Sustainable Development in World Investment Law
Sustainable Development in World Investment Law

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Centre for International Sustainable Development Law Legal Researchers

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Anna Johnston, BA, LLB cand. (University of Victoria), is a member of the Centre for International Sustainable Development Law Research Group and an Executive Member of the University of Victoria Environmental Law Club. Her previous international and environmental law experience includes Facilitator for the Victoria International Development Education Association, Coordinator of Pro Bono Students Canada, University of Victoria Chapter, and Legal Researcher at Ecojustice Canada. Her work has included spearheading student-run pro bono projects for community groups and organizing speaker events on international law, including a speech by former Supreme Court Justice and United Nations High Commissioner for Human Rights Louise Arbour. Her previous publications include research papers with the Polis Project on Ecological Governance. In May 2010, Ms Johnston will begin an internship at the Institute for Law and Environmental Governance in Nairobi, Kenya.

Ms Ashley Elliott (University of Victoria)
Ashley Elliott, BA (University of British Columbia), LLB cand. (University of Victoria), has served in the Centre for International Sustainable Development Law Legal Research Group to assist with this book, under the direction of Professor Andrew Newcombe of the University of Victoria. She developed an interest in sustainable development as a result of her involvement with Youth Challenge International, where she participated in various projects in Yurong Paru, Guyana. Currently, Ms Elliott is taking a year off the study of law to explore the world of contemporary dance. She is looking forward to the day when she can combine her knowledge of the law, her interest in sustainable development, and her love of dance.

Mr Robert Sutherland (University of Ottawa)
Robert Sutherland, BComm (McGill University), LLL (University of Ottawa), LLB cand. (University of Ottawa), is a member of the Centre for International Sustainable Development Law (CISDL) Research Group, having worked for Prof. Markus Gehring at several steps of the editing process for this book. He has also researched the notion of lesion/unconscionability in international commercial transactions before his affiliation with CISDL. This interest in international law
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American Free Trade Agreement (NAFTA) and the World Trade Organization
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Claire Farmer, BA (Hons), LLB cand. (University of Victoria), is a member of the Centre for International Sustainable Development Law Research Group. Ms Farmer received her undergraduate degree from the University of Toronto with a major in International Relations. Prior to attending law school, she worked in South Africa in the human rights field. While at the University of Victoria, Faculty of Law, she has served on the executive committees of several student clubs, including the International and Human Rights Law Association and the Anti-Discrimination Committee. She was also the Co-chair of the 2009 University of Victoria Law Community Conference.

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Mariella Montplaisir, LL.L. (Cum laude), is a J.D. Cand. at the University of Ottawa. Prior to her collaboration with the Centre for International Sustainable Development Law (CISDL), she clerked at the Superior Court of Justice in Montreal and was a research assistant in contract law, private international law and international trade law at the University of Ottawa’s Faculty of Law. She was part of the team who represented the University at the Grand final of the 2010 WTO-Elsa International Moot Competition in Santo Domingo, Dominican Republic.

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Chapter 1

An Introduction to Sustainable Development in World Investment Law

Markus Gehring & Andrew Newcombe*

1. SUSTAINABLE DEVELOPMENT AS A GLOBAL OBJECTIVE

Sustainable development is a widely accepted objective of the global community. Ideas underlying sustainable development have governed the practices of many cultures for thousands of years. As expressed in the 1987 Brundtland Report, it can be defined as ‘development that meets the needs of the present without compromising the ability of future generations to meet their own needs’. Significantly, from inception, the concept did not focus on limiting economic activity but rather on re-directing development in order to ensure the potential for long-term,

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Marie-Claire Cordonier Segger, Markus W Gehring, and Andrew Newcombe, Sustainable Development in World Investment Law, 3–11.
sustained yields. In this way, sustainable development is closely related to, and could be viewed as a core objective of, national and international investment law and policy.

Agenda 21, the world’s plan of action from the United Nations Conference on Environment and Development, highlighted some of the sustainable development challenges with regard to investment:

Investment is critical to the ability of developing countries to achieve needed economic growth to improve the welfare of their populations and to meet their basic needs in a sustainable manner, all without deteriorating or depleting the resource base that underpins development. Sustainable development requires increased investment, for which domestic and external financial resources are needed. Foreign private investment and the return of flight capital, which depend on a healthy investment climate, are an important source of financial resources.

Ten years later, the 2002 World Summit on Sustainable Development in Johannesburg emphasized the need for more environmentally sound and equitable development. The summit’s Johannesburg Plan of Implementation (JPOI) identified ‘an enabling environment for investment’ as one of the foundations for sustainable development. The JPOI is replete with references to the need to increase and promote investment.

