COLUMBIA JOURNAL OF TRANSNATIONAL LAW

Toward Win-Win Sustainable Development

By: Linda Moon

***Conversations*: An Interview with Lisa Sachs**

By Linda Moon, Assistant Solicitations Editor

November 18, 2014

Lisa Sachs, Director of the Columbia Center on Sustainable Investment (CCSI)

Editor's Note: Lisa Sachs is the Director of the Columbia Center on Sustainable Investment. She joined CCSI in 2008, and became Associate Director in 2009 and Director in 2012. Since joining CCSI, she established and now oversees the three areas of focus for CCSI: investments in extractive industries, investments in land and agriculture, and investment law and policy. She has developed a robust research portfolio in each of these areas, and has overseen advisory work in Mozambique, Guinea, Tanzania, Malawi, Namibia, and Timor-Leste. She teaches a masters seminar at Columbia Law School and Columbia's School of International and Public Affairs on Extractive Industries and Sustainable Development, and has helped to build course offerings at Columbia Law School on investment law and policy and executive trainings on extractive industries and land and sustainable development. She specializes in extractive industries, foreign investment, corporate responsibility, human rights, and integrated economic development. She is a member of the UN Sustainable Development Solutions Network's thematic group on the Good Governance of Extractive and Land Resources and is Vice-Chair of the World Economic Forum's Global Agenda Council on the Future of Mining & Metals. She received a Bachelor of Arts in Economics from Harvard University, and earned her *Juris Doctor* and a Masters degree in International Affairs from Columbia University, where she was a James Kent Scholar and recipient of the Parker School Certificate in International and Comparative Law.

Columbia Journal of Transnational Law Bulletin: *How do you define sustainable international investment (SII)? How do different initiatives undertaken by the Columbia Center on Sustainable Investment promote a more sustainable future?*

Lisa Sachs: Sustainable international investment is foreign direct investment (investments made by companies based in one country into another) that contributes to sustainable development. Sustainable development is an internationally agreed concept to promote three objectives in a holistic manner: economic development, social inclusion, and environmental sustainability. Foreign direct investment (FDI) can contribute significantly to sustainable development through the transfer of capital and technology, job creation, linkages with local industries, infrastructure development and capacity building. However, none of these benefits are automatic. Even billion-dollar investments can leave little benefits to a host economy for various reasons such as corruption, tax evasion or reliance on imported goods and services. In some cases, an investment may indeed promote economic growth, but at the cost of social exclusion (such as the displacement of local communities) or environmental degradation.

The Columbia Center on Sustainable Investment (CCSI) is dedicated to promoting sustainable FDI. We do this in several ways. The first is policy-oriented research, in which we look at trends, practices and case studies from around the world, through the conceptual lens of sustainable development. The second is advisory projects, in which we work with governments, companies and other stakeholders to implement practical solutions. The third is to host and facilitate multi-stakeholder dialogues on sustainable FDI to advance common understandings and innovative solutions. The fourth is to train policy makers in executive programs. And the fifth is to develop databases, case studies and other tools to help stakeholders promote, negotiate, implement and monitor investments for sustainable development.

In all of these activities we are tapping into enormous student interest at Columbia Law School. Students participate in CCSI programs in many ways: taking courses and seminars, participating in the research projects and advisory work, and helping to support CCSI's many events and workshops.

Bulletin: *SII cuts across a number of legal areas—foreign investment law, human rights, trade law, land law, etc.—whose interactions are not always appreciated or analyzed in conjunction with one another. How did you first become interested in sustainable investment law as a topic? What did you do as a law student to pursue this interest?*

LS: It's absolutely correct that sustainable investment requires the integration of several different disciplines, and my path to this position at CCSI likewise touched on these various dimensions. I was

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already interested in sustainable development when I began my undergraduate studies, and though I majored in economics, I took courses in diverse subjects including environmental policy and public health. I spent the summers interning in Uganda and India to complement my course work with practical experiences. Toward the end of my undergraduate studies, I felt I could benefit from a greater understanding of international affairs and perspectives from around the world. So, I enrolled at Columbia's School of International and Public Affairs. In some of my early coursework at SIPA, I developed a special interest in the operations of some foreign investors—in particular in the oil sector—that were operating with impunity as they caused significant social and environmental harms in the communities in which they operated, many among the poorest communities in the world. That was my first foray into the world of sustainable investment, as I wondered how the international legal system allocated rights and responsibilities to all players in the global economy. Global oil companies are often larger than the economies in which they operate, so it clearly was not sufficient to allocate all responsibilities to protect human rights and the environment to the host countries when the companies were far more powerful and better resourced.

