Re-Globe Webinar 19 January 2024
Sustainable Development and International Investment Law

Sustainable Investment and Land Grabbing

Mirko Camanna, University if Pavia

Abstract: This intervention analyses the relationship between foreign investments and land grabbing from a sustainable development perspective. The phenomenon is highly relevant due to the ever-increasing demand for food, biofuels, and raw materials. Large-scale land grabbing poses severe problems for sustainable development. From an environmental perspective, it leads to biodiversity losses, deforestation, environmental degradation, and pollution. From a social perspective, land grabbing often leads to violations of public participation rights and free prior informed consent, forced migration, and damages to cultural heritage and sacred lands. Moreover, large-scale investments often fail, obstacled by conflicts with local communities. States and financial institutions have also often failed to use adequately their economic and political leverage to avoid these concerns. International Investment Law, which is traditionally investor-oriented, plays a prominent role in facilitating land grabbing, protecting foreign investors, and exacerbating the shortcomings of States on this issue. The protection provided in Investment Agreements can hinder public policies in favor of sustainable development but affecting foreign investors and their legitimate expectations. Some recent investment arbitrations highlight these concerns. In addition, the system lacks transparency and does not involve the local communities. On the other hand, International Investment Law could promote a new balance between investors' interests, human rights, and the environment, favoring land investment in line with Sustainable Development Goals and avoiding land grabbing. Promoting community involvement in public decisions and protecting only sustainable, responsible, and qualitative investments could achieve this result.This paper firstly explains the problem of land grabbing, its negative effects, and the obstacles it creates to sustainable development. The second section analyses the relationship between International Investment Law and land grabbing, focusing on the current concerns created by International Investment Law. The third section outlines potential reforms and shows how Investment Law could become part of the solution. It focuses on four pillars: imposing obligations on States and investors; sanctioning or excluding authors of land grabbing from protection; increasing transparency and public participation; enhancing the role of financial institutions, supply chain, and inclusive business models.

Short bio: **Mirko Camanna** is a PhD candidate in International and EU Law at the University of Pavia, Department of Law (2020 - 2023). The title of his thesis is: Protection and promotion of non-economic interests in International Investment Agreements. He was also a visiting researcher at Leiden University, The Netherlands (9/2023 – 12/2023). He has been a speaker at several conferences and lectures, mainly on the relationship between International Economic Law and Sustainable Development. His other main interests are Business & Human Rights and Environmental Law. He obtained a Master's Degree in Law from the University of Pavia with a thesis in International Law on Universal Civil Jurisdiction (2013 - 2018). He also spent a period of Erasmus study at the Katholieke Universiteit Leuven, Belgium (2017 - 2018). He obtained the SSPL degree at the Universities of Pavia and Bocconi (2020). In 2022 he passed the Italian bar exam.

Sustainable Development Goals and International Investment: In pursuit of compatibility

Michal Plšek - Università degli Studi di Milano Bicocca

Abstract: Since the creation of the system of international investment law, its goal has been to promote capital flows into developing countries to stimulate their growth. Setting economic development aside, it was not until recently that governments started to be troubled by the environmental implications of investment protection. The speaker presents the findings of his PhD research focused on whether and how sustainable development policy objectives are respected and pursued in international investment law. The method used for the study consists of qualitative research of international law provisions, including their interpretation, being scrutinised under the sustainable development framework created for the study. At the webinar, the speaker will present the outline of his doctoral thesis. During the introduction, the interactions between investment law and sustainable development policy objectives are demonstrated in the wording of Agenda 2030, pointing out the potential for mutual benefit. However, this potential is still being frustrated, as is shown on examples such as Eco Oro v. Ecuador, RWE v. Netherlands, or SD Myers v. Canada. Proceeding with the research outline, the presenter introduces the sustainable development framework. Thoroughly analysing the content and value of several sources of international law (e.g. Agenda 2030; New Delhi principles; Brundtland Report), the speaker synthetises a number of common aspects among these sources, resulting in the creation of the framework. The speaker then takes on the analysis of whether there is a way for governments to accommodate sustainable development considerations into international investment law. Indeed, several options for shaping the regime to greater deference towards sustainability considerations are identified. A spark of reforms can be observed in Morrocco, Nigeria, India, and certain Latin American countries. A bottom-up trend thus seems to emerge. From a critical perspective, it is shown that the capital-exporting countries are more conservative and have not yet followed such reforms. Crucially, the presenter contrasts the identified options of investment law protections with the framework to look for compatibility between sustainable development and international investment law. The results are shown, indicating in what ways some provisions can be more favourable towards the policy objective of sustainability. In conclusion, shortcomings of the current investment protection regime are underlined, relying on arguments from legal, as well as political, science. A proposition is offered to the audience. Perhaps it is time the investment law faces a paradigm shift. It is propounded to divert the focus from pure protection of investments and instead pursue sustainability through the protection of meritorious investments only.

