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Rethinking Just Transition in Investment Law Perspective: Incentives against Climate Crisis between Sustainability, Economic Security, and Strategic Industrial Planning

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Abstract: With the expression "Just transition", the European Commission refers to a new development model to bring in the environmental and digital transition "leaving no one behind". From an investment law perspective, it implies the adoption of several incentives to support new green economy activities or the reconversion of old ones into green and energy-neutral production models. Starting from an analysis of the EU just transition strategy, the paper focuses on the Italian case, investigating the interconnection between just transition funds and other measures (the Single Special Economic Zone and National Recovery and Resilience Program) to verify their effectiveness in terms of investment retention and attraction and their effects in terms of strategic industrial planning. Concerning retention, the Sider Alloys and Acciaierie d'Italia case studies are analyzed. Concerning attraction, as the incentives may appeal to aggressive activities dangerous to the EU and Member States' strategic autonomy, the paper offers an overview of the instruments available for screening and preventing creeping economic operations, especially the proposed reform of the investment screening mechanism and the anti-coercion instrument. In conclusion, the paper proposes the adoption of an ex ante impact assessment, including citizen consultation, aimed at verifying investment concrete capacity to contribute to the just transition process.

Keywords: just transition; incentives; strategic autonomy

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1. Introduction

"Just transition" is an expression used by the United States (US) trade union movement to indicate the interventions needed to secure workers' rights and livelihoods when economies are driven towards more sustainable models of production[1]. The European Commission adopted the expression to refer to a new socioeconomic development model to fight climate change and make environmental and digital transition a reality, "leaving no one behind".

Just transition has several implications in terms of economic growth, social transformation, environmental protection, and territorial cohesion. From the investment law perspective, it implies the adoption of several incentivizing instruments aimed at supporting new green economy activities or reconverting the old ones into greener and energy-neutral production models. Although it is very interesting both in terms of the quantity of financial resources and the impact on business model modernization, it is questionable whether these measures are really able to attract and retain investors interested in starting or carrying out profitable and innovative long-term projects.

This paper examines the effects of the European Union (EU) just transition strategy on EU and Member States' (MS) industrial policy in order to assess its effectiveness in attracting and retaining investors. Furthermore, as investments have a significant impact not only on economic development but also on the environment, social policy, land use, and territorial

[1] International Trade Union Confederation, "Climate Frontlines Briefing–No Jobs on a Dead Planet", March 2015.

cohesion, the paper seeks to underline the strict linkage between just transition incentivizing measures and industrial policy planning, focusing in particular on the decision making that leads to the decision to accept a specific foreign investment in a given territory.

2. Methods

Starting from an analysis of the EU regulation and documents concerning just transition, the paper focuses on Italy, investigating the interconnection between just transition funds and other incentivizing measures—-specifically the Single Special Economic Zone (SEZ) for Southern Italy and the National Recovery and Resilience Program (NRRP). More specifically, this study aims to verify the effectiveness of these converging incentivizing measures in terms of investment retention and attraction. With regard to retention, two case studies concerning foreign investments in plants located in the just transition areas are analyzed: Sider Alloys (formerly Alcoa) and Acciaierie d'Italia (formerly Ilva). As for attraction, in light of the epilogue of the two case studies, the paper investigates the risk that such incentives may appeal to aggressive activities and investments capable of undermining the EU and Member States' economic security and strategic autonomy. From this perspective, the paper offers an overview of the instruments adopted by the EU institutions to screen and prevent creeping economic operations managed by foreign actors. Lastly, the paper emphasizes the linkage between investment planning and more general territorial planning issues, proposing a method for strengthening ex ante investment impact assessment and reinforcing stakeholder and citizen involvement in decision making so that the just transition can become a reality.

3. The Green Deal and the Just Transition Fund: Promoting Sustainability through Supporting Greener Investments

With the 2019 Communication on the European Green Deal[2], the European Commission launched a new growth strategy to transform the EU into a "modern, resource-efficient and competitive economy where there are no net emissions of greenhouse gases in 2050 and where economic growth is decoupled from resource use". The European Commission underlined the necessity to assure that the "transition must be just and inclusive. It must put people first, and pay attention to the regions, industries and workers who will face the greatest challenges". The ultimate aim was to transform the EU into "a global leader on climate and environmental measures, consumer protection, and workers' rights" (Schoenefeld 2021; Chiti 2022; Tufano 2023; van der Sluis 2023). From this perspective, the European Commission established a roadmap aimed at designing a set of deeply transformative policies in several fields (clean energy supply, industry, production and consumption, large-scale infrastructures, transport, food and agriculture, construction, taxation and social benefits, natural ecosystems, sustainable use of resources, and improving human health). According to the European Commission perspective, sustainable transformation should be accompanied by digital transformation and the promotion of circular economy[3], conceived as an opportunity to expand sustainable and job-intensive economic activity. The European Commission focused in particular on some specific energy-intensive industries, such as steel, whose decarbonization and modernization entail the adoption of new business models able to support clean steel breakthrough technologies leading to a zero-carbon steel-making process by 2030 and energy neutrality by 2050. The European Commission appears to be aware that climate change and environmental degradation hit the most vulnerable more than any other but also that the transition entails significant

[2] COM (2019) 640 final, 11.12.2019, "The European Green Deal".

[3] According to the data collected by the European Commission "from 1970 to 2017, the annual global extraction of materials tripled and it continues to grow, posing a major global risk. About half of total greenhouse gas emissions and more than 90% of biodiversity loss and water stress come from resource extraction and processing of materials, fuels and food. The EU's industry has started the shift but still accounts for 20% of the EU's greenhouse gas emissions. It remains too 'linear', and dependent on a throughput of new materials extracted, traded and processed into goods, and finally disposed of as waste or emissions. Only 12% of the materials it uses come from recycling".

structural changes in production models, skill requirements, and relative prices. To face these problems, the European Commission proposed a Just Transition Mechanism (JTM). The JTM focuses on the regions and sectors most affected by the transition because they depend on fossil fuels or carbon-intensive processes. It is funded by the EU budget, as well as the European Investment Bank (EIB) group to leverage the required private and public resources. JTM is composed of three pillars: the Just Transition Fund (JTF), the Just Transition Scheme under InvestEU, and a Public Sector Loan Facility for Just Transition that combines European Commission grants with European Investment Bank loans. The main aim is to protect the citizens and workers most vulnerable to the transition, providing access to re-skilling programs, jobs in new economic sectors, or energy-efficient housing, involving and committing all the territorial stakeholders in the choices, and action geared to constructing the transition.

After the pandemic, the need to carry on the Green Deal strategy and promote the just transition became a priority of the European Commission and was pursued through several actions funded by the Multiannual Financial Framework 2021–2027[4], mainly the Just Transition Fund Regulation adopted as part of cohesion policy programming 2021–2027[5]. Based on Article 175 of the Treaty on the Functioning of European Union[6] (TFEU) and point (a) of Article 322(1) TFEU[7], the Regulation aims to contribute to the fulfillment of the Union's commitments to implement the Paris Agreement adopted under the United Nations Framework Convention on Climate Change (the 'Paris Agreement')[8]. More specifically, it pursues efforts to limit the temperature increase to 1.5 °C above pre-industrial levels and put the European Green Deal into practice. Regulation is based on the assumption that, although fighting climate change and environmental degradation can produce medium-term benefits, regions have different starting points in relation to transition. More specifically, transition has a wider social, economic, and environmental impact for regions that rely heavily on fossil fuels for energy use, especially coal, lignite, peat, and oil shale, and for greenhouse gas-intensive industries, risking variable transition speeds in the EU in terms of climate action, but also growing disparities between regions, with a detrimental impact on social, economic, and territorial cohesion[9]. The Regulation is also based on the conviction that "in order to be successful and socially acceptable for all, the transition has to be fair and inclusive"[10]. In this perspective, the JTF aims to "provide support to the people, economies and environment of territories which face serious socio-economic challenges deriving from the transition process towards the Union's 2030 targets for energy and climate [. . .] and a climate-neutral economy of the Union by 2050"[11]. The Regulation also establishes a green

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[4] See, for example, Council Regulation (EU) 2020/2094 of 14 December 2020 establishing a European Union Recovery Instrument to support the recovery in the aftermath of the COVID-19 crisis, *OJ* L 433I, 22.12.2020, p. 23 ff., launching the Next Generation EU Program, Recital 7 "The support under the instrument established by this Regulation (the 'Instrument') should in particular focus on measures . . .for maintaining efforts to ensure a just transition to a climate-neutral economy" and Article 1, §2 letter f) "Support under the Instrument shall in particular finance the following measures to tackle the adverse economic consequences of the COVID-19 crisis or the immediate funding needs to avoid a re-emergence of that crisis: (f) measures to ensure that a just transition to a climate-neutral economy will not be undermined by the COVID-19 crisis".

[5] Regulation (EU) 2021/1056 of the European Parliament and of the Council of 24 June 2021 establishing the Just Transition Fund, *OJ* L 231, 30.6.2021, p. 1 ff.

