

## CONFERENCE REPORT

# "Bridging the Gap between International Investment Law and the Environment", 4<sup>th</sup> and 5<sup>th</sup> November, The Hague, The Netherlands

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This contribution is based on the discussions that took place in the international conference "Bridging the Gap between International Investment Law and the Environment" which was held on 4-5 November 2013 in the Hague. The main goal of the conference was to answer the question of how the gap between international investment law and the environment can be bridged. Different perspectives were presented, helping to shed light on this issue. The emphasis of the first day of the conference was the academic debate in the field of international investment law and the environment. Four main perspectives were discussed: general principles of international investment law and the environment, various legal regimes, specific legal regimes and case studies. Furthermore, also the topics of sustainable development, the right to access to water and climate change were elaborated upon by the experts. The second day of the conference focussed on the perspective of policy-makers. Most of the topics were presented in the form of panel discussions. Issues that were discussed included: the perspective of various intergovernmental organisations, concerns and dilemmas of non-European capital-importing countries, and the European Investment Policy. This contribution elaborates upon the most important themes and issues debated at the conference, providing academic and policy perspectives.

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**Keywords:** bilateral investment treaties; investment; environment; International Investment Agreements; foreign direct investment; green economy; climate change; International Trade Law

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## I. Introduction

### A. Introduction and Objectives

On the 4<sup>th</sup> and 5<sup>th</sup> November 2013, the International Conference on Investment Law and the Environment took place at the premises of the Dutch Ministry of Foreign Affairs. The conference was organised by the Research Centre for Water, Oceans and Sustainability Law of Utrecht University Law School and the Center for Sustainability of Nyenrode Business University. The Dutch Ministry of Infrastructure and the Environment and the Dutch Ministry of Foreign Affairs supported the conference as well as the law firm Pels Rijcken & Droogleever Fortuijn. The organising committee is grateful to Kitty van der Heijden, Herman Bavinck, Hugo von Meijenfeldt, Martijn Scheltema, Jaap Spier and Marleen van Rijswijk for their good ideas and active support concerning the organisation of this conference. The organising committee consisted of Yulia Levashova, Tineke Lambooy, Ige Dekker and Rosalien Diepeveen.

The first day of the conference aimed to develop the academic debate in the field of international investment law and the environment. The second day served as a platform for a broader discussion on this topical issue. Policymakers from many jurisdictions in the North and the South, trade law experts from the European Commission and the Organisation for Economic Co-operation and Development (hereafter:

OECD), arbitrators, lawyers and academics were invited to participate in this international brainstorming session on challenges and solutions.

On the first day, 16 academic specialists in the fields of international investment law, public international law and environmental law came together from different parts of the world to present their papers on topics addressing the gap between investment law and the environment law. This day's program focused on four subjects: (1) general principles of international investment law and the environment, (2) various legal regimes, (3) specific legal regimes and (4) case studies.<sup>1</sup> At the start of the day, to stimulate the discussion, leading experts offered their insights regarding the current environmental challenges in international investment law and they also participated in the closing discussion round. Most of the papers had been exchanged beforehand among the presenters. Every academic specialist had been requested to review one of the papers, to prepare a written peer review comment on such paper and to present his or her comment in the conference to spark the debate.<sup>2</sup>

The academic experts will incorporate the peer review comments in their papers and then submit them to the conference organisers for publication in a book containing the conference proceedings. The title of the book will be: 'Bridging the Gap between International Investment Law and the Environment' and it will be published in the series 'Legal Perspectives on Global Challenges' by Eleven Legal Publishing<sup>3</sup> in mid-2014. The publication date will be communicated to all participants of the conference and the editors' intention is to organise a book launch in order to publicly communicate the findings that came out of this research project and conference.

The second day of the conference had a broader focus and the emphasis was on the policy angle. The dilemmas of policymakers in the field of international investment law and protecting the environment were discussed during various panel discussions. The speakers included politicians, policymakers and representatives of international organisations, legal practitioners, academics and civil society. In the first panel the perspective of various intergovernmental organisations was presented and discussed. The second panel revealed the main concerns and dilemmas of non-European capital-importing countries (mostly from the South), illustrated by case studies. The third panel delved into the topical theme of European Investment Policy.

This conference report will inform the reader on the most important themes discussed during the conference. Section 2 will provide a bird's-eye view of the interaction between international investment law and the environment and will pinpoint the challenges and opportunities in bridging the gap between these two fields of law. It will underline that political tensions and business interests make easy solutions unattainable. Section 3 will give consideration to the link between economic growth and sustainable development. Section 4 will deal with international investment law with regard to access to water. Section 5 will reflect on the link between international investment law and climate change challenges. Section 6 discusses the approach of intergovernmental organisations, such as the OECD and the United Nations Conference on Trade and Development (hereafter: UNCTAD) with regard to foreign direct investment (hereafter: FDI) and the environment. Section 7 describes the perspective of non-European countries, including Ecuador, Argentina, Venezuela, Indonesia and Mexico as presented on the second day of the conference. Section 8 discusses environmental concerns in the context of the European Investment Policy. This contribution will end with some concluding remarks.

## II. International Investment Law and the Environment: Where do we stand?

Jorge E. Viñuales<sup>4</sup> elaborated upon the interaction between investment law and the environment. These two fields are increasingly interacting.

First of all, during the last two decades, the private sector's role in environmental governance has moved from being marginal to central. The private sector has a very important role because it has become clear that the public sector alone cannot finance the movement from a brown to a green economy.<sup>5</sup> The private

<sup>1</sup> Please see the conference website for abstracts of the papers: <http://iilconference.com/speakers.html> (last accessed 21 February 2014).

<sup>2</sup> For the list of speakers, please see the conference website: <http://iilconference.com/speakers.html> accessed 23 February 2014.

<sup>3</sup> Please find a draft table of contents for the book here: <http://iilconference.com/images/Chapters.pdf> accessed 23 February 2014.

<sup>4</sup> Professor Jorge Viñuales holds the position of Harold Samuel Professor of law and environmental policy at the University of Cambridge.

<sup>5</sup> According to Uwe Deichmann, a Senior Environmental Specialist at The World Bank, brown growth refers to the 'economic development that relies heavily on fossil fuels and does not consider the negative side-effects that economic production and consumption have on the environment.' Green growth 'implies moving to a far cleaner energy system that uses energy more efficiently and to

sector in a globalised economy possesses capital and resources necessary for realising the transition to a low carbon economy. To make this happen, regulatory change is needed.

Secondly, the process has been mirrored in the field of investment law. Investment treaty making has been increasingly permeated by environmental law considerations. The majority of newly concluded International Investment Agreements (hereafter: IIAs) contain clauses that relate to environmental concerns. Thirdly, the work by a number of international organisations has resulted in more interaction between international investment policies and environmental issues. Viñuales referred to the Investment Policy Framework for Sustainable Development (hereafter: IPFSD), developed by UNCTAD and the OECD Guidelines for Multinational Enterprises (hereafter: OECD Guidelines). Viñuales pointed out that the importance of environmental concerns could also be observed in investment arbitration. In the last ten years, more than 40 investment claims were brought before arbitral tribunals with an environmental component and in comparison, before 1990, only 9 investment claims had an environmental component.

