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The coming harmonization of climate change policy and international investment law

by
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Developments in climate change policy and international investment law may be ushering in a new era characterized by profound harmonization between the two regimes. Although policy instruments such as the Kyoto Protocol's "Clean Development Mechanism" (CDM) have been in existence for years, it is only relatively recently that the international community has turned to low-carbon foreign direct investment (FDI) and away from command-and-control regulation as the preferred means by which to achieve future greenhouse gas emissions reductions. Meanwhile, states have begun to renegotiate international investment agreements (IIAs) or sign new treaties to take into account policy goals, including climate change mitigation, that extend beyond the regime's traditional preoccupation with investor protection. Though still somewhat tentative, emerging trends in both arenas are thus showing unmistakable signs of convergence.

New climate change policies, particularly those related to finance and technology transfer, are proving to be compatible with international investment law in ways inconceivable for traditional environmental measures. Both the 2009 Copenhagen Accord and the 2010 Cancún Agreements, for instance, call on developed-country governments to mobilize hundreds of billions of dollars in private financing for climate mitigation projects in the developing world, while largely eschewing the imposition of hard caps on emissions, as under the Kyoto Protocol. Low-carbon FDI has thus taken center stage in international climate negotiations, with diplomats discussing a range of new financial mechanisms to incentivize private investments in the lead-up to the seventeenth Conference of the Parties in December 2011.

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Clusters of states are also initiating a host of national, bilateral and regional initiatives to encourage low-carbon FDI and facilitate a range of public-private partnerships on clean technology transfer. Examples include new national-level programs aimed at attracting greater FDI inflows under existing mechanisms such as the CDM, bilateral agreements on technology transfer such as the U.S.-China Framework for Ten Year Cooperation on Energy and Environment, and regional accords such as the Asia-Pacific Partnership on Clean Development and Climate.[1] The sorts of investment promotion strategies emphasized in these initiatives tend not to conflict with states' international investment law obligations, as do many forms of traditional environmental regulation. Rather, the benefits of a "clear, stable and predictable policy framework"[2] for low-carbon FDI become even greater as states seek to facilitate sustainable development through private investment.

At the same time, international investment law is itself undergoing a transformation of sorts, as increasingly multidirectional capital flows call into question long-standing distinctions between capital importing and capital exporting countries,[3] and as more serious consideration is therefore given to host country regulatory flexibility by traditional capital exporters.[4] This give-and-take is reflected in the language of IIAs: recent agreements impose less stringent obligations on host countries and contain more environmentally-minded exceptions and, in some cases, climate-specific language than those concluded just a few years earlier. New initiatives may go even further. The European Commission's proposed regulation on foreign investment, for instance, includes provisions on the environment and discusses the potential imposition of home country obligations in this regard. Such rules could conceivably include low-carbon finance or technology transfer requirements that may further enhance the relationship between climate policy and international investment law.

To maximize the potential for coordination and mutual learning rather than fragmentation and discord, states should take several affirmative steps to consolidate the progress they have made thus far on low-carbon FDI. First, climate policymakers and investment treaty negotiators should communicate early and often. Most immediately, states should craft a coherent, forward-thinking framework for low-carbon FDI to be adopted at seventeenth Conference of the Parties. Second, states should seek to develop novel mechanisms to incentivize low-carbon FDI, particularly if such mechanisms can strengthen rather than undermine existing legal frameworks governing such investments. For example, developed country governments could make export credit guarantees for clean technology firms conditional upon certain performance requirements, such as capacity-building programs, that not only comply with investment treaty provisions but also support host countries' good faith efforts to tackle climate change. Finally, states should accelerate the process of concluding new IIAs with explicit climate-friendly language, while at the same time renegotiating some of the nearly 3,000 investment treaties currently on the books in order to strike the right balance between incentivizing low-carbon FDI and guaranteeing strong protections for all forms of foreign investment.

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[1] For a lengthier examination of these and other related initiatives, see Firger and Gerrard, op. cit.

[2] UNCTAD, *World Investment Report 2010: Investing in a Low-Carbon Economy* (New York: United Nations, 2010), p. xxvii.

[3] *See, e.g.*, Daniel H. Rosen and Thilo Hanemann, *An American Open Door?: Maximizing the Benefits of Chinese Foreign Direct Investment* (New York: Asia Society, May 2011).

[4] Canada, for example, announced in 2010 that it would amend its foreign investment law to require greater transparency and accountability from foreign investors. *See* Bernard Simon, "Canada to toughen rules on foreign investment," *Financial Times*, November 7, 2010.

The international community has come a long way over recent decades in recognizing that the purposes of international investment law include more than merely safeguarding investors' rights. With the threats posed by climate change looming ever larger, states must take affirmative steps to remove barriers to the transition away from carbon-intensive investments and toward sustainable, low-carbon growth.

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