[6] Treaty on the Functioning of European Union, signed, together with the Treaty on European Union (TEU), in Lisbon on 13 December 2007.

[7] While Article 175 TFEU concerns cohesion policy, Article 322 TFEU concerns the EU budget.

[8] Council Decision (EU) 2016/1841 of 5 October 2016 on the conclusion, on behalf of the European Union, of the Paris Agreement adopted under the United Nations Framework Convention on Climate Change, *OJ* L 282, 19.10.2016, p. 4. Paris Agreement on climate change was signed at the UN Climate Change Conference (COP21) on 12 December 2015 and entered into force on 4 November 2016. The agreement sets long-term goals to guide all nations to substantially reduce global greenhouse gas emissions, aiming to keep the increase in global temperatures to well below 2 °C above pre-industrial levels and pursue efforts to limit it to 1.5 °C above pre-industrial levels.

[9] Regulation (EU) 2021/1056, Recital 2.

[10] Regulation (EU) 2021/1056, Recital 3.

[11] According to Article 3, the resources for the JTF should be 7,500,000,000, which could be increased by additional resources. The European Commission should adopt a decision, by means of an implementing act, setting

rewarding mechanism, whereby, if the resources increase, the additional funding will be distributed among the MS on the basis of the change in greenhouse gas emissions from their industrial facilities in territories funded by the JTF[12]. Access to resources is conditional upon the MS commitment to implement the objective of achieving a climate-neutral EU by 2050[13]. Restrictions on accessing the funds have been established for MS that have not made this commitment (Armeni 2023, p. 1035 ff.; Villani 2023).

The activities financed by the JTF consist of investment in industry[14], research and innovation[15], the deployment of technology, systems, and infrastructures for affordable clean energy[16] and renewable energy[17], investments in smart and sustainable local mobility rehabilitation[18], an upgrade of district heating networks[19], as well as digitalization[20], in addition to investments in the regeneration and decontamination of brownfield sites, land restoration including green infrastructure and repurposing projects[21], investments in enhancing the circular economy[22], and, lastly, the up-skilling and re-skilling of workers and jobseekers[23].

The JTF resources are allocated for the categories of regions where the territories concerned are located on the basis of territorial just transition plans approved by the European Commission after verifying that the identification of the territories most negatively affected by the transition process is duly justified. MS should co-finance the JTF at differentiated rates for every category of region[24].

Territorial just transition plans[25] must be prepared in concert with the relevant local and regional authorities of the territories concerned and must cover one or more affected territories corresponding to NUTS level 3[26] regions or the areas within them that are "most negatively affected, based on the economic and social impact resulting from the transition, in particular with regard to the expected adaptation of workers or job losses in fossil fuel production and use and the transformation needs of the production processes of industrial

out the annual breakdown of available resources by MS in accordance with the allocations set out in Annex I. Poland is the country that receives the greatest funding (20%), followed by Germany, Bulgaria, and Romania. As already underlined, these resources are complemented by funds allocated to just transition objectives by the National Recovery and Resilience Plans (NRRPs) adopted under Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility, *OJ* L 57, 18.2.2021, p. 17.

12 Regulation (EU) 2021/1056, Article 5.

13 Regulation (EU) 2021/1056, Article 7.

14 Regulation (EU) 2021/1056, Article 8. These consist of (a) productive investments in SMEs, including micro-enterprises and start-ups, leading to economic diversification, modernization, and reconversion; (b) investments in the creation of new firms, including through business incubators and consulting services, leading to job creation.

15 These include research carried out by universities and public research organizations and fostering the transfer of advanced technologies.

16 These include energy storage technologies and technologies devoted to greenhouse gas emission reduction.

17 These include the sustainability criteria set out in Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources (recast), *OJ* L 328, 21.12.2018, p. 82, and energy efficiency, including for the purposes of reducing energy poverty.

18 These include the decarbonization of the local transport sector and its infrastructure.

19 These include investments to improve the energy efficiency of district heating systems and investments in heat production provided that the heat production installations are supplied exclusively by renewable energy sources.

20 These include digital innovation and digital connectivity.

21 In this case, the 'polluter pays' principle has to be taken into account.

22 These include waste prevention, reduction, resource efficiency, reuse, repair, and recycling.

23 These also include job search assistance for jobseekers and active inclusion of jobseekers, as well as activities concerning education and social inclusion, and, where duly justified, investments in infrastructure for the purposes of training centers, child- and elderly-care facilities.

24 Regulation (EU) 2021/1056, Article 10. More specifically, the allocation is divided as follow: 85% for less developed regions, 70% for transition regions, and 50% for more developed regions.

25 Regulation (EU) 2021/1056, Article 11. Annex II offers a template.

26 See Regulation (EC) n. 1059/2003 of the European Parliament and of the Council of 26 May 2003 on the establishment of a common classification of territorial units for statistics (NUTS), *OJ* L 154, 21.6.2003, p. 1, and its modifications and amendments.

facilities with the highest greenhouse gas intensity"[27]. It implies the adoption, in areas covered by the JTF, of a method of governance able to match environmental objectives, socioeconomic interests, land-use planning, and cohesion.

Since 2022, an indirect contribution to JTF objectives is also offered by the REPower EU program, launched by the European Commission after the Russian invasion of Ukraine to free the EU from dependency on Russian energy sources[28]. More specifically, REPower EU is based on four actions: EU energy supply diversification, securing affordable energy supplies, saving energy, and investing in renewable energy. Diversification is pursued by establishing agreements with other third countries for pipeline imports, the supply of renewable hydrogen, and the export of natural gas to Europe, as well as by investing in the common purchase of liquefied natural gas (LNG). Energy security is assured, firstly, through the EU Energy Platform launched in April 2022 to coordinate EU action and negotiations with external gas suppliers through common gas procurement for MS (Moschetta 2022; Pugliese 2023, p. 356 ff.; Marin 2023)[29]. It was accompanied by an EU company joint gas purchase initiative (Aggregate EU mechanism). Secondly, a gas storage mechanism was established to fill underground gas storage to 80% capacity by 1 November 2022 (Pugliese 2022b, p. 405 ff.; 2023, p. 356 f.; Marin 2023)[30]. By working together, EU countries surpassed this, reaching 95% gas storage instead. The yearly target for the coming winters will be to fill storage to 90% capacity by 1 November. Action to save energy is geared to changing the habits of businesses and citizens and being accompanied by actions to control energy prices[31]. Furthermore, actions have been taken to increase renewable energy deployment[32]. Lastly, Regulation 2023/435 allowed MS to introduce a REPower chapter in the National Plans for Recovery and Resilience (NPRRs) adopted in accordance with Regulation (EU) 2021/241 establishing the Recovery and Resilience Facility[33]. By assuring energy security and solidarity, reducing energy prices, and incentivizing renewable energy production, REPower is indirectly contributing to the objective of fostering just transition.

Nevertheless, despite all the (also financial) efforts to promote it, the ability of the just transition to balance fighting climate change and the promotion of economic development and cohesion is not to be taken for granted. In the coming sections, the case of the Italian Just Transition Fund National Plan (JTF NP) will be examined to assess its concrete effects

[27] A territorial just transition plan must contain the following elements: (a) a description of the transition process towards a climate-neutral economy at national level; (b) the reasons for identifying the territories as most negatively affected by the transition process; (c) an assessment of the transition challenges faced by the territories identified as most negatively affected; (d) a description of the expected contribution of the JTF support to addressing the social, demographic, economic, health, and environmental impacts of the transition to a climate-neutral economy; (e) an assessment of its consistency with other relevant national, regional, or territorial strategies and plans; (f) a description of the governance mechanisms consisting of the partnership arrangements, the planned monitoring and evaluation measures, and the responsible bodies; (g) a description of the type of operations envisaged and their expected contribution to alleviating the impact of the transition; and (h) an indicative list of operations and enterprises to be supported and a justification of the need for such support through a gap analysis demonstrating that the expected job losses would exceed the expected number of jobs created in the absence of the investment. Annex III establishes common output and result indicators.

[28] See COM (2022) 108, 8.3.2022, "REPower EU: joint European action for more affordable, secure, and sustainable energy"; COM (2022) 230, 18.5.2022, "REPower EU plan".

[29] Council Regulation (EU) 2022/2576, of 19 December 2022, enhancing solidarity through better coordination of gas purchases, reliable price benchmarks, and exchanges of gas across borders, *OJ* L 335, 29.12.2022, p. 1.

[30] Regulation (EU) 2022/1032 of the European Parliament and of the Council of 29 June 2022 amending Regulations (EU) 2017/1938 and (EC) n. 715/2009 with regard to gas storage, *OJ* L 173, 30.6.2022, p. 17.

[31] Council Regulation (EU) 2022/1369, of 5 August 2022, on coordinated demand-reduction measures for gas, *OJ* L 206 8.8.2022, p. 1; Council Regulation (EU) 2022/1854 of 6 October 2022 on an emergency intervention to address high energy prices, *OJ* L 261I, 7.10.2022, p. 1.; Council Regulation (EU) 2022/2578, of 22 December 2022, establishing a market correction mechanism to protect Union citizens and the economy against excessively high prices, *OJ* L 335, 29.12.2022, p. 45.

