Book Review—*Integrating Sustainable Development in International Investment Law: Normative Incompatibility, System Integration and Governance Implications* by Manjiao Chi

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International investment law is a field of law that is characterized by an important and constant evolution. The constitutive instruments of international investment law, international investment agreements (IIAs),[1] are continually metamorphosing to take into account the concerns expressed towards the regime and to provide an adequate legal framework for the changing economic realities and the nature of the activities they are called to regulate. It is especially the case given the far-reaching consequences and impacts of international investment law on, amongst other things, host states' right to regulate.

In *Integrating Sustainable Development in International Investment Law: Normative Incompatibility, System Integration and Governance Implications*,[2] Professor Manjiao Chi addresses the evolution of international investment law with respect to one specific concept: sustainable development. In particular, this book provides a comprehensive analysis of sustainable development-related concerns raised by the regime of international investment law and it identifies ways in which sustainable development is—insufficiently—taken into

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1 The origins of international investment treaties can be traced back to the conclusion of the 1959 bilateral investment treaty between Germany and Pakistan (*Treaty for the Promotion and Protection of Investments*, Pakistan and Germany, 25 November 1959, 457 UNTS 23 (entered into force 28 April 1962)). It is worth observing, however, that the origins of international investment law pre-date the development of international investment treaties and lie mostly in customary international law.

2 Manjiao Chi, *Integrating Sustainable Development in International Investment Law: Normative Incompatibility, System Integration and Governance Implications* (Abingdon, UK: Routledge, 2018).

account by the regime. Finally, it proposes avenues for the regime to evolve towards a broader inclusion of sustainable development concerns through the incorporation of new substantive and procedural provisions of IIAs.

At a moment in time when international investment law and arbitration are increasingly under scrutiny for their real or perceived lack of legitimacy by civil society organizations, scholars, and states alike, this book is timely and of the upmost relevance for treaty negotiators and policymakers, but it will also undoubtedly be an important reference for scholars and practitioners. Although several books[3] have been dedicated to the study of the interaction between international investment law and sustainable development, an interesting aspect of Professor Manjiao Chi's book resides in its analysis of recent international investment law initiatives that are increasingly addressing sustainable development.

This book is divided into three Parts composed of eight Chapters and it provides a solid foundation to navigate the intricate interaction between international investment law and sustainable development. The first Part addresses the challenges for international investment law and IIAs to take into account sustainable development. The second Part analyses ways in which sustainable development is taken into account in the web of IIAs that compose the universe of international investment law. The last Part is dedicated to an analysis of how the international investment law regime and its IIAs can build an improved relationship with sustainable development through a broader integration of this concept.

One of the major difficulties when it comes to the analysis of sustainable development is the challenge of clearly defining the sustainable development concept. Indeed, sustainable development is a notion whose contours are blurry and often difficult to distinguish clearly. In this regard, Manjiao Chi provides in the first Chapter an insightful and well-documented, albeit brief, analysis of what the notion of sustainable development refers to and of its difficult and uncertain evolution into a legal norm. Although the author does not actually develop a clear definition of "sustainable development", several international initiatives that attempted to do so are mentioned and are used to provide a list of issues subsumed under the concept. In this first Chapter, the author also provides a broad overview of the evolution of IIAs and of their traditional inclusion of references to sustainable development in their preambles. The purpose of this analysis, as announced by the author, is not to offer a comprehensive understanding of what sustainable development and IIAs are. Rather, it aims to provide the necessary background to understand the topics that are analysed in the following Chapters of the book. This exercise is accomplished masterfully given the complexity of the many notions that are addressed. The author provides brief and clear explanations of the most important aspects of the notion of "sustainable development" and of IIAs.

The second Chapter of the first Part proceeds to analyse recent policy initiatives that aim at enhancing the integration of sustainable development in the international investment

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[3] See e.g. Marie-Claire Cordonier Segger, Markus W Gehring & Andrew Newcombe, eds, *Sustainable Development in World Investment Law,* Global Trade Law Series, vol 30 (Alphen aan den Rijn, the Netherlands: Kluwer Law International, 2011); Olivier De Schutter, Johan Swinnen & Jan Wouters, *Foreign Direct Investment and Human Development: The Law and Economics of International Investment Agreements* (New York: Routledge, 2013); Stephan W Schill, Christian J Tams & Rainer Hofmann, eds, *International Investment Law and Development: Bridging the Gap* (Cheltenham, UK: Edward Elgar, 2015).

