
1-14-2021

Integrating Sustainable Development in International Investment Law, by Manjiao Chi

Haniehalsadat Aboutorabifard
Osgoode Hall Law School of York University

Follow this and additional works at: <https://digitalcommons.osgoode.yorku.ca/ohlj>



Part of the [Law Commons](#)

Book Review

Citation Information

Aboutorabifard, Haniehalsadat. "Integrating Sustainable Development in International Investment Law, by Manjiao Chi." *Osgoode Hall Law Journal* 57.2 (2021) : 519-527.
<https://digitalcommons.osgoode.yorku.ca/ohlj/vol57/iss2/8>

This Book Review is brought to you for free and open access by the Journals at Osgoode Digital Commons. It has been accepted for inclusion in Osgoode Hall Law Journal by an authorized editor of Osgoode Digital Commons.

Integrating Sustainable Development in International Investment Law, by Manjiao Chi

Abstract

The idea of sustainable development has a long history and is comparable to that of democracy, freedom, and justice.³ In the twenty-first century, sustainable development is an unavoidable paradigm underpinning all human actions from local to global levels, in both the public and private sectors. Sustainable development is high on the global governance agenda and needs to be followed by making a balance between the competing priorities of economic growth, environmental protection, and social progress.⁴ Sustainable development, on the one hand, is closely dependent on transnational investment activities to promote economic growth, especially in developing countries. On the other hand, it requires foreign investors to consider socio-environmental issues associated with their investment activities. Despite the universal importance of the role of transnational investment activities in sustainable development, whether and to what extent international investment law could amount to a legal norm that protects socio-environmental values while encouraging economic growth is not a settled issue.

Book Review

Integrating Sustainable Development in International Investment Law,
by Manjiao Chi¹HANIEHALSADAT ABOUTORABIFARD²

THE IDEA OF SUSTAINABLE development has a long history and is comparable to that of democracy, freedom, and justice.³ In the twenty-first century, sustainable development is an unavoidable paradigm underpinning all human actions from local to global levels, in both the public and private sectors. Sustainable development is high on the global governance agenda and needs to be followed by making a balance between the competing priorities of economic growth, environmental protection, and social progress.⁴ Sustainable development, on the one hand, is closely dependent on transnational investment activities to promote economic growth, especially in developing countries. On the other hand, it requires foreign investors to consider socio-environmental issues associated with their investment activities. Despite the universal importance of the role of

-
1. *Integrating Sustainable Development in International Investment Law: Normative Incompatibility, System Integration and Governance Implications* (Routledge, 2018) [Chi, *Integrating Sustainable Development*].
 2. PhD student at Osgoode Hall Law School, York University.
 3. See World Commission on Environment and Development, *The Report of the World Commission on Environment and Development: Our Common Future*, UNGAOR, 42nd Sess, Supp No 25, UN Doc A/42/427 (1987). The report notes that “[s]ustainable development is development that meets the needs of the present without compromising the ability of the future generation to meet their own needs” (*ibid* at 54).
 4. Virginie Barral, “Sustainable Development in International Law: Nature and Operation of an Evolutive Legal Norm” (2012) 23 Eur J Intl L 377 at 379.

transnational investment activities in sustainable development, whether and to what extent international investment law could amount to a legal norm that protects socio-environmental values while encouraging economic growth is not a settled issue.⁵

Manjiao Chi, a scholar of international law at Xiamen University, notes that, although sustainable development has been a global objective for decades, difficulties persist in establishing a balanced global investment governance regime.⁶ According to *Integrating Sustainable Development in International Investment Law*, the current international investment agreements (IIAs) and investment-state dispute settlement (ISDS) form the main constituents of international investment law.⁷ However, Chi argues that these two constituents are not sufficiently compatible with sustainable development concerns caused by transnational investment activities. First, IIAs chiefly supply norms designed for protecting investors against the political and economic instability of developing countries.⁸ Meredith Wilensky, in 2015, also raised a similar critique that IIAs are mainly negotiated to safeguard foreign investors,⁹ but Chi furthers the discussion by linking the failure of IIAs to consider values beyond the economic prosperity of foreign investments to sustainable development. Second, IIAs are made by states to promote the flow of foreign investments and fuel investment business among contracting parties.¹⁰ And thus the rights of non-state actors affected by foreign investments, such as local communities, are rarely considered in the IIA-making process. Third, although the impacts of foreign investments go beyond economic issues and cause public international concerns, the fragmentation of international law leaves little space for ISDS tribunals to address socio-environmental

