



## **‘Sustainable Development in World Investment Law’**

An International Legal Experts Seminar

### **List of Abstracts (By Experts Panel)**

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### First Panel - The Foundations

#### Prof. Marie-Claire Cordonier Segger: Sustainable Development and Integration in World Investment Law

Sustainable development, as a concept, can serve as a common objective of international investment treaties. Of the 192 states that exist today, a vast majority are considered 'developing countries'. The definition of development, however, remains unclear in fact and in law. Many economic development decisions have significant environmental and social impacts, and the notion of 'sustainable development' has gained currency in international debates over the past two decades. When states commit 'to promote sustainable development' in a treaty, or agree to conduct their economic relations in accordance with a 'principle of sustainable development', the implications of this commitment are not always clear. However, sustainable development has increasingly been recognized as part of the object and purpose of treaty law on investment, and may have interstitial normative effects on the elaboration of world investment law regimes. In this context, it is suggested that sustainable development, as a common goal and 'bridging concept,' plays a role in reconciling tensions between economic growth, social development and environmental protection activities. Certain principles which aim to contribute to and achieve sustainable development *as an objective* may come to be used so often, and to be accepted so generally, that they do, indeed, gain recognition as customary international rules themselves, binding on all States that have not persistently objected.

In 2002, the International Law Association's Committee on the Legal Aspects of Sustainable Development released its New Delhi ILA *Declaration on Principles of International Law relating to Sustainable Development* as a Resolution of the 70th Conference of the International Law Association in New Delhi India, 2-6 April 2002. The ILA New Delhi Declaration outlines seven principles of international law on sustainable development. Detailed analysis is beyond the scope of this chapter and can be found elsewhere.<sup>1</sup> First, it recognizes a duty of states to ensure sustainable use of natural resources whereby States have sovereign rights over their natural resources, and a duty not to cause (or allow) undue damage to the environment of other States in the use of these resources. Second, it recognizes a principle of equity and the eradication of poverty. Third, it recognizes a principle of common but differentiated obligations. Fourth, it recognizes a principle of the precautionary approach to human health, natural resources and ecosystems. Fifth, it underlines the principle of public participation and access to information and justice. Sixth, the ILA New Delhi Declaration posits a principle of good governance. Seventh, and perhaps most telling, the Declaration recognizes a principle of integration and interrelationship, in particular in relation to human rights and social, economic and environmental objectives. In this paper, the implications of such principles for investment law are examined, drawing on examples from recent bilateral and multilateral investment treaties, and from arbitral awards.

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<sup>1</sup> N Schrijver and F Weiss, *International Law and Sustainable Development: Principles and Practice* (Martinus Nijhoff, Lieden 2004) 1-152, 699-706; Cordonier Segger and Khalafan (n 1) 95 - 191; D French, *International Law and Policy of Sustainable Development* (Manchester University Press, Manchester 2005); See also 7 CISDL Legal Working Papers detailing the meaning, scope and existing status in international law of each proposed ILA New Delhi Declaration Principle, online: <<http://www.cisd1.org/projects001.html>>.

### **Ms. Åsa Romson: Investment and Environment**

There are mainly two strands in the discussion about environment and international investment law. One focuses on the constraints for environmental rules and measures by the globalisation of investment protection standards. The other focuses on how to promote better transfer of new technology as a crucial mean for sustainable development. Foremost, this article will engage in the former strand and only briefly comments on the latter issue, as other literature elaborates more on how investment rules may actively promote environmentally sustainable investments.

The aim is to discuss three important aspects in environmental law which makes health- and environmental regulations vulnerable to challenges by commitments in the international investment agreements (IIAs). The first aspect concerns the fact that health- and environment regulations change constantly in today's society, the second is the great policy mix used for environmental purposes, and the third involves the often decentralised and administrative complex structure used for decisions on environmental permits. The concepts of investment protection law discussed in these matters are mainly the respect for investment backed expectations, the fear for measures with anti-investment intent, origin neutral discrimination and compensation for indirect expropriation. In the end of the article investment initiatives in the multilateral environmental agreements are presented as examples of a 'environmental' view on investments.

### **Dr. Marcos Orellana: Investment and Development**

### **Mr. Zachary Douglas: Human Rights and Investment Treaties**

## **Second Panel - Recent Progress in Investment Law Making and Procedures for Sustainable Development**

### **Dr. Markus W. Gehring: Impact Assessment of Investment Treaties**

This paper discusses the different stages at which investment can be assessed as to its social and environmental impact. First, the paper introduces the concept of environmental and increasingly sustainable development assessments. Then, three different existing mechanisms of investment impact assessments are distinguished: impact assessment of the investment project, impact assessment of the investment chapter as part of the impact assessment of a trade treaty and most recently impact assessment of a stand-alone investment treaty. Finally, methodological difficulties of different kinds of regulatory assessments are discussed, with a conclusion offered on future sustainable development through process in world investment law.

