



Columbia Center on Sustainable Investment

A JOINT CENTER OF COLUMBIA LAW SCHOOL
AND THE EARTH INSTITUTE, COLUMBIA UNIVERSITY

The Tenth Annual Columbia International Investment Conference

Investment Treaty Reform: Reshaping Economic Governance in the Era of Sustainable Development

**November 10-11, 2015
Columbia University
Co-organized with:**



PROGRAM

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With support from:



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Indonesia Investment
Coordinating Board



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Columbia Center on Sustainable Investment (CCSI)

The Columbia Center on Sustainable Investment (CCSI), a joint center of Columbia Law School and the Earth Institute at Columbia University, is a leading research center and forum dedicated exclusively to the study, practice and discussion of sustainable international investment (SII) worldwide. Through research, advisory projects, multi-stakeholder dialogue and educational programs, CCSI constructs and implements an investment framework that promotes sustainable development, builds trusting relationships for long-term investments, and is easily adopted by governments, companies and civil society.

For more information, see: <http://ccsi.columbia.edu>.

UNCTAD Investment and Enterprise Division (DIAE)

The Division is recognized as a global centre of excellence on issues related to investment and enterprise for sustainable development. Built on several decades of successful experience, its staff provide international expertise in research and policy analysis, inter-governmental consensus-building, and technical assistance to over 150 countries. Its flagship product is the annual World Investment Report and its main global stakeholder event is the biannual World Investment Forum. The Division also maintains the interactive World Investment Network of over 9,000 members to disseminate and promote all its work on investment and enterprise. UNCTAD does not receive funding from private sponsors, including for this or any conference.

For more information, see <http://unctad.org/en/pages/DIAE/DIAE.aspx>.

Arbitration Institute of the Stockholm Chamber of Commerce (SCC)

The Arbitration Institute of the Stockholm Chamber of Commerce (SCC) has been recognized since the 1970's as a neutral centre for the resolution of East West trade disputes, and has since expanded its services in international commercial arbitration and emerged as one of the most important and frequently used arbitration institutions. The high number of international cases proves that SCC is a preferred venue for dispute resolution among the international business community: every year parties from as many as 30-40 countries use the services of the SCC, and today, the SCC is the world's second largest institution for investment disputes worldwide. 2014 was a record year for investment treaty disputes at the SCC with 11 investor cases being administered under the SCC rules. The SCC was established in 1917 and is part of the Stockholm Chamber of Commerce. The SCC consists of a Board and a Secretariat, and provides efficient dispute resolution services for both Swedish and international parties.

For more information, see <http://www.sccinstitute.com>.

Baker & McKenzie

Baker & McKenzie has one of the largest and most recommended dispute resolution practices in the world. Our experience in complex, high-stakes, multijurisdictional disputes and deep local roots mean we can deal effectively with the substantive issues and subtle nuances of managing disputes wherever they arise. We provide clients with strategic advice on how best to meet their objectives when dispute resolution becomes necessary, assisting in pre-contentious negotiations and alternative dispute resolution techniques to resolve matters quickly whenever possible. Baker & McKenzie has also been representing clients in investor-state disputes since the 1980s. We represented more than 40 claimants before the Iran-U.S. Claims Tribunal from 1983 to 1999 and currently represent both investors and states in a number of investor-state cases.

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BKPM

BKPM is the Investment Coordinating Board of the Republic of Indonesia. As the lead government entity for issuance of licenses and permits, it positions the world's 4th most populous nation of over 250 million people into a key global business destination, not only as a market but as ASEAN production base abundant in natural resources aimed to ultimately achieve sustainable economy. Under the leadership of Chairman Franky Sibarani, BKPM plans and executes strategies to encourage quality domestic and foreign direct investment by prioritizing industry sectors in infrastructure, agriculture, labor intensive, import substitute, export oriented, maritime and tourism. It is headquartered in Jakarta and employs staffs at the Investment Promotion Center of New York, Singapore, Sydney, Tokyo, Taipei, Seoul, Abu Dhabi and London. The agencies facilitate services and consultations through dedicated high level one-on-one meetings, executive roundtables, investment missions, "de-bottlenecking" and site visitation. Please contact Mr. Yos Harmen (Director, IIPC NY) at yos.harmen@bkpm.go.id.