The G8 Heads of State, in their declaration Responsible Leadership for a Sustainable Future in 2009 highlighted the role investment plays in ensuring sustainable growth:

6. Johannesburg Plan of Implementation, ibid., paras 16, 19, 21, 40, 42, 43, 62, 66–67, 69, 83–84, 106 and 141. Para. 84 addresses foreign direct investment and highlights the need to ‘facilitate greater flows of foreign direct investment so as to support sustainable development activities, including the development of infrastructure, of developing countries, and enhance the benefits that developing countries can draw from foreign direct investment, with particular actions to: (a) Create the necessary domestic and international conditions to facilitate significant increases in the flow of foreign direct investment to developing countries, in particular the least developed countries, which is critical to sustainable development, particularly foreign direct investment flows for infrastructure development and other priority areas in developing countries to supplement the domestic resources mobilized by them’.
7. ‘G8 Declaration’, available online: <www.g8italia2009.it/static/G8_Allegato/G8_Declaration_08_07_09_final.0.pdf>.
An Introduction to Sustainable Development in World Investment Law

The current crisis has affected capital flows, including foreign direct investments (FDIs), which represent an important source of financing and a driver of economic growth and integration. We stress the positive role of long term investments. We will work to reverse the recent decline in FDI, by fostering an open, receptive climate for foreign investment, especially in emerging and in developing countries. […] Conscious of the complementary role played by governments and the private sector in reaching a sustainable growth, we call for enhanced efforts to avoid wider consequences of the financial crisis and to promote responsible business practices.8

This recognition was echoed and magnified in the Core Values for Sustainable Economic Activity, agreed upon in Pittsburg in 2009, where the G20 Heads of State noted:

We share the overarching goal to promote a broader prosperity for our people through balanced growth within and across nations; through coherent economic, social, and environmental strategies; and through robust financial systems and effective international collaboration. […] We have a responsibility to recognize that all economies, rich and poor, are partners in building a sustainable and balanced global economy in which the benefits of economic growth are broadly and equitably shared. We also have a responsibility to achieve the internationally agreed development goals. […] We have a responsibility to ensure an international economic and financial architecture that reflects changes in the world economy and the new challenges of globalization.9

Furthermore, the G20 Heads of State in their 2009 Pittsburg Leaders Statement, commit to a sustainable growth model:

We will work together to ensure that our fiscal, monetary, trade, and structural policies are collectively consistent with more sustainable and balanced trajectories of growth. We will undertake macro prudential and regulatory policies to help prevent credit and asset price cycles from becoming forces of destabilization. As we commit to implement a new, sustainable growth model, we should encourage work on measurement methods so as to better take into account the social and environmental dimensions of economic development.10

Sustainable development has, in one formulation or another, been enshrined as an explicit objective in more than fifty binding international treaties.11 It is central to

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8. Ibid., at paras 49–53.
the mandate of many international organizations, and it is the subject of numerous ‘soft law’ declarations and standards. Sustainable development and its principles guide domestic and international law in many areas of economic, social and environmental policy, particularly where these fields intersect. However, in international investment law, sustainable development remains challenging to implement. The challenge is to ensure that new international and domestic rules that are being developed to encourage investment by providing additional protection for investors from capital exporting States also provide sufficient policy flexibility and incentives to encourage sustainability.

2. THE CONCEPT OF SUSTAINABLE DEVELOPMENT AND ITS MEANING IN INTERNATIONAL LAW

While the introduction of the concept of sustainable development can be traced back to eighteenth-century forestry laws in Central Europe, its ongoing evolution in the field of international law is a much more recent phenomenon to the point that it is now included and, to lesser and greater degrees, implemented in many international agreements. To date, the most frequently cited definition of sustainable development is ‘development which meets the needs of the present without compromising the ability of future generations to meet their own needs’. There is also a general understanding that the development mentioned above must take into account three intersecting factors – economic development and social (human rights) development, as well as environmental protection. The exact delimitation of these factors and their applicability in practice has been at the centre of many discussions over the last few decades across many academic and international institutional fora.