-
5. It is argued that the lack of an effective regime in addressing sustainable development leaves this legal norm uncertain in the international law system. See e.g. Christina Voigt, *Sustainable Development as a Principle of International Law: Resolving Conflicts between Climate Measures and WTO Law* (Martinus Nijhoff, 2009).
 6. Chi, *Integrating Sustainable Development*, *supra* note 1.
 7. *Ibid.*
 8. *Ibid.*
 9. “Reconciling International Investment Law and Climate Change Policy: Potential Liability for Climate Measures Under the Trans-Pacific Partnership” (2015) 45 *Env’t L Rep* 10683.
 10. Since IIAs can have a wide range of implications for host states’ legal systems, economies, and individual citizens, non-state actors such as NGOs should be involved in the IIA-making process. See Stephan W Schill, “Five Times Transparency in International Investment Law” (2014) in Marc Bungenberg & August Reinisch, eds, Special Issue, *The Anatomy of the (Invisible) EU Model BIT*, 15 *J World Investment & Trade* 363.

concerns associated with transnational investment activities.¹¹ Therefore, foreign investments that are supposed to bring economic prosperity to host countries may give rise to a wide range of public concerns.

Chi was inspired by the International Institution for Sustainable Development (IISD) Conference focused on IIA negotiation and developing countries to write this book about international investment law and sustainable development.¹² A call for integrating sustainable development in IIAs, therefore, is key for Chi to make international investment law more compatible with sustainable development. The question that centers his book is how to improve IIA-making and IIA-enforcement processes in the context of sustainable development?

According to this book, integrating sustainable development in international investment law is a systemic study of using conceptual, normative, and governance perspectives.¹³ The book is split into three parts: (1) the sustainable development challenge for IIAs, (2) core sustainable development provisions in IIAs, and (3) reforming IIAs to be more compatible with sustainable development. Chi initiates his research by focusing on two sustainable development-impeding provisions: Expropriation and fair and equitable treatment (FET). He analyzes how the wording of these substantive provisions and their applications in ISDS may restrict states from pursuing sustainable development goals within the investment sector. In the second part, Chi explores thematic issues of various types of clauses in IIAs that are intended to promote sustainable development and discusses their normative and enforcement obstacles. In the final section of the book, he concludes why the existing global investment governance regime is not sufficiently compatible with sustainable development and raises three suggestions for enhancing future IIA-making.

Similar to the majority of international agreements, IIAs also limit the scope of domestic police power to administrative regulations, to which foreign investors must subject themselves.¹⁴ Despite its lack of definition, state police power implies that states have regulatory flexibility and policy space to fulfill their public interests. However, substantive provisions, such as expropriation and FET, could hinder host states from implementing sustainable development measures. In practice, if host states' socio-environmental measures adversely

11. Saverio Di Benedetto, *International Investment Law and the Environment* (Edward Elgar, 2013).

12. Chi, *Integrating Sustainable Development*, *supra* note 1.

13. *Ibid.*

14. Rudolf Dolzer & Christoph Schreuer, *Principles of International Investment Law*, 2nd (Oxford University Press, 2012).

affect the value, economic, or commercial use of foreign investments, investors will bring claims before ISDS tribunals for breaching the substantive provisions of IIAs. FET is a core pro-investment provision that “may constrict a State’s sovereignty considerably and ... threatens sustainable development.”¹⁵ The application of these substantive provisions in ISDS brings host states under the external scrutiny of international investment tribunals that significantly narrow the boundary of a state’s involvement in global investment governance.¹⁶

