

Introductory observations

Investment lawyers and environmental lawyers barely speak to each other. Their lack of communication is mostly the result of either mutual disinterest or mutual distrust; and it has had an important consequence, namely that the relationship between two thriving fields of international law – international investment law and international environmental law – has only recently started to be elucidated.

The purpose of the present study is to make, in this context, one basic theoretical point, with two important practical implications. The theoretical point is that, as both international investment law and international environmental law develop and become more precise and demanding, their interactions will intensify, both in terms of synergies and conflicts. The first practical implication is that the operations of investors in an array of sectors, ranging from the extractive industries, to energy production, to waste treatment, will likely be affected. Sometimes, environmental regulation will create new markets, as is the case with a variety of ‘clean’ technologies. In other cases, environmental regulation will adversely affect the operations of foreign investors, particularly in those areas of environmental regulation where a treaty requires or encourages States to take certain measures. The potential impact of such treaties has been overlooked. For many years, environmental treaties, often couched in broad or even vague terms, did not seem to be relevant for the operations of investors. Today, many of these treaties are ‘waking up’. The increasing environmental awareness of growing sectors of the world’s population is breathing new life into previously ‘dormant environment clauses’. From the perspective of investors, it becomes more and more important to assess the risks posed by environmental measures as well as the legal remedies available to counter potential abuses. This leads to the second practical implication

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identified above, namely that the regulatory powers of the State in the environmental arena are increasingly besieged by the legal strait-jacket imposed by investment disciplines. States would be ill-advised to underestimate the litigation risk arising from these disciplines, which by most measures can go as far as representing billions of dollars. From the perspective of States, it is thus critical to assess the regulatory space that they will keep for environmental protection purposes. The future importance of these two practical implications must be assessed in the light of the current move towards a green economy. Realising the green economy will indeed take both investment and regulation.¹

This book is an attempt to identify and analyse the most pressing legal issues raised by the interactions between foreign investment and environmental protection in contemporary international law. As such, it does not seek to provide an analysis of the investment–environment equation from an economic or a political perspective. Such aspects are covered in more detail in a companion volume to this book forthcoming with the same publisher.² I have endeavoured to state the current state of international law on the issues covered,³ avoiding as much as possible the implicit bias sometimes underlying purely environmental or purely investment perspectives. I believe that the protection of the environment is probably the foremost challenge of our time, but I also believe that, as far as international law is concerned, such protection is best served by disentangling law from hope. Just as international environmental law is in many respects economic law, in the meaning of the law governing the activities of economic operators, international investment law is also environmental law, to the extent that investment disciplines, properly interpreted and applied, may help channel much needed resources towards pro-environment projects.

The book is structured into three parts, each consisting of five chapters. Part I sets the overall analytical framework. It begins with two theoretical chapters, one mapping the evolving relationship between environmental and investment law and the other conceptualising the dual nature of this relationship, synergistic and conflicting. The third and fourth chapters provide overviews of the main

¹ See United Nations Environment Programme, *Towards a Green Economy: Pathways to Sustainable Development and Poverty Eradication* (2011).

² P.-M. Dupuy and J. E. Viñuales (eds.), *Harnessing Foreign Investment to Promote Environmental Protection: Incentives and Safeguards* (Cambridge University Press, forthcoming).

³ The study takes into account, to the best of my knowledge, developments until 1 December 2011.

instruments that have been developed to create synergies between foreign investment and environmental protection as well as to establish some 'soft' safeguards against the potential risks entailed by the operations of multinational companies abroad. These chapters are of rather descriptive nature, because their contents and implications will be analysed in detail in the aforementioned companion volume. The fifth chapter of Part I begins the technical analysis of the relations between environmental and investment law by focusing on a variety of issues (jurisdiction, applicable law, procedure, damages) raised by the incorporation of environmental considerations into investment proceedings.⁴

