



Columbia Center
on Sustainable Investment

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

Moving the Discussion Forward: Exploring Alternatives to ISDS

October 31, 2016, Columbia University

8:30 am – 5:30 pm

The recent conclusion of the Trans-Pacific Partnership (TPP) negotiations and ongoing negotiations of the Trans-Atlantic Trade and Investment Partnership (TTIP) agreement, both of which contain controversial investment provisions, have focused attention on the objectives and implications of investment treaties. What do these instruments aim to do? What should they aim to do? What intended and unintended impacts will they have?

Investment treaties are often described as instruments aiming to (1) promote investment flows; (2) provide investors remedies for harms; (3) improve governance and the rule of law in host countries; and (4) depoliticize disputes – objectives of varying degrees of importance to multinational enterprises, home states, host states, and other stakeholders. The investor-state dispute settlement (ISDS) mechanism contained therein is, in turn, cited as a necessary means of achieving those objectives. Yet in addition to mounting concerns about the legitimacy and negative consequences of ISDS, there are increasing doubts about whether it appropriately serves its purported objectives. More fundamentally, there are increasing doubts regarding whether those four objectives noted above are adequate or appropriate for international economic governance in an era in which the world is facing pressing economic, environmental, social and governance challenges, and in which the Sustainable Development Goals have been universally adopted to address those challenges.

Against that background, this workshop is part of a more comprehensive effort to examine the objectives of investment treaties - as they are and as they should be - and the best ways of

achieving those objectives. It zeroes in on ISDS, examining both whether ISDS advances the four commonly stated goals of investment treaties (noted above), and whether it is consistent with broader sustainable development objectives. But beyond merely critiquing ISDS, this workshop seeks to advance a creative, solution-oriented and forward-looking discussion of the following five possible and non-exclusive alternatives to that mechanism:

- state-to-state dispute settlement;
- international collaboration to strengthen domestic legal systems;
- political risk insurance systems;
- human rights mechanisms; and
- a standing investment court.

For each of the alternatives, the workshop will examine both (1) whether and to what extent it can help advance the currently stated goals of investment treaties; and (2) whether and to what extent it reflects the policy coherence and attention to sustainable development that are imperative for 21st century international economic governance.

PRELIMINARY PROGRAM

8.30-8.45 **Registration and Breakfast**

8.45-9.00 **Opening Remarks**

9.00-10.20 **Session I: State-to-State Procedures**

It is often noted that the ISDS system is rather remarkable in international law in that it provides non-state individuals and entities direct rights of action against states to enforce the states' international law obligations through ISDS. However, some states have tried to narrow the role of ISDS in at least some contexts (e.g., in disputes over tobacco control measures, taxation, financial services, and applicability of exceptions), and permit certain claims only to be pursued through state-to-state proceedings, or to filter those claims through state-to-state consultation and negotiation processes for resolution before permitting unresolved issues to be decided through ISDS. Additionally, Brazil has been promoting and signing a breed of investment treaties that rely entirely on inter-state mechanisms to identify, avoid, and resolve barriers to cross-border investment and disputes between investors and states. Do or should these efforts foretell a broader shift away from ISDS and toward state-to-state dispute resolution? Is the reign of ISDS as a uniquely powerful tool in international law in decline?

This session will consider the options for, and advantages and disadvantages associated with, using state-to-state political diplomacy and/or legalistic dispute settlement systems to address allegations of investment treaty breach.

Questions that this session will consider include:

- *What do we know about the impacts that availability of ISDS has had in terms of depoliticizing disputes? Are host states and/or home states indeed benefitting?*
- *To what extent should state-to-state proceedings be rule-based and legalistic, or allow for political diplomacy? Are political resolutions desirable in some cases? If so, in what circumstances and under what conditions?*

- *If depoliticization is a goal, can state-to-state dispute settlement systems be constructed in a manner that reduces or eliminates politicization of disputes?*
- *What are the different institutions or mechanisms that can be used for state-to-state dispute resolution to, inter alia, avoid repeating past mistakes associated with investor protection? What lessons can be learned from state-to-state dispute resolution of investor claims through political pressure, “gunboat diplomacy”, investment treaty disputes, WTO cases on investment issues, and other inter-state mechanisms? Which, if any, models merit renewed attention?*
- *Are some policy areas better suited than others for state-to-state dispute settlement? If so, which ones and for what reasons?*