### **Ms. Mahnaz Malik: IISD Model BIT – Treaty Provisions for Sustainable Development**

The IISD Model International Agreement on Investment for Sustainable Development marks the first fundamental effort to review the nature and purpose of international investment agreements since the current model was developed almost 50 years ago. Current investment agreement models, including those represented by the failed OECD's Multilateral Agreement on Investment and almost 2,500 existing bilateral investment treaties, offer too narrow a focus as they address only the rights of the foreign investor. And experience has highlighted flaws in a wide range of areas including in transparency, conflict of interest and clarity of substantive obligations.

IISD's Model Agreement starts from the clear relationship between investment and the achievement of sustainable development. Among other features, it recognizes that an investment agreement is fundamentally about good governance, and that protection of investor rights and obligations and host state rights and obligations are an essential part of that equation; applies basic standards of good governance to the agreement

itself, including through an appropriate institutional mechanism; establishes a clear purpose for the agreement: to foster international investment that is supportive of sustainable development aspirations and requirements in both the North and South; develops provisions that balance the rights and obligations of investors, host states and home states; and sets out specific proposals to fix the broken investor-state arbitration system.

### **Dr. Chester Brown: Procedural Mechanisms to Bring Sustainable Development Issues before Investment Treaty Tribunals**

This paper will discuss the procedural mechanisms available to parties and non-disputing parties to integrate sustainable development concerns in investment negotiations and arbitrations. These might come in the form of specific treaty provisions, express provisions in the applicable procedural rules, the exercise by the international tribunal of inherent powers, and the tribunal choosing to take account of such issues of its own motion.

There are various possibilities open to the tribunal to take account of sustainable development and environmental issues in interpreting the underlying treaty obligations, such as the principle of an evolutionary approach to treaty interpretation and the application of article 31(3)(c) of the Vienna Convention on the Law of Treaties.

## **Third Panel – Emerging Elements of Investment Law that Affect Sustainable Development**

### **Prof. Andrew Newcombe: General Exceptions to Investment Treaty Obligations**

A small, but growing number of international investment agreements (IIAs), have general exceptions to IIA obligations modeled on Art. XX, General Agreement on Tariffs and Trade (GATT). States appear to include general exceptions to ensure that they can achieve specific policy objectives without breaching IIA obligations. There remains significant uncertainty, however, as to how tribunals will interpret general exceptions. This paper argues that the inclusion of general exceptions in IIAs is unlikely to have much practical significance on the scope of IIA obligations. IIA jurisprudence on core investment treatment obligations, including national treatment, fair and equitable treatment and expropriation, has recognized the right of States to regulate in the public interest. As a result, general exceptions make express the exceptions for legitimate objectives recognized in IIA jurisprudence. For States concerned about the scope of IIA obligations, the inclusion of general exceptions serves as an important check against tribunals that might interpret investment obligations in unexpected ways. The risk, however, is that general exceptions provisions might have the unintended consequence of limiting the range of legitimate objectives available to a State. This paper discusses these challenges, including recent treaty law practice and arbitral awards in this area.

### **Prof. Andrea Bjorklund: Necessity Exceptions to Investment Treaty Commitments – Necessity of Sustainable Development?**

Most investment treaties do not explicitly provide for exceptions for development or environmental purposes. Even the recent free trade agreements of the United States that have environmental side agreements or understandings subordinate those concerns to strategies and tactics for increasing foreign direct investment. By invoking the doctrine of necessity States can, at least theoretically, take measures to secure their interests against a grave and imminent peril, which the International Court of Justice and the International Law Commission has said includes environmental threats.

Sustainable development is, however, a long-term and slowly moving goal, and many environmental threats are equally slow moving. Whether and how the dangers to the environment posed by matters such as global warming can be recognized as sufficiently imminent threats to justify State's suspension of its investment

obligations is a hurdle to be overcome before the necessity doctrine will be of help to those seeking to integrate sustainable development with investment obligations. It may be that other international legal doctrines, such as treaty interpretation theories that seek to integrate States' varied obligations rather than to prioritize some obligations over others, will be a more fruitful approach in the search to balance investment obligations with other international commitments. Increasing threats to human prosperity posed by global warming, the world-wide food shortage, and increasingly high oil prices have grabbed the attention of national and international decision makers. With increased attention on these matters, the time is ripe for suggesting an interpretive approach that re-integrates the fragmented structure of international law by harmonizing the obligations States have taken to both the international community and to their domestic constituents as well as by conferring international obligations as well as rights on individuals and corporations. This paper discusses these questions, offering analysis and policy recommendations for world investment law.