law regime. The chronological analysis of such initiatives is interesting, as it illustrates the growing realization by treaty drafters and policymakers of the importance of taking sustainable development into account in the international investment law regime. The surveyed initiatives provide an overview of the approaches that are adopted in different parts of the world and groups of countries, including the South African Development Community (SADC),[4] the countries of the Commonwealth,[5] the European Union,[6] and Organisation for Economic Co-operation and Development (OECD) countries.[7] United Nations Conference on Trade and Development (UNCTAD) initiatives are also part of the analysis.[8] However, it is not always clear why these initiatives have been chosen and not others, such as the 2016 Indian Model Bilateral Investment Treaty (BIT)[9], which is often used as an example of an initiative that illustrates the growing need to take into account values pertaining to sustainable development in international investment law. The choice to locate this Chapter at the beginning of the book is also interesting: although it both addresses previous initiatives (such as the 2004 International Institute for Sustainable Development Model IIA) and very recent initiatives (such as the EU's proposal for an investment court system), one might have expected to read about such initiatives at the end of the monograph. Such a structure would ultimately have allowed a better understanding, on the basis of the other Chapters, of the significance of these initiatives.

The second Part of the book goes to the heart of the topic by analysing how sustainable development is considered in the current international investment law regime and why existing IIAs do not sufficiently or adequately incorporate sustainable development. The major contribution of this Part resides in the exhaustive analysis of the content of IIAs with respect to sustainable development. The analysis is not limited to the study of preambles or of new treaties that address sustainable development more extensively. Rather, many aspects of IIAs and well-known provisions are analysed through the lens of sustainable development. The first Chapter analyses expropriation and fair and equitable treatment (FET) provisions, referred to

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4 Southern African Development Community, "SADC Model Bilateral Investment Treaty Template with Commentary" (July 2012), online (pdf): <http://www.iisd.org/itn/wp-content/uploads/2012/10/sadc-model-bit-template-final.pdf> [*SADC Model BIT*].

5 Prepared for the Commonwealth Secretariat by J Anthony VanDuzer, Penelope Simons & Graham Mayeda, *Integrating Sustainable Development into International Investment Agreements: A Guide for Developing Countries* (Commonwealth Secretariat, 2012), online: <www.iisd.org/pdf/2012/6th_annual_forum_commonwealth_guide.pdf>.

6 See e.g. European Commission, "Concept Paper – Investment TTIP and beyond: the path for reform" (2015), online (pdf): *European Commission* <trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.pdf>.

7 Kathryn Gordon, Joachim Pohl & Marie Bouchard, "Investment Treaty Law, Sustainable Development and Responsible Business Conduct: A Fact Finding Survey" (2014) OECD Working Papers on International Investment No 2014/01.

8 UNCTAD, "Investment Policy Framework for Sustainable Development" (2012), online (pdf): <unctad.org/en/PublicationsLibrary/diaepcb2012d5_en.pdf>; UNCTAD, "Investment Policy Framework for Sustainable Development" (2015), online (pdf): <unctad.org/en/PublicationsLibrary/diaepcb2015d5_en.pdf>.

9 Indian Government, "Bilateral Investment Treaty between the Government of the Republic of India and -------" (2016), online (pdf): <www.mygov.in/sites/default/files/master_image/Model%20Text%20for%20the%20Indian%20Bilateral%20Investment%20Treaty.pdf> [*Indian Model BIT*].

by the author as "substantive sustainable development provisions of IIAs".[10] The link drawn between these standard international investment law protections and sustainable development mostly consists of the impact that they have on host states' regulatory power and "regulatory chill", although it also includes an analysis of the integration of external principles, such as equity in the investment process through the FET principle and the latter's conceptualization as an expression of the rule of law.[11] This Chapter starts with an explanation of expropriation and FET provisions and proceeds to analyse how such provisions can strike a balance between the protection of investors and the preservation of states' legitimate regulatory power. As announced, the angle through which sustainable development is analysed in connection with such provisions consists of the fact that these provisions have "restraining effects [that] have become an unavoidable governance obstacle for states when pursuing sustainable development goals".[12] The Chapter thus provides a descriptive analysis of "balance paradigms" that exist in the investment treaty universe: it identifies different paradigms, including the "element-listing paradigm", the "carved-in exception paradigm", the "mitigation paradigm", and the "differentiation paradigm".

