Lyuba Zarsky

Balancing Rights and Rewards

# International Investment for Sustainable Development

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*Edited by*
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**Lyuba Zarsky** is senior research fellow at the Global Development and Environment Institute at the Fletcher School of Law and Diplomacy at Tufts University, Boston, and Senior Associate at the Nautilus Institute for Security and Sustainability. She is co-founder of the Nautilus Institute and directed its Globalization and Governance Program. Her work focuses on globalization and sustainability, including the governance of international investment and global corporate responsibility. She has published and consulted widely to organizations including the OECD, WWF, the Earth Council and the Asian Development Bank. Her latest publications are *Human Rights and the Environment: Conflicts and Norms in a Globalizing World* (contributing editor) (Earthscan, 2002), and *Beyond Good Deeds: Case Studies and a New Policy Agenda for Corporate Accountability* (co-authored with Michelle Leighton and Naomi Roht-Arriaza) (Natural Heritage Institute, 2002).

# Preface

This book is the culmination of the International Sustainable and Ethical Investment Rules Project, a collaboration of researchers from the following five non-governmental organization (NGO) think-tanks:

- African Centre for Technology Studies, Nairobi, Kenya;
- Fundacion ECOS, Punta del Este, Uruguay;
- International Institute for Sustainable Development, Winnipeg, Canada;
- Nautilus Institute for Security and Sustainability, Berkeley, California, US;
- Singapore Institute for International Affairs, Singapore.

Conceived and directed by Lyuba Zarsky and Sandy Buffett of the Nautilus Institute, the project aimed to articulate a framework for the governance of international investment that promotes economic development, environmental sustainability, human rights and global security. At the centre of such an investment regime is the fundamental principle that private investor rights must be balanced by investor responsibilities and public goods.

Project collaborators worked together in two meetings in 2001. An initial working group meeting, held in Berkeley in April, defined the objectives and sketched broad terms of reference for research papers. The second meeting brought project researchers together with a wider group of policy experts, activists and business representatives for a strategic consultation on ethics, security and international investment. Held at the Rockefeller Brother Fund's Pocantico Conference Center in New York shortly after the September 11, 2001, bombings of the World Trade Center, the consultation generated ten-year scenarios about the governance of investment that helped to deepen the thinking behind the papers in this volume (the scenarios are available on www.nautilus.org/enviro/).

Researchers from two additional academic institutes – the Yale Center for Environmental Law and Policy and the Global Development and Environment Institute at Tufts University – joined the project at a later stage to fill in key gaps.

All the contributors are not only researchers, but are also passionate and engaged advocates. Their collective efforts to implement trade and investment rules that promote global sustainability and socially just development have targeted the World Trade Organization (WTO), OECD, the European Union and the Common Market of the Southern Cone (MERCOSUR), as well as the North America Free Trade Agreement (NAFTA) and the Free Trade Area of the Americas Agreement. This book is dedicated to the spirit and energy that animates those efforts, and millions like them around the world.

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The staff of the Nautilus Institute, including Christine Ahn, Leif Brottem, Jin Chen, Peter Hayes and John Williams assisted with project administration, communication and research. Special thanks to Joan Diamond for her constancy and gentle prodding in keeping the institute on track.

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Thanks to the Rockefeller Brothers Fund for support of a strategic consultation held at the Pocantico Conference Center in New York in 2001. Special thanks to Peter Riggs for participating in the consultation and for his early embrace of scenario methodology as a strategic tool. Thanks also to all the participants of the strategic consultation and to Alain Wouters of the Global Business Network-Europe for excellent and creative facilitation.

