PROFIT VS. SUSTAINABILITY
HOW TO PURSUE A SUSTAINABLE INVESTMENT

It seems that nowadays the debate on fragmentation of international law is not yet ready to reach a prompt solution. On the contrary, every and each occasion, even at the jurisprudential level, seems a good one to offer some new reflections, in brief or at length, on the reason why international law results fragmented within itself and, in parallel, on the instruments suitable to solve that phenomenon.

True the above, we deem, on the contrary, that reference to fragmentation should be avoided, given that the so labeled phenomenon should instead be referred with other concepts such as that of expansion of international law. Today we are indeed witnessing the raise of many different sub-systems of law, almost one for each subject, which "ask" for it. This mean that next or below international law of general character there is a multitude of sub-system, formed by norms of special character. As such, they reflect the blooming of new needs, deserving a normative qualification, in term of rights and obligations. From this, it derives the raise of conflicts among norms (and values empowered by them), of general and special character, or of norms coming from different sub-systems.
In this respect, our assumption is that sub-systems of law are not completely autonomous nor from each other nor from that of general international law (in which, in case of failure, all fall back). This interconnection seems to make useless any search for the prevalence of a norm over the other; contrarily, it renders strong the need to find a way to integrate and balance among provisions which, while pursuing opposite aim, result contemporarily binding and applicable to a given situation.

This scenario seems to be well mirrored by the on-going struggle involving norms coming from two sub-systems of law apparently pursuing conflicting interest.
Namely, reference is made to international (and European) investment law and the group of norms empowering the principle of sustainable development (that concept appeared for the very first time in 1967, to later becoming a principle of international law endorsed in binding, or non-binding, normative provisions).
At first sight, the two groups of norms protect opposite interests: investment law has, indeed, been framed in order to guarantee investors'(economic) rights, thus allowing them to pursue their activity in the most profitable way. The second group of norms aim, instead, to drive economic activity in a sustainable way, thus in respect of all fundamental and social rights involved (such as environment, labor rights, public health).
According to the praxis, host State - especially when developing country - has accepted foreign investment at almost any condition, so to increase investment flow within it-self and boost its economy. Accordingly, host State has never asked foreign investor for any special behavior nor it has imposed upon him obligations to contribute to its development. By and large, this has meant investment only with long lasting protection and economic guarantee. Consequently, host State has for long time refused to higher its standard of protection of fundamental right, so to align them to the international ones.

Such an imbalanced relation has been for decades legitimized at the normative level (multilateral and bilateral agreements) and well mirrored by arbitral decision, which have always avoided any chance to reason on (alleged) violation perpetrated by

investors against host State'development. It is enough to remember that, the attempt made in Salini (¶57) case law was not pursued by further jurisprudential praxis.
Despite this, it seems that, in the last decade, a wide spread consensus has evolved on the need to guarantee sustainable development.

The question of this contribution is therefore, whether and how it is possible to pursue a sustainable investment.
A first attempt to remodeled the relation investment law-sustainable development, date back to 2008 when Prof. J. Ruggie, by that time UN SG'Special Representative on the issue of Human Rights and Transnational Corporations and other business enterprises, law made a public statement related to the introduction of sustainable development within investment law as a binding concept (§ 12 Protect, Respect, Remedy).

Since then, States have started various tools to integrate SD concerns within FDI sources of law. The relative new born principle on sustainable development has thus started to be empowered also by international investment law, so to render it a binding obligation.
This change seems to have been driven at both political and normative level, where obligations have started to be imposed also on foreign investors, namely if juridical persons (small, medium or multinational enterprises).
To prove this, an excursus through the most recent normative and arbitral praxis is required.

As regard the normative level, it seems on-going a deep reshape of investment treaties (BITs and IIAs) which, for themselves, are not necessarily treacherous legal products. In fact, as any other treaties, they are simply instruments at the disposal of contracting parties to legally protect their respective interests. What really matters is their content, which obviously depends on agendas, choices and concessions of the parties. Consequently, investment agreements have started to change nature, including several innovative provisions able to recalibrate the legal protection of all stakeholders' interests (host State along foreign investors). This step forward can be expected to enhance the chances for economically, socially and environmentally sustainable investments.

A clear, and virtuous example, comes from the Morocco and Nigeria BIT, which has increased host State's right to regulate and it has imposed obligation of conduct upon foreign investors. Namely, host State provisions, enacted to pursue a S.D. goal, are legitimate; conversely, foreign investors have to pursue their activity contributing to host State' sustainable development.
Sustainable Development' goals are thus not anymore declaration of principle embedded in preambles (thus serving as mere interpretative tools), but they are becoming legally binding provision included right in the text, along with all other clauses on rights and obligations. Parties to the above-mentioned BIT have shown confidence that such an instrument can offer investors solid protection, without compromising on host State's rights or on social values.

In parallel, also the European Union seems to have endorsed a more sustainable oriented approach, at both the internal and external level (after all, art. 2.5 and art. 21 TFEU oblige the EU to pursue its foreign relation respecting also… sustainable development).

As regard the internal level, the European Court of justice, in its Opinion 2/15, found that that the EU has exclusive competence to enter any international

agreement including commitments on all aspects of intellectual property and also those concerning sustainable development and environmental protection: all are indeed sufficiently linked to the objective of freeing trade.

At the international level, EU is assuming a leading role in "the sustainability cause": for instance, it was instrumental in shaping Agenda 2030 and, along with member States, it is fully committed to implementing it and its Sustainable Development Goals into EU policies. This has certainly induced EU negotiator to include provision on SD' goals in the most recent treaties.

As regard jurisprudential level, it seems that arbitrators have started to allow Respondent-host State' counterclaims raised versus Claimant-foreign investor for its alleged violation of fundamental rights (Blusun v. Argentina). Besides, it seems spreading the practice to start proceeding against corporations which have allegedly acted, infringing fundamental rights.

Given the above, two last doubt raises.
The first regards the allocation of responsibility: who respond for infringement of a SD'obligation? Our tenet is that the same fact could potentially raise joint and several responsibilities of both host State and foreign investor.
Investor responds where international agreement, or contracts, binding the parties involved, include specific obligations on SD. Host State is responsible where it has bound it-self with international treaties (Basel Convention, 1989, Kyoto protocol, 1997; Paris Agreement, 2016) or other instruments (Protocol of finance and investment binding States parties to South African Development Community and requiring them to pursue their investment relations according to SD principle) providing for obligations on SD.
The second doubt is strictly related to the first one: if host State can be held responsible for infringement of a SD provision, any action pursued to align itself to that latter (or other international standard), should not engage State responsibility (in Gabcikovo-Nagymaros, Respondent State casted doubt *upon whether "ecological necessity" or "ecological risk" could […] constitute a circumstance precluding the wrongfulness of an act*). Some have qualified that circumstance as State of necessity, but this seems of limited practical application. It should, instead, be viewed as exercise of sovereign power in the public interest. Given this, and provided that the measure adopted is necessary to the aim pursued, the act is legitimate and the compensation due should be defined according to proportionality test, as endorsed by the ECtHR.

To conclude, it seems that at both normative and jurisprudential level there is a widespread consensus aimed at legitimizing a more balanced investment relation, leading to a sustainable investment.
The better avenue for a State seeking to further its SD' goal, is to harmonize them with its investment obligations, rather than to seek outright relief from investment obligations.

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