To respond to the restraining effects of the substantive provisions, Chi shifts the focus of his research towards striking a balance between investment protection and environmental considerations by elaborating on sustainable development-promoting provisions included in IIAs.¹⁷ Through rules analysis, comparative research, and case studies, he identifies core sustainable development provisions in existing IIAs, including exceptive provisions, public interest provisions, and procedural provisions. Exceptive provisions that provide conditions under which host states’ regulatory actions will be excepted from breaching FET standards are one of the most illuminative provisions promoting sustainable development. IIAs have recently incorporated exceptive provisions to exempt host states from liability for taking IIA-inconsistent measures for public interest concerns.¹⁸ “Some IIAs, especially recent ones, incorporate exceptive provisions to address various kinds of public interest concerns, such as the protection of national security interests, [and] the preservation and protection of life.”¹⁹ With reference to these provisions, host states might be exonerated from expropriating foreign investments and breaching FET standards. For instance, GATT article XX is an exceptive clause whereby WTO members may justify their sustainable development measures that are inconsistent with WTO obligations, if such

15. Roland Kläger, “Revising Treatment Standards—Fair and Equitable Treatment in Light of Sustainable Development” in Steffen Hindelang & Markus Krajewski, eds, *Shifting Paradigms in International Investment Law: More Balanced, Less Isolated, Increasingly Diversified* (Oxford University Press, 2016) 65 at 67.

16. Scholars in the field of sustainable development and international investment law consider expropriation and the FET clauses as a “powerful weapon” for foreign investors to not only limit state sovereignty in pursuing public interests but also expose state conduct under further scrutiny of international arbitral tribunals. See e.g. GC Christie, “What Constitutes a Taking of Property Under International Law?” (1962) 38 *Brit YB Intl L* 307; Roland Kläger, *Fair and Equitable Treatment in International Investment Law* (Cambridge University Press, 2011).

17. Chi, *Integrating Sustainable Development*, *supra* note 1.

18. Kenneth J Vandevelde, “Rebalancing Through Exceptions” (2013) 17 *Lewis Clark L Rev* 449.

19. Chi, *Integrating Sustainable Development*, *supra* note 1 at 66.

measures fall under paragraphs a, b, e, f, and g of article XX.²⁰ Transplanting GATT article XX to IIAs, therefore, is an effective avenue for promoting the sustainable development goal of foreign investments while exempting a host state from being accountable for expropriation or an FET violation.

Parallel to reviewing the sustainable development provisions, Chi outlines challenges facing exceptive, public interest, and procedural provisions. High threshold requirements for invoking exceptive provisions in ISDS, for example, are the main barriers to sustainable development integration into the global investment governance regime. Requirements such as a two-tiered test weaken the practical effectiveness of exceptive provisions for promoting sustainable development. A classic enumeration of the two-tiered test can be found in the *US–Gasoline* Appellate Body report:²¹

In order that the justifying protection of Article XX may be extended to it, the measure at issue must not only come under one or another of the particular exceptions—paragraphs (a) to (j)—listed under Article XX; it must also satisfy the requirements imposed by the opening clauses of Article XX. The analysis is, in other words, two-tiered: first, provisional justification by reason of characterization of the measure under XX(g); second, further appraisal of the same measure under the introductory clauses of Article XX.

20. *General Agreement on Tariffs and Trade*, 30 October 1947, 58 UNTS 187 (entered into force 1 January 1948) [*GATT*]. Article XX of the *GATT* reads:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

(a) necessary to protect public morals;

(b) necessary to protect human, animal or plant life or health;

[...]

(e) relating to the products of prison labour;

(f) imposed for the protection of national treasures of artistic, historic or archaeological value;

(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption (*ibid*).

21. *United States–Standards for Reformulated and Conventional Gasoline* (1996), *WTO* Doc WT/DS2/AB/R at 22 (Appellate Body Report), online (pdf): <www.wto.org/english/tratop_e/dispu_e/2-9.pdf> [perma.cc/Y4BL-MTAC].

