

## Speaking Notes

### **Balancing the Rights and Obligations of States and Investors by Marrying Foreign Investment Protection off to Sustainable Development?**

by *Prof. Dr. Steffen Hindelang, LL.M., Freie Universität Berlin* \*

#### **A. [Thanks and Introduction]**

Mr Chairman, your excellencies, distinguished guests, ladies and gentlemen,

Many thanks for the opportunity to address you at the 24<sup>th</sup> Meeting of the Energy Charter Conference on such an important discussion topic as balancing the rights and obligations of States and investors.

Within the next 15-20 minutes I would like to bring together two debates which have been dealt with as separate issues for far too long. Over the past decades, sustainable development and the protection of foreign investment have been addressed in parallel discourses. Only gradually have these two policy strands, each with its own perspectives and distinct socialization processes, started to take notice of each other. Therefore, mutual prejudices and barriers need to be reduced, ideologically-driven arguments need to be identified and avoided. Balanced approaches to examining the relationship between investment protection and the principles of sustainable development are in their very early stages and need to be cultivated. It is at this critical moment that this Energy Charter Conference Meeting wants to facilitate the debate by creating a forum for a critical, reflective and balanced analysis which is very much to be welcomed.

#### **B. [Sustainable Development – What is it?]**

While one can in few words explain what international investment law is about and what its main features are, the task of definition becomes immediately more difficult when we turn to sustainable development.

One might justifiably form the impression that the international policy circus cannot do without it anymore: the term is echoed, for example, in Agenda 21 from the United Nations Conference on Environment and Development, and in the Johannesburg Plan of Implementation adopted by the 2002 World Summit on Sustainable Development. You will find it in the G8 2009 declaration on Responsible Leadership for Sustainable Future and in the G20 Core Values for Sustainable Economic Activity.

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\* Associate Professor at the Department of Law of Freie Universität Berlin, Senior Fellow of the Walter Hallstein Institute of European Constitutional Law at Humboldt University Berlin, Academic Advisor to the International Investment Law Centre Cologne (IILCC), research interests and advisory experiences comprise constitutional law, European Union law, public international and international economic law, especially international investment law, international arbitration and dispute settlement. Contact [mail@steffenhindelang.de](mailto:mail@steffenhindelang.de); <http://www.jura.fu-berlin.de/en/fachbereich/einrichtungen/oeffentliches-recht/lehrende/hindelangs/index.html>

Sustainable development is identified as an explicit objective in dozens of international treaties; most notably in art. 19 of the Energy Charter Treaty, in art. 21 of the Treaty on European Union, and in the preamble of the 1995 WTO Agreement, as well as in numerous soft-law instruments. And, it would appear that the number of references to sustainable development is set to increase even further. The European Union is committed to include operational chapters on sustainable development in its comprehensive free trade agreements and organizations such as the United Nations Conference on Trade and Development (UNCTAD) has ventured to take a fresh look at international investment policy-making from the viewpoint of sustainable development.

Despite the concept's obvious popularity, its content and meaning are uncertain and heavily disputed. The 1987 Brundtland-Report defined sustainable development as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs." A more detailed understanding of the concept alludes to three pillars – economic development, social well-being and social development, and environmental protection. While certain smaller elements or fragments of the concept might indeed form customary international law, one can, however, surely doubt that there is any general all-embracing customary international law principle of sustainable development. Hence, when talking about sustainable development *at large* we must be aware that we operate mainly with a political and not a legal concept. Hence, when claiming that international investment law as it stands today does not conform to and must be brought in line with the concept of sustainable development *at large*, then this is first and foremost not a conflict of legal norms. Rather, it is a political claim that the law *should* be formulated or interpreted in a certain way. And, one has to acknowledge, such a political claim is not easily resisted on the political stage. From a communication theory point of view, it is an ideal inflammatory term, conjuring up a multitude of controversial issues about which many of us - if not all - have some sympathy: who among us, and more importantly, which of our political decision-makers, would wish to be labeled as insensitive to environmental concerns or human rights issues?