# List of Acronyms and Abbreviations

| | |
|---|---|
| AGC | Ashanti Goldfields Corporation |
| ASEAN | Association for Southeast Asian Nations |
| ASrIA | Association for Sustainable and Responsible Investment in Asia |
| BITs | bilateral investment treaties |
| CBD | Convention on Biodiversity |
| CCIED | China Council for Environment and Development |
| CERES | Coalition for Environmentally Responsible Economies |
| CG | corporate governance |
| CIDA | Canadian International Development Agency |
| CO | carbon monoxide |
| CSR | corporate social responsibility |
| CSWG | Corporate Sunshine Working Group (US) |
| ECLAC | Economic Commission on Latin America and the Caribbean |
| EKC | Environmental Kuznets Curve |
| EMS | environmental management system |
| EPA | Environmental Protection Agency (US) |
| EPCRA | Environmental Protection and Community Right to Know Act (US) |
| EPZ | export processing zone |
| EU | European Union |
| FCPA | Foreign Corrupt Practices Act |
| FDI | foreign direct investment |
| FTC | Free Trade Commission of NAFTA |
| FTAA | Free Trade Area of the Americas |
| GATT | General Agreement Tariffs and Trade |
| GCGF | Global Corporate Governance Forum (World Bank) |
| GRI | Global Reporting Initiative |
| HC | hydrocarbons |
| ICGN | International Corporate Governance Network |
| ICSID | International Center for the Settlement of Investment Disputes |
| IDA | International Development Agency |
| IFC | International Finance Corporation |
| ILO | International Labour Organization |
| IOSCI | International Organization of Securities Commissions |
| IPO | initial public offering |
| IRN | International Rivers Network |

| | |
|---|---|
| IRTK | International Right to Know Campaign |
| IUCN | International Union for the Conservation of Nature |
| JSE | Johannesburg Stock Exchange (South Africa) |
| LRTAP | long range transboundary air pollutants |
| MAI | Multilateral Agreement on Investment |
| M&As | mergers and acquisitions |
| MCGF | multistakeholder corporate governance framework |
| MEAs | multilateral environmental agreements |
| MERCOSUR | Common Market of the Southern Cone |
| MFN | most favoured nation |
| MIGA | Multilateral Investment Guarantee Agency |
| MNE | multinational enterprise |
| NAFTA | North America Free Trade Agreement |
| NBER | National Bureau of Economic Research (US) |
| NCCR | National Coalition for Corporate Reform |
| NCP | National Contact Point (for the OECD MNE Guidelines) |
| NGO | non-governmental organization |
| $NO_2$ | nitrogen dioxide |
| Nox | nitrogen oxide |
| ODA | overseas development assistance |
| OECD | Organisation for Economic Co-operation and Development |
| OPIC | Overseas Private Investment Corporation |
| PROFEPA | Procuraduría Federal de Protección al Ambiente (Federal Agency for the Protection of the Environment, Mexico) |
| SADC | Southern Africa Development Community |
| SEC | Securities and Exchange Commission (US) |
| SEE | social, environmental and ethical |
| $SO_2$ | sulphur dioxide |
| Sox | sulphur oxide |
| SOX | Sarbanes-Oxley Act |
| SSA | Sub-Saharan Africa |
| TNCs | transnational corporations |
| TRI | Toxic Release Inventory |
| TRIPs | Trade-Related Aspects of Intellectual Property Rights |
| UIA | Uganda Investment Authority |
| UNCTAD | United Nations Conference on Trade and Development |
| UNEP | United Nations Environment Programme |
| UNFCC | United Nations Framework Convention on Climate Change |
| UNICTRAL | United Nations Commission for International Trade Law |
| VOC | volatile organic compounds |
| WG | working groups |
| WTO | World Trade Organization |
| WSSD | World Summit for Sustainable Development |
| WWF | World Wide Fund for Nature |

# Introduction: Balancing Rights and Rewards in Investment Rules

*Lyuba Zarsky*

Investment is the lifeblood of economic growth – sustainable or otherwise. For rich and poor alike, investment is of especial importance in charting a global path to sustainable development. Investment is needed to nurture the institutions, technologies, organizations, ideas and values that could allow humans the world over to live well while preserving the Earth's ecosystems – the essence of 'sustainable development'.

Investment is of particular importance to the poor. Through investment in the building of productive capacities – knowledge, skills, technology and institutions for collective action – stagnant patterns of poverty and marginalization can be transformed into dynamic patterns of economic development and social inclusion. With development comes the potential for greater equity, within and between nations. Greater equity, in turn, enhances the prospects for global peace and security.