Short bio: **Michal Plšelk** obtained a law degree from the Masaryk University, Brno. He has experience representing the government of the Czech Republic in investment arbitrations and investment treaty negotiations. Currently, Michal is pursuing a PhD degree focusing his research on the relationship between investment law and sustainable development. During the studies, he conducted an internship for the ICSID Secretariat in Washington D.C., assisting with case administration and legal research. Additionally, Michal is a visiting scholar at the Max Planck Institute in Heidelberg, Germany

Sustainable Development Can Drive a Change in the Paradigm Underlying Investment Treaties

Alexandros Bakos Catalin – City University of London

Abstract: Traditionally, international investment treaties have mostly protected foreign investment, seeking to counter-balance the political risk incurred by foreign investors when committing capital abroad. Such instruments are geared around protection standards – only exceptionally establishing tools that safeguard the host states' powers to regulate (including, but not limited to, the promotion of sustainable development) and police their territories. Moreover, investment treaties would only allow other interested parties, such as local communities, to voice concerns in very limited circumstances. This determined stakeholders to construe international investment law as a mechanism characterised by an investment protection paradigm. In turn, stakeholders such as states, civil society, or local communities felt disempowered by those developments, having little to no opportunities to voice their concerns in investment arbitration (the mechanism normally used to settle disputes between states and foreign investors). States, for example, felt that their regulatory and police powers were hindered by the investment treaty protection standards and their application by arbitral tribunals. In turn, this has set in motion various reform processes. What an important number of these reform endeavours have in common is that they have led to a change in the paradigm underlying the structure and content of investment protection treaties. States are not only looking to protect foreign investment anymore. They are looking beyond that, to provide more safeguards to their regulatory powers and to act in the pursuit of their essential interests (the transition to clean energy or protection of local communities, for example). In some cases, even a move towards the regulation of foreign investment internationally has occurred. It is to this last part that this paper will turn, fundamentally asking three questions: are we seeing a pattern of moving away from international investment protection towards international investment regulation? How does this manifest itself in the structure of international investment treaties? What are the prospects for such a movement in the future? Sustainable development offers the perfect example of this and is a perfect example of how a move towards such a regulatory paradigm can safeguard a state's power to promote sustainable development policies. Part I of the article starts with a description of the (still) dominant paradigm of investment protection underlying investment treaties in force. It will explain how the nexus of international investment treaties has always been investment protection and the establishing of a counterbalance against political risk entailed by capital commitment to a foreign territory. Part II will then discuss the main characteristics of a regulatory framework underpinning (elements of) international investment treaties. It will address the difference between standards as abstract principles (even if binding), such as investment protection standards, and rules and regulations, which are established in detailed form. It also looks at the purposes of regulatory frameworks, which often establish a minimum baseline for the protection of specific interests. And it looks at how the enforcement of regulations seems to have a rather managerial nature, with effective enforcement sometimes directing the specific behaviour of its target in great detail. Part III of the Article will then look at three types of instruments/practices in international investment treaties that might satisfy certain of those criteria and also be used to promote sustainable development – non-regression clauses that prohibit the relaxation of standards, and protection practices, in various areas (e.g. environment and human rights) to attract foreign investment; actual sustainable development and corporate social responsibility instruments; and the inclusion of investment chapters in free trade agreements that already have a developed sustainable development angle, sometimes even containing specific chapters to this end (thus, influencing, among others, the context in which the investment chapter provisions will be interpreted).

While none of those offers a perfect example of a regulatory paradigm, a few come close. In any case, they demonstrate snippets of a potential pattern. Finally, Part IV looks at prospects for the future of sustainable development-oriented treaties and treaty provisions and how a regulatory paradigm can safeguard the power of states to design, and implement such policies – or how they can even be designed internationally. It contextualises a regulatory pattern in investment treaties in the reform process of international investment law. It also considers geopolitical tensions that might hinder the uniformization of regulatory paradigms, especially when the common concerns of humanity (e.g., protection of the environment or the protection human rights) are at stake.

Short Bio: **Alexandros Bakos** is a PhD candidate in international economic law at City, University of London. He is also a teaching assistant in international law and EU law at City. More info at https://www.city.ac.uk/about/people/research-students/alexandros-catalin-bakos