To bridge the gap between international investment law and the environment, the question about the place of environmental law within investment law (the current approach) is important, but the (reverse) question about the place of investment law within environmental law must also be asked and clarified.

After the perspective of Viñuales, Martijn Scheltema<sup>6</sup> continued along the same lines. He acknowledged that various approaches are possible to bridge the gap. One would be to modify the content of investment treaties from an approach that only aims to protect the financial interests of investors towards an approach that also secures public interests including environmental concerns. A general observation is that offering protection to foreign investors for their assets enjoys global recognition, because many countries want to attract FDI, informs Scheltema. Environmental issues are treated quite differently in the context of investment law. Although most countries agree that investment laws should leave room for national policymakers to regulate environmental issues, there is still no global understanding about what we should do to align investment protection with maintaining a healthy environment on a global scale. Scheltema points out that there is a real challenge to implement environmental issues into investment treaties in a proper manner. The question arises whether investment treaties are the best way to deal with environmental issues. Are the goals of these treaties compatible with non-investment objectives?

The second approach would be that the procedures in investment law disputes would be amended. For instance, arbitrators should be chosen from different legal backgrounds than today, e.g. they should also have experience in dealing with environmental law issues.

Mads Andenas<sup>7</sup> poses the question whether the current international investment law regime works against national environmental policies. He states that the issue on the table is how to balance environmental and investment interests. Andenas sees this as an agency problem. He explains that the 'pro-investment position' entails that environmental concerns lie outside the regulatory competence of investment protection. On the other hand, the 'pro-environment position' advocates that investment protection regulation needs to include a carve-out for regulating environmental concerns at a national level. He stresses that this is a much polarised discussion and that there are no clear options or simple ways to solve this. But that carve outs or autonomous and fragmented regimes are not the right answers.

The solutions need to be found in a different way of treaty making and in dispute resolution. He informed that Norway started a consultation process on drafting a new model bilateral investment treaty (hereafter: BIT) with NGO's and other stakeholders ten years ago but this process has not led to the adoption of a model so far. This open process brought out very different positions and conflicting interests which have so far blocked one another.

Andenas also points out that the EU now takes exclusive competence in this area. We can hope for a regulatory best practice here.

### III. Can Economic Growth and Sustainable Development go Together?

Kitty van der Heijden,<sup>8</sup> the host of the conference, opened the second day. In her speech, she examined the topic of economic growth in relation to sustainable development and she pointed out which solutions she sees regarding the challenges of bridging the gap between international investment law and the environment.

much better natural resource management especially on agricultural lands and in forests.' Available at <<http://www.worldbank.org/en/news/feature/2013/06/25/growing-green-europe-and-central-asia>> accessed 23 February 2014.

<sup>6</sup> Professor Martijn Scheltema is professor at the law school of Rotterdam University. He is also a partner at the law firm Pels Rijcken & Droogleever Fortuijn in The Hague, The Netherlands.

<sup>7</sup> Professor Mads Andenas is chair at the faculty of Law at the University of Oslo.

<sup>8</sup> Ms Kitty van der Heijden is the Netherlands' Ambassador for Sustainable Development and the Director of the Department for Climate, Energy, Environment and Water at the Dutch Ministry of Foreign Affairs.

Sustainable development refers to the 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs'.<sup>9</sup> Sustainable development is about the balance between the economy, equity and ecology. In the last decade, most countries have profited from economic growth. However, inequity has also increased, both in developing and developed countries, as has environmental degradation. Instead of creating a balance between the three pillars of sustainable development, economic growth has not been distributed equally and came at the expense of the environment.

Van der Heijden explained that it is often argued that economic growth is needed to lift people out of poverty. Forecasts of economic growth and the rising middle class thus hold the prospect of greater property and well-being. But with it comes risks. If an economic 'business as usual' scenario is followed and all mankind would consume the way western customers do, we would use up the earth's finite resources quickly: land, water, clean air and oceans. These are the very natural resources and ecosystems on which our economies depend and they are the foundations of food security and thus human development. Without fertile lands and water to irrigate the fields and without action to address climate change, poverty eradication is not possible. Van der Heijden stressed that we do need growth, but a different kind of growth than we have had. We need an economic growth that is decoupled from a growth in CO<sub>2</sub> emissions, loss of biodiversity, looming water scarcity, deforestation and ocean acidification.

To ensure that sustainable growth is in line with the three pillars of economy, equity and ecology, new economic models are needed. The prevailing economic model does not lead to equitable and sustainable development because of market and institutional failures, for instance not pricing externalities or providing 'green incentives'. Which policies could address these shortcomings? Options are, according to Van der Heijden, amongst others, greening the tax system, removing environmentally harmful subsidies, such as subsidies for fossil fuels, making pollution more costly by pricing externalities, valuing natural assets and ecosystem services, encouraging green innovation and devising effective regulations.

Van der Heijden considers international investment law a key factor to achieve sound economic growth. She answered the question 'How can we bridge the gap between international investment law and the environment?' as follows. First of all, international investment law should embrace sustainable development by putting the environmental, social and economic elements of sustainability at the forefront. Secondly, IIAs were originally created at a time when environmental issues did not receive adequate attention from the global community, therefore, their main focus is to protect investors. Although these agreements acknowledge that investors must comply with the environmental laws of Host State countries, sustainability is still regarded as secondary to investment protection. Thirdly, international investment law could better balance the global interests in international investments and sustainability by: (a) including sustainability-related performance requirements for investors in IIAs, based on international principles of human rights and environmental protection; (b) limiting the causes of action that investors have against governments in such a way that investment protection is better in balance with the country's interest in protecting its resources; or (c) limiting the use of international arbitral tribunals for claims of investors against Host governments particularly in countries with a functioning independent judiciary.

#### **IV. International Investment Law: Access to Water**

This section deals with international investment law in relation to the right to access to water and is based on the remarks by Attila Tanzi.<sup>10</sup> He explained that the relevance of international investment law within the body of environmental law is of increasing importance, to a pace equalling the increase in importance of environmental law within the body of international investment law. The main normative catalysts to that end should be found in: (a) the sustainable development principle which emerged in environmental law; (b) the relevance of 'vital human needs' within the equitable utilisation principle in water law; (c) the recently attained human rights dimension of the right to access to water and (d) the pursuit of balance between private foreign interests and the public interest concerns of Host States in investment law. Accordingly, as Tanzi argues, by way of mutual cross-fertilisation, environmental law, with its human rights dimension, should be incorporated into investment law and vice versa as part and parcel of the same process.

This approach would be in full conformity with the principle of harmonisation advocated by the International Law Commission (ILC) in its work on the fragmentation of international law, which was finalised in 2006, as well as with customary rules on treaty interpretation, which were codified in the Vienna

<sup>9</sup> World Commission on Environment and Development (WCED), *Our common future* (OUP 1987) <<http://www.un-documents.net/our-common-future.pdf>> accessed 23 February 2014, 16.

