

*International Investment Law and Sustainable
Development:
Challenges for a New Agenda*

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Howard Mann
Senior International Law Advisor

International Institute for Sustainable Development
www.iisd.org/investment

Agenda

- Why is international investment law important for sustainable development?
- What is the appropriate notion for sustainable development in this context?
- The current regime and SD
- Microcosm: climate change and the investment regime
- Elements for a future agenda
- Obstacles to a future agenda

Why is int'l investment law important to Sustainable Development?

- Sustainable development is an investment problem
- Achieving SD tomorrow depends on investments made today
- Will not give up existing jobs until new ones are available
 - Future jobs have no political voice in current politics of the economy or ecology
- Jeffrey Sachs, October 2007: The investment and sustainable development regimes must become inextricably linked
 - Current development unsustainable, costs outstrip benefits
- Current regime does nothing to promote SD, does work against it in specific ways
 - Limits host state regulatory space for SD

Appropriate notion for SD in this context

- “Development that meets the needs of today’s generation without sacrificing the needs of future generations”
- 3 pillar approach to Sustainable Development
 - Economic (poverty alleviation, equitable distribution, etc)
 - Social (human rights, education, health, etc)
 - Environmental (local, national, international)

Appropriate notion for SD in this context

- Required Approach in Investment Regime:
 - Focus on quality, not quantity of investment
 - Benefits for local economic and social development
 - Minimization/elimination of negative impacts
 - Designation of appropriate responsibilities
- IISD Guideposts, 2005 Model Agreement:
 - transparency, accountability, legitimacy (equitable)

The current regime and SD

- Substance of investment agreements
- Dispute settlement processes
- Institutional framework

The current regime and SD

- Substance of investment agreements
 - Over 2500 bilateral and regional investment agreements
 - Very few have any reference to SD, but now emerging, slowly
 - Limited references to environmental protection, human rights, social development
 - Focus on investor rights and remedies
 - National treatment, MFN, fair and equitable treatment, expropriation, repatriation of assets and profits
 - Rights used to fend off new regs; seek compensation
 - Work especially well with stabilization provisions in HGAs
 - Investment liberalization, prohibitions on performance requirements
 - No obligations on investors or states for SD positive investments

The current regime and SD

- Dispute settlement processes
 - Investor-state arbitration open to private investors to initiate
 - Can displace domestic judicial processes, turn contract claims into treaty issues
 - Apply classic commercial arbitration models
 - Limited to no transparency (trend now away from transparent rules by investors)
 - Limited to no accountability:
 - No appeal, very narrow judicial review
 - Correctness in law not a standard to be applied
 - Conflicting decisions on key issues of right to regulate on all SD pillars
 - No ability to reconcile conflicts

The current regime and SD

- Institutional framework
 - No institutional framework today
 - No multilateral regime
 - No systemic structures to relate bilateral and regional agreements
 - No coordinating institutional structures
 - No substantive controls by any institutions
 - Limited exceptions in US agreements, NAFTA
- OECD now policy oriented after MAI failure, but influential (MAI by stealth through unilateral policy adoption??)
- UNCTAD UN lead but no role in agreements, disputes
- ICSID: arbitration facilitation, but no substantive role at all
 - Choice of arbitrators in some cases

Microcosm: climate change and the investment regime

- Existing bilateral and regional agreements does nothing
- Energy Charter Treaty: An investment agreement for climate change?
 - Does have an institutional structure, but no broad access
 - Expressly reinforces highest level of investor rights over environmental needs
 - Environmental provisions hortatory only
 - Nothing to legally promote or require climate friendly investments
 - Model HGAs very investor friendly
 - Totally opaque dispute settlement process
 - no requirement of any disclosure of cases, decisions, etc

Elements of a future agenda

- Elements for a new substantive legal regime
 - Objectives
 - Assignment of rights and obligations
- Dispute Settlement
- Institutional framework

Elements of a future agenda: Objective

IISD's approach:

- Investment Agreement for Sustainable Development
 - Expressed in preamble, "Objectives"
 - Expressed in balance of rights and obligations, choice of tools

Elements of a future agenda: Rights and obligations

- Comprehensive: Expressly include rights and obligations of foreign investors, host states and home states
- Need to clearly change balance in interpretation from investor rights only

Elements of a future agenda: Rights, Scope

Scope:

- More restrictive definition of an “investment”
 - enterprise based, services and non-services, broad range of legal forms
 - no IPRs per se, no portfolio investment
- Post establishment rights only
- Limited to no investment liberalizations and pre-establishment rights
 - Unilateral decisions do not need to be locked in with penalties
 - Need space for economic linkages to be required

Elements of a Future Agenda: Rights and Obligations

- Six sets of *interacting* rights and obligations

	Rights	Obligations
Foreign Investor	X	X
Host state	X	X
Home state	X	X

For. Investor Rights and Obligations

	Rights	Obligations
<p>Foreign Investor</p> <p>Good governance agenda for investors, investment</p>	<ul style="list-style-type: none"> ■ National treatment ■ Most favoured nation ■ Minimum international standards ■ No expropriation w/o compensation ■ Senior management ■ Transfer of assets ■ IISD: <ul style="list-style-type: none"> ■ More developed text, less room for vagueness ■ “Minimalist” language does not mean minimalist obligations, has led to expansive interpretations ■ e.g. on expropriation, NT 	<ul style="list-style-type: none"> ■ Comply with local laws ■ Pre-establishment impact assessment ■ Anti corruption ■ Environmental management/international environmental obligations ■ Human rights protection ■ Core labour standards ■ Provision and publication of information ■ CSR (most economic, social) ■ Investor liability ■ Tie it to investor-state for enforceability ■ DO WE HAVE ENOUGH?

Host State Rights and Obligations

	Rights	Obligations
Host State Good governance agenda for host state, investment	<ul style="list-style-type: none">■ Inherent right of states to regulate, articulate development policy■ Right to performance requirements (exception from national treatment)■ Investment promotion■ Access to investor information	<ul style="list-style-type: none">■ Procedural fairness■ Maintenance of environmental standards, labour standards■ Minimum standards for: environmental assessment, core labour, human rights■ Anti-corruption■ Publication of information■ Subsidies for foreign Investors (Correlate to investor rights)

Home State Rights and Obligations

	Rights	Obligations
Home State Role in good governance of foreign investment	<ul style="list-style-type: none">■ Claim protection of investor rights in dispute settlement	<ul style="list-style-type: none">■ Assistance to facilitate foreign investment■ Provide information on investors■ Ensure procedural laws allow for hearing on investor liability■ Anti-corruption

Elements of a future agenda: Dispute settlement

- Goals:
 - Independent, Transparent and Accountable
 - Subject to Rule of Law
 - **Dispute settlement as part of a public international law regime, not just ad-hoc dispute settlement**
 - GATT/WTO: 125 cases before permanent system with appeals
 - Investor-state: now over 300 cases we know of

Elements of a future agenda: Dispute settlement

- Independent
 - End prevailing “MAFIA”, conflicts of interest
 - Standing panel of arbitrators who do not act as lawyers
 - Prevent multiple claims
- Accountable
 - Appeals process (WTO model)
 - Institutional oversight mechanism
 - Restore exhaustion of local remedies
 - Breaches of obligations can be raised by host states as a defense, mitigation or to cancel investor rights
 - Corruption can be raised to vitiate investor rights in relation to an investment
- Transparency
 - Public access to all main written materials, hearings
 - “Amicus curiae” submissions

Elements of a future agenda: institutional framework

- Focus on regime building for SD, not for dispute settlement for investor rights
 - Multilateral regime, regional or bilateral
 - Conference of the Parties
 - Secretariat
 - Technical assistance committee on promoting investment for SD
 - Financial mechanism
 - Dispute settlement body: oversee arbitration process like in WTO
 - Legal Assistance Centre
 - National contact points
 - OECD Guidelines type complaint role

Obstacles to a New Agenda

- Diffuse regime today makes coherence difficult, interests of status quo easier to protect
 - Lack of institutional setting
 - OECD not balanced
 - UNCITRAL ineffective in SD leadership for developing countries; donor bound, etc
 - cannot go to WTO, wrong place, culture
- Need to identify a proper institutional structure (UNFCCC- type option?)
- Need coherent, independent dispute settlement process

Obstacles to a New Agenda

- Select interest of the rich and powerful
 - International business community wants rights, no obligations (ICC, BIAC, US Chamber of Commerce, etc)
 - International law firms and arbitrators
 - Seek to reduce even current transparency
 - Reduce accountability
 - No liability
 - Have a current controlling interest in dispute settlement process, embedded with self-interest
 - Large capital exporters remain conservative: US, UK, Germany, will move to more EC role have an impact?
- Need to begin from new goal, relationship of SD to international investment