

Final Draft

Introduction to IIA Conference 10-11 October 2013 at Freie Universität Berlin

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A. [Welcome]

Your Excellencies, distinguished guests, dear friends and colleagues, ladies and gentlemen,

Dear Dean *Möller*, many thanks for your kind, welcoming words.

On behalf of Markus Krajewski and myself, I would like to extend this warm welcome. Herzlich willkommen an der Freien Universität Berlin.

Over the next two days, we want to bring together two debates which have been dealt with as separate issues for far too long. Over the past decades, sustainable development and the protection of foreign investment have been addressed in parallel discourses. Only gradually have these two policy strands, each with its own perspectives and distinct socialization processes, started to take notice of each other. Mutual prejudices and barriers need to be reduced, ideologically-driven arguments need to be identified and avoided. Balanced approaches to examining the relationship between investment protection and the principles of sustainable development are in their very early stages and need to be cultivated. It is at this critical moment that this conference wants to step into the debate. The hope is to create a forum for a critical, reflective and balanced analysis.

The specific catalyst for this conference is the “Investment Policy Framework for Sustainable Development” (IPFSD), the conceptual framework published in April 2012 by the United Nations Conference on Trade and Development (UNCTAD).

In this Policy Framework UNCTAD ventures to take a fresh look at international investment policy-making from the viewpoint of sustainable development. And not just this: UNCTAD has placed sustainable development at the core of its Investment Policy Framework.

B. [Sustainable Development and Investment protection]

While one can in few words explain what international investment law is about and what its main features are, the task of definition becomes immediately more difficult when we turn to sustainable development.

One might justifiably form the impression that the international policy circus cannot do without it anymore: the term is echoed, for example, in Agenda 21 from the United Nations Conference on Environment and Development, and in the G8 2009 declaration on Responsible Leadership for Sustainable Future.

Sustainable development is identified as an explicit objective in dozens of international treaties as well as in numerous soft-law instruments. And, it would appear that the number of references to sustainable development is set to increase even further, as the concept now spreads into the realm of international investment law.

Now, when relating sustainable development *at large* to foreign investment, there seems to be a widespread political consensus that foreign investment is one of the key elements in furthering the development of States. However, controversy has long existed around the question of precisely which qualities an investment should exhibit in order to fulfill its function without compromising competing public interests.

Foreign investment is essentially about the acquisition of a cross-border claim to income in the hope of getting a return in the future. And, in very simple terms, an investment will be made where it generates the highest returns. This is how foreign investment essentially works and there is nothing intrinsically negative about it, at least as long as we embrace a free or social market economy model. However, it gets tricky when this economic rationale does not go hand in hand with the objectives pursued by the host State. Taxes generated by foreign investments are certainly highly appreciated, as are any transfers of technology or of knowledge. But foreign investment may be accompanied by environmental pollution, or poor labor and health standards. Regulatory measures taken in the interests of preserving the environment, of safeguarding labor standards, or for other non-investment concerns – no matter how necessary or indispensable these may be – also have the capacity to negatively impact on investment returns.

It is the host State's right to reach an appropriate balance of the diverse interests at play for the benefit of its people. This is to be achieved not only by national measures but also by way of international treaties.

Since the late 1950s, States have entered into thousands of bilateral and regional treaties aiming at the promotion and protection of foreign investment.

It is hardly possible to overestimate the value of those treaties with regard to certain aspects: on the micro-level, they provide investors with a tool to manage and mitigate political risk and offer host-states an advantage when competing with one another to attract investments. On the macro-level, these treaties promote the rule of law and good governance standards; they make public international law even more meaningful for the individual, beyond the narrow elite of States and international organizations, and beyond the fragmentary protection of human rights.

However: the question arises whether these benefits might ultimately come at too high a price. Some claim that the current body of international investment law, in particular its application in the context of investor-State dispute settlement, curtails or even frustrates the sustainable development of host-States. At the extreme, international investment agreements are depicted as hegemonic instruments, straightjackets preventing host-States from taking much-needed measures to secure the wellbeing of their populations.

But this story can also be told differently: while foreign investors are certainly not motivated by altruism, they can nevertheless contribute to the economic and social development of their chosen host-State in many different and meaningful ways. And having made their investment, they can find themselves in a kind of hostage situation: the host-State might suddenly adopt protectionist or discriminatory measures to the detriment of the foreign investor. International

investment agreements are in place to deter host states from this type of conduct. From this perspective, the demand to “balance” investor protection and sustainable development might be characterized as an ill-camouflaged attempt to get rid of the bounds of the international rule of law and accountability by maximizing regulatory arbitrariness.

C. [Foundations – Key note address by Professor Sacerdoti]

Ladies and gentlemen, in this conference, we do not aim for the extremes nor are we interested in such black-and-white rendering of the issues. Rather, we would very much like to aim at the many shades of grey. In order to achieve this end we have - and we very much hope that you agree with us - assembled a wonderful set of scholars, policy-makers and legal practitioners here in Berlin today.