The concept in its current form, primarily its ‘underlying environmental principles’, can be traced back to the Conference on the Human Environment, hosted by the United Nations in 1972 in Stockholm. The 1972 UN Stockholm Declaration on the Human Environment that stemmed from this conference spurred significant efforts at the international level to protect the environment, notably the creation of the United Nations Environment Programme (UNEP) in 1973. While not tackling the issue of sustainable development specifically, there were some minimal references to the concept, most notably in the second paragraph of the Declaration, where governments agreed that: ‘The protection and improvement of the human environment is a major issue which affects the well-being of peoples and economic development throughout the world’. As for sustainable development as its own

12. Ibid.
15. Cordonier Segger & Ashfaq Khalfan, supra n. 11, at 1.
16. Ibid., at 16.
socio-political concept, its first express manifestations were in the early 1980s in the report from the International Union for Conservation of Nature, World Conservation Strategy, as well as in the book *Building Sustainable Strategies*. 18

It was not until 1987 that the concept truly took hold with the release of the World Commission of Environment and Development report entitled Our Common Future, commonly referred to as the Brundtland Report. 19 It was also manifest in 1992 in the work that arose out of the United Nations Conference on Environment and Development held in Rio de Janeiro. Investment is a key element of both the Rio Declaration and Agenda 21. 20

International economic institutions, such as the World Trade Organization (WTO), have come to embrace the concept of sustainable development. In fact, the concept went from being mentioned in the Preamble of the WTO Agreement in 1995 (‘while allowing for the optimal use of the world’s resources in accordance with the objective of sustainable development, seeking both to protect and preserve their respective needs and concerns at different levels of economic development’) 21 to being highlighted in later declarations. This was made clear in several Ministerial Declarations in the years following the conclusion of the WTO Agreement, including in the 1998 Geneva Ministerial Conference Declaration, where the ministers state that: ‘We shall also continue to improve our efforts towards the objectives of sustained economic growth and sustainable development’. 22

Despite many references to the concept of sustainable development and widespread recognition by States of the need to pursue it, there was little, if any, consensus on its precise meaning. The 2002 World Summit on Sustainable Development aimed to ‘reinvigorate global commitment to sustainable development’. 23

From this conference came the JPOI, which shifted the focus of sustainable development from ‘primarily “environmental protection” to an integrated environmental, social and development agenda, with attention to poverty eradication, sanitation, and health’. 24 Once again though, a consensus was not reached on the principles that govern sustainable development.

In 2002, after a decade’s worth of research, the International Law Association (ILA) Committee on the Legal Aspects of Sustainable Development drafted the New Delhi Declaration on the Principles of International Law Related to Sustainable Development (ILA Declaration). 25 The ILA Declaration identifies seven different principles in the field of sustainable development. There is the duty of

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18. Cordonier Segger & Khalfan, supra n. 11, at 17.
20. See Ch. 6 in this volume.
21. Preamble of the WTO Agreement.
23. Cordonier Segger & Khalfan, supra n. 11, at 25.
States to ensure sustainable use of natural resources, first reflected in Principle 21 of the Stockholm Declaration, as well as in Principle 2 of the Rio Declaration.  

This principle calls upon States to use the natural resources within their jurisdictions in such a way as to not damage the environment or natural resources of other States. The second principle (equity and poverty eradication) refers ‘to both inter-generational equity (the rights of future generations to enjoy a fair level of the common patrimony) and intra-generational equity (the rights of all the peoples within the current generation of fair access to the current generation’s entitlement to the Earth’s natural resources)’ and highlights the importance of the eradication of poverty to achieving sustainable development (as did Principle 5 of the Rio Declaration).  

Next there is the principle of common but differentiated responsibilities, which draws on, among other concepts, ‘the polluter pays’ principle. Principle 4 highlights the need to use the precautionary approach to human health, natural resources and ecosystems, which was first enshrined by Principle 15 of the Rio Declaration, which states that: ‘Where there are threats of serious or irreversible damage, lack of scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation’. In Principle 5, the ILA Declaration emphasizes public participation and access to information and justice as a necessary element of sustainable development in that ‘it is a condition of responsive, transparent and accountable governments’. In close correlation to that, in Principle 6, the ILA Declaration expresses that good governance is a key principle to ensure sustainable development, both at the domestic and international levels. In this respect, the JPOI states that:

Good governance within each country and at the international level is essential for sustainable development. At the domestic level, sound environmental, social and economic policies, democratic institutions responsive to the needs of the people, the rule of law, anti-corruption measures, gender equality and an enabling environment for investment are the basis for sustainable development.

