Sustainable Development in World Investment Law

Edited by

Marie-Claire Cordonier Segger
Markus W Gehring
Andrew Newcombe
Summary of Contents

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Acknowledgements</td>
<td>xxxi</td>
</tr>
<tr>
<td>List of Contributors</td>
<td>xxxiii</td>
</tr>
<tr>
<td>Table of Abbreviations</td>
<td>lxiii</td>
</tr>
<tr>
<td>Foreword</td>
<td>lxvii</td>
</tr>
<tr>
<td>Part I</td>
<td></td>
</tr>
<tr>
<td>The Foundations</td>
<td>1</td>
</tr>
<tr>
<td>Chapter 1</td>
<td></td>
</tr>
<tr>
<td>An Introduction to Sustainable Development in World Investment Law</td>
<td>3</td>
</tr>
<tr>
<td><em>Markus Gehring &amp; Andrew Newcombe</em></td>
<td></td>
</tr>
<tr>
<td>Chapter 2</td>
<td></td>
</tr>
<tr>
<td>International Investment Law and Development</td>
<td>13</td>
</tr>
<tr>
<td><em>Anna Joubin-Bret, Marie-Estelle Rey and Jörg Weber</em></td>
<td></td>
</tr>
<tr>
<td>Preface by James Zhan</td>
<td>13</td>
</tr>
<tr>
<td>Chapter 3</td>
<td></td>
</tr>
<tr>
<td>International Investment Law and the Environment</td>
<td>33</td>
</tr>
<tr>
<td><em>Åsa Romson</em></td>
<td></td>
</tr>
<tr>
<td>Preface by Ole Kristian Fauchald</td>
<td>33</td>
</tr>
</tbody>
</table>
Summary of Contents

Chapter 4
International Investment Law and Human Rights  
Jorge Daniel Taillant & Jonathan Bonnitcha  
Preface by Ashfaq Khalfan

Chapter 5
The Theory of Norm Conflict Solutions in International Investment Law  
Jörg Kammerhofer  
Preface by Martti Koskenniemi

Chapter 6
An Integrated Agenda for Sustainable Development in International Investment Law  
Marie-Claire Cordonier Segger & Andrew Newcombe  
Preface by Vaughan Lowe, QC

Part II
Sustainable Development in International Investment Law

Section 1
Procedural Innovations for Sustainable Development in International Investment Law

Chapter 7
Impact Assessments of Investment Treaties  
Markus W. Gehring  
Preface by Karl P. Sauvant

Chapter 8
Bringing Sustainable Development Issues before Investment Treaty Tribunals  
Chester Brown  
Preface by Campbell McLachlan, QC

Chapter 9
Transparency and Amicus Curiae in ICSID Arbitrations  
Nathalie Bernasconi-Osterwalder  
Preface by Antonio R. Parra
Summary of Contents

Section 2
Emerging Elements of International Investment Law That Affect Sustainable Development 209

Chapter 10
Development Considerations in Defining Investment 211
Marek Jeżewski
Preface by Andrés Rigo Sureda 211

Chapter 11
‘Fair and Equitable Treatment’ and Sustainable Development 237
Roland Kläger
Preface by Francisco Orrego-Vicuña 237

Chapter 12
Sustainable Development, National Treatment and Like Circumstances in Investment Law 261
Kate Miles
Preface by Armand de Mestral 261

Chapter 13
Regulatory Expropriation and Sustainable Development 295
Martins Paparinskis
Preface by Jan Paulsson 295

Chapter 14
Are Stabilization Clauses a Threat to Sustainable Development? 329
Audley Sheppard & Antony Crockett
Preface by Kamal Hossain 329

Chapter 15
General Exceptions in International Investment Agreements 351
Andrew Newcombe
Preface by Peter Muchlinski 351

Chapter 16
The Necessity of Sustainable Development? 371
Andrea K. Bjorklund
Preface by Christoph Schreuer 371
Summary of Contents

Section 3
Sustainable Development Implications of Bilateral and Regional Investment Treaties 403