<sup>10</sup> Professor Attila Tanzi is Chair of international law at the University of Bologna.

Convention on the Law of Treaties (VCLT).<sup>11</sup> Indeed, when different rules bear on the same subject matter, which pertains to the disputed facts, such rules should, as far as possible, be interpreted so as to give rise to a single set of compatible obligations.<sup>12</sup>

In the case *Suez and Vivendi Universal S.A. v The Argentine Republic*<sup>13</sup>, the ICSID Tribunal<sup>14</sup> stated, 'Argentina is subject to both international obligations, i.e. human rights and [investment] treaty obligations and must respect both of them equally. [...] Argentina's human rights obligations and its investment treaties obligations are not inconsistent, contradictory or mutually exclusive.' Accordingly, Argentina could have respected both human rights obligations and investment treaty obligations at the same time. 'This is a sign that international investment law is not really denying the human rights dimension on the right to access to water', as stated by Tanzi.

The right to water has been implicitly or explicitly taken into consideration in various arbitration cases. The Suez case remains the most interesting case study on the topic. Tanzi explains that in this case, the Tribunal appropriately rejected the argument that human rights obligations amount to necessity, as a circumstance precluding the wrongfulness of a breach of an investment obligation, since the conduct of Argentina constraining the right of the foreign investor was not the only means for Argentina to cope with the circumstances, including water provision to its population. Nonetheless, the Tribunal acknowledged the relationship of compatibility between international investment law obligations and the right to access to water also stressing that they could be interpreted and complied with in a compatible way. To that end, referring to the extravagant increase of tariffs introduced by the foreign company, the Argentine government could have met its international obligations to protect consumers with respect to the right to access to water by subsidising the affected disadvantaged groups of its population. According to Tanzi, this appears to be a solution for attaining compatibility and proportionality, which will have to be tested in the future on a case-by-case basis thereby making full reference to the principles of good faith and legitimate expectations on the basis of reciprocity between foreign investors and Host States.

## V. International Investment Law: Climate Change Issues

This section describes the implications of investment law in respect of national policy decisions on climate change. Existing challenges will be illustrated by providing a discussion on the Vattenfall cases. In this context, also the role of the Energy Charter Treaty<sup>15</sup> will be highlighted. Subsequently, the issue of legal liabilities for climate change damage will be presented.

### A. The Vattenfall Cases and their Implications for Regulating Climate Change Mitigation

Francesca Romanin Jacur<sup>16</sup> discussed the Vattenfall cases.

Not only developing countries have had to respond to investment claims from multinational companies. Increasingly, Western States are also facing legal challenges posed by foreign investors. The Vattenfall cases are an example thereof.<sup>17</sup> Vattenfall is a Swedish state-owned energy company operating in Germany. The Vattenfall I case was instigated by Vattenfall in its capacity of foreign investor and the owner of a coal-fired power plant. Vattenfall claimed that additional environmental restrictions had been imposed to reduce pollution from the plant on the River Elbe and that these restrictions constituted a violation of the investor's rights to fair and equitable treatment. Vattenfall alleged that Germany had violated the obligation under the Energy Charter Treaty (hereafter: ECT) to accord fair and equitable treatment to foreign investors and not to commit expropriation. In the end, the parties reached a settlement agreement.

The Vattenfall II case was brought before an ICSID tribunal as a result of the decision by the German Parliament to abandon the use of nuclear energy by 2022. Romanin Jacur explained that since the proceedings of this dispute are not publicly accessible, it might be presumed that Vattenfall is claiming a violation

<sup>11</sup> International Law Commission, 'Fragmentation of international law: difficulties arising from diversification and expansion of international law' (2006) A/CN.4/L.682 <[http://untreaty.un.org/ilc/documentation/english/a\\_cn4\\_l682.pdf](http://untreaty.un.org/ilc/documentation/english/a_cn4_l682.pdf)> accessed 23 February 2014.

<sup>12</sup> *ibid.*

<sup>13</sup> International Centre for Settlement of Investment Disputes *Suez and Vivendi Universal S.A. v The Argentine Republic* (2010) ARB/97/3.

<sup>14</sup> The ICSID Tribunal is the International Centre for Settlement of Investment Disputes.

<sup>15</sup> Energy Charter Treaty [1994] OJ L380/24. Available at: <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1994:380:024:0088:EN:PDF>> accessed 23 February 2014.

<sup>16</sup> Dr Francesca Romanin Jacur is a professor of International Environmental Law at the University of Milan.

<sup>17</sup> International Centre for the Settlement of Investment Disputes *Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG v. Federal Republic of Germany* (2009) ARB/09/6.



of the duty not to indirectly expropriate (Article 13 ECT) and the duty to afford fair and equitable treatment (Article 10 ECT). The proceedings are still pending.

Romanin Jacur posed the question of 'What are the implications of these cases regarding the right of sovereign States to regulate environmental issues?' She argued that the ECT constitutes a significant step forward in bridging the gap between international investment law and environmental issues insofar as it expressly envisages several key environmental and sustainable development principles. In the preamble of the treaty, reference is made to the climate change regime,<sup>18</sup> but most notably in the ECT provisions, reference is made to sustainable development, the principle of precaution and the polluter-pays principle.<sup>19</sup> She stated that it would be desirable that the arbitral tribunal applies these principles in the Vattenfall cases. In the pursuit of integrating environmental principles into investment arbitration, she suggested that they could usefully serve as a theoretical basis for awarding equitable compensation, which would adequately reflect the underlying environmental concerns in the dispute.

### **B. Legal Liabilities for Climate Change Damage**

Richard Lord<sup>20</sup> set out the legal options for holding individuals and companies liable for climate change damage.

The liability for climate change damage is relevant, because the threat of liability is a driving force for behavioural change. When climate change damage is punishable, people and companies will act in such a way that the climate is respected. Therefore, it could be a tool for decelerating climate change.

The topic of climate change is very relevant for investors, because investors assess opportunities and price risks. Whereas on the one hand climate change poses significant opportunities for investors, there are also substantial risks. The risks that can materialise for companies and their investors in the context of climate change damages and liabilities are: (a) operational risks; (b) reputational risks; (c) regulatory risks which means the pressure to disclose risks and to disclose activities from regulators, shareholders and environmental campaigners; (d) litigation risks and (e) financial risks. The litigation risk relates to the liability of individuals and companies.

Lord explains that it is technically difficult to hold individuals and companies responsible for climate change damage although there are various legal mechanisms by which this might be done. There are four situations to be considered in terms of a 'risk quadrant' and the medium to long term likelihood of rights to compensation from those said to be responsible for damages caused or contributed to by climate change: (a) if there would exist effective regulation that requires governments, companies and individuals to employ climate change mitigation efforts and if climate change would cause damages on a limited scale, questions of liability will be of minor importance; (b) if the regulation would be effective and the effects of climate change would be significant, questions of liability will be of moderate importance; (c) the same would apply when the effect on climate change is limited, but when there would be an ineffective regulation and (d) in a situation of ineffective regulation and at the same time a significant climate change effect, the question of liability is important because damages will be caused and people will seek compensation. Many would say that we are already past the first of these possibilities.