Lastly in Principle 7, the ILA Declaration suggests that there is a principle of integration and interrelationship, in particular in relation to human rights and social, economic, and environmental objectives. This last principle permeates many different soft law instruments, including Principle 4 of the Rio Declaration,
which states that ‘In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it’,32 and Chapter 39 of Agenda 21, where States agree to ‘focus on the further development of international law on sustainable development, giving special attention to the delicate balance between environmental and developmental concerns’.33

3. INTERNATIONAL INVESTMENT LAW AS AN INSTRUMENT FOR SUSTAINABLE DEVELOPMENT

There is a global consensus that there is a need for sustainable development and that foreign direct investment (FDI) is a key component of any development agenda.34 Indeed, many soft law instruments have stressed the importance of investment with regard to sustainable development. This relationship is reflected in Agenda 21 and is stated very expressly in the final report of the International Conference on Financing for Development (Monterrey Consensus): ‘Private international capital flows, particularly foreign direct investment, along with international financial stability, are vital complements to national and international development efforts. Foreign direct investment contributes toward financing sustained economic growth over the long term’.35

In light of this policy consensus, there needs to be an appropriate international and national regulatory framework to facilitate FDI. According to the Monterrey Consensus, key aspects of this framework are a ‘transparent, stable and predictable investment climate, with proper contract enforcement and respect for property rights, embedded in sound macroeconomic policies and institutions that allow businesses, both domestic and international, to operate efficiently and profitably and with maximum development impact’.36

Although there is general consensus on the importance of foreign direct investment for sustainable development, there is still much to be done to ensure that the current regulatory framework for international investment law promotes sustainability. Given the proliferation of international investment agreements (IIAs) across the globe,37 these agreements offer great potential to integrate

32. Rio Declaration, supra n. 28.
33. Agenda 21, supra n. 4, at para. 39.1, Ch. 39.1.
sustainable development principles while at the same time fulfilling their classic role of promoting and protecting international investments. As international investment law has matured, there have been attempts to integrate sustainable development principles into the negotiation, structure, content and implementation of IIAs. 38 Thus, there are lessons to be learned from the successful implementation of sustainable development principles into international investment law, but there also remains room for improving the legal framework for foreign investment to ensure that it actively promotes sustainable development.

This volume builds upon previous research on sustainable development in international trade law and policy, published in Sustainable Development in World Trade Law. 39 The volume’s goal is to analyse the state of international investment law through the lens of sustainable development and to clarify how international investment law can contribute to sustainable development. The various chapters in the volume identify, characterize, and analyse existing rules, innovations, and best practices in international investment agreements, including the investment measures used by other sustainable development treaties and instruments. The volume proceeds in four parts.

Part I establishes the foundations. Chapters by leading experts examine links between investment law and development, investment law and the environment, and investment law and human rights. A further chapter explains why traditional rules on norm conflict do not present the most effective way to address the problematic aspects of these relationships. The last chapter in this part proposes a new agenda for a more integrated approach, taking into account principles of sustainable development law.

Part II of the volume addresses the procedural and substantive dimension of sustainable development in international investment law. The first section of Part II covers procedural mechanisms for addressing sustainable development concerns: impact assessments of investment treaties and innovations in the dispute settlement process. The second section of Part II analyses substantive elements of investment treaties: the definition of investment, fair and equitable treatment, national treatment, regulatory expropriation, stabilization clauses, exceptions, and necessity. The third section of Part II focuses on innovations in bilateral and regional investment law, providing an analysis of the North American Free Trade Agreement (NAFTA) and water resources, investment innovations in the European Union – African, Caribbean and Pacific Group of States (ACP) agreements, experiences with investment arbitration in the case of water privatization in Africa, recent developments in investment treaty law in the Asia-Pacific region, and an examination of investment mechanisms found in the Energy Charter Treaty and their potential role in addressing climate change.

Part III is divided into two sections. The first section examines emerging issues and proposals: improvements to IIAs for developing countries, a chapter on the International Institute for Sustainable Development’s Model Investment

38. Newcombe, supra n. 34.
Agreement, a chapter on one of the core issues identified in the G8 Declaration – corporate social responsibility, and a final chapter of the institutionalization of sustainable development in investment arbitration. The second section of Part III examines how investment can be promoted through sustainable development treaties in general, followed by chapters on climate change, and biodiversity treaties, as well as treaties concerning water use and shared river regimes.

Part IV provides the conclusions, which draw out the themes from this volume and provide a research agenda for the future in this emerging and important area. With rich contributions from leading investment law practitioners, arbitrators, and academics, the volume offers a constructive, timely, and accessible expert analysis of recent ‘sustainable developments’ within the realm of international investment law, providing an integrated and essential guide to some of the most important debates in international economic law today.