Chapter 17
Investment and Water Resources: Limits to NAFTA 405
Céline Lévesque

Preface by Meg Kinnear 405

Chapter 18
Liberalizing Investment in the CARIFORUM–EU Economic Partnership Agreement: EU Priorities, Regional Agendas and Developmental Hegemony 429
Paul James Cardwell & Duncan French

Preface by Nico Schrijver 429

Chapter 19
The Asymmetrical Legalization of Investment Regimes in Africa: Lessons from Water Privatization 453
Emma Saunders-Hastings

Preface by Don McRae 453

Chapter 20
Globalization and Inclusive Governance in China and India: Foreign Investment, Land Rights and Legal Empowerment of the Poor 481
Kishan Khoday & Jonathan Bonnitcha

Preface by M. Sornarajah 481

Chapter 21
Edna Sussman

Preface by Graham Coop 513

Part III
Future Directions 533

Section 1
New Proposals for More Sustainable Investment Law 533
Summary of Contents

Chapter 22
Sustainable International Investment Agreements: Challenges and Solutions for Developing Countries 535
Graham Mayeda
Preface by Susan Rose-Ackerman 535

Chapter 23
The IISD Model International Agreement on Investment for Sustainable Development 561
Mahnaz Malik
Preface by David Runnalls 561

Chapter 24
Corporate Social Responsibility and Investment Treaties 585
Jarrod Hepburn & Vuyelwa Kuuya
Preface by Christopher McCrudden 585

Chapter 25
The Institutionalization of Investment Arbitration and Sustainable Development 611
Jan Wouters & Nicolas Hachez
Preface by Gavan Griffith, QC 611

Section 2
Investment Provisions in Other Sustainable Development Treaty Regimes 641

Chapter 26
Governing Investment in Sustainable Development: Investment Mechanisms in Sustainable Development Treaties and Voluntary Instruments 643
Marie-Claire Cordonier Segger & Duncan French
Preface by Christopher Greenwood, CMG, QC 643

Chapter 27
The Kyoto Protocol in Investor–State Arbitration: Reconciling Climate Change and Investment Protection Objectives 681
Freya Baetens
Preface by James Crawford 681
Summary of Contents

Chapter 28
Investment Promotion and Protection in the UNCBD: An Emerging Access and Benefit Sharing Regime 717
Olivier Rukundo & Jorge Cabrera

Preface by Charles Gbedemah 717

Chapter 29
Two Rivers Meet: At the Confluence of Cross-Border Water Law and Foreign Investment Law 745
Paul Stanton Kibel & Jon Schutz

Preface by Hans Christian Bugge 745

Part IV
Conclusion 769

Chapter 30
Promoting Sustainable Investment through International Law 771
Marie-Claire Cordonier Segger & Avidan Kent

Table of Treaties 793

Table of Cases 799

Table of Other International Instruments 811

About the CISDL 815

Bibliography 817

Index 859
# Table of Contents

Acknowledgements xxxi  
List of Contributors xxxiii  
Table of Abbreviations lxiii  
Foreword lxvii  

**Part I**  
The Foundations 1

**Chapter 1**  
An Introduction to Sustainable Development in World Investment Law 3  
*Markus Gehring & Andrew Newcombe*

1. Sustainable Development as a Global Objective 3  
2. The Concept of Sustainable Development and Its Meaning in International Law 6  
3. International Investment Law as An Instrument for Sustainable Development 9

**Chapter 2**  
International Investment Law and Development 13  
*Anna Joubin-Bret, Marie-Estelle Rey and Jörg Weber*

Preface by James Zhan 13

1. Introduction 15  
2. Trends 17
# Table of Contents

## Chapter 4
**International Investment Law and Human Rights**

*Jorge Daniel Taillant & Jonathan Bonnitcha*

Preface by Ashfaq Khalfan 53  
1. Introduction 57  
2. The Legal Framework Governing Foreign Investment 61  
   2.1. Investment Contracts 62  
   2.2. Bilateral Investment Treaties and Stakeholder Rights 65  
   2.3. Compulsory Investor-State Arbitration 68  
3. The Legal Frameworks that Protect Human Rights 70  
   3.1. The Relationship between the State and the Individual 70  
   3.2. The Relationship between the State and the Foreign Investor 72  
   3.3. The Relationship between the Individual and the Foreign Investor 73  
   3.4. Human Rights Protection in Voluntary Codes, International Finance Institution Social Safeguards, and Other Soft Law Instruments 74  
4. The Tension between International Investment Law and Human Rights 75  
5. Conclusions 79