A great mind, who paints not in shades of grey but in brilliant and vivid colour, has kindly agreed to lay the foundations of our understanding for this two day endeavor. Professor *Giorgio Sacerdoti* of Bocconi University Milan will illuminate us in his key-note address on the concepts, issues and challenges of investment protection and sustainable development. Professor *Sacerdoti* combines the virtues of a scholar and practitioner. He has had a long and rich academic carrier with professorships held in Milan, Bergamo, Urbino and Bari, and, most notably, has taught courses at the prestigious Hague Academy. He also served as Member and Chairman of the WTO Appellate Body, as Vice-president of OECD Working Group on Bribery in International Business Transactions, and as frequent arbitrator, expert witness, and party representative in investment arbitrations around the globe. A very warm welcome to you!

D. [Investment Policy Framework for Sustainable Development – Presentation by Ms Türk]

We will build on the foundations laid out by Professor *Sacerdoti*, and proceed to the “Investment Policy Framework for Sustainable Development” - the specific catalyst for our conference. This conceptual framework, published by the United Nations Conference on Trade and Development, clearly merits closer critical analysis and discussion.

With the framework, UNCTAD has done more than just neutrally describe the universe of national and international policy making. It has put forward a comprehensive investment policy framework in which it states its views on perceived or real imperfections in the current system. It also proposes potential remedies in the areas of national policy agenda-setting and international treaty making.

Among others, UNCTAD suggests that international investment agreements unduly constrain national development policy-making. As a matter of fact, any international commitment reduces policy space and, thus, also development policy-making. One might wonder which causality was proven here: that between the investment protection instruments and their negative impact on sustainable development, or simply between international commitments and unfettered sovereignty more generally. Let me take the liberty of asking an iconoclastic question: is the Policy Framework a call for more unfettered sovereignty, more national egoism and fewer international commitments?

I am sure that *Elisabeth Türk*, Officer in Charge of the Section on International Investment Agreements in UNCTAD's Division on Investment and Enterprise will vigorously contradict.

I am very happy that Ms *Türk* has kindly agreed to come from Geneva to Berlin. Not only one of the key authors of the UNCTAD's Investment Policy Framework, she also contributes to the analytical and research work of UNCTAD, including the popular series of IIAs Issues Notes and the Series on International Investment Policies for Development.

Ms *Türk*, it is a great pleasure to have you here!

E. [Discussion of the IPFSD – Chaired by Professor Hofmann]

Following the presentation of the Policy Framework, a Panel chaired by Professor *Rainer Hofmann* of the Goethe University Frankfurt will critically review UNCTAD's analysis of the current state of play in international investment policymaking as well as its policy recommendations. I very much hope you will agree with me when I say that a wonderful group of panelists have come together today, combining academia, policy makers, legal practitioners as well as civil society. Besides *Rainer Hofmann*, the panel consists of Professor *Christian Tietje* of the University of Halle-Wittenberg, *Verena Wiesner* of the Federal Ministry for Economic Cooperation and Development Berlin, *Mahnaz Malik*, Barrister at 20 Essex Street Chambers London, and, last but not least, *Peter Fuchs* of PowerShift Berlin. A very warm welcome to all of you!

F. [Session I – IIA Specific Substantive Issues – Chaired by Dr Bubrowski]

The last session for today and the first one to focus on specific aspects of UNCTAD's Policy Framework will be the session on specific substantive issues chaired by Dr *Helene Bubrowski* of the Frankfurter Allgemeine Zeitung. Not only an excellent journalist, Ms *Bubrowski* was also until recently a researcher in the area of international investment law at the University of Cologne.

When addressing the impact of substantive provisions in IIAs on sustainable development, their shortcomings and possible remedies one needs to be particularly careful identifying deficiencies first before applying any cure. For example, is the protection of legitimate expectations of an investor truly at odds with sustainable development or is such a safeguard not simply a basic element of the rule of law?

Out of the several policy options in UNCTAD's Framework on how to design and structure substantive provisions more SD-friendly, in this session we would like to concentrate on two of them:

Dr *Todd Weiler*, Solicitor and Barrister in Canada – still on his way and hopefully with us this afternoon – has kindly agreed to talk on the national treatment standard. Dr *Roland Kläger* of Haver Mailänder Rechtsanwälte Stuttgart has taken up the challenge of tackling one of international investment law's vaguest terms: that is the fair and equitable treatment standard. On both presentations, Dr *Anna de Luca* of Bocconi University Milan will deliver a reply. Welcome to all of you!

G. [Session II – IIA Specific Procedural Issues – Chaired by Dr Rachkov]

The first session tomorrow morning, chaired by *Dr Iljy Rachkov* of King & Spalding Moscow, will focus on specific procedural issues addressed by the UNCTAD Policy Framework. Hereby, “procedure” is given a micro and a macro perspective.