10.20-10.30 **Coffee Break**

10.30-12.00 **Session II: Building Domestic Capacity**

While ISDS may be able to provide some covered foreign investors compensation for harms, its coverage is limited, its costs are high, and its outcomes are often unpredictable. ISDS also only protects investors against harms caused by the conduct of the host state, and is not directed at broader improvements to the legal framework and institutions that can be essential for governing other key relationships such as foreign investors’ relationships with customers, suppliers, competitors, employees, landlords, etc. Moreover, there remain significant questions regarding whether the mechanism has any positive impact on good governance and rule of law in the host state that will result in improvements to the investment climate over time. Indeed, some theoretical and empirical research suggests that ISDS may have the opposite effect by, for example, reducing incentives for the government to improve its legal climate, or giving rise to an unequal system of law that privileges the rights of foreign investors over other stakeholders.

If the objectives of investment treaties include (1) better ensuring that those harmed by wrongful government conduct secure appropriate remedies, and (2) improving the rule of law and governance in host countries, it is important to consider whether there are approaches that can advance those aims better than ISDS. This may include treaty commitments for technical, financial, and other resources to help post-conflict or low-income countries improve their administrative, legislative, and/or judicial capacities; and treaty provisions establishing ombudsmen or other institutions to identify governance challenges and setting forth obligations on the host state or the treaty parties to take action to address them.

Questions that this session will consider include:

- *If there are concerns about the efficiency, independence and/or quality of domestic legal systems, should effort be focused on expanding resources to improve those systems as opposed to creating exit routes from those systems?*
- *What types of provisions that seek to build domestic capacity will be acceptable to states and other stakeholders? Does this approach represent a greater infringement on sovereignty than the ISDS mechanism?*
- *Can lessons be learned from other systems of supra-national adjudication such as the International Criminal Court and human rights bodies in which doctrines of complementarity or exhaustion of local remedies seek to maintain a focus on improving domestic legal systems?*

- *Can lessons be learned from the EU's norms on the rule of law and mechanisms for improving the rule of law in its member states?*

12.00-13.15 **Lunch (speaker series)**

13.15-14.45 **Session III: Political Risk Insurance as an Alternative to ISDS**

Like investment treaties and ISDS, political risk insurance – which is available from private and public sector providers – can help protect investors from losses due to legal uncertainty, war and civil strife, expropriation, physical harm, transfer restrictions, breaches of contract, and other government interference. Yet there are important differences between investment treaty protections enforced through ISDS and political risk insurance. This session identifies those similarities and differences and examines their contributions to the various actual and potential objectives of international investment treaties, exploring relevant issues such as the implications for dispute resolution or avoidance, provision of adequate compensation for harms, promotion of quality investment, and risk of moral hazard.

Questions that this session will consider include:

- *What are the advantages and disadvantages of requiring investors to purchase political risk insurance as opposed to effectively providing it at no cost to investors through investment treaties? Relevant considerations include:*
 - *Desirability of conditions that can be placed on investor conduct in insurance contracts as a condition of securing protection;*
 - *The role of market-based signals (reflected in availability of insurance, pricing or policy terms) in influencing conduct of investors and/or host states;*
 - *Risks of moral hazard from free “risk insurance” available to all investors/investments in all countries through ISDS.*
- *To what extent can intervention by the political risk insurer prevent a dispute from escalating to claim status? Is such intervention (e.g., by MIGA or the home state’s insurance provider) desirable?*
- *Does the availability of investment treaty protection crowd out or lessen demand for political risk insurance protection available from public and/or private providers?*
- *What factors influence whether companies purchase political risk insurance?*
 - *Are there certain sectors/ activities for which political risk insurance is not presently reasonably available?*
 - *Are there countries for which political risk insurance is not presently reasonably available?*
 - *Is scope of coverage adequate to meet investors’ needs?*
 - *To the extent there are limitations in any of those areas, are there practical ways of overcoming those limitations and expanding coverage?*