## Chapter 5
**The Theory of Norm Conflict Solutions in International Investment Law**

*Jörg Kammerhofer*

Preface by Martti Koskenniemi 81  
1. Introduction 83  
2. The Possibilities of Norm Conflict in Investment Law 84  
3. Norm-Conflict Solutions in Theory and Practice 87  
   3.1. Pragmatic Solutions Offered in International Investment Practice 87  
   3.2. Theoretical Solutions Offered by Generalist Scholarship 91  
   3.2.1. The *Lex Specialis* Maxim 91  
   3.2.2. The *Lex Posterior* Maxim 93  
   3.2.3. References in International Investment Agreements 97  
4. Conclusion 98
## Table of Contents

### Chapter 6
#### An Integrated Agenda for Sustainable Development in International Investment Law
*Marie-Claire Cordonier Segger & Andrew Newcombe*

Preface by Vaughan Lowe, QC

1. Introduction 101
2. Sustainable Development in International Policy and Law 104
3. The Investment Treaty Landscape 111
4. Investment Treaties and the New Delhi Principles 114
   4.1. The Duty of States to Ensure Sustainable Use of Natural Resources 115
   4.2. The Principle of Equity and the Eradication of Poverty 116
   4.3. The Principle of Common but Differentiated Responsibilities 118
   4.4. The Principle of the Precautionary Approach to Human Health, Natural Resources and Ecosystems 120
   4.5. The Principle of Public Participation and Access to Information and Justice 121
   4.6. The Principle of Good Governance 122
   4.7. The Principle of Integration and Interrelationship, in Particular in Relation to Human Rights and Social, Economic and Environmental Objectives 124
5. Sustainable Development-Related Provisions in IIAs 125
   5.1. Exceptions, Reservations and Rules of Relationship 126
   5.2. Provisions to Establish Complementary Social or Environmental Cooperation 132
   5.3. Stimulating More Sustainable Investment through IIAs Themselves 139
7. Future Directions for the Sustainable Investment Law Agenda 142

### Part II
#### Sustainable Development in International Investment Law

### Section 1
#### Procedural Innovations for Sustainable Development in International Investment Law

### Chapter 7
#### Impact Assessments of Investment Treaties
*Markus W. Gehring*

Preface by Karl P. Sauvant

1. Introduction 149
2. The Growing Role of Impact Assessment Globally 150
## Table of Contents

3. Impact Assessments of Trade Agreements 153  
   3.1. Impact Assessment of Investment Chapters of FTAs 156  
      3.1.1. Canada 156  
      3.1.2. The United States 159  
      3.1.3. The European Union 164  
   3.2. Impact Assessment of Investment Treaties 167  
      3.2.1. Canada’s Environmental Assessments of FIPAs 167  
      3.2.2. The EU’s Future Approaches to SIAs of International Investment Agreements 167  
4. Practical Challenges and Opportunities for Innovation 168  

<table>
<thead>
<tr>
<th>Chapter 8</th>
<th>Bringing Sustainable Development Issues before Investment Treaty Tribunals</th>
<th>Chester Brown</th>
<th>171</th>
</tr>
</thead>
<tbody>
<tr>
<td>Presby Campbell McLachlan, QC</td>
<td>171</td>
<td></td>
<td></td>
</tr>
<tr>
<td>1. Introduction</td>
<td>175</td>
<td></td>
<td></td>
</tr>
<tr>
<td>2. Placing Sustainable Development Issues on the Record</td>
<td>178</td>
<td></td>
<td></td>
</tr>
<tr>
<td>2.1. Invoking Express Provisions in the Treaty</td>
<td>178</td>
<td></td>
<td></td>
</tr>
<tr>
<td>2.2. Invoking Express Provisions in the Applicable Procedural Rules</td>
<td>180</td>
<td></td>
<td></td>
</tr>
<tr>
<td>2.3. Exercising Inherent Powers</td>
<td>181</td>
<td></td>
<td></td>
</tr>
<tr>
<td>2.4. Raising Sustainable Development Issues <em>Proprio Motu</em></td>
<td>184</td>
<td></td>
<td></td>
</tr>
<tr>
<td>3. Methods of Treaty Interpretation</td>
<td>185</td>
<td></td>
<td></td>
</tr>
<tr>
<td>3.1. The Evolutive Approach</td>
<td>185</td>
<td></td>
<td></td>
</tr>
<tr>
<td>3.2. Article 31(3)(c) of the Vienna Convention on the Law of Treaties</td>
<td>187</td>
<td></td>
<td></td>
</tr>
<tr>
<td>4. Conclusion</td>
<td>188</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

