POLICY BRIEF
March 2011

Responsible investment through international investment law: Addressing rights asymmetries through law interpretation and remedies

Katja Gehne, World Trade Institute, NCCR Trade Regulation

The vast majority of states have, on a number of different occasions, confirmed that foreign direct investment (FDI) forms an important part of sustainable development. The concept of sustainable development requires pursuing economic, social, and environmental objectives in such a way that they mutually reinforce each other. In this regard, international investment law should foster investor protection interests while allowing a balance to be struck with environmental and social concerns in a mutually supportive manner. Current calls for responsible investment in land reflect this concern: while there is widespread consensus that investment in agriculture is vital for global food security and poverty reduction, experts warn that these need to take into account land rights of people, food security, participatory processes, and social and distributional impacts, to ensure that not only the economic interests of investors but also peoples' interests in livelihoods are met.

International investment law should foster investor protection interests while allowing a balance to be struck with environmental and social concerns

International investment law has not yet integrated this comprehensive economic, social, and environmental management approach. Due to the history of this branch of law, the majority of international investment agreements (IIAs) provide a high standard of protection for investors without clarifying the scope of host states' discretion to regulate in the public interest and in regard to people's rights. The current concept of investment law is based on a separated approach: while the investment law regime is tailored to promote good governance for investment protection, and thereby economic growth and welfare, other regimes, such as international human rights and environmental law, are supposed to enhance good governance with regard to other issue areas of international law.

This separation of different issue areas is artificial: as within the state economic, environmental, and social interests are closely inter-related, with a high potential for triggering trade-offs (e.g. environmental harm) as well as mutual gains (employment, standards of education, infrastructure). This hardly allows for international regulatory fields that operate in isolation.

While strong arbitration mechanisms are available to protect and enforce investors' rights and trade law, peoples' access to remedies to enforce their rights is difficult in practice and limited in scope

Regarding the separated issue areas, there is an asymmetry in regard to the protection and promotion they enjoy under international law. While strong arbitration mechanisms are available to protect and enforce investors' rights and trade law (e.g. ICSID, WTO dispute settlement body), peoples' access to remedies to enforce their rights outside the boundaries of their states is comparatively difficult in practice and limited in scope. There is no IIA practice imposing obligations on investors to do no harm or on investors' home states to ensure that their nationals comply with international human rights

world trade institute

cirad

INTERNATIONAL LAND COALITION

or environmental standards abroad. As a result, there is an unbalanced enforcement of inter-related legal positions; this mainly when host states suffer from weak governance or authoritative regimes and fail to provide adequate access to justice. States can, in theory, file complaints against investors. This has, however, rarely happened, not least due to the fact that IIAs generally impose few obligations on investors.

The asymmetry is intensified by the isolated character of international investment law. It generally provides little guidance in regard to safeguarding and balancing conflicting human rights and legitimate public interest, although a vast majority of states that are members of the WTO or party to IIAs are generally bound to at least one of the core human rights instruments and key agreements of international environmental law.

Although international investment law does not constitute a multilateral and coherent legal regime, most IIAs provide basically the same core international investment protection standards, such as non-discrimination, fair and equitable treatment, and expropriation rules. These standards tend to be broad in scope, and imply significant risks of constraints on host states regulating in the public interest. International arbitration awards suffer from inconsistencies, not least because the outcome of arbitration decisions depends to a large extent on the interpretational approach taken by the arbitrators. This lack of legal certainty carries the risk of "regulatory chill" in host states, with governments refraining from regulating in favour of the public interest because they fear international arbitration, imposing high costs and amounts of compensation.

> The lack of legal certainty carries the risk of "regulatory chill" in host states, with governments refraining from regulating in favour of the public interest

Regarding the asymmetries, this report suggests two gateways to promote an international investment law regime that will respond more clearly to the task of sustainable development:

Mainstreaming a sustainable development interpretational approach to international investment law:

- Taking into account sustainable development standards as they have been carved out in the Rio process; a vast majority of states have committed to these, thereby creating aspirations;
- Considering decisions by international dispute settlement bodies (e.g. ICJ, Gabcikovo-Nagymaros and Pulp Mills case; WTO Appellate Body, US-Shrimp case; Permanent Court of Justice, Iron Rhine case) that have dealt with and set standards for law interpretation in terms of sustainable development;
- Applying the sustainable development concept of international law (ICJ, WTO Appellate Body) to international investment law, which requires reconciling economic, social, and environmental objectives in a mutually supportive way; this on the basis of the principle of proportionality as it has been developed in legal theory and practice to optimize conflicting legal positions;
- Respecting and securing states' regulatory space in the public interest, and in respect to human rights and environmental standards;
- Developing good faith standards to frame "legitimate expectations" of investors, states, and people, and as benchmarks to weigh and balance investment protection standards and social and environmental concerns;
- Fostering "hard" interpretational rules in terms of sustainable development interpretational standards. For example: anchoring sustainable development as an objective in the preamble of IIAs (as, e.g., in the EC-CARIFORUM agreement); integrating the obligations of investors to respect human rights in IIAs.

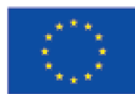
Promoting transnational grievance mechanisms for people in regard to FDI activities:

- Further developing and mainstreaming extra-territorial jurisdiction with regard to cross-border investments and services; establishing common standards (rule of law, mutual recognition, cooperation for evidence, and enforcement), through guidelines or agreement;
- Ensuring international enforcement of decisions (similar to the ICSID regime in regard to states' assets);
- Fostering state complaints in international arbitration;
- Thinking about the possibility of legal recourse for people in international arbitration. This requires overcoming the historical divide between different issue areas of international law and creative thinking in regard to viable procedural and/or institutional facilities – e.g. mixed arbitration panels, different arbitrator rosters for different arbitration issues, the role of experts, etc.;
- Promoting non-binding remedy mechanisms and legally binding recourse mechanisms as two separated instruments with two equally important, but different, roles to play in ensuring human rights and environmental standards compliance. The role of legally binding mechanisms: due diligence enforcement and "stick"; non-binding mechanisms: to monitor and allow for participatory development of good practices and respective mediation. Non-binding instruments could serve as an obligatory pre-instance to legally binding recourse.

ILC wishes to thank the following donors for their support:

Canadian International Development Agency

Agence canadienne de développement international



Ministry of Foreign Affairs

Enabling poor rural people to overcome poverty

Schweizerische Eidgenossenschaft
Confédération suisse
Confederazione Svizzera
Confederaziun svizra

Swiss Agency for Development and Cooperation SDC

This policy brief is derived from a wider initiative on Commercial Pressures on Land (CPL). If you would like further information on the initiative and on the collaborating partners, please contact the Secretariat of the International Land Coalition or visit **www.landcoalition.org/cpl.**

International Land Coalition
Secretariat

Via Paolo di Dono, 44
00142 – Rome, Italy
tel: +39 06 5459 2445
fax: +39 06 5459 3628
info@landcoalition.org
www.landcoalition.org

The opinions expressed in this brief are those of the author and do not necessarily constitute the official position of the International Land Coalition, nor of its members or donors.