Now, when relating sustainable development *at large* to foreign investment, there seems to be a widespread political consensus that foreign investment is one of the key elements in furthering the development of States. However, controversy has long existed around the question of precisely which qualities an investment should exhibit in order to fulfill its function without compromising competing public interests.

Foreign investment is essentially about the acquisition of a cross-border claim to income in the hope of getting a return in the future. And, in very simple terms, an investment will be made where it generates the highest returns. This is how foreign investment essentially works and there is nothing intrinsically negative about it, at least as long as we embrace a free or social market economy model. However, it gets tricky when this economic rationale does not go hand in hand with the objectives pursued by the host State. Taxes generated by foreign investments are certainly highly appreciated, as are any transfers of technology or of knowledge. But foreign investment may be accompanied by environmental pollution, or poor labor and health standards. Regulatory measures taken in the interests of preserving the environment, of safeguarding labor standards, or for other non-investment concerns – no matter

how necessary or indispensable these may be – they all have the capacity to negatively impact on investment.

It is the host State's right to reach an appropriate balance of the diverse interests at play for the benefit of its people. This is to be achieved, among others, by means of establishing a regulatory framework which maximizes positive and minimizes negative impacts from foreign investment. Such regulatory framework does not only comprise national measures but also includes international treaties.

Since the late 1950s, States have entered into thousands of bilateral and regional treaties aiming at the promotion and protection of foreign investment.

It is hardly possible to overestimate the value of those treaties – including that of the Energy Charter Treaty – with regard to certain aspects: on the micro-level, they provide investors with a tool to manage and mitigate political risk and offer host States an advantage when competing with one another to attract investments. On the macro-level, these treaties promote the rule of law and good governance standards; they make public international law even more meaningful for the individual, beyond the narrow elite of States and international organizations, and beyond the fragmentary protection of human rights.

However: the question arises whether these benefits might ultimately come at too high a price. Some claim that the current body of international investment law, in particular its application in the context of investor-State dispute settlement, curtails or even frustrates the sustainable development of host-States. At the extreme, international investment agreements are depicted as hegemonic instruments, straightjackets preventing host-States from taking much-needed measures to secure the wellbeing of their populations.

But this story can also be told differently: while foreign investors are certainly not motivated by altruism, they can nevertheless contribute to the economic and social development of their chosen host-State in many different and meaningful ways. However, having made their investment, they can find themselves in a kind of hostage situation: the host-State might suddenly adopt protectionist or discriminatory measures to the detriment of the foreign investor. International investment agreements are in place to deter host States from this type of conduct. From this perspective, the demand to “balance” investor protection and sustainable development might be characterized as an ill-camouflaged attempt to get rid of the bounds of the international rule of law and accountability by maximizing regulatory arbitrariness.

Therefore, any meaningful reform of the current system must not aim for the extremes nor should be interested in such black-and-white rendering of the issues. Rather, what we should aim for are the many shades of grey.

### **C. [Deficits]**

Before proposing potential remedies, any meaningful reform should start off with a thorough analysis of the universe of national and international policy making with a view to identify not just perceived but real imperfections in the current system.

Claims for reform – especially those which call for a readjustment in the current policy focus towards a stronger emphasis on sustainable and inclusive development – suggest that international investment agreements “*unduly*” constrain national development policy-making. As a matter of fact, any international commitment reduces policy space and, thus, also development policy-making. One might wonder which causality was proven here: that between the investment protection instruments and their negative impact on sustainable development, or simply between international commitments and unfettered sovereignty more generally. Let me take the liberty of asking an iconoclastic question: is the call for balancing investor protection and the development interests of host States a call for more unfettered sovereignty, more national egoism and fewer international commitments?

#### **D. [Substantive issues]**

Even if answered in the negative, when addressing the impact of international investment agreements on sustainable development, their shortcomings and possible remedies one needs to be particularly careful identifying deficiencies first before applying any cure. This is particularly true for **substantive provisions**. For example, is the protection of legitimate expectations of an investor truly at odds with sustainable development or is such a safeguard not simply a basic element of the rule of law? Should a host State be able to expropriate property without compensation in cases it is able to name a legitimate public purpose? Or rather should an expropriation always be compensable and the pursuit of a legitimate public purpose be the precondition for its legality?