| Chapter 9 | Transparency and Amicus Curiae in ICSID Arbitrations | Nathalie Bernasconi-Osterwalder | 189 |
| Presby Antonio R. Parra | 189 |
| 1. Introduction | 191 |
| 2. Access to Information and Participation in Decision-Making | 192 |
| 3. The New ICSID Rules on Transparency and Public Participation | 195 |
| 4.1. Tension between Transparency and Confidentiality in the New ICSID Rules Highlighted in Procedural Order No. 3 | 199 |
| 4.2. The First Amicus Curiae Submission under the New ICSID Rules: *Biwater v. Tanzania* | 201 |
| 4.2.1. The Petition for Amicus Curiae Status | 201 |
Table of Contents

4.2.2. The Tribunal’s Response: Procedural Order No. 5 203
  4.2.2.1. Request for Leave to File a Written Submission 203
  4.2.2.2. Request to Access Key Arbitral Documents 204
  4.2.2.3. Request to Attend Oral Hearings 205

4.3. The Final Award 206

5. Conclusion 206

Section 2
Emerging Elements of International Investment Law That Affect Sustainable Development 209

Chapter 10
Development Considerations in Defining Investment 211
Marek Jeżewski

Preface by Andrés Rigo Sureda 211

1. Introduction 215
2. Definition of Investment in International Treaties 217
3. Limiting the Protection? ICSID Case Law on the Definition of Investment 219
  3.1. General Discussion by the Tribunals on the Notion of Investment 219
  3.2. MHS v. Malaysia 225
    3.2.1. The Award 225
    3.2.2. The Annulment Decision 230
    3.2.3. The Reconstruction 231
4. The IISD Model Agreement on Investment 232
5. Conclusions 234

Chapter 11
‘Fair and Equitable Treatment’ and Sustainable Development 237
Roland Kläger

Preface by Francisco Orrego-Vicuña 237

1. Introduction 241
2. The Emergence of a Standard 242
   2.1. The Phrasing of Fair and Equitable Treatment 242
   2.2. The Interpretation of Fair and Equitable Treatment 244
   2.3. Sub-elements of Fair and Equitable Treatment 246
3. Correlation to Sustainable Development 249
   3.1. Conceptual Parallels 249
   3.2. Threats to Sustainable Development 251
   3.3. Impetus Toward Sustainable Development 254
4. Conclusion 259
Chapter 12
Sustainable Development, National Treatment and Like Circumstances in Investment Law 261
Kate Miles

Preface by Armand de Mestral 261

1. Introduction 265
2. Standards of Protection in International Investment Law 267
   2.1. National Treatment 268
      2.1.1. Like Circumstances 268
      2.1.2. Fact of Differentiation and Justification 270
   2.2. Fair and Equitable Treatment 272
      2.2.1. Legitimate Expectations and a Stable Legal and Business Framework 273
3. Sustainable Development as Investment Treaty Violation 274
   3.1. Climate Change Mitigation Measures 274
      3.1.1. Carbon Emissions Trading: Europe 275
      3.1.2. Promotion of Renewable Energy 278
         3.1.2.1. Discrimination and Like Circumstances in Renewable Energy Incentives 279
         3.1.2.2. Trade: Interaction with National Treatment in Investment 279
         3.1.2.3. National Treatment, Pre-establishment Phase, and Climate Adaptation 281
   3.2. Biosafety and Host State Regulation of GMOs 282
      3.2.1. National Treatment and Labelling of GMOs 284
      3.2.2. New Regulation for the Development and Management of Biotechnology 287
      3.2.3. Water Resources 288
         3.2.3.1. Corporations Engaged in Water-Intensive Operations 289
         3.2.3.2. Corporations Engaged in Water Extraction and Export 290
         3.2.3.3. Water Use Efficiency and Process-Related Distinctions 292
4. Conclusion: Ways Forward? 293