Not all investment, however, points development towards sustainability and equity. Formal and informal rules, policies, regulations and behavioural norms governing investment play a large role in determining whether, why, where and, most importantly, with what, economic, environmental and social impact investment takes place. Without proper governance, an increase in investment may exacerbate or reinforce existing patterns of greedy consumption by the rich, marginalization of the poor and environmental devastation, all of which today characterize the global economy.

Capital for investment comes from both domestic and foreign sources. While domestic sources are by far the largest, foreign investment can be strategically decisive in two ways. On one hand, transnational corporations (TNCs) – the primary source of foreign direct investment (FDI) – can potentially transfer technologies, skills and global market links which are lacking domestically, thus stimulating industry growth. On the other hand, 'buying into' the rules which govern international investment can dramatically shape both the domestic investment climate and domestic policy options.

This book explores the interface between sustainability, development and the governance of international investment. The eight chapters are organized along three lines of enquiry:

- Is 'more better' when it comes to attracting foreign investment? What is the relationship between FDI and sustainable development in developing countries?
- What is the 'state of play' in terms of the structure and scope of the emerging international investment regime? What underlying problems does it pose for achieving global sustainability and equity?
- What is the 'way forward' in terms of creating and implementing international investment rules which would promote global sustainability and equity?

## Investment Rules as a Sustainable Development Issue

For two reasons, the governance of international investment emerged in the 1990s as a central concern for advocates of sustainable and ethical global development. First, private flows of FDI increased exponentially in the last decade. While the lion's share – some three-quarters – flows from one rich country to another, the ballooning of FDI flows to developing countries fuelled widespread hopes and fears about the economic and environmental impacts of FDI.

Hopes centred on expectations that FDI inflows would stimulate economic growth, providing fiscal resources to step-up environmental, health and labour standards. There were also hopes that TNCs would transfer clean technology and prod domestic firms towards better environmental management, both of which would improve the environmental performance of industry.

In a mirror image, fears centred on the obverse potential impacts of FDI: the crowding out of domestic investment with a corresponding drag on economic and industrial growth, coupled with widespread environmental degradation and exploitation of low-paid workers. In some countries, there were also concerns about human rights abuses, as TNCs partnered with repressive governments. Indeed, a new area of study and advocacy emerged with increasing evidence of the links between globalization, human rights abuses and environmental degradation (Zarsky, 2002).

The second force propelling the emergence of international investment as a sustainable development issue was the increase in government efforts to create supra-national investment rules. Global rules for trade have been in place since the end of World War II, lodged first in the General Agreement on Tariffs and Trade (GATT) and then in the World Trade Organization (WTO). But governance of private cross-border investment was carved out of the Bretton Woods institutions, largely at the behest of the US. Until the early 1990s, there was little interest from any quarter in discussing or designing multilateral investment rules.

In the past decade, however, capital exporting countries – primarily the US, European Union (EU) and Japan – have, in different ways and venues, pressed for the creation of multilateral, regional and/or bilateral investment rules. While they bicker and clash among themselves over the scope, substantive provisions and venue, they generally share a bias towards a neo-liberal paradigm in which the primary aim of regulation is to expand opportunities for FDI by their own TNCs. Emerging investment rules are thus aimed primarily at increasing the rights and protections of foreign investors in host countries.

Various efforts to negotiate international investment rules – most notably the OECD's ill-fated Multilateral Agreement on Investment (MAI) – crashed into a storm of criticism and opposition by a wide variety of activists, intellectuals and developing-country governments. Non-governmental organizations (NGOs) spanning a range of concerns – development, environment, human rights, labour, gender equity, religion, anti-poverty and others – criticized the MAI for favouring the interests of TNCs not only over domestic firms but over 'common good' public policy objectives.

Opposition to investment rules also flowered in the context of the anti-globalization 'another world is possible' protests which shut down the WTO ministerial in Seattle in 1999, and contributed to the collapse of the WTO ministerial in Cancun in 2003. Indeed, it was the introduction by the US and EU of a draft text on investment – one of the WTO's so-called 'Singapore issues' – which prompted a group of developing countries to walk out of the Cancun talks after being frustrated in negotiations over agricultural subsidies.