[32] Council Regulation (EU) 2022/2577 of 22 December 2022, laying down a framework to accelerate the deployment of renewable energy, *OJ* L 335 29.12.2022, p. 36.

[33] Regulation (EU) 2023/435 of the European Parliament and of the Council of 27 February 2023 amending Regulation (EU) 2021/241 as regards REPower EU chapters in recovery and resilience plans and amending Regulations (EU) n. 1303/2013, (EU) 2021/1060, and (EU) 2021/1755 and Directive 2003/87/EC, *OJ* L 63, 28.2.2023, p. 1.

in terms of investment retention and attraction in the funded territories and its concrete ability to drive energy and environmental transition as well as promoting economic growth, employment, social wellbeing, and territorial cohesion.

4. Incentives as a Means of Investment Attraction and Retention: The Italian JTF Program and Its Connection with the Single Special Economic Zone for Southern Italy

The Partnership Agreement between the European Commission and Italy 2021–2027[34], signed and adopted on 19 July 2022, declared two Italian NUTS level 3 areas eligible for access to the JTF, namely Sulcis Iglesiente in Sardinia and the Taranto industrial area, located in Apulia. The Italian Program for a Just Transition 2021–2027 (JTF NP), including the two territorial transition plans, was approved on 16 December 2022[35].

From the context analysis proposed by the program, the two areas elected as JTF beneficiaries have several common features: economic dependency on the steel and carbon sectors, energy poverty, a large number of contaminated sites, high emission rates[36], risks for health, a high unemployment rate, low incomes, a low entrepreneurship level, skills mismatch, and low innovation rates. Against these phenomena, the JTF NP promotes a strategy to mitigate the transition impact on climate neutrality in the two areas through business diversification in sustainable and innovative sectors, new employment and training opportunities, the fight against energy poverty, and environmental protection.

More specifically, in order to allow regions and people to face the employment, economic, and social effects of transition towards the 2030 objectives of energy and climate Union, as well as climate neutrality in 2050, the JTF offers incentives to undertakings to promote the use of renewable energy resources and decrease energy consumption, also by creating intelligent energy storage and distribution systems, mitigating effects on workers through up-skilling and re-skilling and by promoting research and development projects to implement the green hydrogen supply chain[37]. While these actions principally favor energy-intensive businesses, specific actions supporting small and medium enterprises

[34] "Decisione di esecuzione della Commissione C (2022) 4787 finale del 15.7.2022 che approva l'accordo di partenariato con la Repubblica italiana". The Partnership Agreement is the document adopted under Regulation (EU) 2021/1060 of the European Parliament and of the Council of 24 June 2021 laying down common provisions on the European Regional Development Fund, the European Social Fund Plus, the Cohesion Fund, the Just Transition Fund, and the European Maritime, Fisheries, and Aquaculture Fund and financial rules for those and for the Asylum, Migration, and Integration Fund, the Internal Security Fund, and the Instrument for Financial Support for Border Management and Visa Policy, *OJ* L 231, 30.6.2021, p. 159 ff. According to Article 10, the Partnership Agreement ". . .sets out the strategic orientation for programming and the arrangements for using the ERDF, the ESF+, the Cohesion Fund, the JTF and the EMFAF in an effective and efficient way for the period from 1 January 2021 to 31 December 2027". According to Article 11, §1, c, the Partnership Agreement must contain, above all, "preliminary financial allocation from each of the funds covered by the Partnership Agreement by policy objective at national and where appropriate at regional level, respecting Fund-specific rules on thematic concentration and the preliminary financial allocation for the specific objective of the JTF. . .".

[35] Decisione di esecuzione della Commissione del C (2022) 9764 final 16.12.2022 che approva il programma "Programma Nazionale Just Transition Fund Italia 2021–2027" per il sostegno a titolo del Fondo per una transizione giusta nell'ambito dell'obiettivo "Investimenti a favore dell'occupazione e della crescita" in Italia.

[36] Sardinia has two plants: Emission Trading System (ETS) (Centrale ENEL Grazia Deledda e Portovesme Srl) and two plants that are going to be reopened (Eurallumina and Sider Alloys—formerly Alcoa). Taranto has four plants ETS (Acciaierie d'Italia (AdI), formerly Ilva, ENI, Leonardo spa, Unicalce spa), but the most pollutant is AdI responsible for 50% of the emissions in the province, which caused, in 2013, an infringement procedure against Italy for violation of Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control) (recast), *OJ* L 334, 17.12.2010, p. 17, followed, in 2014, by an infringement procedure for PM10 emissions. The ETS system was established by Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a system for greenhouse gas emission allowance trading within the Union, *OJ* L 275 25.10.2003, p. 32. It is based on a "cap-and-trade" approach mechanism: the EU sets a cap on how much greenhouse gas pollution can be emitted each year, and companies need to hold a European Emission Allowance (EUA) for every metric ton of CO^2 they emit within one calendar year. They receive or buy these permits—and can trade them. Companies face a fine of EUR 100 if they emit more CO^2 than their emission allowances permit. Conversely, they have an incentive to reduce emissions by investing in energy efficiency because they can then sell excess allowance.

[37] Specifically for the Taranto area, the JFT NP promotes the re-employment of people who risk being fired and laid off due to the AdI reconversion process in the green hydrogen and renewable energy supply chain.

(SMEs), start-ups, spin offs, and spin outs to accelerate the process of economic innovation and diversification are planned.

In pursuing these objectives, the JTF NP operates in synergy with structural fund planning (European Regional Development Fund[38] and European Social Fund Plus[39]) and NRRP, as well as with the National Integrated Program for Energy and Climate, contributing to the objective of decarbonization by 2025 promoting renewable energy sources and electricity production by gas. JTF is a "shared management fund" between the European Commission and Italian Government. The JTF NP Managing Authority was the Cohesion Agency, whose functions were transferred in 2023 to the Cohesion Policy Department, a consultative body of the Presidency of Council of Ministers[40]. According to Regulation 2021/1056, the Italian Government manages the JTF NP in partnership with the regions and with the involvement of other territorial institutional, economic, and social stakeholders. As a consequence, the JTF NP has an effect on territorial governance and management, calling all the public and private territorial stakeholders to comply with just transition values and objectives.

It appears clear that the Italian JTF NP is principally intended to support undertakings in energy transition in three ways:

- Direct support comprising public aid directly devolved to renewing production processes with the aim of reducing energy consumption, adapting them to renewable resources, using digital instruments to "dematerialize" them, saving raw materials, but also reconverting energy-intensive businesses towards greener activities, and creating new undertakings.
- The "indirect" support derived from the availability of energy-renewable resources and infrastructures, more efficient services and areas, and a more skilled workforce.
- A "collateral" benefit deriving from the creation of a more investor-friendly context by improving environmental, urbanistic, service, way of life, educational, training, cultural, and creative milieux, such as to stimulate endogenous innovation, technological development, and more efficient territorial services.

As a consequence, despite being designed for specific objectives to drive production methods towards climate neutrality and renewable energy, the JTF NP also has an undeniable incentivizing potential. It could be used both to retain investors already present on the territory and deter them from delocalizing their activities elsewhere and to attract new investors. From this perspective, it promotes an innovative model of industrial planning, strictly inter-related to land use, urban regeneration plans, and social policy programs[41]. It implies a transdisciplinary and innovative perspective in land-use management oriented towards promoting societal transformation in terms of sustainability, aesthetics, and inclusion, according to the "New European Bauhaus" movement principles[42].

Conceived as an instrument to attract and retain investors, among other things, JT incentives could be considered complementary to other state aid systems, both sectoral and horizontal, able to accumulate their effects in specific territories to favor economic activity and green transition. As an example of sectoral aid, the reference is to aid that

[38] Regulation (EU) 2021/1058 of the European Parliament and of the Council of 24 June 2021 on the European Regional Development Fund and on the Cohesion Fund, *OJ* L 231, 30.6.2021, p. 60, Recital 8.

[39] Regulation (EU) 2021/1057 of the European Parliament and of the Council of 24 June 2021 establishing the European Social Fund Plus (ESF+) and repealing Regulation (EU) n. 1296/2013, *OJ* L 231, 30.6.2021, p. 21, Recital 6.

[40] Decreto del Presidente del Consiglio dei Ministri del 10 novembre 2023, "Soppressione dell'Agenzia per la coesione e trasferimento delle relative funzioni al Dipartimento per le politiche di coesione", *GU* Serie Generale n. 280, 30-11-2023.

[41] In the Taranto area, for example, the creation of a "green belt", composed of a network of urban and peri-urban parks, naturalistic and rural areas, is established to reduce the CO_2 emissions, promote the territory protection, valorization, and fruition by the collectivity, and foster the blue economy. At the same time, bioremediation actions are planned in polluted areas, with the aim to restore the land with productive reuse purposes.