Chapter 13
Regulatory Expropriation and Sustainable Development 295
Martins Paparinskis

Preface by Jan Paulsson 295

1. Introduction 299
2. Regulatory Expropriation, Sustainable Development, and International Law 301
Table of Contents

3. Regulatory Expropriation and the ‘Sole Effect’ Perspective 305
4. Regulatory Expropriation and the ‘Purpose’ Approach 312
5. Regulatory Expropriation and Sustainable Development in Contemporary Lawmaking 320
6. Conclusion 326

Chapter 14
Are Stabilization Clauses a Threat to Sustainable Development?
Audley Sheppard & Antony Crockett

Preface by Kamal Hossain 329

1. Introduction 333
2. Taxonomy of Stabilization Clauses 336
   2.1. Freezing Clauses 336
   2.2. Compensation Clauses 337
   2.3. Economic Equilibrium Clauses 337
   2.4. Renegotiation Clauses 338
3. Criticism of Stabilization Clauses 338
4. The UN-IFC REPORT 340
5. Current Drafting Trends 341
   5.1. Fair and Equitable Treatment and Legitimate Expectations 343
      5.1.1. Legitimate Expectations 343
      5.1.2. Compliance with Contractual Obligations 345
      5.1.3. Procedural Propriety and Due Process 345
      5.1.4. Good Faith 345
6. Arbitral Awards on Stabilization Clauses and Fair and Equitable Treatment 346
7. Conclusion and Recommendations 348

Chapter 15
General Exceptions in International Investment Agreements
Andrew Newcombe

Preface by Peter Muchlinski 351

1. Introduction 355
2. IIA Treaty Practice Relating to General Exceptions 358
3. The Interpretation of Exceptions to IIA Obligations in IIA Jurisprudence 361
4. Approaches to the Interpretation of General Exceptions in IIAs 365
5. Conclusion 369
### Table of Contents

#### Chapter 16
**The Necessity of Sustainable Development?**  
*Andrea K. Bjorklund*  
371

**Preface by Christoph Schreuer**  
371

1. Introduction  
2. The History of the Necessity Doctrine  
3. Necessity and the Environment  
   3.1. The Affirmative Requirements  
      3.1.1. Safeguarding an Essential Interest against a Grave and Imminent Peril  
      3.1.2. The ‘Only Means’  
      3.1.3. Impairment of Essential Interests of Other States  
   3.2. The Exceptions  
      3.2.1. The International Obligation in Question Precludes the Use of the Defence  
      3.2.2. The State Has Contributed to the Situation of Necessity  
      3.2.3. *Jus Cogens*  
4. Consequences of Establishing a State of Necessity  
   4.1. Temporality  
   4.2. Compensation  
5. Conclusion  

#### Section 3
**Sustainable Development Implications of Bilateral and Regional Investment Treaties**  
403

#### Chapter 17
**Investment and Water Resources: Limits to NAFTA**  
*Céline Levesque*  
405

**Preface by Meg Kinnear**  
405

1. Introduction  
2. *Bayview Irrigation v. Mexico*: The Case  
   2.1. The Background  
   2.2. Reasoning of the Tribunal  
3. Water Rights: The Reach of NAFTA Chapter 11  
   3.1. Water as a Good in Commerce  
   3.2. Water as an Investment  
4. Potential Limits to the Reach of NAFTA Chapter 11  
   4.1. Territoriality  
   4.2. Interaction of Treaty Regimes  
   4.3. Interaction of International Law and Domestic Law  
5. Conclusion  

xxi
Table of Contents

Chapter 18
Liberalizing Investment in the CARIFORUM–EU Economic Partnership Agreement: EU Priorities, Regional Agendas and Developmental Hegemony 429
Paul James Cardwell & Duncan French

