

Tuesday, 10 October 2017, 15:00 - 18:00, Room E. 3023

Phase 2

## Break-out session 7

Towards a global reform effort – referencing global standards

10 options

### Moderators

**Ms. Susan Mathews**, Right to Development Section, Office of the United Nations High Commissioner for Human Rights (OHCHR)

**Ms. Mavluda Sattorova**, Senior Lecturer Law, University of Liverpool

### Kick-off speakers

**Mr. Lorenzo Cotula**, Principal Researcher, International Institute for Environment and Development (IIED)

**Ms. Nathalie Bernasconi**, Director, Economic Law and Policy, International Institute for Sustainable Development (IISD)

**Mr. Ralf Van de Beek**, Senior Policy Advisor, Ministry of Foreign Affairs, Netherlands

**Ms. Patience Okala**, Deputy Director/Legal Adviser, Nigerian Investment Promotion Commission, Nigeria

**Ms. Champika Malalgoda**, Executive Director, Research and Policy, Board of Investment, Sri Lanka

**Mr. Felix Imhof**, Deputy Head of Division, International Investment and Multinational Enterprises Division, State Secretariat for Economic Affairs (SECO), Switzerland

**Mr. Lamin Dampha**, Deputy Permanent Secretary, Ministry of Trade, Industry, Regional Integration and Employment, The Gambia

### Rapporteurs

**Mr. Nicolás Perrone**, Assistant Professor of International Law, Durham Law School

**Ms. Lise Johnson**, Head, Investment Law and Policy, Columbia Center on Sustainable Investment (CCSI)



# UNCTAD Annual High-level IIA Conference: Phase 2 of IIA Reform

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**Tuesday, 10 October 2017, 15:00 - 18:00, Room E. 3023**

**Break-out session 7 – Report back**

**Towards a global reform effort – referencing global standards**

*This report represents the views of the rapporteurs on the discussions among the participants of the respective break-out session. It does not represent the views of the UNCTAD Secretariat or its member States.*

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## Rapporteurs

**Ms. Lise Johnson**, Head, Investment Law and Policy, Columbia Center on Sustainable Investment (CCSI)

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BoS 7 was a small group but a very active and lively discussion. There was consensus that this is a very important topic for the phase 2 of IIA reform covered in UNCTAD's 2017 WIR. Representatives from States and civil society noted that referencing global standards is a newly emerging, but key part of IIA reform.

Discussions highlighted that global standards can be included in IIAs in order to better protect the right to regulate, as well as to improve the conduct of multinational enterprises and the outcomes of foreign investment projects. Regarding the connection with responsible investors/investments, there was general agreement that, depending on its nature and quality, FDI can advance the sustainable development goals (SDGs). FDI is a means to an end, not an end in and of itself. In this context, global standards can serve to facilitate and promote FDI that contributes to the SDGs.

Regarding the link between this reform option and the right to regulate, representatives of States and civil society mentioned that global standards can serve to clarify State obligations and other provisions in IIA. Specifically, the group determined that referencing global standards can:

- be a useful means to express State commitment to protect public interests, such as the environment;
- serve to advance investment protection while also limiting any undesired or expected use of such protection;
- provide the IIA regime a new context, where foreign investment protection does not come at the expense of public concerns and the right to regulate; and
- serve to manage systemic complexity and improve overall coherence between domestic law, IIAs and other areas of international law such as human rights.

It was noted that practices of referencing global standards were newly emerging and evolving, and could encompass both provisions directed solely at States, as well as those directed at and imposing obligations on investors.



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It was further highlighted that although practices of referencing global standards were becoming more common in newer treaties, it was possible in some contexts to use international law rules of interpretation as a means to take global standards into account even where, as is the case in most older generation treaties, the treaty text itself does not incorporate those standards.

BoS 7 discussed a range of issues relating to the pros and cons of incorporating global standards. These included:

- Relative advantages and disadvantages of integrating global standards in IIAs as compared with relying on or incorporating domestic law; and
- Determination of which global standards and how specific to be in the event of incorporation. It was said, for instance, that in some cases, global standards could be used to help provide more content and clarity regarding the nature of a given investor obligation. It was also noted, however, that the meaning of global standards themselves weren't necessarily clear, and that more clarity could be provided through specific obligations set forth in domestic law. Concerns were also raised about whether, by including references to global standards, they could be interpreted as a ceiling in terms of permissible environmental or social standards, as opposed to a floor.

Additionally, BoS 7 also discussed pros and cons relating to the “teeth” or “bite” that references to global standards should be given – for example, whether they should be used to inform the spirit of the treaty and the scope of treaty protections, and/or have more “bite”, whether by being a precondition for treaty protection, or being directly enforceable against the investor through counterclaims or standing given to those who are currently non-parties, such as affected communities.

BoS 7 discussed these pros and cons in light of a number of issues, such as the impact and effectiveness of these types of provisions, the role of global standards in helping to elaborate the content of responsible business practices, and on the proper role of domestic law and institutions in ensuring and enforcing responsible business conduct. On the issue of domestic law and institutions, for instance, it was noted that domestic law is and should be a crucial place for imposing regulations on investors, and it was important to adopt an approach that ensured domestic institutions were willing to and capable of addressing claims of investor misconduct. Yet, it was also highlighted that there are often governance gaps impeding access to justice for claims against multinational enterprises—gaps that treaties can potentially help fill.

Some participants highlighted that expressly incorporating references to environmental, health and other public interest issues in the treaty was important because tribunals did not necessarily give domestic law and policies regarding environmental and other public interest measures adequate weight. Thus, the discussions in the session considered the role of including global standards both as a means of better protecting the right to regulate, as well as a more proactive tool to improve MNE conduct and the outcomes of foreign investment projects.

BoS 7 noted that practices were evolving rapidly in this area and that there were important developments that could be learned from in thinking about *which* fora and *which* legal and policy



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instruments are appropriate for addressing *which* issues associated with attracting FDI and ensuring that it produces positive outcomes for host countries and their stakeholders.

It was also noted that there was a range of approaches being explored, some of which resulted from the fact that countries were trying to tailor the treaties to their specific needs and specific circumstances, for instance incorporating global standards that were especially relevant to some of the challenges they were facing in connection with foreign investment. This diversity of approaches could potentially result in increasing fragmentation, but in this context and at this stage, it was noted that fragmentation may be desirable and that BoS 7 should consider approaches – such as enhanced multilateral and multi-stakeholder communication – for dealing with and maximizing learning from the innovation that is currently being evidenced in this area.

In this context, the role of UNCTAD as a forum for sharing experience and charting the way forward through this Phase II option will be crucial.