What we currently see is an overall decline of concise wordings and abstract language in favour of more elaborated provisions, especially on fair and equitable treatment and indirect expropriation. At the heart of these “chatty” provisions is a desire to regain policy space, to accommodate commercial and non-commercial regulatory concerns in an even broader fashion. This trend has been triggered by increased security concerns, a changing perception of strategic industries, State measures in cases of economic crisis, and a growing trend that former capital exporting countries turn increasingly also into host States for capital from developing countries and emerging market economies.

However, in public debate, the argument supporting a call for re-design often does not refer to the aforesaid but it is tailored “slightly” different. It is the concept of sustainable development which is frequently cited to justify a demand for re-design of the substantive provisions in investment instruments. Such re-design would supposedly be called for, because the current investment agreement regime has produced “unexpected” interpretations of provisions or has allowed for “unwanted” challenges to national measures in pursuit of a public purpose. However, is this perceived “unfairness” really due to the text and wording of international investment agreements? Or is it due to the interpretation and, ultimately, due to those people who interpret them?

#### **E. [Procedural issues]**

Academic research has critically examined the current system of dispute settlement and it laid bare its weaknesses and shortcomings in respect of treaty interpretation. There are good ar-

guments suggesting that sustainable development needs might be better addressed by focusing on the interpretation of treaties, as opposed to the creation of specific SD-friendly provisions. The Vienna Rules on the interpretation of treaties constitute a workable gateway for integrating sustainable development into IIAs; if applied correctly instead of just paying lip-service to them. Hence, the real problems of the current system are not necessarily the indeterminacy of material standards, but methodological weaknesses in their interpretation. What seem to be particularly problematic are the backward looking, path-dependent, quasi-precedence system and the refusal of some arbitrators to pronounce on points of law – perhaps because they might fear that this would negatively impact on their future nominations. In other words, it appears that we have to talk more about people, their qualifications, and the institutional layout of dispute resolution.

However, it is not only the quality of legal reasoning investor-State dispute settlement practice is criticized for, but also for a lack of coherence and consistency, for a lack of transparency, for a lack of respect towards democratically elected governments implementing policies in the public interest, and last but not least, for having created an oligopolistic dispute resolution industry.

At least part of this criticism is shared not only by an increasing number of scholars and civil society campaigners but has also found its way into policy proposals of international organizations such as UNCTAD or the Commonwealth Secretariat. Policy proposals on how to remedy these shortcomings aim, by and large, at shielding host States from so-called “unjustified liabilities.” However, what precisely those unjustified liabilities actually are and how one can meaningfully draw a dividing line between justified and unjustified liabilities is problematically left open. With all the enthusiasm for reforming dispute settlement, one should not forget that international investment law is one of the very few areas of public international law where there exists a rather effective enforcement mechanism. If there were no such mechanism, or if IIAs were to provide only for State-to-State dispute settlement, the field would probably lose much of its controversy, but also its appeal to businesses as an effective means to mitigate of political risk.

## **F. [Perspectives]**

Faithful to the slogan of the Prince of Salina in *Tomasi's* novel “Il gattopardo,” also in the realm of international investment law everything must change in order to stay the same. The Italian novelist used this phrase in order to describe a dramatic turn of two epochs. Only time will tell whether we are at such a moment in respect of investment protection.

What we are witness to is a regionalization of international investment law with the negotiation of major preferential trade and investment treaties already under way.

Moreover, trade and investment policy is integrating; for better or worse. Notions such as special and differential treatment will gain importance. Most prominently, chapters on sustainable development will most likely be included in future EU-investment agreements with references to internationally agreed principles and rules, in particular in the area of labor and the environment. However, is it about substance i.e. enforcing higher labor and environmental

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standards? Or is it about securing broader regulatory discretion? Or is it merely about marketing, bearing in mind that any trade and investment agreement has to be sold to ever more critical parliaments and to the wider public?

Having posed these questions, ladies and gentlemen, I should leave it here, in certainty that everything must change in order to stay the same. Thank you for your attention.