Preface by Nico Schrijver 429

1. Introduction 433
2. EU–ACP Relations: The Context 435
3. The Cotonou Agreement: ‘Trade or Development’, ‘Trade and Development’ or ‘Development through Trade’? 438
4. The CARIFORUM–EU EPA: A Meeting of Minds? 444
5. Conclusion 450

Chapter 19
The Asymmetrical Legalization of Investment Regimes in Africa: Lessons from Water Privatization 453
Emma Saunders-Hastings

Preface by Don McRae 453

1. Introduction 457
2. Conditioning and Regulating Water Privatization 459
3. BITs and Freshwater Management 467
4. Legalization and Sustainable Development 475
5. Conclusion: What’s Coming Down the Pipe 479

Chapter 20
Globalization and Inclusive Governance in China and India: Foreign Investment, Land Rights and Legal Empowerment of the Poor 481
Kishan Khoday & Jonathan Bonnitcha

Preface by M. Sornarajah 481

1. Introduction 483
2. The Rise of China and India 485
3. China, India and the Post-Crisis World: Beyond the Washington Consensus 488
4. ‘China Shining’: Emerging Challenges of Social Equity and Land Rights 493
   4.1. The Role of Special Economic Zones 494
   4.2. The Process of Land Acquisition 496
   4.3. Legal Reforms 498
Table of Contents

5. Emerging India: The World’s Largest Democratic Market Economy 501
6. Towards a New Deal: Social Equity and Legal Empowerment of the Poor 510

Chapter 21
Edna Sussman

Preface by Graham Coop 513

1. Introduction 515
2. Energy Charter Treaty Background 516
3. ECT Investment Protections 517
4. Dispute Resolution Provisions 518
5. Applications of the ECT 519
6. ECT Potential to Foster International Investment in Emerging Economies to Address Global Warming and Foster Sustainable Development 523
7. United States Accession to the Energy Charter Treaty 530
8. Conclusion 531

Part III
Future Directions 533

Section 1
New Proposals for More Sustainable Investment Law 533

Chapter 22
Sustainable International Investment Agreements: Challenges and Solutions for Developing Countries 535
Graham Mayeda

Preface by Susan Rose-Ackerman 535

1. Introduction 539
2. Designing More Sustainable Investment Agreements 544
   2.1. Modifying Provisions Commonly Found in IIAs 545
   2.2. Innovations in IIA Design 552
3. International Law as a Tool for Interpreting IIAs 557
4. Conclusion 559

xxiii
Table of Contents

Chapter 23
The IISD Model International Agreement on Investment for Sustainable Development  561
Mahnaz Malik

Preface by David Runnalls  561

1. Background  565
2. Unique Features of the IISD Model  566
   2.1. Overview  566
   2.2. Features  567
       2.2.1. Articulating the Link between Investment and Sustainable Development  568
   2.3. Creating Rights and Obligations for Investors, Host States and Home States  569
       2.3.1. A Clear Articulation of Investor Rights  569
       2.3.2. The Introduction of Investor Obligations and Duties  570
       2.3.3. The Provision of Host State Obligations and Rights  572
       2.3.4. The Introduction of Home State Rights and Obligations  572
   2.4. The Development of an Institutional Framework  573
   2.5. Increasing the Accountability, Transparency, and Legitimacy of the Investor-State Dispute Resolution Mechanism  574
3. Response to the IISD Model  577
4. Conclusion  582

Chapter 24
Corporate Social Responsibility and Investment Treaties  585
Jarrod Hepburn & Vuyelwa Kuuya

Preface by Christopher McCrudden  585

1. Introduction  589
2. Definition of CSR  591
3. Characteristics of CSR  592
   3.1. Soft Law and the Voluntary Approach to CSR  592
   3.2. Legal Approach to CSR  594
4. CSR and Foreign Investment  596
5. Recent Developments in Investment Treaties  599
6. Conclusion  609
Chapter 25
The Institutionalization of Investment Arbitration and Sustainable Development 611
Jan Wouters & Nicolas Hachez