This two-step test needs ISDS tribunals to decide whether the socio-environmental measures in question fall under paragraphs a, b, e, f, and g of article XX of the GATT.²² If the first step is satisfied, the tribunals would proceed to the second phase to determine whether the requirements of this article are fulfilled. Due to the high invocation requirements of the exceptive provisions, they have been rarely invoked in ISDS and are often dismissed by investment tribunals.²³ According to a study by Public Citizen, up to August 2015, there had been forty-three WTO cases in which GATT article XX had been invoked by host states, however, only one case satisfied all requirements for being exempted from breaching FET.²⁴ The result of this case study shows that investor arbitrators often employ a rigid interpretation style for the GATT exceptive provision and demonstrates that there is a strong bias in favor of investment protection over sustainable development in ISDS.²⁵

Chapter five of this book discusses the overlap between protecting public interests and promoting sustainable development. Since international law often deals with interstate relations, the inclusion of public interests in international investment law seems to be of paramount importance. However, IIAs appear disinterested in addressing public issues, other than investment protection. This is due to the fact that international investment law has been developed in light of fragmentation theory,²⁶ which divides the tracks of various fields of international law.²⁷ The economic motivations behind negotiating IIAs also tend to limit the scope of provisions to those favoring investments. The potential adverse

22. *Ibid.*

23. Kati Kulovesi, *The WTO Dispute Settlement System: Challenges of the Environment, Legitimacy and Fragmentation* (Wolters Kluwer Law & Business, 2011).

24. "Only One of 44 Attempts to Use the GATT Article XX/GATS Article XIV 'General Exception' Has Ever Succeeded: Replicating the WTO Exception Construct Will Not Provide for an Effective TPP General Exception" (August 2015) at 1-2, online (pdf): *Public Citizen* <www.citizen.org/sites/default/files/general-exception_4.pdf> [perma.cc/K466-7VU7].

25. Manjiao Chi, "Exhaustible Natural Resource in WTO Law: GATT Article XX (g) Disputes and Their Implications" (2014) 48 *J World Trade* 939.

26. Fragmentation theory supports the autonomy of IIAs with respect to other rules of international law; it applies to cases where rules belonging to different regimes are applied in ISDS tribunals in a potentially conflicting way. See Study Group of the International Law Commission (finalized by Martti Koskenniemi), *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, UNGAOR, 58th Sess, UN Doc A/CN.4/L.682 (2006).

27. See Benedetto, *supra* note 11. "The more 'fragmentary' the approach taken, the less likely it is that environmental and human health concerns will be integrated when applying investment rules" (*ibid* at 23).

impacts that public interest protection could have on institutional attractiveness of host states for alluring foreign investors is another reason why IIAs fail to address such issue.

In response, Chi claims that IIAs should be more accommodative to public interest provisions covering environmental and human rights.²⁸ He notes that, similar to the exceptive provisions, environmental provisions, for example, would promote sustainable development by exempting host states from liability for taking IIA-inconsistent environmental measures.²⁹ The environmental provisions included in the 2012 US Model BIT,³⁰ the 2004 Canadian Model BIT,³¹ and the 2005 China–Madagascar BIT,³² serve as references for Chi to explain how the environment could be protected in IIAs. Basically, under environmental provisions, environmental measures implemented by host states do not constitute an act of expropriation and are exempted from the scope of the FET clause. However, these provisions are insufficiently clear, and their interpretation is subject to investment arbitrators’ discretion. Chi examines the vague statement of “except in rare circumstance” from the 2004 Canadian Model BIT³³ to illuminate how “it remains possible for arbitrators to interpret the words in a manner inconsistent with the contracting states’ real intention.”³⁴

28. Manjiao Chi, “The ‘Greenization’ of Chinese Bits: An Empirical Study of the Environmental Provisions in Chinese Bits and its Implications for China’s Future Bit-Making” (2015) 18 J Intl Econ L 511.

29. Chi, *Integrating Sustainable Development*, *supra* note 1.

30. *Treaty Between the Government of the United States of America and the Government of [Country] Concerning the Encouragement and Reciprocal Protection of Investment* (20 April 2012), Annex B.4 (B), online (pdf): *Office of the US Trade Representative* <ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf> [perma.cc/WV63-KJRK].

