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Sustainable Development in World Investment Law

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International investment flows and investment activity are necessary for sustainable development but whether they lead to sustainable development in fact depends on a number of variables, including effective domestic regulation in host states. Since international investment treaties constrain domestic government action in the interests of protecting foreign investors and, it is hoped, encourage foreign investment as a result, they affect these two key determinants of sustainable development. *Sustainable Development in World Investment Law*, a new book in the Kluwer Global Trade Law series, makes an important contribution to our understanding of the complex relationship between international investment law and sustainable development.[1] It provides both a useful stocktaking of current treaty practice and investment treaty arbitration decisions from a sustainable development point of view and a range of suggestions regarding how the existing regime may be adapted to contribute more effectively to sustainable development.

Sustainable Development in World Investment Law is very timely. The effect of international investment law on sustainable development has become a significant concern of academics, policy makers and governments. A few examples serve to illustrate this point. In August 2010, more than 50 academics from around the globe

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[1] These comments are based on a presentation made on the occasion of a launch for the book at the University of Ottawa, Faculty of Law on 26 September 2011.

signed a public statement of concern about the harm done to public welfare by international investment agreements. The statement asserts that international investment agreements hamper the ability of governments to act for their people in response to concerns regarding human development and environmental sustainability. Similarly, some states have questioned the content and even desirability of investment treaties. In 2008, Ecuador, Bolivia and El Salvador renounced 11 investment treaties. Australia announced in April 2011 that it would no longer seek to negotiate international agreements with investor-state dispute settlement – a process that allows private investors from one treaty party to claim financial compensation for the other party's breaches of the treaty in binding arbitration. This remarkable change in direction from a country highly integrated into the international economy breaks a strong consensus among developed countries on the need for investor-state procedures to enforce substantive standards for investor protection in treaties with developing countries.

In this context of concern and change, it is very useful to have an analysis of the standards in international investment agreements and the arbitral awards applying them from a sustainable development point of view. The editors of *Sustainable Development in World Investment Law* are to be commended for bringing together a wide range of different viewpoints on these issues. The papers in this book are contributed by some of the leading scholars around the globe and are typically strong on legal analysis of the problems with the current situation and on imagining technical reforms to the existing system that would be of assistance in helping to achieve sustainable development. The contributors provide an insightful account of the surprisingly expansive interpretations of investor protection provisions that have been adopted by investor-state arbitral tribunals. These decisions have caused concerns that the current standards for host states are too high and that they inappropriately limit state power to legislate in the public interest and the contributors debate a wide range of possible solutions to these concerns. The investor-state arbitration process itself is also criticized on various grounds, including inconsistency in the decisions that it has produced and its lack of transparency. The papers in *Sustainable Development in World Investment Law* not only critique the decisions, but also canvass a large number of approaches to achieving progressive change.

Overall, however, the papers are relatively weak on strategic thinking about how to address the considerable barriers that impede reform. One challenge is that the existing system is highly fragmented, consisting of almost 3,000 bilateral investment treaties and more than 250 preferential trade agreements with investment provisions that together involve 170 countries. It is true that some reforms, especially to the investor-state arbitration process, could be made in a systemic way. For example, one could change the arbitration rules under the International Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention), which are used for about two-thirds of investor-state arbitrations. Nevertheless, most changes require new or revised treaties. On that front some change is occurring. As discussed in *Sustainable Development in World Investment Law*, new treaty models are being developed by some states that provide more scope for host states to regulate to achieve sustainable development by, for example, circumscribing the protection given to investors. In some cases, these new models are forming the basis for new or renegotiated treaties, but change in this way is a slow and incremental process. More systematic change may result from the 2008 Lisbon Treaty under which the European Commission acquired the authority to negotiate investment treaties. Currently, the EU is considering what it will do with the 1,300 or so treaties that are in place between its Member states and non-member countries. The strategy that is ultimately adopted could lead to substantial changes in the agreements currently in place.

The fragmented nature of international investment law, however, is not the only challenge to reform. Despite signs of dissatisfaction with existing treaties and some incremental changes to some treaty models in response, many new agreements continue to be negotiated based on traditional models. Fifty-four new bilateral investment treaties were signed in 2010 and 23 in the first 6 months of 2011, most based on traditional models. For people concerned about re-engineering the system to better achieve sustainable development this raises an important strategic question: why do developing countries continue to sign treaties that do not do a good job of contributing to sustainable development? Power politics partly explain this phenomenon, but it is also driven by competition for investment. Many countries, especially developing countries, see international investment commitments that protect foreign investors as an important part of a strategy to attract investment. Countries are encouraged to seek an advantage in the competition with other countries for investment by signing treaties with stronger investor protection. This suggests that good legal analysis of the kind found in this book regarding helpful reforms will not lead to significant change on its own. Governments have to be convinced that it is in their interests to seek new forms of treaties that better achieve sustainable development and, in particular, that they will not be putting themselves at a competitive disadvantage by seeking to negotiate treaties with the new sorts of provisions outlined in this book.

In particular, it will be necessary to convince governments of developing country host states that new sustainable development-based investment agreements will help them to attract investment at least as well as traditional agreements would. Investor protection provisions in any new form of agreement are likely to be weaker than in traditional treaties in the interests of ensuring that host states are not subject to restrictions that prevent them from regulating to achieve sustainable development. They may also involve obligations in some form on investors themselves to protect the environment and labour and human rights. Both these kinds of changes may be unappealing to investors and so may reduce the investment inducing impact of signing an investment treaty. Strategies could be developed to counter this effect, however. For example, treaties might include new obligations for investors' home states to promote investment in developing country host states directly and to provide technical assistance that will help host states to create robust and transparent schemes of domestic regulation. This kind of regulation would encourage domestic as well as foreign investment by providing a certain and predictable legal structure for investment and is more likely to be effective in achieving host state development goals. Whatever approaches are taken in the new treaty models designed to achieve sustainable development, technical assistance and capacity building programs will be needed to explain their merits to governments.[2]

Governments of investment exporting countries will also have to be convinced that new sustainable development-based treaty models will not put their investors at a disadvantage compared to investors from other states if the investor protection provisions in such treaties are weaker than those in traditional treaties or investors bear obligations. More thinking needs to be done about how to persuade investment exporting states and their investors regarding the benefits of sustainable development-based treaty models for them.

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[2] Some of this work is already going on, such as the International Institute for Sustainable Development's Investment Forum for Developing Country Negotiators held for the 5th time in 2011.

Some of the ingredients of possible strategies to implement sustainable development reforms are already referred to in *Sustainable Development in World Investment Law*. Nevertheless, we need a next instalment to address strategic issues in a more comprehensive and thorough going way to complement the excellent legal analysis in this significant new work.