Preface by Gavan Griffith, QC 611

1. Introduction 615
2. Characteristics of Investor–State Arbitration 617
   2.1. Procedural Characteristics of Investment Regimes 618
   2.2. Organizational Characteristics of International Investment Regimes 623
   2.3. The True Nature of Investment–State Arbitration 624
3. Impact of Investor–State Arbitration on Sustainable Development 625
   3.1. Investment and Sustainable Development 625
   3.2. Is Investor–State Arbitration Promoting Sustainable Development? 627
      3.2.1. The Private Nature of Investor–State Arbitration and the Public Interest 627
         3.2.1.1. Is Investor–State Arbitration Biased toward Investor Protection? 627
         3.2.1.2. The Transparent, Democratic, and Legitimate Character of Arbitral Proceedings 630
         3.2.1.3. State Liability and the Granting of Damages 631
         3.2.1.4. Intermediate Conclusion 632
      3.2.2. The Promotion of the Rule of Law by Investor–State Arbitration 633
   3.3. How to Gear Investor–State Arbitration toward the Promotion of Sustainable Development? 635
4. Conclusions 637

Section 2
Investment Provisions in Other Sustainable Development Treaty Regimes 641

Chapter 26
Governing Investment in Sustainable Development: Investment Mechanisms in Sustainable Development Treaties and Voluntary Instruments 643
Marie-Claire Cordonier Segger & Duncan French

Preface by Christopher Greenwood, CMG, QC 643

1. Introduction 645
Table of Contents

2.1. International Mechanisms to Finance Sustainable Development 647
   2.1.1. The Global Environment Facility 647
   2.1.2. The World Bank Prototype Carbon Fund 652
   2.1.3. The Montreal Protocol Fund, and Its Investments into ODS-Free Projects 654

2.2. Treaty Rules to Encourage More Sustainable Investment 656
   2.2.1. The Kyoto Protocol’s Clean Development Mechanism 656
   2.2.2. The FAO Seed Treaty’s Material Transfer Agreements 658
   2.2.3. The Desertification Convention’s National Action Plans 660
   2.2.4. The UNCLOS and Its Protocol on Straddling Stocks 663
   2.2.5. The UN Convention Against Corruption 666

2.3. Regional Regimes and Their Role in Promoting Investments in Sustainable Development 668
   2.3.1. The North American Agreement on Environmental Cooperation (NAAEC) 668
   2.3.2. The Mercosur 669
   2.3.3. The South African Development Community 670
   2.3.4. The ASEAN 671
   2.3.5. The Cotonou Agreement 672

2.4. International Policy Instruments for Socially Responsible Investment 673
   2.4.1. The OECD’s MNE Guidelines, and the Way That These Rules Influence International Investments 673
   2.4.2. The Extractive Industries Transparency Initiative 674
   2.4.3. The Equator Principles for Banks 675

3. Sustainable Development Treaty Rules: Conflicts or Coherence with IIAs? 676

4. Conclusions and Future Directions for Research 679

Chapter 27
The Kyoto Protocol in Investor–State Arbitration: Reconciling Climate Change and Investment Protection Objectives 681
Freya Baetens

Preface by James Crawford 681

1. Introduction 683
2. Overview of the Current Climate Change Regime 685
   2.1. The United Nations Framework Convention on Climate Change 685
   2.2. The Kyoto Protocol 686
      2.2.1. Establishing an Emission Reduction Regime 686
      2.2.2. Implementation through the ‘Kyoto Flexibility Mechanisms’ 687
      2.2.3. Interaction with International Investor–State Arbitration 690
**Table of Contents**

3. Standards of Investment Protection versus Kyoto Objectives 693  
   3.1. The Prohibition on Expropriation without Compensation 694  
      3.1.1. Direct Expropriation 694  
      3.1.2. Indirect Expropriation 694  
      3.1.3. Potential Conflicts with Kyoto Objectives 696  
   3.2. Substantive Standards of Treatment 698  
      3.2.1. National Treatment, Most-Favoured-Nation Treatment, and Fair and Equitable Treatment 698  
      3.2.2. Potential Conflicts with Kyoto Objectives 699  
   3.3. The Prohibition on Performance Requirements 702  
      3.3.1. Investment Clauses Regulating Performance Requirements 702  
      3.3.2. Potential Conflicts with Kyoto Objectives 703  
4. Reconciling and Reinforcing Kyoto and Investment Objectives 704  
   4.1. Reconciling Objectives: How Not to Do It 705  
   4.2. Suggestions for Future Treaties and Contracts 706  
   4.3. Public International Rules on Treaty Interpretation 709  
      4.3.1. The Limits of the 1969 Vienna Convention on the Law of Treaties 709  
      4.3.2. Re-interpretation of Existing Standards 711  
      4.3.3. MFN and National Treatment: Narrow Application of the *Ejusdem Generis* Principle 712  
5. Conclusion 714