For more information, see <http://www7.bkpm.go.id/>.

We are at a unique moment in terms of cooperation on and regulation of international investment. The United Nations has adopted the Sustainable Development Goals (SDGs) outlining crucial priorities for inclusive and sustainable growth and development. Many of the 17 goals and 169 targets point to the fundamental role of public and private capital in achieving those objectives. Developing countries alone face an annual investment gap of USD 2.5 trillion for meeting SDG-implied resource demands. The July 2015 Addis Ababa Action Agenda on Financing for Development (FfD) similarly emphasizes the need for governments to establish the signals and enabling environments that can effectively catalyze and harness investment, channeling it into areas essential for achieving the SDGs and away from areas that are inconsistent with that agenda.

In light of these developments on the SDGs and FfD, and the implications they have for domestic and international policy, our Conference will focus on the role that international investment agreements (IIAs) can and should play in international economic governance now and in the decades to come. Reforming the IIA regime is fundamental to building and maintaining an enabling environment for sustainable investment and maximizing the chances of reaching FfD targets.

This Conference starts from a premise that international investment law should aim to create and support the necessary policy frameworks for sustainable investment, and do so while respecting the legitimate policy space needed by governments to pursue their development strategies. As the Addis Ababa Action Agenda states, “The goal of protecting and encouraging investment should not affect our ability to pursue public policy objectives. We will endeavour to craft trade and investment agreements with appropriate safeguards so as not to constrain domestic policies and regulation in the public interest. We will implement such agreements in a transparent manner.”¹ In line with these principles, and following on the heels of UNCTAD’s 2015 World Investment Report (WIR), which offers a menu of options for the reform of the IIA regime, together with a roadmap to guide policymakers at the national, bilateral, regional, and multilateral levels, this Conference will dive deeper into the practical steps countries have taken and can take to reshape their IIAs.

The first panel provides context for the ensuing discussions by outlining the core objectives of modern IIAs, and the elements of IIAs and IIA reform that can help achieve those objectives. The remaining panels then discuss concrete paths to reform that governments have taken to ensure their investment policies (which may include not having an IIA) meet their domestic development objectives. The discussion will focus primarily on treaty reviews, the substantive and process issues related to such reviews, and various reform paths that countries have chosen. Panels will draw on experiences to date to explore (1) why countries are initiating such reviews and reforms, (2) the process of such reviews (who should be engaged and how), and (3) actual and potential outcomes of such actions. Drawing together representatives from governments, the private sector, and civil society, the conference will explore the issues, processes, and possible next steps for further IIA review and reform.

¹ Addis Ababa Action Agenda of the Third International Conference on Financing for Development (“Addis Ababa Action Agenda”, para. 91).

November 10, 2015, Tuesday

8:30 – 9:00 **Breakfast and registration**

9:00 – 9:10 **Opening remarks**

- **Lisa Sachs**, Director, Columbia Center on Sustainable Investment
- **James Zhan**, Director, Investment and Enterprise Division, United Nations Conference on Trade and Development (UNCTAD)

9:10 – 9:55 **Opening Address**

- **Jeffrey D. Sachs**, Director, Earth Institute, Columbia University

10:00 –12:00 **Session I: Setting the scene: Objectives of IIAs and IIA Reform**

One of the stated purposes of IIAs is to promote economic development through investment. The underlying assumptions are that IIAs will lead to additional investment, and that the additional investment will lead to development benefits. It is now well recognized that the pathways from IIAs to development are not as direct and that the broader policy and regulatory frameworks of home and host countries have substantial impacts on development outcomes; moreover, concerns have been raised that by restricting governments' policy space, IIAs may constrain, rather than facilitate, efforts to promote sustainable development. In order to provide a framework for subsequent panels, this first panel thus explores these underlying questions about the objectives of IIAs and IIA reform, and the existing and possible future links between IIAs and the broader sustainable development agenda.