[42] To better understand the New Bauhaus movement, see the EU website page: https://new-european-bauhaus.europa.eu/about/about-initiative_en accessed on 16 April 2024.

might be considered compatible under Art. 107, §3, letter (c), TFEU on the basis of Guidelines on state aid for environmental protection and energy 2014–2020[43] and on the basis of Guidelines on state aid for climate, environmental protection, and energy 2022[44], as well as the aids considered as compatible under Art. 107, §3, letter (b), on the basis of the Temporary Crisis Framework for State Aid measures to support the economy following the aggression against Ukraine by Russia adopted by the European Commission on 24 March 2022[45]. As for the horizontal aid, the JT incentives mainly appear to be complementary with the regional aid that could be considered compatible under Article 107, §3, letter (a). The amount of aid allowed in each region is established by the National Regional Aid Map, which generally grants greater intensity to the aid conferred to undertakings located within the less developed regions, which also receive more significant structural funds in order to accumulate the benefits coming from the two types of funds[46]. In the current programming cycle, the Italian National Regional Aid Map for cycle 2021–2027, first adopted on 2 December 2021[47], was amended on 19 June 2023 in an effort to increase aid for territories identified for support by the JTF[48], demonstrating willingness to assure convergence between state aid and European cohesion funds (structural funds and the Just Transition Fund) in areas paying the higher price in terms of energy and the environmental transition.

More recently, in the just transition areas, as in all the Southern Italy regions, a new overall model of incentivization has been put in place on an experimental basis: the so-called “Single Special Economic Zone”. Special Economic Zones (SEZs) are an evolution of a traditional customs procedure (the free zone) as a blend of several customs procedures (such as temporary admission, inward/outward processing, or end-use) aimed at assuring preferential treatment for goods intended to be processed before being released for free circulation or exported[49]. They are used in EU as in several traditionally closed countries (such as China) to attract foreign investors offering them, along with easier customs treatments, simplified and less onerous administrative procedures, tax reductions, lower wages, and less heavy company–law burdens to facilitate localization (Bakos 2020; Da Silva Leandro and Li 2020; Sabatino 2020; Xie and Wang 2020; Pusceddu 2020; Pugliese 2020).

In Italy, SEZs were first disciplined by Law n. 296/2006[50], establishing the possibility of creating “urban free zones” in the southern cities’ disadvantaged districts to favor economic and social development, extended in 2007 to all cities with over 30,000 inhabitants. Overall regulation of SEZs as incentivization instruments was established by Law Decree 91/2017[51], allowing the establishment of SEZs to foster the creation of agreeable conditions in economic, financial, and administrative terms with a view to developing existing and new undertakings and to incentivize the founding of new industries. An SEZ should include at least one port area connected to the Trans-European Network Transport (TEN-

[43] Communication from the Commission, “Guidelines on state aid for environmental protection and energy 2014–2020”, *OJ* C 200, 28.6.2014, p. 1.

[44] Communication from the Commission C (2022) 481, “Guidelines on state aid for climate, environmental protection, and energy 2022”, *OJ* C 80, 18.2.2022, p. 1.

[45] Communication from the Commission C (2022) 1890. “Temporary crisis framework for state aid measures to support the economy following the aggression against Ukraine by Russia”, *OJ* C 131I, 24.3.2022, p. 1, and its modifications and amendments.

[46] COM (2021) 2594 final, 19.04.2021, “Guidelines on regional state aid”.

[47] Decisione della Commissione europea C (2021) 8655, 2.02.2021, “Aiuto di Stato SA.100380 (2021/N)—Italia Carta degli aiuti a finalità regionale per l’Italia (1° gennaio 2022-31 dicembre 2027)”, and its integrations and modifications. See Decisione C (2022)1545 final, 18.03.2022.

[48] Decision C (2023) 3913 final, 19 June 2023. Last Map modifications were established by Decision C (2023) 8654 final, 18.02.2023.

[49] For a definition of customs procedures, see Regulation (EU) n. 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code (recast), *OJ* L 269, 10.10.2013, p. 1, Articles 210 ff.

[50] Law n. 296, 27.12.2006, “Disposizioni per la formazione del bilancio annuale e pluriennale dello Stato (legge finanziaria 2007)”, *GU* n. 299, 27.12.2006.

[51] Law Decree, n. 9, 20.06.2017, “Disposizioni urgenti per la crescita economica nel Mezzogiorno”, *GU* n.141, 20.06.2017, converted by Law n. 123, 3.08.2017, *G.U.* n. 188, 12.08.2017.

T)[52]. The benefits granted to the undertakings working inside an SEZ consist of customs and administrative simplification, preferential access to infrastructures, and tax credit on investments. To realize SEZs in Southern Italy, further regulations were adopted both at the central and regional levels (Pugliese 2020, 9 ff.)[53]. Law Decree 77/2021[54] implemented the "Italia Domani" NRRP and established further facilitations and tax credit measures for undertakings localizing their activities in SEZs. Lastly, Law Decree 124/2023[55] unified the regional SEZs, as of 1 January 2024, in a Single Special Economic Zone for Southern Italy. In this area, the economic and production activities of undertakings already present, together with new investors, could benefit from special investment and business development conditions. Like the JTF NP and the NRRP[56], the Single SEZ already has a centralized governance, attributed to a control room, set up within the Council of Ministers' Presidential Bureau, comprising all the Ministries concerned and the Presidents of the southern regions. Coordination and monitoring are attributed to a mission structure created within the Presidency. The Single SEZ development policies are established according to a three-year strategic plan, consistent with the NRRP, which identifies the sectors, investments, and priority measures to be promoted. Specific attention is placed on investments in industrial reconversion, energetic transition, and the creation of enclosed free customs zones in accordance with Regulation 952/2013 (EU Custom Code). A single office (Sportello Unico per le Attività Produttive/SUAP) is responsible for carrying out all the administrative procedures preparatory to the launch of business activity. At the same time, a tax credit is in place for investments in modern equipment or building construction within the Single SEZ.

Single SEZ is an instrument devoted to making the Southern Italy regions more investor friendly. It operates in synergies with the measures funded by NRRP, structural funds, and, in areas where it operates, especially JTF. This is demonstrated by the fact that the Decree establishing the access procedures and requirements to the tax credit fixes, in line with the Italian Regional Aid Map, higher rates for undertakings investing in areas that may be admitted to the JTF[57].

All these measures are devoted to supporting existing and new undertakings in facing the challenges determined by subsequent crises (financial crisis, the pandemic, recent wars) and energy and digital transition.

In the following sections, an effectiveness assessment of incentivization measures as a form of investment retention and attraction will be performed, underlining opportunities and risks in terms of the Government–investor relationship, created by the decision to concentrate massive fund granting in a specific area.

52 For the map of the EU TEN-T, see Regulation (EU) n. 1315/2013 of the European Parliament and of the Council of 11 December 2013 on Union guidelines for the development of the Trans-European Transport Network, *OJ* L 348, 20.12.2013, p. 1.

53 The Presidential Decree of 12/2018 (in *GU* n. 47 of 26.02.2018) established procedures and requirements for setting up SEZs. At the same time, several Italian regions adopted a specific regulation for SEZs. See Campania Region Executive Board Deliberation n. 175/2018; Calabria Region Executive Board N. 100/2018; and Puglia Region Executive Board Deliberation 612/2019. Lastly, the so-called "Growth Decree" (Legislative Decree 34/2019, *GU* n. 100, 30.04.2019) established a plan for large investments in the SEZs.

54 Law Decree n. 77, 31.05.2021 "Governance del Piano nazionale di ripresa e resilienza e prime misure di rafforzamento delle strutture amministrative e di accelerazione e snellimento delle procedure", *GU* n. 129, 31.05.2021. The law decree was converted with modifications by Law n. 108, 29.07.2021 (in *S.O.* n. 26, related to *G.U.* 181, 30.07.2021). It created a mission structure related to the cabinet.

55 Law Decree n. 124, 19.09.2023 "Disposizioni urgenti in materia di politiche di coesione, per il rilancio dell'economia nelle aree del Mezzogiorno del Paese, nonche' in materia di immigrazione", *GU* n. 219 del 19.09.2023, converted with modifications by Law n. 162, 13.11.2023 (in *G.U.* n. 268, 16.11.2023).

56 See Law Decree n. 13, 24.02.2023 "Disposizioni urgenti per l'attuazione del Piano nazionale di ripresa e resilienza (PNRR) e del Piano nazionale degli investimenti complementari al PNRR (PNC), nonché per l'attuazione delle politiche di coesione e della politica agricola comune", *G.U.* n. 47, 24.02.2023, converted by Law n. 41, 21.04.2023, *G.U.* n. 94, 21.04.2023.

57 Presidential Decree 17 May 2024 "Modalità di accesso al credito d'imposta per investimenti nella ZES unica, nonché criteri e modalità di applicazione e di fruizione del beneficio e dei relativi controlli", *GU* n. 117, 21.05.2024, Article 4, §1, letter c).