Stymied at the multilateral level, capital exporting countries looked to regional and bilateral routes to put investment rules in place. Chapter 11 of the North American Free Trade Agreement (NAFTA) set a precedent in a wide set of procedural and substantive provisions which expanded investor rights. These provisions, in turn, became part of many bilateral investment treaties. By 2003, over 2000 bilateral investment treaties (BITs) had been negotiated.

## Is 'More Better'? FDI and Sustainable Development

In the 1990s, FDI inflows became the leading source of external capital in many developing and transition countries. From Sub-Saharan Africa (SSA) to East Asia, Russia to Latin America, hunger for FDI exploded. Counselled by international organizations, country after country in the developing world made attracting FDI the heart of its development strategy. In addition to investment liberalization, a variety of national policies meant to reassure, 'incentivize', protect, build the confidence of and generally lure foreign investors were put in place. In many cases, these policies jeopardized existing domestic firms and productive capacities.

In many countries, the stated objectives of FDI-led development strategies were to stimulate domestic investment, generate technology spillovers, improve the environmental performance of industry and raise living standards, especially for the poor.

On three counts, the strategy was risky. First, FDI flows might not materialize. Of the quarter of global FDI flows which go to developing countries, 80 per cent are concentrated in only 12 middle-to-large countries (see Gallagher and Zarsky in Chapter 1). China alone accounts for more than half. Most countries compete with dozens and dozens of others for what amounts to a trickle. Moreover, FDI outflows dropped sharply after 2001, largely due to recession in the US and greater global insecurity following the September 11 attacks in the US.

Second, there was the risk that FDI would disrupt or destroy existing agricultural and/or industrial production, but not deliver the promised benefits of sustained economic growth and technology transfer. For countries with substantial manufacturing capacity, FDI liberalization could lead to a 'hollowing out' of domestic firms. For countries with a large sector of the population engaged in small-scale or peasant agriculture, the risk was that FDI would undermine livelihoods and attract migrants to urban areas, without providing sufficient or stable employment.

Third, there was the risk that FDI inflows would overwhelm domestic capacities for environmental and social oversight, generating net costs rather than benefits to local communities and national revenue streams. Environmental risks included soil erosion, air and water pollution, toxic contamination, resource loss or degradation, biodiversity loss, and health risks to workers and surrounding communities.

Which is the more likely 'face' of FDI: a jumpstart to sustainable development or a costly hollowing out of domestic development opportunities? Is it a courier of cleaner production or environmental devastation?

In Chapter 1, Kevin Gallagher and Lyuba Zarsky examine recent case study and statistical evidence about the impacts of FDI in developing countries on economic growth, technology spillovers and environmental performance. Reflecting the heterogeneity of developing countries, they find no consistent relationship: the impact of FDI on each variable has been found to be positive, neutral or even negative. Key conditioning variables are domestic policies, capacities and institutions.

Gallagher and Zarsky also examine Mexico's experience in the 1990s. With a development strategy centred on attracting FDI into manufacturing, Mexico was the poster child for the benefits of investment and trade liberalization. They find that, while a large volume of FDI flowed in, technology and knowledge spillovers were minimal or non-existent. Moreover, FDI 'crowded out' domestic investment and hollowed out domestic manufacturing capacity, in part because inputs to the production of foreign firms were imported rather than sourced locally. Environmental benefits of clean technology transfer were minimal and the number of jobs created was small compared to new entrants. And after 2001, FDI inflows dropped off sharply. They conclude that FDI is no 'miracle drug', that the purported benefits of FDI are exaggerated and that its centrality in development strategies is misplaced.

In Chapter 2, Monica Araya analyses recent empirical research on FDI and the environment in developing countries. She considers environmental impacts stemming from how FDI affects changes in economic scale, technology and productive structure. Despite common myths about both positive and negative linkages, she finds no overarching determinate relationship between FDI and the environment. Like Gallagher and Zarsky, she finds a key conditioning role for policies and institutions.