Questions this panel will consider include:

- What implications does the global sustainable development agenda have for IIAs and the investment regime?
- What can be done to maximize the role of IIAs in mobilizing investment and channeling it towards SDG sectors, while minimizing potential risks?
- Do investment protection standards found in IIAs leave governments adequate regulatory flexibility to achieve relevant policy objectives?
- If not, what reforms are needed and how can they be accomplished?

Moderator:

- **James Zhan**, Director, Investment and Enterprise Division, United Nations Conference on Trade and Development (UNCTAD)

Panelists:

- **Nathalie, Bernasconi-Osterwalder**, Group Director, Economic Law & Policy, International Institute for Sustainable Development (IISD)
- **Thierry Mutombo Kalonji**, Director, Investment and Private Sector Development, Secretariat, Common Market for Eastern and Southern Africa (COMESA), Zambia
- **Annette Magnusson**, Secretary General, Arbitration Institute, Stockholm Chamber of Commerce (SCC)

- **Stormy-Annika Mildner**, Head of Department External Economic Policy, Bundesverband der Deutschen Industrie e.V. (BDI), Germany
- **Micheal Tracton**, Office Director, Office of Investment Affairs, United States Department of State, United States

12:00 – 13:30 **Lunch**

13:30 – 15:30 **Session II: Undertaking Treaty and Policy Reviews**

The panel will focus on the issue of IIA treaty and policy reviews. The first step in a reform process consists of an effort to take stock of the status quo, understand existing and potential future challenges, assess whether objectives are being met, and/or formulate a policy to guide future action. Motivated by various considerations, a number of countries and regional organizations have embarked on such reviews. In doing so, they have each chosen a particular path, encountered diverse reactions, come to their own conclusions, and faced challenges associated with implementing policies reflecting those conclusions. In order to shed light on these experiences and the lessons learned, this panel explores the IIA treaty and policy review process as it has taken place in several countries and in the European Union.

Questions this panel will consider include:

- What substantive or procedural aspects of IIAs or IIA policies triggered or were the subject of review?
- Who was involved in the reviews, and how? To what extent and when were the private sector, civil society, and partner governments engaged in the process?
- What were the outcomes of the review?
- What were the reactions at home and abroad to the decision to conduct the review and the review itself? Were there impacts of investment, political reactions, or diplomatic reactions? Did these sentiments shift over time?
- What are the lessons learned?

Moderator:

- **Lisa Sachs**, Director, Columbia Center on Sustainable Investment

Panelists:

- **Daniel Bahar**, Deputy Assistant Trade Representative for Investment, United States
- **Ronald Eberhard**, Head of Services Section, Directorate for Treaties of Economic, Social and Cultural Affairs, Ministry of Foreign Affairs, Indonesia
- **Cristian Rubén Pino Garrido**, Executive Secretary, Citizens' Commission for a Comprehensive Audit of Investment Protection Treaties and of the International Investment Arbitration System (CAITISA), Ecuador
- **Niki Kruger**, Chief Director, Trade Policy and Negotiations, Department of Trade and Industry, South Africa
- **André von Walter**, Legal Counsel, Directorate General for Trade, European Union

15:45 – 17:30 **Session III: Developing and Implementing New Models**

Many countries have taken steps to craft and adopt “model” IIAs reflecting their policy objectives as shaped by the needs and interests of their stakeholders. Indeed, even non-governmental organizations have drafted and published “model” IIAs reflecting their views of optimal texts. According to UNCTAD, at least 50 countries and regions are currently reviewing their model IIAs. The process of crafting, adopting, and negotiating these models can establish meaningful channels for shaping IIA policy both within and across countries. This process can therefore provide an important avenue for advancing IIA reform.

Although the process offers opportunities for reshaping IIAs, it also raises myriad challenges of design and implementation. In order to capitalize on the ever-expanding diversity of experiences in this area, this panel takes a close look at the issues and considerations associated with crafting a new model, including the challenges and opportunities of then using that model as a basis for dialogue with constituents at home, foreign investors, and foreign governments.