5. Are Incentives Effective in Influencing Investor Choices? Lessons Learnt from the Sider Alloys and Acciaierie d'Italia Cases

5.1. Analytical Description of the Sider Alloys and Acciaierie d'Italia Case Studies

This section presents two case studies in order to verify whether the availability of a mix of incentives in a specific territory could influence "stay-or-go" investor decisions. The case study concerns two important foreign investors operating in the areas covered by the JTF. They are currently involved in disputes against the Italian Government caused by their decision to disinvest from those areas. Due to the investors' importance, the size of the plants, and their position in the global supply chains, the plants could be considered strategic not only at the domestic but also at the EU level. This implies the strong Italian Government and local authorities' interest and their importance as examples of the difficult relationship between States and investors in critical sectors and areas.

It is important to underline that in these two cases, the disputes, rather than being adjudicated by Investor State Dispute Settlement (ISDS) tribunals, are managed through domestic administrative or judicial procedures. Despite often being ignored by investment law scholars, these kinds of disputes are very frequent and very interesting, as they give the opportunity to investigate to what extent a government is prepared to accept foreign investors' conditions and what the "breaking point" of the investor–State relationships is.

The first case study concerns the investment carried out in 2018 by the Swiss steel giant Sider Alloys in the Portovesme steel plant for aluminum production. The plant was owned by US Alcoa Inc. and has been shut down since 2014. In 2018, it was sold to Sider Alloys Italia Spa, controlled by Sider Alloys Holding Italia S.r.l., linked to the Swiss Sider Alloys and involving, as minority funders, Invitalia, the business development agency of the Italian Ministry of Economy, and an association of workers. Sider Alloys Italia signed a Development Contract to reactivate the Alcoa plant, funded by the Italian Ministry of Economic Development and the Sardinia Region through a Regional Program Agreement[58]. Reopening has been delayed several times due to the requirement to sign agreements with ENEL, the Italian company responsible for energy network management, negotiating the amount and prices for energy provision, and with regional administration seeking to obtain environmental authorizations in accordance with the Environmental Strategic Assessment (ESA)[59] and Environmental Integrated Authorization (AIA)[60] procedures. Although Sider Alloys should have become one of the more substantial beneficiaries of the JTF, the frequent delays in restarting production caused difficulty in accessing these funds and the temporary framework adopted after the Ukrainian crisis[61]. After repeated delays, in December 2023, Sider Alloys obtained a loan from SACE, the Italian insurance

[58] Development Contract and Regional Program Agreement are two instruments of "negotiated programming". These instruments were firstly established in Italy by Law n. 662, 23.12.1996 "Misure di razionalizzazione della finanza pubblica", *GU* n. 303, 28.12.1996, Article 2, § 203 and its modifications and amendments to create a partnership between public and private territorial stakeholders to carry on joint development and industrial projects. From this perspective, they have been used several times as administrative instruments to manage the creation of new plants by foreign investors or the acquisition of existing plants by foreign investors. More specifically, the "Development Contract" was created by Law Decree n. 112, 25.06.2008 "Disposizioni urgenti per lo sviluppo economico, la semplificazione, la competitività, la stabilizzazione della finanza pubblica e la perequazione Tributaria", *GU* n. 147, 25.06.2008, converted by Law n. 133, 6.08.2008, *SO* n. 196 published in *G.U.* n. 195, 21.08.2008. This instrument facilitates large innovative and strategic plant investment programs. Regional Program Agreements are instruments involving public and private actors in promoting economic and industrial territorial growth. In Sardina, these are regulated by Regional Law n. 45, 22.12.1989 "Norme per l'uso e la tutela del territorio regionale", *BURAS* n. 48, 22.12.1989, and its modifications and amendments.

[59] Environmental Strategic Assessment is the procedure established by the Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programs on the environment, *OJ* L 197, 21.7.2001, p. 30. It aims to identify ex ante, through the involvement of experts, public authorities, non-governmental organizations (NGOs), and all interested parties, the potential impact of plans and programs on the environment. It is regulated in Italy by Legislative Decree n. 152, 3.04.2006 "Norme in materia ambientale", *G.U.* n. 88, 14.04.2006 (Testo Unico Ambiente), Article 11 ff.

[60] This procedure is disciplined by Articles 29-bis ff. of Legislative Decree 152/2006. It certifies the compliance of a project with all the environmental requirements imposed by EU and national regulation.

[61] See the Italian Ministry of Businesses and Made in Italy, meeting report "Sideralloys Italia SpA", 6.10.2022.

financial company specializing in supporting businesses and the national economic fabric[62]. Conferral of this further state aid was considered the premise for beginning production again in 2024, but news concerning the last meeting between the undertakings, the regional authorities, and the Ministry of Businesses and Made in Italy show great uncertainty about a genuine possibility of starting production. There is doubt surrounding the hypothesis that the foreign investor would only exploit the incentives without actually relaunching the plant[63]. These delays are putting at serious risk the possibility for Sider Alloys to benefit from all the direct incentives and the indirect and collateral advantages coming from its positioning in an area covered by the JTF NP and the other incentivizing measures for the Sulcis development. The principal damage arising from this situation is suffered by satellite activities and workers[64].

The second case study concerns investment by the global steel leader ArcelorMittal in the ex-Ilva of Taranto, in the Apulia Region. Ilva of Taranto, the largest European steel plant, has a very troubled history: born as a State-owned enterprise (Ilva/Italsider) in 1965, in 1995 it was privatized and sold to the Ilva group owned by an Italian entrepreneurial family, the Rivas. In 2012, during an investigation on environmental and pollution crimes, the court ordered seizure, and the Italian Government, to safeguard production and employment, decided to put the plant under external administration and opened an international purchasing tender, which attributed, in 2018, ownership to the entrepreneurial group ArcelorMittal through the AM InvestCo Italy S.p.A. In 2019, after the worsening of the environmental situation, condemned also by some European Court of Human Rights (ECtHR) judgments (Scocca 2020)[65], ArcelorMittal declared its intention to withdraw from the purchase and return the plant to Ilva. After several negotiations, in 2020, in the context of massive re-nationalization operations launched by the Italian government in reaction to the pandemic crisis (Pugliese 2022a, p. 232 f.; 2024), Invitalia decided to assume 38% ownership of the plant, leaving 62% to the foreign investor. In this way, the new company, Acciaierie d'Italia (AdI), came under the joint control of public and private foreign investors. The agreement also established new environmental and industrial investments aimed at completely decarbonizing production and making Ilva the largest EU "green" steel producer[66]. The strategy followed by the Italian Government was based on the conviction that participating in Ilva's capital through public funds, assuring AdI indirect advantages through NRRP funds, and offering it green energy resources funded by the JTF would retain the foreign investor and encourage it to invest new funds in modernization, environmental protection, and complete plant decarbonization. The Italian Government's ultimate goal was to ensure ongoing production and employment maintenance[67].

More specifically, in the "Italiadomani" NRRP, a specific investment was envisaged (Investment M2C23.2) to incentivize hydrogen use in the sectors where emission reduction is prohibitively costly or impossible to reduce with the currently available abatement technology (the so-called "hard-to-abate" sectors). Specifically concerning the steel sector, the NRRP funds the production of direct reduced iron (DRI), also called "sponge iron", realized from the direct reduction of iron ore into iron by a reducing gas, which contains hydrogen without greenhouse gas emission. In Taranto, the NRRP funds DRI d'Italia, an undertaking created by Invitalia to make research and produce DRI devoted to becoming the principal semi-product of the AdI plant production processes, when the electric furnace

[62] See the Italian Ministry of Businesses and Made in Italy, meeting report "Sideralloys Italia SpA", 10.10.2023.

[63] See Ansa, "Sindacati, confronto urgente con il governo per Sider Alloys", 26.03.2024.

[64] See Ansa, "Sider Alloys, verso nuova mobilitazione 'subito tavolo al Mimit'", 8.05.2024

[65] European Court of Human Rights, Judgment of 24 March 2015, *Case of Smaltini v. Italy*, Application n. 43961/09 and 54264/15; European Court of Human Rights, Judgment of 24 January 2019, *Case of Cordella and others v. Italy*; Application n. 54414/13 and 54264/15.

[66] Invitalia press release, "Ilva di Taranto, firmato l'accordo fra Invitalia e ArcelorMittal Roma", 11.12.2020.

[67] See the Italian Ministry of Businesses and Made in Italy, meeting report "Am InvestCo Italy", 26.03.2021; meeting report "Am InvestCo Italy", 7.04.2021; meeting report "Am InvestCo Italy", 14.05.2021; meeting report "Acciaierie d'Italia S.p.A.", 8.07.2021.

is built[68]. It should be specified that neither JTF NP nor NRRP confer specific funds on the AdI plant. Nevertheless, the object of creating a green energy supply chain in the Taranto area by funding hydrogen energy research and production is primarily meant to benefit AdI.