Araya also examines TNC choices about how to manage environmental impacts in different countries given differences in the regulatory contexts. She finds that a number of variables affect such choices, including firm and industry characteristics, as well as market forces, regulation and actions by non-governmental groups. She suggests that the study of cross-border corporate environmental management is fertile ground for the further study of FDI–environment linkages.

In Chapter 3, John Mugabe considers the relationship between FDI and sustainable development in SSA. He finds that, despite major policy, legislative and institutional reforms aimed at attracting foreign investment, FDI flows to countries in SSA remain very low.

Using illustrative cases, Mugabe argues that a more fundamental concern than quantity is the quality of FDI inflows; that is, whether FDI contributes to the enlargement of livelihood options, respect and protection of social and labour rights, protection of the environment and overall economic development. He concludes that there is a mismatch between the goals of FDI regimes and those of environmental and social regulations, and argues for the explicit integration of environmental and poverty reduction considerations into FDI policies, laws and practices.

In Chapter 4, Simon Tay and Iris Tan examine how the integration of sustainability into investment rules might play out in Southeast Asia. They argue that sustainable development remains overshadowed by bread-and-butter issues. Despite widespread and severe environmental degradation, FDI continues to be highly sought after by Southeast Asian governments. They also find that a growing number of promising, on-the-ground initiatives are promoting a more sustainable approach to development and suggest that greater environmental awareness marks the emergence of a new public consciousness.

## 'Investors Rule': The Governance of International Investment

The political dynamics of international investment rules focus on the nexus between TNCs, host states and home (capital exporting) states. The point of investment agreements is to define rights and responsibilities of the three parties – what they can, cannot and must do. In the absence of overarching rules, the relationship between TNCs and host governments is governed solely by national policies and direct bargaining. Even with supra-national rules, national bargaining power influences where and how TNCs invest.

The interests of the three parties are not the same. For TNCs, foreign investment is motivated by the search for rents and/or market share. TNCs seek to protect their intellectual property and maximize control over their operations.

In investment agreements they seek protection from uncompensated expropriation and other discriminatory host government actions, as well as freedom of access to national investment opportunities.

For host governments, inward foreign investment is not only a potential source of growth and technology transfer but also a potential avenue for instability and, because of profit repatriation and lack of accountability, for exploitation. Host governments seek to gain access to TNC intellectual property and, representing the public interest, to exercise sufficient control over TNC operations to reap economic gain and to minimize environmental and social harms.

For home country, capital-exporting governments, outward foreign investment by domestic TNCs is a multi-headed beast. On one hand it can be a source of political and economic advantage in foreign policy. Promoting the foreign interests of large companies can also redound to political advantage at home. On the other hand, foreign investment by TNCs can lead to 'outsourcing', draining domestic jobs and productive capacities. Home country governments tend to seek maximum opportunities for and protection of TNCs in investment agreements . Depending on the political stripe of the government, they may also seek to regulate TNCs' overseas behaviour.

Supra-national investment agreements shape the bargaining space between TNCs and home and host governments. In the 1970s, an attempt was made by the UN to tilt bargaining power towards developing countries. A code of conduct for TNCs, developed by the Center for Transnational Corporations, focused largely on defining the social and economic responsibilities of TNCs towards host countries and communities. However, the code was not adopted and the Center was eventually disbanded.

In the 1990s, the emerging international investment regime tilted bargaining power the other way, towards TNCs and their governments. While there is yet no overarching international institution governing investment, the tilt is evident in national policies, as well as provisions in three types of piecemeal agreements:

- bilateral investment treaties (BITs);
- regional agreements, most notably Chapter 11 of the North American Free Trade Agreement (NAFTA); and
- Trade Related Investment Measures (TRIMS), negotiated under the auspices of the WTO.

The tilt towards foreign investors is evident, first of all, in the absence of defined social, economic and/or environmental responsibilities for TNCs in BITS and NAFTA. Rather, the agreements focus solely on defining and expanding the rights of investors, and the responsibilities of host states to protect them.