## **VI. Approach of Intergovernmental Organisations: FDI and the Environment**

In the first panel discussion on the second day of the conference, investment and trade law experts of intergovernmental organisations argued about the possibilities to integrate environmental concerns into IIAs. In this section, their discussion is captured. Firstly, the IPFSD<sup>21</sup> as presented by the UNCTAD expert will be elaborated on. Secondly, a discussion follows on how the UN Guiding Principles on Business and Human Rights (hereafter: UN Guiding Principles)<sup>22</sup> could bridge the gap between international investment law and the

<sup>18</sup> The preamble states that the contracting parties to the ECT recognise 'the increasingly urgent need for measures to protect the environment, including the decommissioning of energy installations and waste disposal and for internationally agreed-objectives and criteria for these purposes'.

<sup>19</sup> According to article 19.1 ECT, in pursuit of sustainable development, each contracting party shall strive to minimise harmful environmental impacts occurring from all operations within the Energy Cycle. In addition, each contracting party shall strive to take precautionary measures to prevent or minimise environmental degradation. Furthermore, article 19.1 lays down the polluter-pays principle, which means that the polluter should bear the costs of the pollution.

<sup>20</sup> Richard Lord is Queen Counsel at the Brick Court Chambers in London, UK.

<sup>21</sup> Investment Policy Framework for Sustainable Development [2012] <[http://unctad.org/en/PublicationsLibrary/webdiaepcb2012d6\\_en.pdf](http://unctad.org/en/PublicationsLibrary/webdiaepcb2012d6_en.pdf)> accessed 23 February 2014.

<sup>22</sup> UN Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Frame-

environment. Thirdly, this section will indicate that it has to be ensured that investment treaties contain clear language on the integration of environmental concerns. Finally, it deals with sustainable development goals.

The international organisations were invited to the conference because of their expertise in the field of international investment law and in particular to present the research results concerning the studies that they conducted in this field. We note that UNCTAD<sup>23</sup> and the OECD<sup>24</sup> have had a significant impact on policy development in the field of investment law. Their influence on States and private parties is ensured through on-going dialogue, organised by these organisations to exchange ideas with various stakeholders about the various challenges and dilemmas.

### **A. United Nations Conference on Trade and Development**

Anna Joubin-Bret<sup>25</sup> elaborated upon the IPFSD. She gave her own personal opinion on the matter and indicated that this might not always reflect the view of the UNCTAD.

The IPFSD states in the preface that it 'consists of a set of core principles for investment policy making, guidelines for national investment policies and guidance for policy makers on how to engage in the international investment policy regime in the form of options for the design and use of IIAs'. The IPFSD places sustainable development at the core of investment agreements, addressing all dimensions of investment policy, with the idea that there is a need for coherence between international investment policies and domestic policies. The principles are guiding principles for both domestic and international policies. One of the core principles of the IPFSD is investment in sustainable development. The overarching objective of investment policymaking is to promote investment for inclusive growth and sustainable development. To achieve this objective, Joubin-Bret argued, the IPFSD proposes to draft the scope of investment protection clauses with caution. It is possible also to include exceptions to the scope of an investment agreement to protect human rights, people's health, labour standards and the environment. Finally, international state dispute settlement could be abolished or could be useful as a last resort after having proposed an alternative system, such as investor state mediation.

According to Joubin-Bret, the best way to deal with environmental issues within IIAs is by including exceptions allowing the State to regulate environmental matters, but not by bringing specific environmental or human rights matters into investment treaties. Investment treaties are not the right place to regulate a much broader and much more important issue which is the protection of the environment and of sustainable development. IIAs should not become overloaded with topics and matters that are not their subject matter.

### **B. UN Guiding Principles on Business and Human Rights**

Andrea Saldarriaga and Andrea Shemberg<sup>26</sup> contended that the UN Guiding Principles can contribute to bridging the gap between international investment law and the environment. They explained their view as follows.

The UN Guiding Principles offer a platform to embed the protection of the environment and human rights into investment structures, rules and systems. They provide a three-pillar structure: (1) the State's duty to protect human rights against human rights abuses by third parties, including business enterprises, through maintaining appropriate policies, regulation and adjudication; (2) the corporate responsibility to respect human rights, which means that business enterprises should act with due diligence to avoid infringing the rights of others and to address adverse impacts with which they are involved, and (3) better access to remedies for victims.

Saldarriaga and Shemberg focused on three principles as an example of how the UN Guiding Principles could bridge this gap between investment law and the environment. First of all, Principle 8 of the UN Guiding Principles addresses policy coherence. According to this principle, States have to ensure that human rights are protected in the policies of governmental departments, agencies and other state-based institutions when fulfilling their respective mandates. Secondly, Principle 9 of the UN Guiding Principles indicates that States should maintain sufficient domestic policy space to meet their human rights obligations when

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work, Human Rights Council, seventeenth session [2011] <<http://www.business-humanrights.org/media/documents/ruggie/ruggie-guiding-principles-21-mar-2011.pdf>> accessed 23 February 2014.

<sup>23</sup> See <<http://unctad.org>> accessed 23 February 2014.

<sup>24</sup> See <<http://www.oecd.org>> accessed 23 February 2014.

<sup>25</sup> Ms Anna Joubin-Bret is a former senior legal adviser at the division on investment and enterprise for the UNCTAD. Currently, she is Avocat à la Cour de Paris. Ms. Joubin-Bret also acts as an arbitrator in investment disputes.

<sup>26</sup> Ms Andrea Saldarriaga and Ms Andrea Shemberg are project leaders of the Investment and Human Rights Project at the London School of Economics.

pursuing business-related policy objectives with other States or business enterprises, for instance through investment treaties or contracts. The commentary on this principle states that economic agreements concluded by States, such as BITs, free-trade agreements or contracts for investment projects, could affect the domestic policy space of governments. Therefore, States should ensure that they retain an adequate policy and a regulatory ability to protect human rights under the terms of such agreements, while providing the necessary investor protection. Finally, Principle 23 indicates the responsibility of business enterprises to comply with human rights, wherever they operate, to honour human rights when faced with conflicting requirements and to treat the risk of causing or contributing to gross human rights abuses as a legal compliance issue wherever they operate.

### **C. The OECD Guidelines for Multinational Enterprises**

Kathryn Gordon<sup>27</sup> stated that clear language in treaties on environmental concerns can be helpful. Such language would stress in preambles the importance that State parties attach to environmental and other societal concerns and would provide more specific guidance in other parts of the treaty (such as in substantive provisions and texts on applicable law) on how environmental concerns are to be integrated into investment treaty interpretations.

She sets out that the substantive norms of environmental treaties provide a solid guide for government action, including for environmental protection. The substantive principles of non-discrimination, fair and equitable treatment and compensation for expropriation are a good basis for public sector action. The UN Declaration on Human Rights (hereafter: UDHR), provides a few principles which are good principles for governments in action. For instance, article 7 UDHR indicates equality before the law, article 8 UDHR highlights the right to an effective remedy and article 17 UDHR lays down the right not to be arbitrarily deprived of one's property.

