⁹ This is again very much in line with the average worldwide of these provisions (99 in total, representing 3% of all IIAs). On 29 November 2020, the same topic was the subject of a popular initiative, «For responsible businesses – protecting human rights and the environment», a proposal to hold Swiss companies accountable for their actions abroad. The initiative was rejected after not obtaining a majority cantonal support, despite winning the majority popular vote.⁸⁰

In this article, we have provided a limited overview of sustainable development provisions in IIAs. But Switzerland could also consider other types of provisions in future negotiations or renegotiations of investment agreements. For example, in recent years, we have seen the inclusion of gender provisions in IIAs, in line with Goal 5 of the SDGs, which is to achieve gender equality and empower all women and girls.⁸¹

Regardless of the quantity of sustainable development provisions found in IIAs, what is probably most important is to focus on its quality. Atanasova has already suggested that instead of comparing the soft law language IIAs use for non-international economic law (IEL) disciplines or the lack of reference to such fields in earlier agreements, it seems desirable to compare it to the more effective language IIAs already employ regarding IEL disciplines.⁸²

78 «Vote Results: March 7, 2021», SWI swissinfo.ch, 7 March 2021, <<https://www.swissinfo.ch/eng/vote-results--march-7--2021/46380436>> accessed 15 March 2021.

79 These are the eight EFTA agreements referred above, the BITs with Kosovo (2011) and Georgia (2014), and the China – Switzerland FTA (2013).

80 «Responsible Business Initiative Rejected at the Ballot Box», SWI swissinfo.ch, 29 November 2020, <<https://www.swissinfo.ch/eng/swiss-to-vote-on-holding-companies-accountable-for-supply-chain-abuses/46184500>> accessed 15 March 2021.

81 See for example, Canada – Chile FTA (as amended in 2017), Art. Nbis-01: «4. The Parties acknowledge that international trade and investment are engines of economic growth, and that improving women's access to opportunities and removing barriers in their countries enhances their participation in national and international economies, and contributes to sustainable economic development».

82 DAFINA ATANASOVA, «Non-Economic Disciplines Still Take the Back Seat: The Tale of Conflict Clauses in Investment Treaties», 34 *Leiden Journal of International Law* (2021), 155–180.

Finally, to avoid these provisions becoming just «window dressing», Switzerland should also focus on their effective implementation.⁸³ An effort could also be made to renegotiate «old-generation» IIAs that do not include sustainable development provisions, even if such modification does not depend only on Switzerland.

83 One good example of this approach is the Ordinance on the import of sustainably produced palm oil from Indonesia at preferential tariff, which regulates the implementation of the corresponding EFTA – Indonesia FTA provision. Swiss Federal Council, «Ordonnance Sur l'importation Au Taux Préférentiel d'huile de Palme de Production Durable En Provenance d'Indonésie», December 2020, <<https://www.admin.ch/ch/f/gg/pc/documents/3176/Projet-d-ordonnance.pdf>> accessed 15 March 2021.