### **Mr. Audley Sheppard: Stabilisation Clauses - Reverse National Treatment and a Threat to Sustainable Development?**

The national treatment standard of protection found in many investment treaties typically provides that investments of foreign investors shall receive treatment no less favourable than that accorded to investments of nationals of the host state. In order to attract investment, host states will often agree terms that are more favourable to foreign investors than nationals (e.g. advantageous tax provisions). Some host states will go as far as to offer to protect the foreign investor against changes in the national law through stabilisation or change-in-law clauses. However, such provisions could have a "chilling effect" on legal reform in the host state, including in areas of human rights, social regulation and the environment. This paper will address the arguments made in favour of and against stabilisation and change-in-law clauses, followed by an overview of current drafting practice and concluding with a number of proposals regarding ways in which foreign investors might respond to the criticisms that have been made.

This paper will first review the different types of stabilisation and change-in-law clauses that might be found in major investment contracts. These range from clauses that seek to freeze the law at the time of signature (so that no subsequent changes in the law will apply to the project) to clauses that provide that the host state shall compensate the investor for any financial harm caused by a change in law and renegotiation clauses which provide that the parties shall seek to renegotiate their contract so as to maintain the original economic equilibrium. Secondly, the paper will comment on current drafting practice, where the trend is against freezing clauses and more in favour of economic-equilibrium clauses. Thirdly, the paper will review how stabilisation and change-in-law clauses have been interpreted in international arbitration and, in some cases, as a matter of national law. Fourthly, the paper will summarise the criticisms that have been made against stabilisation and change-in-law clauses, in particular the "chilling effect" they might have on law reform and the possible consequences for sustainable development. Reference will also be made to the recent report by Andrea Shemberg on "Stabilisation Clauses and Human Rights". The paper will conclude with some proposals on how stabilisation and change-in-law clauses might be drafted so as to meet the reasonable concerns of foreign investors to have a stable legal and fiscal regime, while not impeding legitimate social and environmental law reform.

## **Fourth Panel – Sustainable Development Innovations in Bi-Lateral and Regional Investment Law**

### **Prof. Céline Lévesque: Investment and Water Rights – Lessons from the NAFTA**

Water issues have been raised in a number of disputes since the first award was rendered under the Investment Chapter of the North American Free Trade Agreement (NAFTA) ten years ago this summer. Two claims, however, concerned water rights directly. The first was a claim by a US investor, Sun Belt Water Inc., against Canada regarding a British Columbia moratorium on licences for bulk water exports. The second was a claim by

a group of Texas investors regarding water rights the claimants alleged to own in Mexico. The first case never proceeded past the submission of a notice of claim in 1999. The impact of this filing, however, resonates to this day. The second case led to an award in June 2007 in which the Tribunal held that it did not have jurisdiction to hear the matter on the merits. The focus of this paper is on the latter case, *Bayview Irrigation District et al. v. Mexico*, as it offers an actual reading of NAFTA Chapter 11 provisions applied to water rights as opposed to speculation as to what might have been in *Sun Belt Water Inc. v. Canada*. While the award does not treat the substantive claims made by the Texan investors, it still provides insights as to the sensitive issues related to water rights and investor rights under NAFTA Chapter 11.

The first part of the paper presents a description of the case: the parties, procedures, legal background and the reasoning of the Tribunal. The second part examines some of the findings of the Tribunal with a view of exploring the reach, as well as the potential limits of NAFTA Chapter 11 as applied to water rights. First, it analyses water as an object of NAFTA regulation by considering the questions of water as a good in commerce as well as water as an investment. Second, it explores some of the potential limits to the reach of NAFTA Chapter 11 related to the concept of territoriality, the interaction of different Treaty regimes and the interaction of international law and domestic law. Challenges for sustainable development are highlighted throughout.