On the micro level, we will elaborate on the current practice of dispute resolution and its implications and perceived or real shortcomings in the light of the promotion of sustainable development. Investor-State dispute settlement provisions are at the heart of international investment law and, at the same time, they are perhaps the main focal point of criticism.

On this topic, we welcome the contribution of *Dr Hege Kjos*, Assistant Professor at the University of Amsterdam to shed some light on the embattled field of investor-state-arbitration and its implications for the sustainable development of a responding host State.

On the macro level, this session will look at the more fundamental question of how to bring about any change to the current regime of over 3000 international agreements: that is the issue of termination and re-negotiation of IIAs. Until recently, these two subjects had not attracted much public attention, despite the fact that IIAs over the last decades were frequently updated, replaced or even terminated.

Professor *Karsten Nowrot* of the University of Hamburg has kindly taken up the task of presenting to us – to use his own phrase – the “downgrading of the legal position of the investor” against the background of general public international law.

Dr Julia Sackmann of RWE Essen will reply to both papers. It is great to have you all with us today!

H. [Session III – IIAs, Sustainable Development and the Wider Corpus of Public International Law – Chaired by Dr Burgstaller]

The second session on Friday is devoted to UNCTAD’s Policy Framework and the wider corpus of public international law. The session is chaired by *Dr Markus Burgstaller* of Hogan Lovells London.

Several policy proposals are found in UNCTAD’s Framework on how to make the texts of IIAs more-friendly to sustainable development. Such re-design would supposedly be called for, because the current investment agreement regime has produced “unexpected” interpretations of provisions or has allowed for “unwanted” challenges to national measures in pursuit of a public purpose. However, is this perceived “unfairness” really due to the text and wording of international investment agreements? Or is it due to the interpretation and, ultimately, due to those people who interpret them?

Katharina Berner of the Humboldt University of Berlin will critically examine the current system of dispute settlement and will lay bare its weaknesses and shortcomings in respect of treaty interpretation. Ms *Berner* will look in particular at how sustainable development needs

might be better addressed by focusing on the interpretation of treaties, as opposed to the creation of specific SD-friendly provisions, as is proposed in the Policy Framework.

Moreover, UNCTAD's Policy Framework is rather silent on the question of the potential role of the law of State responsibility in accommodating sustainable development concerns. It includes, though, some policy recommendations on remedies. Indeed, the choice of a specific remedy might not only have an impact on a State's policy space, but also significantly influence the legitimacy of the investment protection regime. There is perhaps nothing more devastating for this legitimacy than excessive damages awards. Dr *Helmut Aust* of Humboldt University Berlin will take a fresh look and critically contest UNCTAD's approach, which appears to favour compensation over restitution.

Both papers will be commented on by Professor *August Reinisch* of the University of Vienna. Thank you all very much for coming!

I. [Session IV - Regional Focus – Chaired by Professor Krajewski]

The last session in our conference is devoted to regional perspectives on UNCTAD's Investment Framework. Originally *Axel Berger* wanted to chair the session but unfortunately he has had to cancel his visit due to personal reasons. Professor *Markus Krajewski* of the University of Erlangen-Nuremberg has kindly agreed to step in on short notice.

Faithful to the slogan of the Prince of Salina in *Tomasi's* novel "Il gattopardo", also in the realm of international investment law everything must change in order to stay the same. The Italian novelist used this phrase in order to describe a dramatic turn of two epochs. Only time will tell whether we are at such a moment in respect of investment protection.

Sean Woolfrey of TRALAC South Africa, *Maria Luque* of the University of Erlangen-Nuremberg, and Professor *Frank Hoffmeister* of the European Commission will take stock of the current developments and trends in three regions of the world. Their contributions will be commented on by Professor *Philipp Dann* of the University of Gießen and *Jan Wisswässer* of European Parliament. To all of you, a warm welcome!

J. [Young Scholars' Round Table]

Due to the impressive number of younger participants taking part in the conference we have decided to make an important addition to the programme: an open format that we call the Young Scholars' Round Table. The Round Table is a format in which participants can get to know each other, exchange ideas about their current research. It will take place immediately after the official end of the conference. Everybody is very welcome to take part, whether they consider themselves young or they are interested in getting in contact with our younger participants to let them benefit from their experiences. We hope that following the conference sessions, the Round Table will provide a useful forum for a deeper understanding of these issues to take root, and for new and dynamic approaches to them to flourish.

K. [Closing]

Ladies and gentlemen, all that remains is to wish us all many fruitful discussions over the next two days. These may provide us with some answers to the many questions posed. The very least I am hoping for is that we will leave better informed, and more importantly, challenged, even if still skeptical!

With no further ado – Professor *Sacerdoti*, the floor is yours. Once again, many thanks for coming to Berlin and for speaking to us on such an important topic.