Citing an OECD Survey on Environmental concerns in IIAs,<sup>28</sup> Gordon noted that IIAs only rarely contain language on environmental concerns. The dominant approach – followed in 92 per cent of the treaties - is to not include any language whatsoever on the environment. However, there is a growing tendency in the new generation of agreements to include such environmental language. It is noteworthy that in contrast to BITs, the free trade agreements with an investment chapter (FTAs) in the sample contain environmental language.<sup>29</sup>

Gordon also noted that another OECD survey demonstrates that IIAs are often silent on fundamental procedural issues – the arbitration process is only lightly regulated by such treaties.<sup>30</sup> For instance, very few of the agreements examined in this survey contain information relating to conflicts of interest, third party financing, the allocation of costs and the calculation of compensation – these matters would be tightly regulated in advanced domestic law systems. Another problem within the dispute settlement procedure is transparency. International public governance guidance stresses that policies involving high fiscal risks or impacts should be subject to a very high standard of transparency should be applied. For example, the IMF Codes of Good Practice on Fiscal Transparency states that the public 'should be provided with comprehensive information on [...] major fiscal risks'. While transparency standards in investor-state arbitration are improving, they still create the conditions in which the public can be kept in the dark on matters that are clearly of great importance to it.

In summary, clear environmental language in IIAs can be very useful and should be included in ways that do not detract from the investment focus of such agreements (treaties). Such language should however underpin the State's intent to uphold its own environmental responsibilities.

<sup>27</sup> Professor Kathryn Gordon is a senior economist at the OECD.

<sup>28</sup> Kathryn Gordon and Joachim Pohl, 'OECD Survey on Environmental Concerns in International Investment Agreements' (2011) OECD Working Papers on International Investments <<http://www.oecd.org/daf/inv/investment-policy/48083618.pdf>> accessed 23 February 2014.

<sup>29</sup> According to UNCTAD: 'Bilateral investment treaties (BITs) are agreements between two countries for the reciprocal encouragement, promotion and protection of investments in each other's territories by companies based in either country. Treaties typically cover the following areas: scope and definition of investment, admission and establishment, national treatment, most-favoured-nation treatment, fair and equitable treatment, compensation in the event of expropriation or damage to the investment, guarantees of free transfers of funds and dispute settlement mechanisms, both state-state and investor-state.' Available at: <[http://www.unctadxi.org/templates/Page\\_1006.aspx](http://www.unctadxi.org/templates/Page_1006.aspx)> accessed 23 February 2014.

<sup>30</sup> Kathryn Gordon, International Investment Agreements: A survey of Environmental, Labour and Anti-corruption Issues' in OECD, *International Investment Law: Understanding Concepts and Tracking Innovations* (OECD 2008) < <http://www.oecd.org/daf/inv/investment-policy/40471550.pdf>>.



However, the real challenges for ensuring that IIAs contribute to economic and social growth (including environmental well-being) in Home States and Host States lies elsewhere. More effort on treaty drafting and in providing other State inputs into the treaty interpretation process need to be made with a view to clarifying elements of the dispute resolution process.

#### **D. International Development Law Organisation**

Marie Claire Cordonier Segger<sup>31</sup> discussed sustainable development goals. She points out that economic laws have evolved and have moved forward in many ways. Investment law is seeking to guarantee some of that stability, due process and the availability of redress. Legal practitioners and scholars have to look into the balance between investment law and economic law. That balance is not easily redressed. There is a possibility for domestic regulators to strengthen capacity in order to be able to design regulations so that they do not violate investment treaty rules but still achieve the environmental and social objective. However, as Cordonier Segger claims, there is also a need at the international level to give more assistance to negotiators in order to be more creative when drafting international investment treaties. When an international investment treaty is used as a sword to cut down the regulations that might have been adopted in good faith and which are essential for welfare especially in fragile countries, regulatory flexibility in investment treaties should be ensured. The creativity of investment negotiators and the assistance and capacity of domestic regulators is still a significant challenge according to Cordonier Segger.

She suggests that changes in process could motivate parties to make the necessary alterations in substance. To bridge the gap between international investment law and the environment in international investment treaties, States have to ensure that their treaties are committed to supporting sustainable development goals. Cordonier Segger states that it could therefore be useful to include the topics of human rights impact assessments, environmental impact assessments and sustainability impact assessments in future investment treaties. She sees that there is a need to consider carefully how the rule of law can assist in achieving global sustainable development goals. If the parties honour these goals, investment law could make a contribution to foster such goals.

### **VII. The Perspective of Policy Makers of Non-European Countries**

The second panel on the second day of the conference included policy-makers of non-European countries: Ecuador, Argentina, Venezuela, Indonesia and Mexico. In this section, their views in regards to the challenges concerning investment treaties and environmental issues will be presented.

#### **A. Perspective of Ecuador**

Blanca Gomez de la Torre<sup>32</sup> came from Ecuador to share her views on the arbitral proceeding that the Republic of Ecuador must endure due to the environmental litigation initiated by a group of citizens from Ecuador against Chevron. Through her work in the Attorney General office and her direct involvement with the case, Gomez de la Torre was able to shed a light on different aspects of the case from the perspective of the Republic of Ecuador.

She elaborated on the complex history of this multi-sided environmental conflict, which began in the early 90s and has been ongoing ever since. In 1993, Texaco (later acquired by Chevron) was accused by a group of local people from the Amazon region of severe environmental degradation that had caused pollution of land and water, which led to severe health problems among people living in the area. Since the first lawsuit, the legal proceedings in relation to this case have taken place in different countries,<sup>33</sup> different legal forums and involving different parties.<sup>34</sup> The breakthrough in this case was the judgment of the Ecuadorian court on 14 February 2011 that ordered the company to pay more than 9 billion US dollars to clean up and restore the affected region plus an equal amount as punitive damages.

<sup>31</sup> Dr Marie-Claire Cordonier Segger is Senior Legal Expert / Head of Stream, Sustainable Development, for the International Development Law Organization (IDLO) in Rome.

<sup>32</sup> Dr Blanca Gomez de la Torre is currently directing the Unit of International Affairs and Arbitration of the Attorney General Office of Ecuador.

<sup>33</sup> The different jurisdictions include the US, Ecuador, the Netherlands, Brazil, Argentina and Canada.

<sup>34</sup> A few examples are: US District Court New York *Aguinda et al v Texaco Petroleum Company* (1993), Superior Court of Justice of Nueva Loja *Aguinda et al v Chevron Corporation* (2003); *Chevron Corporation and Texaco Petroleum Company v Republic of Ecuador and Petroecuador* (2004); *Republic of Ecuador and Petroecuador v Chevron* (2004); *Chevron Corporation and Texaco Petroleum Company v Republic of Ecuador* (2009).