In March 2022, with the law decree concerning urgent measures to respond to the Ukrainian crisis[69], new funds were allocated to the decarbonization of the former Ilva. In the months to follow, AdI announced the launch of research projects to make production more sustainable through the creation of an electric steel furnace and the use of hydrogen as an alternative energy source. At the same time, it increased production, despite facing a serious lack of liquidity, in part due to the increased energy and raw material costs caused by the Ukrainian crisis[70]. Nevertheless, in November 2022, ArcelorMittal decided to stop a large part of the AdI contracting companies, causing the suspension of production and the redundancy of many workers[71]. Through Law Decree 2/2023[72], the Italian Government established measures to support strategic undertakings, among which AdI was mentioned, through funds devoted to their capital strengthening.

Despite the great number of measures being taken and public resources being spent, in late 2023, the relationship between the public investor Invitalia and the foreign investor ArcelorMittal gradually deteriorated due to the lack of liquidity. This situation caused serious difficulty for AdI's suppliers along with production shortages, leading to the crisis of satellite activities. After Invitalia filed for bankruptcy with the Italian Ministry of Business Development and Made in Italy and entered external administration, AdI appealed to the Milan Bankruptcy Tribunal to suspend the administrative proceedings. However, the Tribunal rejected the appeal, affirming the Ministry's administrative discretion in deciding whether to place the company under external administration, as well as the legislator's freedom to determine the forms of corporate reorganization for strategically important enterprises[73]. This decision allowed the Ministry to place AdI under external administration. This situation anticipates the possibility of—at least temporary–AdI nationalization, pending the identification of new investors interested in providing capital to the company. As evidence of this, on 17 April 2024, the Government extended external administration to the AdI holding to assure continuity of production and the loss of jobs[74].

5.2. Managing Foreign Investment Dismissions in a Just Transition Perspective: Balancing Economic, Environmental, Social, and Territorial Sustainability

Sider Alloys and AdI cases demonstrated the limits of incentives as instruments to retain foreign investors in a territory. Indeed, in both cases, the vast resources allocated to supporting the green and energy transition and recovery after the financial, pandemic, and energy crises were not sufficient to convince the foreign investors neither to assure the plants the funds necessary to continue or restart their production activities nor to realize all the investments necessary to adapt their activity to the strategic objectives promoted by public decision makers and funders. The two cases confirm that, if an investor does not

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[68] Italian Government, NRRP "Italiadomani", April 2021, p. 137. In February 2024, Puglia Green Hydrogen Valley, a partnership comprising Edison, Sostenero, and Saipem to produce green hydrogen devoted to the Ilva plan, was approved by the European Commission in the context of Important Projects of Common European Interest (Ipcei "Hy2Infra"). DRI d'Italia should participate in the project with a 5% share.

[69] Law Decree n. 21, 21.03.2022, "Misure urgenti per contrastare gli effetti economici e umanitari della crisi ucraina", *GU* n. 67, 21.3.2022, Article 10, converted by Law n. 51, 20.05.2022, *GU* n. 117, 20.05.2022.

[70] Italian Ministry of Businesses and Made in Italy, meeting report "Acciaierie d'Italia S.p.A.", 19.01.2022; Italian Ministry of Businesses and Made in Italy, meeting report "Acciaierie d'Italia S.p.A.", 23.06.2022; meeting report "Acciaierie d'Italia S.p.A.", 3.08.2022.

[71] Italian Ministry of Businesses and Made in Italy, meeting report "Acciaierie d'Italia S.p.A.", 17.11.2022.

[72] Law Decree n. 2, 5.01.2023, "Misure urgenti per impianti di interesse strategico nazionale", *GU* n. 4, 5.01.2023, converted by Law n. 17, 3.03.2023, *G.U.* n. 55, 6.03.2023.

[73] Tribunale Ordinario di Milano, II Sezione civile, Rigetto istanza n. cronol. 190/2024 del 02/02/2024 RG n. 683/2024.

[74] Italian Ministry of Businesses and Made in Italy, press release "Acciaierie d'Italia, amministrazione straordinaria estesa anche alla Holding", 17 April 2024.

have a solid long-term vision and business plan, it is unlikely to be convinced to maintain investment on the basis of the injection of State aid and incentives alone.

In both cases, nationalization was envisaged as an instrument to protect national strategic undertakings. From this perspective, in January 2024, a law decree was adopted by the Italian Government aimed at simplifying and accelerating external administration procedures for strategic undertakings, facilitating nationalization[75]. Interpreted in an investment law perspective, the law decree could be considered almost as a form of "indirect expropriation" (Dolzer and Bloch 2003; Weiner 2003; Fortier and Drymer 2004; Reisman 2004; Perkams 2010; López Escarcena 2014; Ortino 2016). Nevertheless, it is justified by the Government's need to safeguard its strategic environmental, economic, and social objectives. As a consequence, it is fully justified by the "right to regulate" (Henckels 2012; Treves 2014; Titi 2014; Pellet 2015; Korzun 2017; Pugliese 2017, p. 133; Mouyal 2018; Levashova 2019).

Since the pandemic emergency, the Italian Government has carried out several (re)-nationalizations, for example, in the transport (Alitalia/ITA) and infrastructure (ANAS) sectors, to support national champions in overcoming their structural difficulties aggravated by the health crisis (Pugliese 2022a, p. 232 f.). Nevertheless, these interventions were conceived as exceptional and temporary. The Government, mainly for budgeting reasons, appears to promote re-privatization as soon as an undertaking shows performance recovery and demonstrates its sustainability. For example, the Italian Government is leading negotiations with Lufthansa for selling ITA. Nationalization could be a useful instrument to protect strategic undertakings from the collapse generated by foreign owner disinvestment and to pursue general interests, such as, for example, climate neutrality (Schrijver 2009, p. 173 ff.). Nevertheless, to assure its effectiveness, State participation should be seen as a long-perspective project, based on a robust business plan able to overcome the industrial crisis and embark on a path of long-term sustainability with high profitability. Re-privatization should be considered only when the undertaking is definitely perceived as solid and reliable by creditors, competitive by international market operators, effective in complying with environmental and social requirements, and genuinely attractive to new private investors. New investor selection and choice should be made through a tender based on requirements compelling the seller not only to assure the undertaking's economic and financial stability and competitiveness, but also compliance with objectives of general interest, such as climate neutrality, environmental protection, and social responsibility[76]. Furthermore, maintaining public control over the undertaking's strategic management through golden power mechanisms allows the State to block any foreign investor decisions that might divert the plant from its strategic functions and protect national and EU general interests (Pugliese 2024). In such a scenario, the mix of incentivizing measures offered in a territory does not become, as in the above-analyzed cases, bait for speculators. Rather, it can represent an effective tool to attract foreign investors willing to start a serious and proud business activity, bring in capital, technologies, innovation, expertise, new export opportunities, and become part of the just transition process.

[75] Law Decree n. 4, 18.01.2024, "Disposizioni urgenti in materia di amministrazione straordinaria delle imprese di carattere strategico", *GU* n. 14, 18.01.2024, converted by Law n. 28, 15.03.2024, *GU* n. 65 18.03.2024.

[76] In its judgment of 27 February 2019, C- 563/17, *Associação Peço a Palavra and Others v Conselho de Ministros*, referring to a case of the re-privatization of an air carrier company, the ECJ, according to the Opinion of AG M. Campos Sánchez-Bordona, established that "Article 49 TFEU must be interpreted as not precluding tender specifications governing the conditions to which a re-privatization process of an air carrier company is subject from including:—a requirement that the purchaser of the shares subject to the re-privatization process has the capacity to fulfil the performance of the public service obligations on that air carrier company, and—a requirement that the purchaser maintain that air carrier company's headquarters and effective management in the Member State concerned, in so far as the transfer of that company's principal place of business outside of that Member State would mean that company losing the air traffic rights conferred on it under bilateral agreements between that Member State and third countries with which that Member State has particular historical, cultural and social ties, which is for the referring court to ascertain. Article 49 TFEU must be interpreted as precluding those tender specifications from including a requirement that the purchaser of those shares ensure that the existing national hub is maintained and developed". On the possibility that this judgement opens to use tender considerations to promote corporate social responsibility, see Papadopoulos (2022), p. 38 ff.

6. Avoiding Speculations on Climate Change Policies: Trade Defense Instruments as a Means of Protecting Strategic EU and National Interests

After the judges' decision to place AdI in external administration, several preliminary offers were made by foreign and domestic investors, some of which appeared advantageous and promising[77]. Nevertheless, no certainty exists as to the reliability and stability of these investments. In reality, the question arises whether, like the previous ones, also these investors are attracted by the direct, indirect, and collateral advantages from the huge funds offered by the territories eligible for the JTF rather than by the perspective of engaging in profitable long-term innovative economic operation.

In reality, using incentives to fight climate change as a means of investment attraction into a specific area may always give rise to the danger of stimulating creeping operations on territorial critical resources and infrastructures (mainly in the raw material, transport, and energy sectors). These operations can distract them from their essential functions, putting national and EU security and public order at serious risk.