I, therefore, applied to Columbia Law School to complete a dual degree. Though I entered the law school with a human rights focus—wondering how human rights law could be used to hold foreign companies accountable for their actions—I became increasingly convinced of the mutual benefit for companies and governments of responsible business practices. While I still believe that international law should hold all actors responsible for their actions, I also believe that a mutually beneficial framework that promotes sustainable foreign investment can be a huge benefit for economic development and meet the business needs of foreign investors at the same time.

Bulletin: *Recently, campaigns encouraging universities to divest from fossil fuels have gained traction. Do you think there has been a notable improvement in how universities use their endowments to further social and environmental goals? What additional changes would you like to see?*

LS: Thanks to the insightful activism of students around the country and efforts of groups like the Responsible Endowments Coalition, there has certainly been an improvement in the collective conscience on college and university campuses that endowments are a powerful tool by which universities can advance sustainable development. There are two ways that universities and other investors can advance societal goals. First, they can choose to invest only in companies that are furthering social good and disinvest from companies whose business practices are at odds with sustainable development. Second, they can exercise their shareholder rights to engage with companies to elicit improved business practices, for instance, through submitting and voting on proxy statements and engaging directly with the Board of Directors, asking them to consider certain actions or to adopt certain human rights, labor, environmental or other policies.

Both approaches make sense, depending on the circumstances. Generally speaking, I favor the second approach, at least initially. As long as universities remain invested in companies, they keep a seat at the table and can engage as shareholders with the companies' management. Divesting one's shares may relinquish the shares to a less active investor who will not engage in the same way with the companies. However, divestment may be appropriate when a company is unwilling to engage with its shareholders or when the core business is so problematic that engagement is futile. Since oil and gas will continue to play a limited role in the future global energy system, active investor engagement to reduce carbon emissions can be very beneficial. Active investors may request companies to explicitly adopt sustainable development business practices and report on them year to year, and to make such reporting a condition of remaining invested.

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Yet to be clear, the active shareholder approach also puts meaningful responsibilities on investors (including university endowments). If universities hold oil and gas stocks but fail as investors to press the companies to adopt sustainable policies, they end up undermining the objectives of sustainable development. Without such active investor engagement, simpler divestment may well become the preferred option.

Bulletin: *In your 2013 article,* [On Solid Ground: Toward Effective Resource-Based Development], *you advocate for collaboration among multiple stakeholders, including host- and home-country governments, multilateral and bilateral donors and partners, regional banks, civil society, and academia in resource-based development. You note "governments and citizen groups have increasingly recognized the potential for win-win solutions." What mechanisms are being leveraged to maximize collaboration? Are there any notable successes you would point to in this area? What remains the biggest challenge?*

LS: Many investments in extractive industries are very capital intensive, sometimes involving up-front investments of billions of dollars. Traditionally, many companies have attempted to capture as much of the revenues from production and as rapidly as possible, paying as little as possible in taxes and giving only token contributions to the community rather than investing in real linkages and development. Multilateral institutions like the World Bank actually promoted an investor-friendly framework in the 1980's and 1990's, based on the assumption that mega-investments would necessarily boost local economies. And the source-country governments (traditionally the US, Europe, and Japan, but more recently China and other emerging-market economies) often lend political support to their outward investors, putting a heavy thumb on the scale during negotiations between investors and host-country governments.

Increasingly, all of these actors are realizing that contracts that are signed with asymmetrical information and grossly unequal negotiating power in favor of the investors are not stable deals. Local communities are protesting these deals, and often overturning them or making them unmanageable. Foreign investors often incur huge reputational costs through such confrontations. Host-country governments are also gaining in their ability to negotiate more just and sustainable arrangements, either in contracts or in law.

In short, the stakeholders are realizing that a mutually beneficial deal, in which investments are profitable but in which communities and host governments also share in the benefits (through revenues, infrastructure, or local job creation, for instance), can produce better outcomes for all and stability of the relationship between the investor and host country in the long run. The "pie" is already very large with extractive investments, meaning that both host countries and companies can get a big slice of the benefits. But in fact, collaborating on supply chain development, shared infrastructure and other potential linkages can make the pie even bigger.

Concepts as simple as transparency—of basic contract terms and tax payments—have been opposed by some obstinate and narrow-minded industry players, but forward-looking and innovative companies like Kosmos Energy and Tullow Oil disclose all of their contracts and payments as a way to build trust and relationships with their community and government partners. Contract and payment transparency improves the ability of local partners to monitor the projects and the use of the revenues while averting distrust of the company and misunderstandings about the contractual terms.