The tilt is also evident in the policy constraints it puts on host governments. Under the TRIMS agreement, as well as in BITs and NAFTA, governments are prohibited from imposing a range of performance requirements for TNCs, such as the requirement to buy imports from domestic suppliers, or to export a given portion of locally manufactured products. Many studies have shown that such requirements have been effective in stimulating domestic industries in both developed and developing countries (Kumar, 2003; Moran, 1998).

Finally, the tilt is perhaps most evident in the new rights it gives to investors in disputes with host governments. NAFTA's Chapter 11, as well as most BITs, grant investors the right to directly sue host governments in a variety of international tribunals. In earlier times, such disputes were handled state-by-state by host and home country governments.

Coupled with poorly defined justifications for a suit, investor–state arbitration mechanisms open the door to an attack by TNCs on the host government's right to regulate. In a rash of high-profile cases in the last five years, TNCs have sued host governments for enacting domestic environmental and health policies which could adversely impinge on company revenues.

In Chapter 5, Luke Peterson examines the procedural problems of the dispute settlement mechanisms found in BITs. In the main, these mechanisms were simply grafted onto BITs from the secretive world of international commercial arbitration. Meant for disputes involving two private parties, they are not required to make public even the fact that a suit has been filed, let alone substantive arguments – notwithstanding the fact that the suit targets public policy measures. Moreover, the multiplicity of BITs and arbitration mechanisms means that an aggrieved TNC can go 'jurisdiction shopping', filing a suit in the arbitration venue most likely to rule in its favour.

Peterson also looks for evidence that the BITs have actually helped developing countries to attract FDI, and finds none. While there may be marginal disadvantage in not having a BIT, there seems to be no net advantage in having one. In short, the BIT imposes a social cost – a dispute settlement mechanism which does not meet the standards for transparency, legitimacy and accountability required when public policy objectives are weighed against private interests – while delivering no net economic benefit.

In Chapter 6, Aaron Cosbey examines problems with the procedural and substantive provisions of NAFTA's Chapter 11. He argues that the intent of Chapter 11 – to protect North American investors from mistreatment at the hands of government – has been construed by TNCs to attack domestic environmental, health and safety measures that might incidentally harm their interests. The attack is made possible by Chapter 11's shortcomings, including the lack of transparency, accountability and legitimacy in the investor–state dispute settlement process; the broad definition of 'investors'; and the overly broad interpretations of host state obligations in areas such as expropriation, non-discrimination and minimum standards of treatment.

## Towards a Sustainable and Ethical International Investment Regime

The emerging international investment regime is fundamentally off kilter. In terms of domestic policy, it over-weights the role of FDI as an elixir of development at the expense of homegrown firms and markets. In international agreements, it tilts towards the interests of foreign investors at the expense of domestic firms and host governments' ability to regulate in the public interest.

Balance should be the central principle of an investment regime which aims to promote sustainable development – balance between private rights and public goods; balance between investor rights and investor responsibilities; and balance in development strategies between promoting domestic producers and encouraging foreign investment.

In international investment agreements, there is also a need for balance between universality and specificity, that is, between global norms and local jurisdiction. The global economy is far too differentiated for it to be governed fairly, efficiently and sustainably by an overly prescriptive set of top-down rules.

From one angle of approach, the global–local problem is revealed in the gap between developed and developing countries. Investment rules that ban performance requirements strip developing-country governments of policy tools that have historically stimulated industrial development. As one account put it: 'When equal rules apply in unequal situations, the result is inequity'.

From another angle of approach, the problem is the gap between universal rules and global adjudication mechanisms versus on-the-ground realities and local adjudicating institutions. The European Union has adopted the principle of subsidiarity – the idea that action should be taken at the lowest level of governance consistent with effectiveness. Subsidiarity is especially relevant to environmental management, because ecosystem and natural resource conditions depend on place. Unlike economic regimes, the principle of subsidiarity is found in many international environmental regimes.