Questions this panel will consider include:

- For those who are developing new model IIAs, what are the purposes of the new model? To what extent do they take into account issues of sustainability?
- What was the process used to shape the model’s contents? Within which ministry? Were there consultations within other branches of the government and other stakeholders? How were other stakeholders involved? What were the lessons learned?
- What is to be done about existing agreements that do not reflect the contents of the new model?
- What have been experiences with negotiating on the basis of a new model?

Moderator:

- **Elisabeth Tuerk**, Chief, International Investment Agreements Section (IIAs), United Nations Conference on Trade and Development (UNCTAD)

Panelists:

- **Leidylin Contreras**, Lawyer, Office of the Legal Advisor to the President, Dominican Republic
- **Thierry Mutombo Kalonji**, Director, Investment and Private Sector Development, Secretariat, Common Market for Eastern and Southern Africa (COMESA), Zambia
- **Niki Kruger**, Chief Director, Trade Policy and Negotiations, Department of Trade and Industry, South Africa
- **Abrão Neto**, Chief of Staff and Deputy Secretary, Foreign Trade Secretariat, Ministry of Development, Industry and Foreign Trade, Brazil
- **Margrethe R. Norum**, Specialist Director, Ministry of Trade, Industry and Fisheries, Norway
- **Eman Gamal Said**, Under-Secretary of State and Head of the International Cooperation Department, General Authority for Investment and Free Zones (GAFI), Egypt

November 11, 2015, Wednesday

8:30 – 9:00 **Breakfast**

9:00 – 11:00 **Session IV: Termination and/or Renegotiation**

Depending on countries' strategic approaches, the renegotiation, amendment or termination (unilateral or consensual) of treaties, are possible options for IIA reform. For some governments, the costs of all or some of their existing IIAs outweighed their benefits and, as a result, they decided to terminate or renegotiate those agreements. Although there is a growing number of such examples, there has been relatively little discussion about the reasons that led them to their decisions to terminate and/or renegotiate, the steps they took to implement those decisions, and the perceived and actual effects of those decisions both at home and abroad. This panel aims to fill that gap, and draw from it lessons regarding how termination and/or renegotiation can play a role in IIA reform.

Questions this panel will consider include:

- For those countries deciding to terminate their treaties, why did they decide to take this action? Does it apply to all or only some treaties? If only some, what criteria were used to determine which ones would be terminated?
- What was the reaction at home and abroad of the actions to terminate? What were the impacts on investment, domestic political responses, and diplomatic reactions? Did these shift over time?
- What are the lessons learned that may be important for other States to consider when thinking about whether and how to terminate investment treaties?
- How does a State choose between termination and renegotiation?
- Is renegotiation a feasible option for reforming existing treaties? What are its advantages / disadvantages? What have experiences to date shown us about the successes and limitations of renegotiation?

Moderator:

- **Joerg Weber**, Head, Investment Policies Branch, Investment and Enterprise Division, United Nations Conference on Trade and Development (UNCTAD)

Panelists:

- **Niki Kruger**, Chief Director, Trade Policy and Negotiations, Department of Trade and Industry, South Africa
- **Ronald Eberhard**, Head of Services Section, Directorate for Treaties of Economic, Social and Cultural Affairs, Ministry of Foreign Affairs, Indonesia
- **Grant Hanessian**, Partner, Baker & McKenzie LLC
- **Eliška Německá**, Former Senior International Law Expert, Ministry of Finance, Czech Republic
- **Rocco Palma**, Legal Officer, Directorate General for the European Union, Ministry of Foreign Affairs and International Cooperation, Italy

11:15 – 13:15 **Session V: Interpretation**

Treaty interpretation responds to the fact that many of the controversial aspects of IIAs are not a result of the strict rules of the treaties themselves. The “fair and equitable treatment” (FET) requirement, for example, contains no language stating that it dictates an interpretation overriding or requiring compensation for actions taken in good faith by governments for environmental, social, or economic aims in the public interest. Yet, as it has been interpreted in some decisions, the FET standard can result in liability for such conduct. While the infamously vague provisions of IIAs have given rise to significant uncertainties (for States and investors), and unforeseen exposure to claims and liability for States, they also leave open the possibility for States to remove the potential constraints IIAs place on legitimate policy space through interpretation (instead of or in addition to renegotiation and termination).

