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Opinion: “This is how we resolve environmental disputes under the free trade agreement”

Many are concerned that the free trade agreement between the USA and the EU will lead to environmental disputes. However, the controversial ISDS (Investor State Dispute Settlement) procedure could just as well assist in protecting the environment, writes Annette Magnusson, Secretary General of the Arbitration Institute of the Stockholm Chamber of Commerce

“**International environmental law** largely lacks efficient tools to place real pressure on states in matters of sustainable development and mitigation of global warming. There simply is no mechanism available which puts force behind the words of international conventions. The restraint on environmental goals at a global level because of this lack of enforcement mechanism is obvious.

Frustration over this lack of effectiveness is perhaps best illustrated by a few voices from international environmental law.

“The international community is largely reliant on individual states to commit to honouring the object and the purpose of the agreement and to monitor compliance. This means that we are heavily reliant on the goodwill of governments to ensure best practice and that targets are achieved. This is obviously inadequate”.
(‘Environmental law gets radical’, *IBA Global Insight*, October 2012).

“International environmental law in particular tends to under-achieve; this is in part because enforcement is so difficult; in most cases only states can enforce these treaties against another state, which is an unappealing path for most to take, and because there is no obvious court or jurisdiction for such cases to go”.
(‘Environmental law gets radical’, *IBA Global Insight*, October 2012).

Former head of the UN Office of Legal Affairs, Hans Correll, shared those thoughts when interviewed on climate issues and noted:

“There is no truly effective mechanism to take states to task for failure to comply” (‘Acts or emissions’, *IBA Global Insight*, February 2012). An article on the threat to our seas in *The Economist* (‘The World in 2014’, February 2012) noted that: “[n]ew rules and institutions are called for, in which the need for consensus on every issue does not hold back best practice.”

These are but a few opinions. The list of examples of lack of efficiency of environmental goals on a global level could be made much longer.

At the same time, in a parallel universe, international law has evolved in a direction which means that states can now truly be held responsible for their obligations under international law. In this enclave of international law, states have chosen to adhere to a system in which they will be liable for damages if they fail to fulfil their international obligations.

The evolution of international law in this area is quite revolutionary. And it presents a historic opportunity to put force behind the words of promises on sustainable development at a global level. At last, a procedural tool is in place to make it happen.

But just one problem arises. The tool is called Investor State Dispute Settlement (ISDS). This has, on a few occasions, been used by parties with which the environmental movement does *not* sympathize, for example in pending cases against Australia and Germany. In the debate, ISDS has therefore come to be treated as a threat, rather than an opportunity, for those of us who strive to safeguard sustainable development.

However, ISDS is merely the tool which puts force behind the words. It is up to states to negotiate the words to be backed up, to define the rights and obligations that should be protected by ISDS.

Why has Philip Morris decided to initiate proceedings against Australia, or Vattenfall against Germany? Because of obligations undertaken by Australia and Germany in international treaties governed by public international law. Do critics find it equally disturbing that Al Jazeera has initiated proceedings against Egypt (*Financial Times*, 29 April 2014) to protect its journalists? Or that in several public cases Spain has had to defend its amended policy conditions that, according to investors filing claims against Spain, changed the conditions for solar energy investments for the worse (*Investment Arbitration Reporter*, 18 June 2013)?

None of the disputes mentioned above have yet been decided, and it must be made clear that the purpose of this text is not to predict the outcome in any of them, or to evaluate the legitimacy of any of these claims. The point is that they all have one thing in common; it is ISDS that puts force behind the words of the alleged rights of investors: rights in the form of substantive provisions negotiated by states.

These are the provisions that should be the focus of the debate on issues of importance for our future. Not their procedural back-up.

International law is a moving target. It evolves as a result of a common understanding by states and their institutions. I wish Carl Schlyter¹ could spend a day to read the dissertation by his colleague Åsa Romson² from 2012 entitled *Environmental Policy Space and International Investment Law*. I particularly recommend the section on how the system could evolve in the future and how ISDS could be used to promote sustainable development. Maybe then he would be able to engage in a constructive dialogue on how ISDS could be used to promote better effectiveness in international environmental law, instead of, as is currently the case, letting high-pitched voices on single, as yet undecided disputes, cloud the view.

The evolution of international law in the last fifty years means that we now stand before a historic opportunity to put force behind the words of international environmental undertakings on a state level. This is why the Arbitration Institute of the Stockholm Chamber of Commerce is using its resources to cross-fertilize Swedish know-how in international investment law, with international environmental law. To dismiss the evolution for which ISDS stands would be a missed opportunity for sustainable development. It must be possible to hold states accountable, including in matters of the environment.”

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² MP and Party Leader of the Swedish Green Party in the Swedish Parliament.