14.45-15.00 **Coffee Break**

15.00-16.30 **Session IV: Human Rights Fora and the Resolution of Investment Disputes**

International human rights law provides individuals and, in some contexts, corporate entities, with protections that may overlap with some investment treaty protections: these include protections regarding rights to information and transparency of government conduct;

protections against discrimination and denial of justice; and, to varying extents, protection of economic and property rights. Reflecting this overlap, some investor-state disputes have resulted in investor recourse to both human rights fora and investment tribunals.

The workshop's fourth session will focus on the advantages and disadvantages of having investors bring their claims before human rights fora. If investors did not have recourse to ISDS, under what conditions could they still pursue direct claims against and seek relief from states using existing human rights instruments and mechanisms? To explore this question, the session will take into account both substantive and procedural rules, and will examine how a potential increase of claims in human rights fora could impact issues relevant for investors and other stakeholders, such as development of the law that is applied by human rights tribunals and the speed of proceedings for investors and other human rights claimants, among other issues.

Questions that this session will consider include:

- *Which investors are protected and able to seek recourse before regional and international human rights authorities? Legal persons? Minority shareholders? Individuals and entities invested in only certain countries?*
- *To what extent can parallels be drawn between the rights typically protected by investment treaties, and those protected by human rights instruments? Do these parallels vary by human rights forum and, if so, how? Which economic rights are protected, and against what types of harm?*
- *Under which preconditions can claims be submitted to human rights authorities (e.g. exhaustion of domestic remedies)?*
- *What kinds of remedies are available when recourse is sought before human rights authorities? Can compensation be sought and, if so, are there limits on the amount of compensation, or differences in the methods used to determine the quantum of damages?*
- *What means of enforcement are available? Do they differ significantly from the means available in the context of ISDS and, if so, is this problematic?*
- *If existing human rights norms and institutions provide a more limited set of protections for individuals and corporate entities than ISDS, is that nevertheless acceptable? Is it desirable?*
- *What are the advantages and disadvantages to other stakeholders of having individual and/or corporate investors, like other aggrieved parties, resort to human rights fora to invoke their rights?*
 - *Will allowing or requiring investors to bring their claims to human rights fora ultimately help increase the strength and effectiveness of those fora for all users? Or will non-investor users be crowded out?*
 - *Similar to objections regarding recognizing constitutional freedom of speech protections for corporations, are there objections to recognizing “human rights” of legal persons?*

16.30-17.15 **Session V: A Standing Investment Court**

In a series of policy statements and actions, the European Commission has acknowledged fundamental problems with existing ISDS mechanisms and has been taking steps to develop a new model, driving the creation of an investment “court” that will depart from the current ISDS model of party-appointed arbitrators while still allowing direct investor recourse against

host states. Moving beyond the European Commission's reforms, others have suggested a more comprehensive proposal for a new court that will not only permit claims by investors against states, but will also be open to other individuals or communities to bring claims against investors.

This session aims to take stock of the various proposals for an investment court structure, and again analyze their advantages and disadvantages in terms of their contributions to the four commonly stated goals of investment treaties, and their contributions to sustainable development, more broadly considered.

Other issues that this session will consider include:

- *What is the current status of proposals made by the EU and other organizations and entities? What are their distinguishing features?*
- *The other alternatives discussed in this note already exist: to what extent is there political will to create a new structure for ISDS claims? For a broader, more comprehensive mechanisms for resolving investment disputes.*
- *With the exception of state-to-state dispute settlement, the other alternatives in this note also suggest a change (reduction) in the scope of substantive investor protections. Is reform of the procedural mechanism alone sufficient?*
- *A court may serve a lawmaking function in a manner that is not served by treaty-by-treaty state-to-state dispute settlement systems, political risk insurance-based protections, or a focus on domestic institutions. Is that desirable?*

17.15-17:30 Closing Discussion and Identification of Ways Forward