In recent years, the EU has adopted some instruments specifically created to detect economic operations by foreign operators that could undermine common strategic interests and strategic autonomy (Helwig and Sinkkonen 2022; Gehrke 2022; Zamani and de Waele 2023). The most important is the investment screening mechanism established by Regulation 2019/452[78] to allow the European Commission and other MS to be informed about foreign direct investments likely to affect security or public order, due to their potential effects on, inter alia, critical infrastructures, including energy and transport, as well as land and real estate crucial for the use of such infrastructure and critical technologies including energy storage, in addition to the supply of critical inputs, including energy or raw materials[79]. There is a specific focus on foreign investments likely to affect projects or programs of Union interest on grounds of security or public order[80], the list of which, attached to the Regulation, has been amended to include also Trans-European Networks for Transport (TEN-T)[81], Trans-European Networks for Energy (TEN-E)[82], and the Connecting Europe Facility[83] (Hillebrand Pohl 2023; Hindelang and Moberg 2020; Pettinato 2019; Vellucci 2019; Verellen 2021; Zwartkruis and de Jong 2019). Learning from the key role played by the national investment screening mechanisms as a means of security and public order during the COVID-19 and energy crises (Pugliese 2022a, 2024; Mauro 2023) on 24 January 2024, as part of the package to strengthen European economic security[84], a reform of Regulation 2019/452 was proposed to improve the mechanism's effectiveness, with important innovations that could improve investment screening effectiveness in areas covered by substantial public incentives[85]. Indeed, the proposal extends the screening on investment typologies that the current regulation does not address specifically, such as, for example, greenfield investments, where the foreign investor or a foreign investor's subsidiary in the EU sets up new facilities or a new undertaking in the EU, or the investments carried out by an EU

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77 Foreign investors that showed an interest in the plant are Steel Mont, the Indian Vulcan Green Steel, and the Ukrainian Metinvest, probably in partnership with the Italian Arvedi.

78 Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union, *OJ* L 79I, 21.3.2019, p. 1.

79 Article 4.

80 Article 8.

81 Regulation (EU) n. 1315/2013cit.

82 Regulation (EU) n. 347/2013 of the European Parliament and of the Council of 17 April 2013 on guidelines for trans-European energy infrastructure and repealing Decision n. 1364/2006/EC and amending Regulations (EC) n. 713/2009, (EC) n. 714/2009, and (EC) n. 715/2009 (*OJ* L 115, 25.4.2013, p. 39).

83 Regulation (EU) 2021/1153 of the European Parliament and of the Council of 7 July 2021 establishing the Connecting Europe Facility and repealing Regulations (EU) n. 1316/2013 and (EU) n. 283/2014 (*OJ* L 249, 14.7.2021, p. 38).

84 JOIN (2023) 20, 20.06.2023, "European Economic Security Strategy"; COM (2024) 22, 24.1.2024 "Advancing European economic security: an introduction to five new initiatives".

85 COM (2024) 23, 24.1.2024, "Proposal for a Regulation of the European Parliament and of the Council on the screening of foreign investments in the Union and repealing Regulation (EU) 2019/452 of the European Parliament and of the Council".

entity controlled by a non-EU investor maintaining decision-making power[86]. At the same time, the proposal aims to ensure that a more careful screening is carried out on foreign investments where the Union target is part of, or participates in, a project or program of Union interest, where the Union target's economic activity relates to a technology, asset, facility, equipment, network, system, or service of particular importance for the security or public order interests of the EU or when it concerns EU targets or economic activities that a MS considers critical for its security or public order[87]. In these cases, according to the proposal, the European Commission could issue an opinion. To improve risk prevention effectiveness, the proposal introduces risk-based conditions for the notification of foreign investments undergoing screening to the other MS and the European commission[88]. At the same time, it requires MS to adopt appropriate measures to mitigate the risks, taking into utmost consideration the comments issued by other MS and the opinion issued by the European Commission. If approved, the proposal seems to significantly reinforce FDI screening mechanism efficiency and effectiveness and to give help also to identify investments that are potentially risky for incentive programs like JT NP (Bohnert 2024).

As a means of investment control in just transition areas, the contribution of sectoral regulation must be taken into account—for example, the Energy Risk Directive and the Storage Mechanism Regulation[89], establishing certification mechanisms aimed at controlling economic operations and investments in energy-critical infrastructures (Pugliese 2022b, p. 414 f.; Pugliese 2023, p. 356 ff.).

Other instruments useful to this effect are the International Procurement Instrument[90], allowing the European Commission to undertake investigations into alleged third-country measures or practices against EU economic operators, goods, and services, and to enter into consultations with the third countries concerned (Dawar 2023)[91]. Additionally, the Foreign Subsidies Regulation[92] aims to establish rules and procedures for investigating foreign

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[86] See SWD (2024) 24 final, 24.1.2024, "Commission Staff Working Document Executive Summary of the evaluation of Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union", p. 7 "The analysis found that 22.7% of foreign acquisitions and 20% of greenfield projects were in Member States without a fully applicable investment screening mechanism ('non-screening Member States'). Based on its own methodology, the Europen Court of Auditors (ECA) report found that approximately 42% of the average FDI stock can be accounted for by non-screening Member States. Most acquisitions by Russian investors went to non-screening Member States. It was also found that investors often use subsidiaries registered in the EU to conduct investments. Between 2019 and the first half of 2023, foreign entities invested using their EU subsidiaries in 31% of acquisitions and 28.2% of greenfield investments on average. This gives an indication of the volume of transactions currently not covered by the cooperation mechanism".

[87] See Annex I, updating the list of projects and programs of EU interest established in the Regulation 2019/452 and Annex II, "List of technologies, assets, facilities, equipment, networks, systems, services and economic activities of particular importance for the security or public order interests of the Union".

[88] Recitals 21 and 36 "Where a foreign investment does not meet any of the conditions, the Member State where the foreign investment is undergoing screening may notify the foreign investment to the other Member States and the Commission, including where the Union target has significant operations in other Member States, or belongs to a corporate group that has several companies in different Member States". See Articles 13–14.

[89] Directive (EU) 2019/944 of the European Parliament and of the Council of 5 June 2019 on common rules for the internal market for electricity and amending Directive 2012/27/EU, *OJ* L 158, 14.6.2019, p. 125; Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC, *OJ* L 211, 14.8.2009, p. 94; Regulation (EU) 2017/1938 of the European Parliament and of the Council of 25 October 2017 concerning measures to safeguard the security of gas supply and repealing Regulation (EU) n. 994/2010, *OJ* L 280, 28.10.2017, p. 1; Regulation 2022/1032, cit.

[90] Regulation (EU) 2022/1031 of the European Parliament and of the Council of 23 June 2022 on the access of third-country economic operators, goods, and services to the Union's public procurement and concession markets and procedures supporting negotiations on access of Union economic operators, goods, and services to the public procurement and concession markets of third countries (International Procurement Instrument—IPI), *OJ* L 173, 30.6.2022, p. 1.

[91] European Commission, Press Release, "Commission launches first investigation under EU International Procurement Instrument", 24 April 2024.

[92] Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 December 2022 on foreign subsidies distorting the internal market, *OJ* L 330, 23.12.2022, p. 1. See also Commission Implementing Regulation (EU) 2023/1441 of 10 July 2023 on detailed arrangements for the conduct of proceedings by the Commission pursuant to Regulation (EU) 2022/2560 of the European Parliament and of the Council

subsidies that distort the internal market and to redress such distortions concerning any economic activity, particularly in mergers and public procurement procedures (Akritidis and Blancardi 2023; Blockx and Mattiolo 2023). The investigation focuses specifically on subsidies supporting concentrations and participation in public procurement in order to acquire control of strategic assets such as critical infrastructure and innovative technologies. From this perspective, it is a useful instrument for intercepting and stopping creeping operations. Applying control of subsidized undertakings investing in areas like Southern Italy, where several EU funds are available, could help to avoid speculation. Nevertheless, although the European Commission underlined the risk of foreign subsidies in the context of access to EU funding[93], the issue is not covered by the regulation. This lack should be filled up by the approval of the new investment screening mechanism, devoting great attention to the investment in the projects and programs of EU interest.