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The infrastructure and supply-chain needs of companies also offer opportunities for mutually beneficial cooperation. Investments in oil, mining and gas, in particular, but also in other sectors, need significant infrastructure (rail, road, ports, power, water, etc.). In remote areas of low-income countries, the foreign investors often have to produce their own energy and build their own transport infrastructure. By working with local utilities, financial institutions, local universities, and other local and international partners, these companies can leverage the infrastructure investments for broader social benefits, and thereby share the costs and benefits of the investments more widely.

There are a number of interesting case studies of companies partnering with other companies, with local utilities and other international partners to develop necessary infrastructure, especially in power and water, in a way that also delivers power and water to the community at a reduced cost to all stakeholders. The World Bank and Australian government, recognizing the value of these opportunities, have supported CCSI to document good examples and to produce a framework for companies and other stakeholders to identify opportunities for collaborative arrangements in infrastructure.

These solutions, however, remain complex and often elusive. For instance, the timelines of the various partners (companies, elected governments in home and host countries, communities) are not easily aligned, so putting in place complex financial, regulatory, and institutional arrangements among the three is challenging. Moreover, there are deep asymmetries of information among the stakeholders, which create distrust and undermine negotiations. Transparency will help to address these gaps, but it will also require capacity building and ‘honest brokers’ to help align the disparate interests and timelines. There is an opportunity for multilateral organizations like the World Bank to help address those remaining challenges.

Maximizing development potential while improving the environmental and social sustainability of large-scale mining is one aim of sustainable international investment (SII)

Bulletin: *You wear many professional hats, including as a teacher, author, lawyer, researcher, and advisor. What have been some of the most rewarding aspects of your career so far?*

LS: The best part of my job is that I can wear all of those hats at once—and I would add another: student. I have the absolute pleasure of learning each day from my colleagues, our partners, and my students, adding to my own understanding of these very complex topics. I suppose the most rewarding moments have been hearing from my students and from the participants in our training programs about how much they have benefited from the courses and how they will apply the tools and concepts in their professional lives. However, knowing that my colleagues and I are helping to influence policy, supporting stakeholders in their respective efforts to maximize sustainable investment, and contributing to important discussions about the role of and opportunities for all stakeholders to improve the lives of those affected by major investments is rewarding on a daily basis.

Bulletin: *You are a member of the UN Sustainable Development Solutions Network's thematic group on the Good Governance of Extractive and Land Resources. As the international community transitions from working to fulfill the Millennium Development Goals (MDGs) to the post-2015 Sustainable Development Goals (SDGs), can we expect a more prominent role for natural resource management? Is there more of a sense now that states have legal and ethical obligations to manage their resources responsibly?*

LS: The number of developing countries dependent upon natural resource revenues has increased rapidly in recent years. Today, over sixty low- and middle-income countries depend upon natural resources as a major share of their exports. Despite this increasing resource wealth, more than 1.5 billion people in these countries subsist on less than two dollars a day. For many low-income countries, the proper development of natural resources and sound management of the revenues from these investments will be critical for achieving the new Sustainable Development Goals.

Many countries recognize both the opportunity and the responsibility but lack the sophisticated technical, legal, financial, and negotiation tools and skills that would enable them to design robust legal and fiscal frameworks, negotiate good contracts, develop linkages to leverage the extractive sector for domestic infrastructure and job creation, and to manage the potential environmental and social impacts. Moreover, while there is increasing pressure on companies to act responsibly, there are still many companies who

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underestimate the costs (to themselves and others) of continuing business as usual and not joining governments as a true partner for development.

The SDGs will give governments and companies a common framework for assessing progress toward real development outcomes. They can hold each other accountable, and others including investors, financial backers and other stakeholders can likewise begin to really track the contribution of extractives to the Sustainable Development Goals. My colleagues and I look forward to giving guidance to companies and others on the implications of the SDGs.

Bulletin: *Do you have any additional advice for students and young practitioners interested in sustainable investment law and policy?*

LS: Our Center is made up of lawyers, economists, and other policy specialists (environment, human rights, institutional investment, etc.), but we all see and recognize the value of integrating these diverse skill sets in all of our projects. My advice would be to embrace this kind of teamwork and learn from many disciplines. This kind of teamwork is highly productive, very exciting, critically important for addressing today's complex global challenges, and tremendously satisfying.