On the 12<sup>th</sup> November 2013, the National Court of Ecuador overruled the decision from the lower courts and eliminated the punitive damages. As a consequence, the amount of indemnification finally was determined on 9 billion US dollars. Chevron was not satisfied with the process in the Ecuadorian courts and filed an arbitration claim against the Republic of Ecuador in 2009. This claim was brought to the Permanent Court of Arbitration (PCA) under the BIT between the US and Ecuador. The company claimed that Ecuador should not have allowed the initiation of legal proceedings against the company in the first place. Chevron argued that Texaco and the government of Ecuador had signed release agreements in favour of the company in 1995 and 1998. Chevron also claimed that the proceedings commenced by the Ecuadorian citizens (the *Lago Agrio* case) lacked due process and allegedly engaged in fraudulent conspiracy between the plaintiffs and the government against Chevron.

Currently these legal battles are continuing and hence preventing the Republic of Ecuador to allow the enforcement of the Court's decision. This case is an important example of a situation in which a developing country has found itself being sued in an investment tribunal. One of the problematic issues in this regard was a lack of clear understanding of legal consequences of investment agreements that have been signed as an attempt to attract foreign investment.

### ***B. Perspective on the Argentine Experience***

Gabriel Bottini<sup>35</sup> addresses the experience of Argentina in investment arbitration. He shares his experience as an arbitrator and says that the relevance of environmental issues in the context of investment arbitration has been limited. Unfortunately, so far, environmental issues, as well as other connected issues such as human rights, have had a relatively minor impact on the outcome of investment arbitrations. One of the reasons for this may be that parties have not yet placed enough emphasis on environmental issues in their pleadings. But this may also be attributed to a misguided view held in some quarters that arbitrators should not be too concerned about public interest issues. It is argued that arbitrators generally do not prevent States from adopting the public policies they choose and only order that damages caused by these policies to foreign investors be compensated. This view cannot be accepted according to Bottini. The monetary consequences for a State arising from investment arbitrations can be high enough to effectively prevent States from taking certain measures. And even if the amounts claimed are not very significant for the State concerned, a finding that a State has breached international law is a serious matter which States will generally try to avoid, even at the expense of not adopting certain environmental measures. Hence, in Bottini's view, the situation is clear: 'arbitrators cannot close their eyes to the possible environmental consequences of their decisions'.

He states that it is sometimes argued that the relationship between investment treaties and environmental treaties poses no problems since States simply have to comply with all of them. But this hardly addresses the complexities of certain situations with which States often have to deal. In any event, it is not a matter of a conflict between investment and environmental obligations, but of applying them together harmoniously. He poses as an example the following situation: 'In deciding whether a certain State measure breaches the fair and equitable standard, it may be extremely relevant to take into account that this measure was taken in furtherance of international environmental obligations'.

Last but not least, Bottini points out that the relationship between investment treaties and the national laws protecting the environment is very important. National law is frequently part of the applicable law in investment arbitration and therefore cannot be considered as a fact. Here again, environmental provisions of national law should be applied jointly and in harmony with international investment obligations, says Bottini. The answer cannot simply be to let the State do what it wants but be liable for any damage. Rather, according to Bottini, investment tribunals should, after considering and applying national laws on the environment as well as applicable international obligations, decide whether the State has breached any of the high standards of investment treaties.

### ***C. Perspective of Venezuela***

Julian Cardenas Garcia<sup>36</sup> shared with the conference participants the perspective of Venezuela. He states that the Venezuelan Constitution refers to the protection of the environment. Article 129 indicates that, in contracts entered into by the Venezuelan Republic which involve natural resources, the obligation to pre-

<sup>35</sup> Mr Bottini is an arbitrator and advisor on issues of international law and litigation and a former national director of international affairs and disputes at the treasury of the Attorney-General's Office in Argentina.

<sup>36</sup> Professor Julian Cardenas Garcia is a former diplomat at the Venezuelan Ministry of Foreign Affairs, Visiting Professor of Inter-

serve the ecological balance, to permit access to and the transfer of technology on mutually agreed terms and to restore the environment to its natural State if the latter is altered, shall be deemed to be included, even if not expressed, on such terms as may be established by law. Cardenas Garcia points out that investment contracts thus do not contain any clauses relating to the protection of the investment. When parties choose Venezuelan law as the applicable law, it is directly based on the Constitution and hence article 129 will apply.

Furthermore, Cardenas Garcia explains that the Venezuelan Environmental Criminal Law sanctions all crimes that adversely affect the environment. The law applies to individuals and business enterprises alike. Guilty investors may be fined, prosecuted and imprisoned. In addition, crimes committed outside Venezuelan territory may be prosecuted in Venezuela itself, provided that the damage and the risks of the specified act have taken place in Venezuela.

Cardenas Garcia states that in investment arbitration cases in Venezuela, the scope of applicable law has to be identified. The determination of applicable law is a complex process. Local law, international law, industry standards, guidelines and arbitral case law could apply. This is the result of the complex network of sources of law and jurisdictions which may have a consequence in a contract between parties. Venezuela is one of the countries that lead the way in litigation concerning how to apply these sources of law given the increase of arbitration claims against the State and a liberal approach towards the use of sources of law. State and non-state law have been employed by the Venezuelan government to support their positions. The interpretation of the concept of 'applicable law' by arbitrators in investment arbitration tribunals allows to invoke the environmental provisions that have an important role in the Venezuelan legal system.

#### ***D. Perspective of Indonesia***

Ahmad Firdaus Sukmono<sup>37</sup> explained the situation in Indonesia. Before 2007, investment in Indonesia was governed by two laws: the Foreign Investment Law and the Domestic Investment Law. In 2007, the legislation was amended by the Investment Law.<sup>38</sup> This legislation has combined the two laws into one law.

Since 2007, the Investment Law contains environmental obligations for investors through provisions on corporate social responsibility and environmental protection.<sup>39</sup> The law also warrants equal treatment for domestic and foreign investors. Every investor has the right to obtain (a) certainty concerning rights, the law and protection, (b) open information concerning business sectors within which they operate, (c) the right to services and (d) various forms of facilities in accordance with the provisions of certain regulations or laws.<sup>40</sup>

Furthermore, Sukmono informs, every investor is required to (a) apply the principle of good company management, (b) implement the company's social liability, (c) draft reports on the investment activity and to submit them to the Coordinating Investment Board, (d) respect the cultural traditions of the communities in and around the location of the investment business activity and (e) comply with all of the rules of the law.<sup>41</sup>

Finally, the Investment Law of Indonesia introduces four concepts of corporate social responsibility. According to the Investment Law, investors have the corporate social responsibility to be in a harmonious and balanced relationship in accordance with the environment, values, norms and culture of the local communities wherever they operate.<sup>42</sup> Article 16 of the Investment Law refers to the corporate social responsibility to preserve the environment.<sup>43</sup> The obligation to restore and repair the environment whenever it is considered to have been damaged is also considered part of corporate social responsibility.<sup>44</sup> Lastly, part of corporate social responsibility is to develop partnerships with small and medium-sized enterprises and cooperatives.<sup>45</sup>

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national Investment Law and Transnational Petroleum Law at the University of Houston Law Center and a doctoral fellow at the research centre on investment trade law (CREDIMI).