Lastly, an indirect contribution to avoid creeping activities in areas where several public incentives converge is the Regulation on anti-economic coercion[94], establishing a framework for the EU to deter or halt economic coercion. It enables the EU, as a last resort, to counteract economic coercion through EU response measures. According to Article 2, §1, "for the purposes of this Regulation, economic coercion exists where a third country applies or threatens to apply a third-country measure affecting trade or investment in order to prevent or obtain the cessation, modification, or adoption of a particular act by the Union or a Member State, thereby interfering in the legitimate sovereign choices of the Union or a Member State. In determining whether the conditions . . . are met, the Commission and the Council shall take into account . . .the intensity, severity, frequency, duration, breadth and magnitude of the third-country measure, including its impact on trade or investment relations with the Union. . .". According to Article 3, 'Particular act' means any legal or other act, including an expression of a position, by an institution, body, office, or agency of, respectively, the Union or a Member State, or of a third country (Casolari 2023; Nguyen 2023; Nguyen 2024a, 2024b; Olsthoorn 2024; Schäffer 2024; Ceci 2024). As a consequence, anti-coercion is an instrument of "right to regulate" and "strategic autonomy" protection. According to Article 9, "the determination of the Union interest in taking, suspending, amending or terminating Union response measures shall be based on all available information and consist of an appreciation of the various interests at stake, taken as a whole. Those interests include primarily the preservation of the ability of the Union and its Member States to make legitimate sovereign choices free from economic coercion, and all other interests of the Union or the Member States specific to the case, the interests of Union economic operators, including upstream and downstream industries, and the interests of Union final consumers affected or potentially affected by the economic coercion or by Union response measures". Although the anti-coercion measures are specifically addressed to third countries, they could also be addressed to certain natural and legal persons in specific circumstances[95]. Criteria for selecting and designing EU response measures include "the avoidance or minimization of negative impact on: (i) Union actors affected by Union response measures, in light of, inter alia, the availability of alternatives for

on foreign subsidies distorting the internal market, *OJ* L 177, 12.7.2023, p. 1. For the implementation, see https://ec.europa.eu/newsroom/comp/items/topic/27733, accessed on 16 April 2024.

[93] See COM (2020) 253, 17.06.2020, "White Paper on leveling the playing field as regards foreign subsidies", p. 14 ff.

[94] Regulation (EU) 2023/2675 of the European Parliament and of the Council of 22 November 2023 on the protection of the Union and its Member States from economic coercion by third countries, *OJ* L, 2023/2675, 7.12.2023.

[95] More specifically, the anti-coercion regulation could concern natural or legal persons "where: (a) that government beneficially owns more than 5% of the equity interest in such legal person, exercises directly or indirectly more than 50% of the voting rights in it, or has the power to appoint a majority of its directors or otherwise to legally direct its actions; (b) such person benefits from exclusive or special rights or privileges granted in law or in fact by the government of the third country concerned, where it operates in a sector where that government limits the number of suppliers or buyers to one or more, or it is allowed directly or indirectly by that government to exercise practices which prevent, restrict or distort competition; or (c) such person effectively acts on behalf of, or under the direction or instigation of, the government of the third country concerned".

such actors, such as alternative sources of supply for goods or services; (ii) the investment environment in the Union or a Member State, including the impact on employment and regional development policy; (e) the avoidance or minimization of negative effects of the Union response measures on Union policies or objectives". Consequently, the impact of anti-coercion measures on the Green Deal and Just Transition objectives, as well as the cohesion objectives must be taken into account. It is remarkable that, according to Recital 15, in verifying where there is coercion, "the Commission and the Council should examine closely whether the third country pursues a legitimate cause, because its objective is to uphold a concern that is internationally recognized, such as, among other things, . . .the protection of the environment, or the fight against climate change". As an instrument to protect EU and MS strategic autonomy, the anti-coercion regulation can also contribute to the climate change objectives, especially after the ECHR judgment establishing a sort of State responsibility to adopt measures in this field[96]. For example, in reaction to coercion measures aimed at sabotaging the strategic undertaking and infrastructure operativity necessary to pursue the energy transition (as export interruptions of raw materials, semi-products, technology, or suspension of intellectual property licenses), the EU could impose measures affecting the access of foreign investments or impose restrictions on the protection of intellectual property rights or their commercial exploitation to third-country citizens[97].

An indirect contribution to protecting general interests could also come from acts external to trade policy, such as Directive 2022/2557 on the resilience of critical entities[98] (Pursiainen and Kytömaa 2023). It lays down obligations on MS to identify critical entities, to support them in meeting the obligations imposed on them, and, more broadly, to take specific measures to ensure that services essential for the maintenance of vital societal functions or economic activities are provided in an unobstructed manner in the internal market. More specifically, MS must ensure that critical entities take appropriate and proportionate technical, security, and organizational measures to ensure their resilience, based on the relevant information obtained from risk assessment, including measures necessary to prevent incidents, duly considering disaster-risk reduction and climate adaptation measures[99]. From the same perspective, the Critical Raw Material Act[100], adopted on 18 March 2024, establishing a framework to ensure the Union's access to a secure and sustainable supply of critical raw materials, should be considered.

Lastly, it is important to consider the impact of cybersecurity regulation[101], with specific reference to the Commission Delegated Regulation of 11.3.2024, establishing a network code on sector-specific rules for cybersecurity aspects of cross-border electricity flow[102] aimed at improving the resilience of critical energy infrastructure and services.

All the instruments mentioned could allow MS and the EU to easily intercept creeping activities realized by foreign operators to speculate on public incentives, mainly in the just

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[96] ECHR Grand Chamber, Application n. 53600/20, *Case of Verein Klimaseniorinnen Schweiz And Others v. Switzerland*, Judgement of 9 April 2024, points 621 ff. In a similar perspective, see also International Tribunal of the Law of the See (ITLOS), "Request For An Advisory Opinion Submitted By The Commission Of Small Island States On Climate Change And International Law", 21 May 2024.

[97] See Annex I.

[98] Directive (EU) 2022/2557 of the European Parliament and of the Council of 14 December 2022 on the resilience of critical entities and repealing Council Directive 2008/114/EC, *OJ* L 333, 27.12.2022, p. 164.

[99] See also Recital 3.

[100] Regulation (EU) 2024/1252 of the European Parliament and of the Council of 11 April 2024 establishing a framework for ensuring a secure and sustainable supply of critical raw materials, *OJ* L, 2024/1252, 3.5.2024.

[101] COM (2023) 209, 18.4.2023, "Proposal for a Regulation of the European Parliament and of the Council laying down measures to strengthen solidarity and capacities in the Union to detect, prepare for and respond to cybersecurity threats and incidents", object of a political agreement between European Parliament and Council of EU on 6 March 2024; COM (2022) 454 final, 15.09.22, "Proposal for a Regulation of The European Parliament and of the Council on horizontal cybersecurity requirements for products with digital elements and amending Regulation (EU) 2019/1020".

[102] Commission Delegated Regulation (EU) 2024/1366 of 11 March 2024 supplementing Regulation (EU) 2019/943 of the European Parliament and of the Council by establishing a network code on sector-specific rules for cybersecurity aspects of cross-border electricity flows, *OJ* L, 2024/1366, 24.5.2024.

transition areas, assuring the effectiveness of public policy, the EU and MS regulatory and political freedom of choice, as well as the protection of citizens' rights.

Nevertheless, to ensure overall control of economic activities that could potentially undermine EU and national climate change objectives, as well as their general interests, it would seem necessary to establish a consistent and innovative decision-making method for investment planning. This method should be capable of balancing economic interests with environmental, land-use, cohesion, and social considerations.

7. Conclusions

The analysis presented suggests that just transition has the potential to promote a significant change in terms of economic growth, social transformation, consistent land use management, and territorial cohesion only if public institutions engage with the investors in a dialogue aimed at making them conscious and responsible about their role as change drivers. Such a relationship with investors could be created only by building an effective decision-making process during the investment pre-establishment phase.

More specifically, it would be very useful to carry out an overall ex ante impact investment assessment to verify its concrete capacity to activate processes of long-term profitability, stable and secure employment, life-long worker training, technological innovation, the adoption of green and circular production patterns, and coordination and cooperation with the local institutions and non-governmental organizations (NGOs). To better understand the needs and fears that the citizens perceive concerning the investment, a deep consultation phase should be open during the impact assessment process. Models like Environmental Impact Assessment (EIA)[103] and Environmental Strategic Assessment (ESA) could be taken as examples, but they should be supplemented by procedures allowing the citizen to have a direct influence on the authorities' final decision about investment approval. In the investment studies, the problem of participation generally arose regarding the right to protection of indigenous peoples (Erueti et al. 2018) and land grabbing in less developed countries (Silvestri 2012; Nino 2018). Nevertheless, also in European countries, where mechanisms of indirect democratic representation are established by constitutions and managed through highly regulated administrative proceedings, inserting forms of mandatory consultation and direct citizen participation in the decision making concerning foreign investments could help the local authorities to better understand their expectations and needs, to select the foreign investor most sensitive and open towards the objectives of general interest, and to drive an effective and just transition truly able to spread benefits across the entire territorial community. To make citizen participation really effective, it could be useful to create bodies comprising NGOs and territorial stakeholders with powers of veto on the local entities' decisions concerning investment acceptance. From this perspective, the Italian experience of negotiated programming could appear to be a valid model, but it should be complemented with systems able to strengthen the responsibility, transparency, and accountability of the engagement taken by all the territorial stakeholders in order to assure investment functionality to the strategic territorial, national, and EU interests.

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[103] Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment (codification), *OJ* L 26, 28.1.2012, p. 1 as amended by Directive 2014/52/EU of the European Parliament and of the Council of 16 April 2014 amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment *OJ* L 124, 25.4.2014, p. 1., Article 6 establishing duties of information and participation of authorities and the public concerned.

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