

has shifted over time.<sup>33</sup> It may do so again, and in either direction. This will depend, among other things, on the attitudes of judges, scholars, and states and state officials. For example, to the extent that the current convergence is driven by the practices of the ICJ and other institutions, it might also be reversed by those institutions. How this plays out in the future may depend on, for example, the disposition of individual members, what cases that are brought before different courts and tribunals, substantive developments in international law, and external political contexts.

*Sondre Torp Helmersen\**

Pierre-Marie Dupuy and Jorge E. Viñuales (eds.), *Harnessing Foreign Investment to Promote Environmental Protection. Incentives and Safeguards*, Cambridge, Cambridge University Press, 2013, 470 pp., ISBN 9781107030770 (hardback), US\$129.99  
doi:[10.1017/S092215651600042X](https://doi.org/10.1017/S092215651600042X)

The international community is now aware that there are urgent environmental challenges that need to be addressed. Important changes need to be introduced in the common behaviours of peoples in their everyday lives, such as the industrial production processes, the public and private transportation systems or the way houses are heated. These and many other core changes of contemporary society come at a cost and require shifting substantial financing towards a greener and low-carbon economy in industrialized countries and – even more challenging – in developing states and emerging economies. These are among the crucial matters that were recently discussed during the climate change negotiations under the UN Framework Convention on Climate Change (UNFCCC) which resulted in the Paris Agreement.<sup>1</sup> The Paris Agreement envisages reinforced financial commitments of developed countries for mitigation and adaptation initiatives to promote the transition to low-carbon economies in developing states and emerging countries and encourages the participation of the private sector.<sup>2</sup> Many politicians, negotiators, businessmen, scholars of various disciplines are focusing their attention on how to encourage and implement these changes and who should pay for them.

Touching upon these challenges, this book describes various types of ‘green’ private sector investments, assesses their contribution to environmental protection and highlights their valuable aspects, as well as their shortcomings. Considering the interface of legal, economic and policy aspects of these matters, this volume

<sup>33</sup> Pp. 503–5.

\* PhD Research Fellow, Department of Public and International Law, Faculty of Law, University of Oslo, Norway [[s.t.helmersen@cantab.net](mailto:s.t.helmersen@cantab.net)].

<sup>1</sup> The Paris Agreement consists of a preamble and 29 articles and is found in an Annex to a Decision (*Draft Decision -/CP.21*) of the Conference of the Parties that provides for interpretative and complementary guidelines on its application. As regards its legal nature, the Agreement is an international treaty which will be open for signature by states on 22 April 2016.

<sup>2</sup> Paris Agreement, Art. 9.

adopts an interdisciplinary approach and counts on a team of experts with complementary legal (scholars and practitioners), economic and policy backgrounds who provide insightful views on environmental governance. The authors and the co-editors identify innovative approaches and propose ways to increase the quantity of financial resources and make their transfers more effective.

The book is divided into three parts. The first part traces the landmark passages in the evolution of international environmental law (Dupuy),<sup>3</sup> and presents the actual challenges of implementation from a legal (Francioni; Maljean-Dubois and Richard)<sup>4</sup> and economic perspective (Luterbacher; Larcom and Swanson). The chapters in the second part are devoted to pro-environment investments, labeled as forms of incentives (Jesko Langer, Firger, Pavoni, Surminski and Athanasakou), while the third part covers traditional foreign investments under bilateral investment treaties (Viñuales and Douglas), activities carried out by multinational corporations (Morgera) and the projects regulated by specific contractual arrangements (Affolder).

While the subtitle of the volume refers to 'incentives and safeguards' and the sections of the volume are divided so as to reflect this dichotomy, this criterion does not appear well suited to distinguish two separate categories of investments. All these instruments should provide incentives to environmental protection and at the same time they should be combined with adequate safeguards. In a sustainable development perspective, also the legal instruments applicable to these investments, be they environmental agreements, trade and investment treaties or non-state actors' standards, should be considered in an integrated way. Mirroring this vision, the co-editors, when presenting the volume, say that: 'Taken together, the essays gathered in this volume are an attempt at providing a unified and coherent view of ways to harness foreign investment to promote environmental protection.'<sup>5</sup>

This edited volume presents interesting data regarding the state of the art in the field of private foreign investments in environmental related sectors. It also provides insightful views on the role and the intertwining of the private and public sector and addresses very timely questions, such as: do private sector standards, such as corporate social responsibility (CSR) instruments develop in the absence of state action? Are these regulatory tools complementary or substitutes of governmental action? Irrespective of how they come into existence, how do they develop and may they strengthen their legal nature when they are incorporated into other legal instruments?