Part II takes the perspective of an environmental lawyer. It looks at the impact of different substantive areas of international environmental law on foreign investment schemes. In other terms, it assesses the consistency of foreign investment transactions – and their international legal protection – with the international legal framework for the protection of the environment. Chapter 6 analyses the available legal techniques that can be used to determine normative priority in case of conflicts between two norms of international law (environmental law vs. investment law). As such, it sets the scene for the analysis of such 'normative conflicts' in the four areas of substantive environmental regulation where they have arisen so far or where they are most likely to arise in the future: the regulation of freshwater resources (Chapter 7); the protection of biological and cultural diversity (Chapter 8); the regulation of dangerous substances and activities (Chapter 9); and climate change regulation (Chapter 10). To clarify the approach followed in these chapters, three additional observations appear necessary. First, each chapter begins with an analysis of collision points, which is intended to: (i) identify those obligations arising from international environmental law with the highest impact (actual or potential) on foreign investment law; and (ii) serve as a sort of primer of the relevant area of international environmental law for readers unfamiliar with it. The impact of international environmental law is analysed from the traditional inter-State perspective and from that of 'human rights approaches' to environmental protection. Second, each chapter follows with an analysis of the relevant international jurisprudence. This

⁴ Chapter 5, as well as a few other sections of this book, draw upon J. E. Viñuales, 'Foreign Investment and the Environmental in International Law: An Ambiguous Relationship' (2009) 80 *British Yearbook of International Law* 244.

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discussion draws on the case-law of investment tribunals as well as on that of several adjudicatory and quasi-adjudicatory bodies, including the International Court of Justice, the European Court of Human Rights, the Inter-American Court of Human Rights, the Inter-American Commission on Human Rights, the African Commission on Human and Peoples' Rights, the United Nations Human Rights Committee, the International Tribunal for the Law of the Sea, the Court of Justice of the European Union, the WTO Dispute Settlement Body, the World Bank's Inspection Panel and Compliance Advisor/Ombudsman, the World Heritage Committee or the Compliance Committee of the Aarhus Convention. This broader body of case-law has received little attention from investment lawyers, despite its significance for the analysis of frictions between investment and non-investment obligations. Third, each chapter concludes with a discussion of certain theoretical and practical problems underlying the understanding of normative conflicts, particularly as regards the link between domestic environmental measures and (broad) international environmental obligations.

Part III adopts the perspective of an investment lawyer and looks at the impact of foreign investment law on domestic environmental measures. It begins with a chapter setting out the main techniques available to solve conflicts between norms stemming from different legal orders (Chapter 11) and then analyses the consistency of domestic environmental measures *tour à tour* with expropriation clauses (Chapter 12), non-discrimination standards (Chapter 13) and stability/due process commitments (Chapter 14). Each chapter starts with a concise overview of the applicable investment disciplines – again, both for conceptual purposes and as a primer for unfamiliar readers – and then analyses the main legal issues raised by the adoption of domestic environmental measures in the light of the relevant case-law. The last chapter (Chapter 15) discusses three cross-cutting 'defence arguments' based on environmental considerations, namely the police powers doctrine, the margin of appreciation doctrine and emergency/necessity clauses.

From a theoretical perspective, Parts II and III can be seen as two alternative 'front lines' where the struggle for the integration of international environmental law and international investment law is taking place. The most wide-ranging – but perhaps also the most difficult – struggle is the one described in Part II. It requires a change of mindset, particularly as regards the impact of international environmental norms and their reception within specialised investment fora. A fuller

understanding of the impact of international environmental norms requires the clarification of the link between such norms and domestic environmental measures. If such link were clear, collisions between environmental measures and investment disciplines would take the form of normative conflicts, which, in turn, would call for a different legal treatment by investment tribunals than that accorded to mere legitimacy conflicts. As long as the link remains unclear, environmental considerations will have to evolve within the bounds set by investment disciplines. Part III analyses these bounds in detail and shows that the space granted to environmental considerations is expanding. As such, the struggle described in Part III can to some extent be seen as an intermediate stage in the integration process, particularly because some of the additional space carved out in investment disciplines for environmental considerations responds to the informal influence of international environmental law. This informal impact will be highlighted, as relevant, in the analysis conducted in Part III.

Overall, the picture that emerges from this book is one where environmental considerations are increasingly present in investment disputes. From mutual ignorance or disinterest, to basic mutual acknowledgment, to growing acceptance and perhaps even integration at some point in the future, the relationship between foreign investment and environmental protection is evolving. This book is an attempt to conceptualise this evolution from the stand-point of international law.