The second and third Chapters of Part II (Chapters 4 and 5 of the book) address other types of provisions that are increasingly incorporated in IIAs and that illustrate a recent trend in investment treaty-making: the broader inclusion of exception provisions and public interest provisions in IIAs.[13] In these two Chapters, the author undertakes a brief analysis of a number of clauses. Chapter 4 focuses on two specific types of exception provisions: general exception provisions and security exceptions. The analysis of these provisions is based on an analogy with similar provisions in the WTO framework and ends with an analysis of the application of security exceptions in the context of the Argentinean crisis.[14] Chapter 5 undertakes an analysis of the inclusion of environmental provisions (which include the protection of the environment as well as health and safety) as well as labour, human rights, and corporate social responsibility provisions in such agreements.

One of the examples used by the author to illustrate the reactive characteristic of international investment law consists of the inclusion of a provision dealing with tobacco control measures in the Trans-Pacific Partnership (TPP)[15] following tobacco-related investor-state arbitration (ISA) claims, in particular the claims brought by tobacco manufacturer Philip

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10 Manjiao Chi, *supra* note 2 at 41.

11 *Ibid*.

12 *Ibid* at 56.

13 See e.g. Armand de Mestral & Lukas Vanhonnaeker, "Exception Clauses in Mega-Regionals (International Investment Protection and Trade Agreements)" in Thilo Rensmann, ed, *Mega-Regional Trade Agreements* (Cham, Switzerland: Springer, 2017) 75.

14 In the early 2000's, Argentina went through a financial and economic crisis which led the country to enact several measures pursuant to its "emergency law" that aimed at redressing the country's situation. Several investor-state arbitration procedures were initiated by foreign investors against Argentina as a consequence of these measures.

15 *Comprehensive and Progressive Agreement for Trans-Pacific Partnership*, 8 March 2018, art 1.1, incorporating the provisions of the *Trans-Pacific Partnership Agreement*, 4 February 2016, art 29.5 (not yet entered into force).

Morris against Australia.[16] This example is very relevant and topical. However, one is left wondering why the author decided to draw most of the reader's attention to the case brought against Australia, which was dismissed on jurisdictional grounds, while merely mentioning Philip Morris's claim against Uruguay.[17] The latter claim would have provided an important illustration of how sustainable development can be integrated in international investment law: the International Centre for Settlement of Investment Disputes (ICSID) Tribunal relied extensively on considerations pertaining to sustainable development to dismiss, by a majority decision, the investor's claims on the merits, despite the absence of an exception provision in the applicable IIA.[18]

Chapters 4 and 5 provide a very good overview of the trend towards incorporating exception provisions and public interest clauses in IIAs. However, the author seems at times to take for granted that answers to many concerns lie in the more systematic inclusion of extensive provisions, such as exception clauses in IIAs. The evolution towards a broader inclusion of such provisions in IIAs to rebalance the rights and obligations of investors and states is undeniable. However, it is less clear whether such provisions will be useful in practice when invoked before investment tribunals[19] or even whether they might have, albeit counterintuitively, the negative impact of limiting the interpretation power of tribunals by restricting their ability to consider legitimate government concerns which are not explicitly listed in exception clauses.[20]

Chapter 6, the last Chapter of Part II, addresses the inclusion of sustainable development in IIAs via procedural provisions. In particular, this Chapter focuses on the efforts that have been made in recent agreements and procedural rules to enhance the transparency of ISA proceedings. This Chapter also addresses the difficult issue of creating an appellate mechanism and the importance of furthering state cooperation. This mostly descriptive Chapter is important as, consistent with the broad understanding of "sustainable development" adopted in the book, it extends the analysis of the role and place of sustainable development in IIAs to the procedural aspects of this regime. This exercise includes, *inter alia*, an extensive analysis of the different dimensions of transparency, such as informational transparency, adjudicative transparency, and participatory transparency.

Part III is composed of the two most interesting Chapters of the book, which provide an analysis of how the international investment law regime can and should be modified or

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16 *Philip Morris Asia Limited v The Commonwealth of Australia* (2015 Award on Jurisdiction and Admissibility), UNCITRAL (Permanent Court of Arbitration).

17 *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v Oriental Republic of Uruguay* (2016 Award) (International Centre for Settlement of Investment Disputes) [*Philip Morris v Uruguay*].

18 *Agreement on the Reciprocal Promotion and Protection of Investments*, Switzerland and Uruguay, 7 October 1988, 1976 UNTS 389 (entered into force 22 April 1991).