The contributions by Maljean-Dubois and Richard, Morgera and Richardson describe the international legal framework developed by, and applicable to, private

<sup>3</sup> P.-M. Dupuy, 'International environmental law: looking at the past to shape the future', in P.-M. Dupuy and J.E. Viñuales (eds.), *Harnessing Foreign Investment to Promote Environmental Protection. Incentives and Safeguards* (2013), 9 at 20 identifies as one of the challenges the soft and hard law distinction and the 'partitioning of legal orders'.

<sup>4</sup> F. Francioni, 'The private sector and the challenge of implementation', in Dupuy and Viñuales (eds.), *supra* note 3, 24, at 30, the author traces possible ways forward to better address the challenges of implementation of international environmental law, among which he suggests reconsidering the concept of state sovereignty in a 'functional' and 'responsible' perspective.

<sup>5</sup> P.-M. Dupuy and J.E. Viñuales, 'Introductory Observations', in Dupuy and Viñuales (eds.), *supra* note 3, 1 at 5.

enterprises. Richardson<sup>6</sup> reviews different types of Social Responsible Investments (SRI) and groups them according to who designed them (financiers' codes, public authority codes, joint financier-public authority codes, third parties' codes, joint financier-third party codes). In his view, responsible investors are not only (if at all!) moved by social and environmental good intentions but rather by the quest for financial advantages they can draw from more ethical business practices.<sup>7</sup>

Maljean-Dubois and Richard<sup>8</sup> highlight the multiplication of legal regimes and the blurring boundaries between international and domestic law, between soft and hard law, and between 'rule makers' and 'rule takers', namely the addressees of the decisions, deriving from the transnational instruments that regulate the activities of business operators.<sup>9</sup> Morgera<sup>10</sup> deepens the analysis of corporate responsibility and accountability mechanisms by exposing their shortcomings but also their convergence in the definition of procedural and substantive international environmental standards. As for the first category, a noticeable development is the rising importance of transparency as a driving factor towards higher compliance rates,<sup>11</sup> and the increased recognition and endorsement of environmental impact assessment, prior informed consent, and of the need to undertake consultations and ensure benefit sharing with the stakeholders involved in, or likely to be affected by, the project. Less developed is the second category of substantive standards, such as the sustainable management of natural resources, the control of greenhouse gases reductions, and the respect for internationally protected sites.<sup>12</sup>

Looking at financial markets, Langer<sup>13</sup> elaborates on the creation of sustainability indexes in stock exchanges worldwide and reflects upon the 'hardening' of the duty of asset managers to take into account environment and social criteria which may reach the level of a mandatory requirement to incorporate them into their investment strategies. Interestingly, the author foresees a potential liability for negligence and breach of fiduciary duties in case of lack of consideration of environmental, social and governance (ESG) criteria.<sup>14</sup>

Based on the reading of these chapters, it would appear desirable to enhance the cross-fertilization and the complementarity between the implementation of these CSR and accountability mechanisms with parallel government regulations.<sup>15</sup>

<sup>6</sup> Ch. 14.

<sup>7</sup> B.J. Richardson, 'Socially responsible investing through voluntary codes', in Dupuy and Viñuales (eds.), *supra* note 3, 383 at 386.

<sup>8</sup> Ch. 4.

<sup>9</sup> S. Maljean-Dubois and V. Richards, 'The applicability of international environmental law to private enterprises', in Dupuy and Viñuales (eds.), *supra* note 3, 69, at 74 and 81.

<sup>10</sup> Ch. 12.

<sup>11</sup> On this matter, see also Maljean-Dubois and Richards, *ibid.*, at 89. Transparency of initiatives undertaken by states for climate change mitigation and adaptation and climate finance is also a central ingredient in the Paris Agreement (art. 14) which should enhance the comparability of the action taken.

<sup>12</sup> E. Morgera, 'From corporate social responsibility to accountability mechanisms', in Dupuy and Viñuales (eds.), *supra* note 3, 321 at 326.

<sup>13</sup> Ch. 6

<sup>14</sup> M.J. Langer, 'Key instruments of private environmental finance: funds, project finance and market mechanisms', in Dupuy and Viñuales (eds.), *supra* note 3, 131 at 152–3.

<sup>15</sup> See, for instance, Morgera, *supra* note 12, at 328 noting that: 'when stakeholder consultations are the responsibility of the host government, the client is expected to conduct a complementary process if the government-led engagement does not meet the policy and performance standards of the IFC'.

Similarly, a complementary role has been played by NGOs when they deemed that the CSR initiatives undertaken were inadequate.<sup>16</sup>

A laudable approach found throughout the book is to revisit from a different angle traditional issues pertaining to the environment-investment nexus and to grasp cutting-edge matters, which have been allegedly under-explored by mainstream scholarship. In this vein, Affolder<sup>17</sup> focuses on project-specific agreements, conservation partnerships and contracts, highlighting the important role they play as instruments of environmental governance. Following a similar approach, Pavoni<sup>18</sup> looks at innovative contractual schemes, namely the payment for ecosystem services, used in the biodiversity sector and Surminsky<sup>19</sup> explores insurance risk transfer investments, whose importance is growing in the field of adaptation to climate change impacts.