The chapters in this book address aspects of the imbalances that currently characterize investment rules and offer pointers towards a better pivot. Focusing on the over-emphasis of FDI in development strategies, Zarsky and Gallagher (Chapter 1) suggest that, rather than attracting FDI *per se*, macroeconomic policies should aim to enhance the overall climate for investment, both domestic and foreign They argue that the central objective of development strategies should be to nurture endogenous local capacities for sustainable production, and that they should be aimed more at local than global markets. With the proper policies and institutions, FDI could potentially be of service in that objective.

John Mugabe (Chapter 3) calls for the integration of social and environmental regulation into the governance of FDI at national and supra-national levels. Pointing towards bitter clashes over the integration of trade and environment, Tay and Tan (Chapter 4) argue that any international investment regime that seeks to promote sustainable development must be based on engaging, rather than bullying, developing countries.

Peterson (Chapter 5) and Cosbey (Chapter 6) address the imbalance between investor rights and public goods. Peterson suggests that a multilateral investment agreement should address the procedural shortcomings and jurisdictional confusion found in the multiplicity of arbitration mechanisms found in BITS. A set of common, transparent rules governing investor–state arbitration would be a good start. Cosbey examines four potential solutions to the problems of NAFTA's Chapter 11, including amendment of the substantive provisions and reform of two key arbitration mechanisms.

In Chapter 7, Konrad von Moltke grapples with defining a balance between global norms and local jurisdiction as found in the interpretation of the principle of non-discrimination. Focusing on standards of post-establishment treatment of foreign investors, von Moltke argues that, at its most fundamental, non-discrimination simply means equality before the law – a worthy objective. When applied to changing and place-specific environmental management requirements, however, the interpretation of non-discrimination can be murky and complex, and can generate perverse outcomes.

Investments are made at different times, in different places, by different companies. Achieving environmental objectives may oblige local and national governments to set standards which are different as those between domestic, as well as foreign, companies. Newer investments, for example, often must meet higher standards than older ones, not least because newer technology makes higher standards feasible. An overly universal interpretation of non-discrimination, set at the regional or global level, could constrain and undermine national and local environmental policy. On the other hand, an overly local interpretation could undermine the principle of non-discrimination.

To find the right balance, von Moltke suggests that investment regimes be modelled on multilateral environmental agreements (MEAs). Based on the principle of subsidiarity, MEAs typically identify a broad global norm and objective, while leaving the specifics of implementation to participating nations. Von Moltke suggests that the parallel in investment regimes would be a global embrace of the broad principle of non-discrimination, while assigning the interpretation of unfair discrimination to local and national institutions.

In Chapter 8, Sandy Buffett addresses the imbalance between investor rights and investor responsibilities by proposing changes in corporate governance. Rules, relationships and expected standards for accountability and disclosure are at the heart of corporate governance. Traditional shareholder-led models of corporate governance have not clearly defined a company's accountability for environmental impacts. However, recent corporate accounting and governance scandals and growing calls by civil society for minimum corporate environmental and social standards provide traction for elevating an enhanced corporate governance and disclosure framework into the international policy arena.

Buffett argues that a good place to start is to define mandatory disclosure requirements for TNCs in their global operations. The OECD's Corporate Governance Principles and Guidelines for Multinational Enterprises both offer a useful framework. However, both are voluntary principles. The inclusion of disclosure obligations in multilateral, regional and bilateral investment agreements would help to move towards the creation of a binding and international multi-stakeholder corporate governance framework.

As a whole, the chapters in this volume point to the conclusion that steering foreign investment towards sustainability and equity will require advocacy and policy action on several fronts. Much water has already passed under the bridge. Even if activists and developing countries continue to fend off a global investment agreement in the WTO, there is still the multiplicity of BITS to deal with, as well as NAFTA. Most important, despite evidence to the contrary, there is the reigning orthodoxy that FDI is an elixir for development, and that investment agreements that favour foreign investors over public goods are needed to attract it.

This book aims to marshal economic and legal arguments that contribute to the rethinking of both assumptions, and to offer pointers to greater balance in the governance of investment. If we have taken even small steps, our purpose will be more than fulfilled.

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