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Part I

Setting the framework

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1 Changing winds – three signs

This opening chapter maps the contours of the changing relationship between environmental and investment law. It focuses on three indicators or ‘signs’. First, international negotiations clearly suggest that the private sector – a proxy for foreign investment – has a growing role in the overall strategy to protect the environment. From a primary focus on environmental protection, to one on sustainable (economic and social) development, to the current shift towards a green economy, the role of the private sector in global environmental governance has moved from marginal to central (Section 1.1). Second, the changing perception of foreign investment in environmental treaties is to some extent mirrored by the increasing attention paid to environmental considerations in investment treaties (Section 1.2). Third, the growing number of investment disputes with environmental components provides still another signal of a changing relationship with important practical consequences (Section 1.3).

1.1 The first sign – conceptual evolution

Since its modern inception in the late 1960s, international environmental regulation has been confronted with the need to integrate considerations of growth and development. In its early days in the nineteenth century and through most of the twentieth century, international environmental regulation was piecemeal, dealing only with some specific issues such as shared water resources,¹ transboundary damages² or the

¹ See, e.g., *Lac Lanoux (Spain v. France)*, Award (16 November 1957), RIAA, vol. 12 (1957), 281–317.

² See, e.g., *Trail Smelter (United States of America v. Canada)*, Awards (16 April 1938 and 11 March 1941), RIAA, vol. 3 (1941), 1905–82.

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management of useful living resources³ (sealing,⁴ whaling,⁵ etc.). The underlying rationale of these early examples of what today would be seen as environmental regulation was the orderly exploitation of a given natural resource. Economic considerations clearly prevailed over environmental protection.

This view changed considerably over the 1960s and the beginning of the 1970s. The environmental concerns voiced in a number of influential writings,⁶ punctuated by several events (e.g., the grounding of the Liberian tanker, *Torrey Canyon*, or the mercury poisoning of the Minamata population in Japan), made the message carried by the emerging environmental movement increasingly powerful. At the time, international environmental law was in its infancy and the main goal was to identify those environmental issues which required action.⁷ The primary concerns of these early efforts were 'first generation' environmental issues, such as combating pollution⁸ or conserving endangered species and fragile habitats.⁹ Perhaps because of the sense of alert and urgency in protecting the environment prevailing at the time, the results of the United Nations Conference on the Human Environment

³ See, e.g., Convention for the Protection of Birds useful to Agriculture, 19 March 1902, B7 902:22.

⁴ See, e.g., Convention between the United States, Great Britain, Japan and Russia providing for the Preservation and Protection of the Fur Seals, 7 July 1911, 37 Stat. 1542.

⁵ See, e.g., International Convention for the Regulation of Whaling with Schedule of Whaling Regulations, 2 December 1946, 161 UNTS 361.

⁶ See R. Carson, *Silent Spring* (Boston, MA: Houghton Mifflin, 1962); K. E. Boulding, 'The Economics of the Coming Spaceship Earth', in H. Jarrett (ed.), *Environmental Quality in a Growing Economy* (Baltimore, MD: John Hopkins University Press, 1966) 3; M. Nicholson, *The Environmental Revolution: A Guide for the New Masters of the World* (London: Hodder & Stoughton, 1969); B. Commoner, *The Closing Circle: Nature, Man, and Technology* (New York, NY: Alfred Knopf, 1971); Donella H. Meadows, Dennis L. Meadows, J. Randers and W. W. Berens, *The Limits to Growth: A Report for the Club of Rome's Project on the Predicament of Mankind* (New York, NY: Universe Books, 1972).

⁷ Report of the United Nations Conference on the Human Environment, UN GAOR, 27th Sess, 21st plen. mtg UN Doc. A/CONF.48/14/Rev. 1 (1973), pp. 2-7.

⁸ See, e.g., Convention for the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, 29 December 1972, as modified by the Protocol of 7 November 1996, 1046 UNTS 120; International Convention for the Prevention of Pollution from Ships, 17 February 1973, as modified by the Protocol of 1978 relating thereto, 17 February 1978, UNTS 1340 I-22484.

⁹ See, e.g., Convention on Wetlands of International Importance especially as Waterfowl Habitat, 2 February 1971, 996 UNTS 245; Convention concerning the Protection of the World Cultural and Natural Heritage, 16 November 1972, 1037 UNTS 151; Convention on International Trade in Endangered Species of Wild Fauna and Flora, 3 March 1973, 983 UNTS 243.