### **Ms. Emma Saunders-Hastings: Legalization of Investment Regimes - Lessons from Water Privatisation in Africa**

This paper draws upon lessons from the *Bivater-Tanzania* dispute to examine the degree and symmetry of legalization in the investment regime for freshwater. The first section outlines both the extra-legal pressures to which Tanzania was subject in the privatisation process and the lack of legal regulation of the investor's conduct. The second section examines the UK-Tanzania BIT and notes an asymmetry between the protections and obligations assigned to investors and states. The third section uses the ICSID investor-state arbitration to illuminate the prospects and pitfalls of legalized investment disputes for developing countries seeking both foreign investment and the ability to regulate the sustainable and equitable management of water utilities. The argument throughout will be that the legalization of investment regimes poses a risk to sustainable development agendas in so far as it has been asymmetrical: the legal avenues for corporations to enforce rights against states have multiplied, without equivalent advances in the legal regulation of investor conduct.

### **Prof. Paul Stanton Kibel: Investment As and In Water - North America's Rio Grande Case**

This paper analysis reviews the history of United States-Mexico transboundary water relations, summarizes the treaty that allocates and governs such waters, provides a short history of NAFTA's Chapter 11, and analyzes the Texans' Chapter 11 NAFTA claim. At the end of this review, our finding is that the Texans' NAFTA water claim against Mexico was not well founded from either a legal or a public policy standpoint. This finding is based in part on a close reading of the operative language in the 1944 Rivers Treaty and NAFTA's Chapter 11, in part on differences between the domestic law context of the Tulare Lake case and the public international law context of the bi-national Rio Grande dispute, and in part on a subsequent 2005 judicial decision in the United States that greatly discredited the Tulare Lake holding.

## **Final Panel – Future Directions for the ‘Sustainable Development’ of a World Investment Law**

### **Ms. Freya Baetens: Investment Promotion and Protection under the UNFCCC/ Kyoto Protocol**

International economic law in general - and investment law in particular - is evolving in a way which causes overlap with other areas of law such as international sustainable development regimes. The Kyoto Protocol to the United Nations Framework Convention on Climate Change (UNFCCC) shows proof of an innovative trend

in thinking about international law among others because it explicitly provides for the involvement of private entities such as foreign investors, to achieve its goals of limiting and reducing greenhouse gas emissions.

This paper will first provide a brief overview of the different ways in which private investors can participate in the execution of the Protocol, the so-called the "Kyoto flexibility mechanisms": joint implementation (JI), the clean development mechanism (CDM) and emissions trading (ET). Secondly, through the analysis of a number of investment protection standards found in most international investment treaties, the paper will address which problems the implementation of the Kyoto Protocol could create for the functioning of investment arbitration (and vice versa). Finally, the paper will make some proposals as to how Kyoto and investment law objectives could be reconciled and even reinforce each other.

### **Prof. W. Bradnee Chambers: Investment, IPR and Climate Change - Creating a Positive Agenda for Technology Transfer for Africa**

There is now strong consensus on the need for new, post-2012 technology approaches to stabilise greenhouse gas (GHG) emissions. Assessments of the technology requirements for GHG stabilisation reveal greater needs than originally thought, strengthening the arguments for a new climate technology innovation framework.<sup>2</sup> Low technological capacities and capabilities have been a major impediment to development in Africa and there is a need to enhance the region's technological development, particularly in terms of local, environmentally friendly technologies. Given the low level of technology development in most countries, this must be complemented by technology transfer. As illustrated by the rapid uptake of mobile phone technology, it is possible to profitably transfer advanced technologies to poor regions using the right combination of investment in services and basic level of infrastructure.<sup>3</sup> Nonetheless, technology transfer to Africa has been inadequate; prompting African countries to call for renewed attention to be paid to its technology needs to address the climate change threat. One possible avenue for Africa is to positively stimulate Foreign Direct Investment (FDI) in climate-related technologies. However, this avenue so far has not offered much success and one reason for this could be the impediment of intellectual property rights in Africa.

In general, the relationship between foreign direct investment and intellectual property rights is nebulous. The prevailing theory is that strong domestic intellectual property right protection will provide a favorable environment for encouraging investors to license their technologies and invest in local firms. The reality, however, is far from the theory. There is partial evidence that in large developing countries such as China, India or Brazil the traditional theory of IPR and investment holds, but for small developing countries, particularly in Africa, investors are (for the most part) not interested in investment as the market share is small and there are elevated risks of piracy. Thus prices remain high and opportunities remain low.

As the market for new technologies for climate change mitigation and adaptation increases, as is expected with so much attention being paid to this issue, there is also increasing risk that patent-holders will not invest in markets where there is a potential for imitation and competition and where the implementation of the TRIPs regime is not as enforceable compared to more developed-country economies.