**Chapter 28**  
Investment Promotion and Protection in the UNCBD: An Emerging Access and Benefit Sharing Regime 717  
*Olivier Rukundo & Jorge Cabrera*  

Preface by Charles Gbedemah 717

1. Introduction 721  
2. Measures to Encourage Investments within the UNCBD 722  
   2.1. Encouraging Public Investment 722  
   2.2. Encouraging Private Investment 724  
      2.2.1. Transfer of Technology 725  
      2.2.2. Intellectual Property Rights 726  
3. Linking Access and Benefit Sharing and Investment 727  
   3.1. Access and Benefit Sharing: Background and Recent Developments 727  
      3.1.1. The CBD 728  
      3.1.2. The Bonn Guidelines 729  
      3.1.3. The International Regime on Access and Benefit Sharing 730
Table of Contents

3.2. Access and Benefit Sharing and Investment: Compatibility or Conflict? 730
  3.2.1. Non-discrimination 731
  3.2.2. Dispute Settlement 734
  3.2.3. Trade Concerns: The Limitations 735

4. Other Relevant Issues linked to the IR Negotiations 737
  4.1. Disclosure of Origins Requirements 737
    4.1.1. Discussions on Disclosure Requirements in the Negotiations of the IR 738
    4.1.2. Disclosure of Origin/Source at the WTO 740
  4.2. Internationally Recognized Certificate 740
  4.3. Technology Transfer Provisions Developed in the IR 742

5. Conclusion 742

Chapter 29
Two Rivers Meet: At the Confluence of Cross-Border Water Law and Foreign Investment Law 745
Paul Stanton Kibel & Jon Schutz

Preface by Hans Christian Bugge 745

1. Streams of Public International Law 749
2. Rio Grande Case in North America 752
  2.1. Rio Grande Allocation Regime under the 1944 Rivers Treaty 752
  2.2. Foreign Investment Terms under the 1994 NAFTA 756
    2.2.1. 1993 NAFTA Statement on Water 756
    2.2.2. NAFTA Chapter 11 Definitions of Investment and Investor 757
    2.2.3. Dispute Settlement Mechanisms 758
  2.3. Texans’ NAFTA Claim for Undelivered Rio Grande Water 758
  2.4. Government of Mexico’s Response to Texans’ Claims 762
  2.5. June 2007 Tribunal Decision 763

3. Principles for Reconciling Potentially Conflicting International Treaties 765

4. Conclusion 767

Part IV
Conclusion 769

Chapter 30
Promoting Sustainable Investment through International Law 771
Marie-Claire Cordonier Segger & Avidan Kent

1. Introduction 771
2. The Challenge 772
  2.1. The Role of Procedures 774
# Table of Contents

2.1.1. SIA Mechanisms 774
2.1.2. Open Dispute Resolution and Public Participation 775

2.2. Substantive Investment Treaty Obligations and Sustainable Development Goals 777
   2.2.1. National Treatment 778
   2.2.2. Fair and Equitable Treatment 779
   2.2.3. Expropriation 781
   2.2.4. Investment 782
   2.2.5. Interim Conclusion 783

3. A Shift towards Integration in International Law 784
   3.1. A New Generation of Sustainable Development-Oriented IIAs 784
   3.2. The Role of Non-investment Treaties in International Investment Law 788
   3.3. The Interpretation of Investment Treaty Provisions in Accordance with ‘Non-investment’ International Treaties 789

4. Toward a Future Integrated Approach 790

Table of Treaties 793
Table of Cases 799
Table of Other International Instruments 811
About the CISDL 815
Bibliography 817
Index 859