19 In *Philip Morris v Uruguay*, *supra* note 17, the tribunal relied on sustainable development instruments despite the absence of an exception clause in the applicable investment agreement to decide in favour of the host state.

20 See e.g Aaron Cosbey, "The Road to Hell? Investor Protections in NAFTA's Chapter 11" in Lyuba Zarsky, ed, *International Investment for Sustainable Development: Balancing Rights and Rewards* (London, UK and Sterling, VA: Earthscan, 2005) 150 at 164–66 and Andrew Newcombe, "The use of general exceptions in IIAs: increasing legitimacy or uncertainty?" in Armand de Mestral & Céline Lévesque, eds, *Improving International Investment Agreements* (New York: Routledge, 2013) 267.

complemented to be more compatible with sustainable development. In particular, this Part contains arguments in favour of a "reconceptualization" of international investment law from the perspective of global governance (Chapter 7) and proposes ways in which sustainable development should be taken more broadly into account in the existing regime (Chapter 8). This Part starts by providing an overview of global governance and proceeds to suggest three reasons why IIAs are incompatible with this concept. In particular, such incompatibility arises from the fragmented nature of international investment law, which is composed of several thousand agreements, the state-centrism of international investment law, and the structural imbalance of IIAs. This Part also explains why investment arbitration is unable to support an effective global investment governance regime because of its "regulatory chill" effect and its inability to protect non-investment interests. Chapter 8 starts with a review of the compatibility gap between international investment law and arbitration and sustainable development, and it argues for the harmonization of sustainable development provisions in IIAs. It also argues for a response to the democratic deficit of IIA-making through enhanced transparency and a broader involvement of non-state stakeholders in the treaty-making process. Although the diverse Chapters of this book propose an array of ways in which sustainable development can be taken into account more adequately in the international investment law regime, the lack of analysis regarding the possible inclusion of investors obligations is striking. This topic of discussion, of the upmost relevance with respect to the central questions of the book, is especially important in light of the recent inclusion of such obligations in the 2016 Indian and 2012 SADC Model IIAs[21] and of the ongoing debate to which they have given rise.[22]

The difficult exercise undertaken by the author of identifying many ways in which sustainable development can be better incorporated into IIAs must be recognized and praised in many regards, as the study of this topic in existing literature is often limited to identifying the sustainable development aspects of investment agreements provided in preambles and exception provisions. However, the broad scope of the analysis, which results from the expansive definition of sustainable development adopted by the author, gives the impression, at times, that the focus of the book is in fact upon the necessity to protect states' regulatory powers, whether considered as an aspect of sustainable development or as a means of protecting the ability to legislate in the public interest and enact sustainable development measures.

Furthermore, although the author announces that the provisions analysed in the book do not constitute an exhaustive list of "sustainable development provisions" provided in IIAs, the analysis would have been even richer had the author elaborated more on why specific provisions were chosen as the topic of analysis. For instance, the growing inclusion of provisions aiming to ensure the proper selection and conduct of arbitrators may, for example, also be qualified as sustainable development provisions given the broad definition of the latter concept that is adopted. Accordingly, if the extension of the qualification of sustainable development to provisions other than those addressing the protection of the environment, for example, is

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21 *Indian Model BIT, supra* note 9; *SADC Model BIT*, *supra* note 4.

22 See e.g. Gabriel Bottini, "Extending Responsibilities in International Investment Law", *The E15 Initiative – Strengthening the Global Trade and Investment System for Sustainable Development* (September 2015), online (pdf): *E15 initiative* <e15initiative.org/wp-content/uploads/2015/09/E15-Investment-Bottini-Final.pdf>; Patrick Dumberry & Gabrielle Dumas Aubin, "How to Incorporate Human Rights Obligations in Bilateral Investment Treaties?" (2013) 3:3 IISD Investment Treaty News 9, online: <www.iisd.org/itn/2013/03/22/how-to-incorporate-human-rights-obligations-in-bilateral-investment-treaties>.

consistent with the definition that is used by Professor Manjiao Chi of sustainable development, an overly expansive understanding of the concept and the analysis undertaken in this book raises the following question: What does not qualify as sustainable development? As explained above and as emphasized by the author, sustainable development is a vague concept. However, an overly expansive understanding of sustainable development might ultimately render this notion empty. Consequently, the reader is sometimes left wondering if the aim of the book is, in fact, to answer each and every criticism directed at international investment law gathered under the *chapeau* of sustainable development.