As a result, African nations cannot afford the licensing of new technologies and, on the one hand, meeting the high standards of the TRIPs agreement could stifle local innovations; but on the other hand not implementing TRIPs means that they cannot attract much needed FDI. Thus African nations find themselves in a vicious cycle. Some have suggested that the answer lies in imposing stronger performance requirements in bilateral investment agreements, however, studies have shown that most times African Bilateral Investment Agreements are favorable to the investors and generally do not impose strong performance requirements as they wish to attract investment and investors normally are less attracted to economies with complicated strings attached or

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<sup>2</sup> Clean Energy Group and the Meridian Institute, June 2008 "Climate Choreography: How Distributed and Open Innovation Could Accelerate Technology Development and Deployment." Available at [http://www.cleanegroup.org/Reports/Climate\\_Choreography\\_July08.pdf](http://www.cleanegroup.org/Reports/Climate_Choreography_July08.pdf)

<sup>3</sup> Christian Webersik and Clarice Wilson, 2008. "Environment for African Development: A Sustainable Future through Science and Technology." UNU-IAS Report, United Nations University, Tokyo.

with tough regulations. The UNFCCC is another potential answer as positive provisions for promoting technology transfer are contained as provisions in the treaty and there are financial mechanisms to assist the transfer of technology either through the Clean Development Mechanism (CDM) or the Global Environment Facility. These measures, though promising, still have not delivered all the technology needs that Africa will require and the AU and African nations in general are looking for other means to somehow kick-start the investment in Africa that it will need to adapt to and mitigate climate change.

In an effort to bring positive solutions to the issue of technology transfer to meet the urgent needs of Africa and to address the threat to climate change, this paper proposes an integrated solution for immediate response. It argues that there is sufficient legal justification contained in TRIPs to justify compulsory licensing for Climate Change technologies and it further argues the need to provide a waiver as was used in the case of essential medicines under the WTO to allow third party countries to provide Climate Change technologies to countries that do not have the sufficient productive base to produce the technologies locally. An integrated approach such as this would send a positive signal to investors, particularly from third party African nations that have the capacity to produce the technology and sell it to neighbouring nations that need it the most.

### **Mr. Jarrod Hepburn: Corporate Social Responsibility in Investment Treaties**

This paper focuses on the role of corporate social responsibility (CSR) in world investment law. Corporate social responsibility (CSR) is a broad concept. Definitions of it vary, but it generally includes some combination of the following: a responsibility to obey laws and remain profitable; enlightened risk management and governance techniques for protection of corporate value; and proactive measures going beyond compliance to create positive *social* value as well as corporate value. Commitments related to corporate social responsibility have only recently become part of investment treaty negotiations, for example in as part of preambles and provisions on investment in free trade agreements. This inclusion could be seen as a possible way to operationalise commitments to deliver on sustainable development objectives through the elaboration of innovative world investment law.

The original drive towards CSR came about from globalisation. As trade and investment liberalised over the last few decades and multinational corporations (MNCs) sought to move their operations offshore and tap into new sources of labour and mineral wealth around the world, NGOs travelled with them and began to report on their activities. News from Bhopal, Ok Tedi and elsewhere spurred calls in the West for greater accountability. While businesses were keen to avoid legal liability, the CSR models of self-regulation or enforced self-regulation appeared more attractive, as the businesses realised that CSR compliance was not only good public relations but could assist in a practical way with risk management as well. Arguably, globalisation continues to be a major driver in CSR adoption, as the need for international trade and investment continues to put pressure on enterprises to present a publicity-friendly face to foreign markets. Given that bilateral investment treaties (BITs) and free trade agreements (FTAs) are part of the essential legal tools of globalisation, it thus seems only natural that these instruments should begin to refer more directly to CSR.

There are, however, some conceptual problems linking CSR and investment treaties. Treaties are legally binding documents, traditionally creating rights in and imposing obligations only on States party to them. CSR, on the other hand, is fundamentally a voluntary affair addressed to corporations, who are not traditional subjects of international law. How then can investment treaties hope to impose binding legal obligations to engage voluntarily in CSR on entities that are not regulated by those investment treaties? One way around the question is illustrated in the recent Canada-Peru FTA, discussed below, which imposes the obligations on the host and home State rather than the investor itself. Another possibility lies in the increasing recognition of international legal personhood for individuals and MNCs, for instance under genocide laws or the ICSID Convention granting investors direct rights of arbitration against States.

### **Ms. Vuyelwa Kuuya: International Investment Law and Corporate Responsibility in Africa**