31. *Agreement Between Canada and ... for the Promotion and Protection of Investments* (2004), art 10(1)(c), online (pdf): *United Nations Conference on Trade and Development* <investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2820/download> [perma.cc/VC4M-9QLZ] [2004 *Canadian Model BIT*].

32. *China–Madagascar BIT*, 21 November 2005, art 3(2) (entered into force 1 July 2007), online: *United Nations Conference on Trade and Development* <investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/933/china-madagascar-bit-2005-> [perma.cc/PA86-L6L5].

33. See 2004 *Canadian Model BIT*, *supra* note 32, Annex B.13(1)(c) reads:

Except in rare circumstances, such as when a measure or series of measures are so severe in the light of their purpose that they cannot be reasonably viewed as having been adopted and applied in good faith, non-discriminatory measures of a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriation.

34. Chi, *Integrating Sustainable Development*, *supra* note 1 at 91.

Despite the frequency of environmentally sensitive expropriation and FET claims in ISDS, he notes that no consistent jurisprudence has been established in exempting environmental measures from expropriation or an FET violation, and the environmental sensitivity of the measures is seldom considered by investment tribunals under public interest provisions.³⁵

In the final section of *Integrating Sustainable Development in International Investment Law*, Chi reiterates that the world is in the era of globalization that “necessitates a paradigm shift of global investment governance.”³⁶ But the fragmentation of international law,³⁷ the state-centrism of international investment law,³⁸ and the inherent structural imbalance of existing IIAs³⁹ impede broader and more effective investment regulations. In Chi’s opinion, though international investment law is a branch of international law, ISDS establishes an enforcement system of IIAs that is only available to private investors.⁴⁰ Failure of some investment arbitrators to recognize the public nature of ISDS allows an insufficient margin to determine and implement various public policy goals. Moreover, IIAs should not only be treated as a regime imposing an investment protection obligation on states but must be deemed as a governance mechanism arranging rights and obligations divisions among the main stakeholders of transnational investment activities. Consequently, the regulatory chill effect of IIAs on state sovereignty and the inability of ISDS to protect non-investment interests have contributed to the legitimacy crisis in which international investment law currently finds itself.

According to Chi, sustainable development is a global object that would be achieved through its integration into the global investment governance regime. To address this situation, Chi has written an excellent scholarly work to “suggest ways of making IIA more compatible with sustainable development from the governance perspective.”⁴¹ First, IIAs are the main supplier for the global investment governance regime. Thus, more “balancing provisions” and “good governance provisions” could enhance the supply of sustainable development

35. *Ibid.*

36. *Ibid.* at 149.

37. See Benedetto, *supra* note 11.

38. See Matthew Nicholson, “Walter Benjamin and the Re-Imagination of International Law” (2016) 27 *Law Crit* 103.

39. See Gus Van Harten, *Sovereign Choices and Sovereign Constraints: Judicial Restraint in Investment Treaty Arbitration* (Oxford University Press, 2013).

40. Chi, *Integrating Sustainable Development*, *supra* note 1.

41. *Ibid.* at 161.

norms in IIAs.⁴² Second, the systemic theory that perceives IIAs as a unit of international law dealing with various public issues is another approach to make a balance between socio-environmental considerations and investment protection in IIAs. Harmonizing the sustainable development provisions with the conflicting norms of other branches of international law through proper treaty interpretation tools would enable investment tribunals to go beyond the mere protection of foreign investments and consider public interests in their decision making.⁴³ Third, since states traditionally play a central role in IIA-making and non-state actors are excluded from the process, the IIA system is insufficient for addressing the values of multiple stakeholders.⁴⁴ Improving the transparency of and involving non-state actors in the IIA-making process could be a crucial approach to integrating sustainable development in IIAs.

42. See Harten, *supra* note 39.

43. See Benedetto, *supra* note 11.

44. See Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment* (Cambridge University Press, 2010).