To explore the possibilities and limitations of interpretation as a mechanism of “reform”, this panel discusses what actions States have taken to reduce ambiguity or uncertainty regarding the treaty text and help shape interpretations of IIAs; the effectiveness of those actions to date; and the legal and practical constraints that might cabin the role of “interpretation” as useful tool.

Questions this panel will consider include:

- When full terminations or renegotiations are not desired, is there a role for interpretation of existing treaties?
- What are countries’ experiences with using interpretation through exchange of diplomatic notes, submissions as non-disputing parties, or other steps?
- How can a country craft an “interpretation” strategy? What are the advantages and disadvantages that need to be considered?
- Is there a role for multilateral action on interpretation? If so, where, when and how can such action be advanced?

Moderator:

- **Lise Johnson**, Head, Investment Law and Policy, Columbia Center on Sustainable Investment

Panelists:

- **Carlos Vejar Borrego**, Director General of Legal Affairs of International Trade Negotiations, Mexico
- **Lisa Grosh**, Assistant Legal Counsel, Department of State, United States
- **Prabhat Mishra**, Government of India
- **Luis Parada**, Partner, Foley Hoag LLP
- **Adriana Vargas Saldarriaga**, Director, Foreign Investment, Services and Intellectual Property, Ministry of Commerce, Industry and Tourism, Colombia
- **Ricardo De Urioste Samanamud**, Advisor, Directorate General of International Economic Affairs, Competition and Productivity, Ministry of Economy and Finance, Peru
- **Sylvie Tabet**, General Counsel and Director, Trade Law Bureau, Canada

1:15 – 14:30 **Lunch**

14:30 – 17:00 **Session VII: Moving forward with IIA Reform**

The previous sessions discussed potential and current national, bilateral and regional IIA reforms. But they have also highlighted the limits of pursuing unilateral and bilateral actions on a relatively piecemeal basis given the thousands IIAs that exist, the truly international issues that they implicate, and the gaps and inconsistencies that result from uncoordinated action. There therefore seems to be an important role for multilateral action that can help achieve the objectives of all stakeholders.

This session seeks to identify areas of future multilateral action and outline what roles international organizations, civil society, academia, the private sector and other individuals and entities can play in pushing that action forward. It aims at identifying concrete steps that diverse stakeholders can pursue to advance comprehensive, sustainable-development related IIA reform at the multilateral level.

Questions this panel will consider include:

- What are lessons learned and guidelines for countries engaging in IIA reform? (e.g., the Roadmap for IIA reform as identified in WIR)
- How can or should national actions be translated into broader, international reform at the bilateral, regional, and multilateral levels? What role can other stakeholders (regional organizations, multilaterals, academia, etc.) take to support those steps?
- Is there a need for multilateral action to prevent fragmentation? Or are there advantages in experimentation and diversity in approaches?
- What are lessons learned and developments through regional and multilateral action (e.g., Transparency Convention, regional reform process at the EU level)?
- For which reform actions and outcomes would a multilateral approach be particularly beneficial? Treaty interpretation? Amendment?

Moderator:

- **Lisa Sachs**, Director, Columbia Center on Sustainable Investment

Panelists:

- **Matteo Barra**, Expert Officer on International Energy Investments, Energy Charter Secretariat (ECS)
- **Gonzalo Flores**, Team Leader, Legal Counsel, International Centre for Settlement of Investment Disputes (ICSID)
- **David Gaukrodger**, Senior Legal Adviser, Investment Division, Organisation for Economic Co-operation and Development (OECD)
- **Timothy Lemay**, Principal Legal Officer and Head of the Legislative Branch of the International Trade Law Division, Office of Legal Affairs, Secretariat, United Nations Commission on International Trade Law (UNCITRAL)
- **Manuel Perez-Rocha**, Associate Fellow, Institute for Policy Studies
- **Karl P. Sauvart**, Resident Senior Fellow, Columbia Center on Sustainable Investment
- **James Zhan**, Director, Investment and Enterprise Division, United Nations Conference on Trade and Development (UNCTAD)

17:00 – 17:15 **Closing remarks**