<sup>37</sup> Mr Ahmad Firdaus Sukmono is Secretary of the Directorate General Foreign Trade of the Ministry of Trade in Indonesia.

<sup>38</sup> The Investment Law 2007 amended the Foreign Investment Law 1967 (no 1/1967) and the Domestic Investment Law (no 6/1968).

<sup>39</sup> According to article 3(1) of the Investment Law 2007, no. 25/2007, investment shall be organised based on the principle of [...] (g) sustainability and (h) environmental friendly.

<sup>40</sup> Investment Law 2007, no 25/2007, art 14.

<sup>41</sup> Investment Law 2007, no 25/2007, art 15.

<sup>42</sup> Investment Law 2007, no 25/2007 art 15b.

<sup>43</sup> Investment Law 2007, no 25/2007 art 16.

<sup>44</sup> Investment Law 2007, no 25/2007 art 17.

<sup>45</sup> Investment Law 2007, no 25/2007 art 18.

### ***E. Perspective of Mexico***

Maria Antonia Correa Serrano<sup>46</sup> described the perspective of Mexico. In Mexico, there is a lack of any correlation between FDI regulations and the general law on the environment. She points out that it is a challenge for Mexico to receive FDI just like other developing countries. However, Mexico has suffered enormously from negative impacts on the environment by industrial parks. Correa Serrano claimed that this has two causes. On the one hand, some authorities behave unethically because they make arrangements with enterprises and therefore these companies continue to pollute. The flexibility of the law allows the authorities to make arrangements with enterprises. On the other hand, Mexico is subject to regional law regulation FDI such as the North American Free Trade Agreement (hereafter: NAFTA). She notes that there is however no regional environmental policy applicable.

The central government does take care of investments and infrastructure but it does not enforce compliance with the environmental law. In Mexico there is a great deal of pollution. If no international law is applicable, the law in Mexico is very flexible and investors are interested primarily in short-term profits. The argument is often heard that Mexico does not have sufficient financial resources to generate employment opportunities and economic growth and therefore has to accept substantial environmental damage.

However, as Correa Serrano continued, Mexico has maintained the environmental spirit that is reflected in the Constitution.<sup>47</sup> For example, the agenda of the Mexican federal government includes environmental issues stated in the international commitments arising from the Montreal Protocol (1987) and the Rio Summit (1992). Since 1971, the prevention and control of environmental pollution reforms have been explicitly incorporated in the Constitution. As a result of commitments made at the Rio Summit, the Constitution governs environmental protection by initiating a power for the State to impose limitations on private property, as well as the right to regulate the utilisation of natural resources which are susceptible of appropriation in order to conserve them and to ensure a more equitable distribution of public wealth.<sup>48</sup>

These approaches consider the rational use of natural resources and impose on the State the duty to adopt the necessary measures to prevent their deterioration. In fact, in the Constitution, environmental care is equated with public health care and therefore it has serious impact on policy making in the country. Among the existing provisions is the General Law of Ecological Balance which is the main legal instrument in force with respect to the environment. This law stems from 1988 and was amended in 1996 and 2013. This last reform was influenced by the concerns about climate change. The law now encourages companies to do research and to promote the development of new forms of energy that will reduce carbon dioxide emissions. Although the law promotes environmental protection and sustainable development, the fragility of the law lies in its lack of implementation by both companies and by governments.

## **VIII. European Investment Policy and Environmental Concerns**

The third panel of the conference addressed the role of the European Union in the framework of a legal regime of FDI. The main topic of the discussion was the development of the European Investment Policy.

### ***A. European Investment Policy***

Angelos Dimopoulos<sup>49</sup> elaborated upon the European Investment Policy which is currently in a state of formation. Since the Lisbon Treaty entered into force in 2009, the European Union (hereafter: EU) now has exclusive competence over FDI. With the introduction of new competence concerning FDI, the EU is facing the challenge of defining the scope of this competence and how it will affect the bilateral investment treaties of the Member States.

<sup>46</sup> Dr Maria Antonia Correa Serrano is a professor and researcher at the Department of economic production (in the field of the "World Economic System") at the Universidad Autónoma Metropolitana-Xochimilco.

<sup>47</sup> Article 4, fifth paragraph, of the Mexican Constitution states: 'Everyone has the right to a healthy environment for their development and welfare. The State shall ensure respect for this right. Environmental deterioration and damage generated on those who are causing in terms of the provisions of the law Likewise Article twenty sixth paragraph of the Mexican Constitution: Under the criteria of social equity and productivity support and promote businesses of social and private sectors of the economy, subjecting them to the rules dictated by the public interest and use, general benefit of productive resources, careful conservation and the environment. Meanwhile the fraction XXIX-G Article 73 states that Congress has the power to enact laws relating to environmental protection and preservation and restoration of ecological balance' Federal Constitution of the United Mexican States, 1824, current to 18 September 2013.

<sup>48</sup> Article 27 Constitution of Mexico.

<sup>49</sup> Dr Angelo Dimopoulos is a lecturer in law at the Queen Mary University in London.

The emergence of an EU investment policy meets a number of legal, political and practical challenges. First of all, the very existence of an EU investment policy depends on the specific delineation of the EU's scope of competence concerning foreign investment. This is not only under article 207 of the Treaty on the Functioning of the European Union (TFEU)<sup>50</sup> but also under other provisions of the EU treaties. It is still unclear whether and to what extent the EU will develop an autonomous investment policy and replace the BITs of the Member States. Secondly, the Member States' investment policies have to be transferred into EU investment policy. In order to address these concerns, the EU has adopted a Regulation<sup>51</sup> in order to ensure legal certainty until these BITs are replaced by EU agreements. Finally, the EU investment policy requires a clear demarcation of the roles of the EU and the Member States in investment policy-making.

Dimopoulos argues that, according to the 'Lex Derogat Legi Priori' rule, the latest law supersedes older ones. Therefore, the later European Investment Policy overrides the provisions of the BITs, whereby the BITs' provisions will no longer be valid according to EU law. However, this could lead to problems because the older rules are no longer applicable and the later European Investment Policy may contradict the BITs. When international investment treaties will be concluded by the EU, according to Dimopoulos, the pertinent question is who is going to be the arbitrator. It could be the European Court of Justice, but then it is necessary that the BITs would be subjected to the primary and secondary norms of EU law, according to the EU's legal hierarchy. Primary norms include the Charter on fundamental rights. The Charter contains important provisions regarding the right to a healthy environment and the right to environmental protection. Therefore, Dimopoulos' conclusion is that an appropriate legal structure with primary and secondary law already exists but that there definitively is a need to appoint an appropriate tribunal.

### ***B. Freedom of Investment and the Protection of the Environment within the Internal Market of the European Union***

Thomas Wiedmann<sup>52</sup> discussed the free movement of capital with the EU's internal market. He stated that the freedoms of the internal market allow and protect cross-border investments within the EU and beyond. Particularly within the internal market, there is the freedom of establishment and the freedom of capital which provide the legal framework for all types of investment. These freedoms guarantee that there should be no obstacle to cross-border investment within the EU. Everybody is free to transfer capital to another country for investment purposes and to return to their Home country. All restrictions on the free movement of capital shall be prohibited.<sup>53</sup> This applies to all restrictions by Member States and also to third countries. This is very important, because this is a particular aspect of the free movement of capital.