In the final part of the volume, the contributions address international investment law matters and their potential interactions with environmental rules. In a commendable manner, these chapters synthesize long-lasting scholarly research, by briefly recalling the state of the art with regard to core issues, such as the scope of jurisdiction of investment tribunals and the applicable law to investment disciplines, and then move forward and propose noteworthy and progressive views. In this regard, it is worth mentioning the remarks by Douglas<sup>20</sup> who investigates the scope for enforcing international environmental norms through counterclaims by the host states before investment tribunals. He reaches the conclusion that this option is possible, for instance, when the dispute concerns international norms incorporated into a contract between the investor and the host state and the counterclaim is based on the investment endorsed by the same contract.<sup>21</sup>

One of the leitmotifs of the book relates to the multiple sources of legal instruments relevant to the investment-environment nexus and the blurring boundaries between the legal orders to which they pertain. Other interesting themes that emerge across the volume are the interaction between soft and hard law instruments (for example, their cross-fertilization) and the legal effects of their evolutions (for example, through incorporation and cross-references). Indeed, voluntary instruments may strengthen and become non optional for enterprises once they have adhered to them.<sup>22</sup> Furthermore, soft law instruments may be upgraded through their incorporation in contracts, national legislation, WTO rules and serve as interpretative tools in the settlement of investment disputes.<sup>23</sup> Thought-provoking reflections are set forth by Viñuales, who stresses that notwithstanding the soft legal nature of the

<sup>16</sup> Morgera, *supra* note 12, at 340 referring to the case of the NGO OECDWatch which considering inadequate the implementation of the OECD Guidelines, produced quarterly updates on the filing, conclusion or rejections of instances.

<sup>17</sup> Ch. 13.

<sup>18</sup> Ch. 8.

<sup>19</sup> Ch. 9.

<sup>20</sup> Ch. 15.

<sup>21</sup> Z. Douglas, 'The enforcement of environmental norms in investment treaty arbitration', in Dupuy and Viñuales (eds.), *supra* note 3, 415 at 435.

<sup>22</sup> Maljean-Dubois and Richards, *supra* note 9, at 90–2.

<sup>23</sup> See Douglas, *supra* note 21, at 438 exploring the possibility that investment arbitral tribunals have the power to operationalize international environmental norms by translating them into standards.

OECD Guidelines for Multinational Enterprises, the standards they envisage may be taken into account by an investment tribunal in assessing whether the legitimate expectations of a foreign investor meet the reasonableness test.<sup>24</sup>

As a final remark, perhaps the book currently displays, at times, a level of repetitiveness and disconnection between the chapters and it could have benefitted from a closer interaction, possibly a dialogue, between the authors/chapters, in particular between those with different backgrounds. While it is certainly a great step forward to have an edited volume collecting chapters covering economic, legal and policy perspectives, it would have been interesting to have the economists follow up on problems raised by the legal scholars and vice versa. For example, when Luterbacher raises the issue of ‘carbon leakage’<sup>25</sup> as a danger deriving or promoted by unilateral environmental regulations not combined with multilateral rules, it would have been useful to have feedback on this point by legal scholars and policy makers. Similarly, when the same author discusses the interpretation of the notion of common but differentiated responsibilities under the climate change regime, a constructive exchange of ideas would be in order to combine efforts to clarify the meaning and effects of this principle.<sup>26</sup> Harnessing the interaction and understanding among different disciplines relevant for the regulation of private foreign investment would greatly contribute to fine-tune the existing regulatory instruments and to elaborate on new ones to better promote environmental protection. This work is a useful reading not only for academics and scholars of policy, legal and economic disciplines engaging in sustainable development matters, but also for practitioners (lawyers, judges and arbitrators), civil servants and negotiators involved in designing present and future legal instruments.

*Francesca Romanin Jacur\**

<sup>24</sup> J.E. Viñuales, ‘The environmental regulation of foreign investment schemes under international law’, in Dupuy and Viñuales (eds.), *supra* note 3, 273, at 301.

<sup>25</sup> Defined by the author as ‘the transfer of production to parts of the world that are less constraining than the countries of origin’. (U. Luterbacher, ‘The political environment of environmental law’, in Dupuy and Viñuales (eds.), *supra* note 3, 50 at 54).

<sup>26</sup> Luterbacher, *ibid.*, at 58.

\* PhD (Milan), Adjunct Professor of International Environmental Law at the University of Milan, Italy [[francesca.romanin@unimi.it](mailto:francesca.romanin@unimi.it)].