This book is about the integration of sustainable development into international investment law. It does not take a stance against international investment law, but rather argues for a reconceptualization of it. It also suggests ways in which it should be modified, complemented, and reconceptualized as a sustainable international investment law regime. In doing so, this book raises another important question which might be analysed at greater length: Is it for IIAs to regulate such matters as extensively as the author suggests? The author proposes insightful ways in which sustainable development provisions, whether substantive or procedural, could be incorporated into IIAs, but provides limited analysis of the justification and practical consequences of such a transformation. For instance, the author seems, at times, to adopt a one-sided perspective and, as laudable as this perspective might be, acting as the devil's advocate could enable the reader to better grasp some important underlying issues. For example, is it really for IIAs to regulate matters having to do with corporate social responsibility or human rights? Perhaps more importantly, do investment tribunals have the necessary tools and legitimacy to adjudicate such disputes and assess such matters? Do IIAs, in their present form, create any real impediment to sustainable development?[23]

These questions are not necessarily straightforward, and proposing answers to them would entail *in extenso* analyses. However, doing so would certainly have helped to understand the broader issues and, to a certain extent, the reasons why, to this day, IIAs insufficiently or inadequately address sustainable development and why they mostly rely on soft law instruments to incorporate specific sustainable development values.

As suggested earlier, one weakness of the analysis undertaken in this book is the lack of case law analysis. In this regard, the title of the book, *Integrating Sustainable Development in International Investment Law*, suggests that sustainable development is not only analysed in light of IIAs, but of the regime as a whole.[24] A comprehensive analysis of case law could provide

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[23] For instance, Andrew Newcombe has argued that

> IIAs are not an impediment to sustainable development. Indeed, aspects of the IIA regime actively promote sustainable development. In the language of the World Investment Report, there is sufficient policy space and flexibility under IIAs for regulation in the public interest. The real impediment to sustainable development is the intensely difficult task of integrating economic, environmental and social consideration in local, national and global communities that have conflicting interests and values.

(Andrew Newcombe, "Sustainable Development and Investment Treaty Law" (2007) 8:3 J World Investment & Trade 357 at 407).

[24] The literature on this topic is indeed often explicit in this regard and it is generally specified in the titles of scholarly work that sustainable development is, similarly to what is done in this book, analysed with respect to international investment agreements. See e.g. VanDuzer et al., *supra* note 5; Markus W

more information as to how investment tribunals have addressed and can include sustainable development in their decision-making process and IIAs through their interpretation and, ultimately, in international investment law.[25] The decision in *Philip Morris v Uruguay* stands as a good example of how sustainable development can be taken into account by ISA tribunals. Furthermore, additional case law analysis would have provided valuable insights on how ISA tribunals have addressed, even if generally inadequately, the interaction between international investment law and human rights.[26]

Notwithstanding these comments, this scholarly work constitutes an important contribution to the field of international investment law, as it provides a very detailed and well-documented analysis of the current inclusion of sustainable development-related provisions in IIAs, as well as the potential for the inclusion of sustainable development concerns in IIAs and how this could be done in practice. Indeed, this very well-written book provides an efficient, rational, and well-structured analysis of the interaction between IIAs and sustainable development by always providing the necessary theoretical background at the beginning of each Chapter for the reader to understand the more specific issues analysed therein. Although some of the Chapters are more descriptive than analytical, this book allows the reader to grasp the underlying stakes of this intricate topic without requiring prior advanced knowledge of international investment law. This book certainly contributes to the ongoing debates surrounding international investment law: it illustrates the general trend in investment treaty-making and the direction in which the regime is—and should be—evolving, and it addresses a topic that needs to be further investigated and expanded upon by scholars, practitioners, and policymakers alike.

Gehring & Avidan Kent, "Sustainable development and IIAs: from objective to practice" in de Mestral & Lévesque, *supra* note 20, 284 at 291–93.

[25] See e.g. Bruno Simma, "Foreign Investment Arbitration: A Place for Human Rights?" (2011) 60:3 ICLQ 573.

[26] See e.g. *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v Argentine Republic* (2005 Order in Response to a Petition for Transparency and Participation as *Amicus Curiae*) at para 19 (International Centre for Settlement of Investment Disputes); *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v Argentine Republic* (2010 Decision on Liability) at paras 258, 262 (International Centre for Settlement of Investment Disputes); *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v The Argentine Republic* (2016 Award) at para 1151 (International Centre for Settlement of Investment Disputes).