Environmental protection also has a very prominent place in EU law, informs Wiedmann. Article 11 TFEU indicates that environmental protection requirements must be integrated into the definition and implementation of Union policies and activities, in particular with a view to promoting sustainable development. In addition, article 191 TFEU refers to the objectives to which the EU policy on the environment shall contribute. Furthermore, environmental protection is a legitimate objective of the public policy which is recognised by EU law. Environmental protection justifies certain restrictions on all markets freedoms. This is because all fundamental freedoms are subject to public policy objectives.<sup>54</sup> The treaty could not make it any clearer that the freedom of investment ends where environmental protection is required. Therefore, in Wiedmann's view, the internal market strikes a fair balance between investment protection and environmental concerns.

He adds that BITs provide for fair and equitable treatment and fair compensation in case of expropriation. BITs contain very broad terms and they open the door to all sorts of claims and limit the Member States' room for policy, such as environmental protection measures. BITs have evolved over time and the new generation of BITs often deal with environmental issues. However, the old generation BITs indeed restrict or potentially restrict the Member States' policy space to a certain extent. This limits Member States in doing what they are allowed to do or what they are obliged to do under EU law which is to protect

<sup>50</sup> Consolidated Version of the Treaty on the Functioning of the European Union [2010] OJ C85/53.

<sup>51</sup> European Parliament and Council Regulation (EP/EC) 1219/2012 of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries [2012] OJ L351/40.

<sup>52</sup> Dr Thomas Wiedmann is a policy analyst in the free movement of capital at the European Commission.

<sup>53</sup> Consolidated Version of the Treaty on the Functioning of the European Union [2010] OJ C85/53, art 63.

<sup>54</sup> See for the freedom of capital, Consolidated Version of the Treaty on the Functioning of the European Union [2010] OJ C85/53, art 65.



the environment. Furthermore, BITs give investors the possibility to sue States at international arbitral tribunals.

Wiedmann concludes by stating given these and other incompatibilities with EU law, BITs between member States, the so-called intra-EU BITs, have to be terminated.

## **IX. Concluding Remarks**

The authors of this report identified several policy and legal issues which were at the centre of the debate during the two conference days. In a general way, these issues can be summarised as follows.

### ***Policy Issues***

1. National and international investment policies constitute a long-term obstacle in the transition from a brown to a green economy. International and national environmental policies have become an integral part of the global economy. Environmental issues have transformed in their complexity. They moved away from the 'cutting trees' rhetoric to complex issues including renewable energy sources, carbon and climate change policies and innovative business models based on Payment for Ecosystems Services (PES). To achieve a successful transformation from a brown to a green economy it is a necessary step to bring together international investment policies and environmental goals. This requires regulatory change on national, regional and international levels. In the future, the interaction between investment and the environment will be even more intense. Further improvement of the environmental governance in the field of global emissions undertaken by the States can negatively affect foreign investors and investments. Companies will then probably turn to legal tools provided by international investment law in order to protect themselves. The risks posed by unmanaged climate change have started to be recognised by governments however the link between climate change, environmental protection and international investment law and policy is still relatively unexplored.
2. There is a necessity to recognise and to encourage private investors as catalysts for a low carbon economy. Private investments are an essential tool for the transformation of the global economy to a sustainable and low carbon economy. At the 15th UN Climate Change Global Conference in 2009, industrialised countries committed to raise 100 billion dollars to assist developing countries to address climate change. It soon became clear that this amount cannot be reached without private investments. Foreign investments can play a key role in mitigating climate change by contributing the required financial and technological resources. To stimulate investors for low carbon investment necessary for sustainable growth, national governments should contribute to the integration and coherency of investment policies and climate change mitigation measures. From countries that are frontrunners in promoting sustainable development and ecological welfare, can be expected that their position would be reflected in IIAs and policies. The lack of coherence between investment and environmental policies has the potential of being counter-productive in the attempt to achieve both environmental and economic policy objectives.

### ***Legal Issues***

1. National concerns regarding legal liability may play an increasing role in deciding on agreeing on investment treaties. Any progressive goals of the Netherlands or any other State concerning environmental protection and climate change might result into a multi-billion claim against such State initiated by foreign investors. This scenario is not unrealistic. Arbitration claims have recently been instituted by the Swedish energy company Vattenfall against Germany. The first investment case initiated by Vattenfall against Germany arose in 2009 as a result of environmental measures introduced by the German government with the objective of climate change mitigation. The second case is still pending and relates to the 'nuclear phase-out' policy introduced by Germany and challenged by Vattenfall in 2011. Both Germany and the Netherlands have the so-called 'gold standard' of investor-protection reflected in their BITs, i.e. favouring the investor's position. For example, it was noted that Dutch BITs rarely include any reference to public policy or environmental concerns. However, as these treaties are reciprocal, companies which invest in the Netherlands or Germany are also entitled to the same strong investment protection as Dutch and German investors abroad. And indeed, that is what was observed in this conference in regard of the Vattenfall cases.

2. BITs contribute to a 'regulatory chill' of environmental policies.<sup>55</sup> The generous investment protection enshrined in several BITs also includes coverage of indirect investments. This broad investment might leads to the establishment of 'mailbox companies' by investors from third States. In this manner, an investor from a third State can invoke the protection of e.g. a Dutch, German, UK or US BIT (the 'hub' countries of BITs) when a dispute arises with the Host State in which the investment was made. In this way, a Dutch BIT can be invoked without any involvement of an investor actually based in the Netherlands. The development of the establishment of mailbox companies might have short-term economic benefits but in the long run it raises questions of the legitimacy of national investment and economic policies. Indeed, such BITs can contribute to the so-called 'regulatory chill' in developing countries. Developing countries are especially susceptible for this threat. For example, the Venezuelan diplomat at the conference confirmed that the reason for the termination of the Netherlands-Venezuela BIT was the inclusion of the broad formulation concerning 'indirect investments'. It created the possibility for third-country investors to challenge Venezuelan policies on the basis of this BIT.

In conclusion, this conference has put in the spotlight the important theme of how we can bridge the gap between international investment law and the environment. Interesting viewpoints were presented and discussed concerning this very topical issue. On the second day, the audience also participated in the discussion with the panel members and a multitude of questions were asked. The debate certainly provided food for thought to the experts and policy-makers. Sometimes, the dialogue was intense. This proved that the topic chosen for this event was a relevant one and has practical significance for policy makers and legal practitioners.

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<sup>55</sup> This concept refers to situations, in which Host States (capital-importing countries) refrain from enforcing against foreign investors the State's legal obligations and policies in the area of environmental protection and human rights because of the high probability that any measures taken by the Host State against an international investor will be challenged by the investor in international investment tribunal. Such claims may result in an order to the national government to pay compensatory damages to the foreign investor and they force the Host State to spend high fees on (foreign) legal advisers.

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