

Sixth Annual Forum of Developing Country Investment Negotiators

Understanding and Harnessing New Models for Investment and Sustainable Development



Executive Summary

The Sixth Annual Forum of Developing Country Investment Negotiators was held in Port-of-Spain, Trinidad and Tobago from October 29–31 2012, and was attended by 75 participants from 36 countries from Asia, Africa, Latin America and the Caribbean. The Forum was co-hosted by the Government of Trinidad and Tobago, the Caribbean Community (CARICOM) Secretariat, the International Institute for Sustainable Development (IISD) and the South Centre.

In keeping with this year's theme, "Understanding and Harnessing New Models for Investment and Sustainable Development," the Forum provided a venue for participants to consider new approaches to ensuring that investment frameworks and agreements support the developmental goals of developing countries, drawing on emerging models, including those from UNCTAD, the Commonwealth Secretariat and the Southern African Development Community (SADC).

The Forum was divided into seven sessions and covered the following topics: an overview of the key features of the various treaty models and frameworks from UNCTAD, the Commonwealth Secretariat and SADC; the challenges in moving towards a sustainable development model; the growing breadth and implications of investor–state dispute settlement on sustainable development; how to integrate sustainable development into the main investment treaty provisions, particularly fair and equitable (FET) treatment, expropriation, pre-establishment rights and performance requirements; and finally, the tools and institutions needed by developing countries to lead the transition to investment for sustainable development.

In the discussions following the sessions, the consensus formed among the participants was that there was no clear correlation between the number of BITs and FDI, and that there was a need to shift towards a more balanced investment treaty regime that would take into account developing countries' sustainable development objectives. Participants noted that such a shift would not be without challenges. Participants also observed the growing number of investor–state disputes and the alarming rate at which the private sector and practitioners have sought to expand the scope of investment arbitration through various means. Bearing this in mind, the participants articulated the need to limit the breadth and scope of investment disputes by re-examining and delimiting the application of the typical investment treaty provisions such as FET, expropriation, ensuring the ability of states to legislate or to enact policies in the public interest as well as proposing the inclusion of specific performance requirements and investor obligations.

During the various breakout sessions, participants proposed several recommendations, notably:

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- In relation to **expropriation**, the participants considered whether expropriation should be limited to direct expropriation. If indirect expropriation is included, states should define indirect expropriation. Compensation in the event of expropriation should be based on fair and adequate value rather than on fair market value alone. Consideration should be given as to whether the investor has “clean hands.”
- As for **fair and equitable treatment (FET)**, the participants considered excluding FET altogether or including FET, if capital exporting, but only while giving interpretative guidance to tribunals. A reference to “fair and equitable treatment” alone was deemed to provide insufficient guidance. Therefore, if included, the participants noted two ways to provide guidance: (1) to define the standard in accordance with customary international law or to provide a separate definition. In addition, the reference to customary international law could be further complemented. The participants noted that the SADC Model template provided useful example clauses.
- Participants generally saw no benefit to developing countries from the inclusion of **pre-establishment rights**. Protection should be reserved for post-establishment. If included, these rights should be itemized using a positive list rather than through a negative list approach. The participants also pointed out that automatic ratcheting up of treaty commitments should be avoided. Reference to levels of development along the lines of the WTO-style approach should also be considered.
- There was a consensus against the inclusion of prohibitions on **performance requirements**. Participants noted, to the contrary, that the imposition of performance requirement may in some cases be useful and successful. Several supported admission and incentive schemes to be tied to performance requirements. Participants cautioned against including any performance requirement prohibitions in relation to trade-related aspects of intellectual property rights (TRIPS) and against extending any elements of trade-related investment measures (TRIMS).
- Participants agreed on the need to include **investor obligation** provisions in investment agreements and that investments must be linked to sustainable development. Participants proposed, among other things, that investors be required to provide the host state with sufficient and timely information on their operations, to respect human rights, labour and environmental rights, and to accept domestic and international laws on transparency. Participants emphasized the need to include corporate social responsibility (CSR) provisions in investment treaties and for states to ensure an adequate domestic framework to regulate investors. The participants likewise recognized the need for

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sanctions in case of breach by an investor of its obligations. The issue of counterclaims was also raised.

At the end of the Forum, the participants discussed how issues and concerns raised during the Forum could be channeled into intergovernmental processes and reach decision makers. The participants suggested testing the various models presented at the Forum in negotiating or renegotiating future investment treaties and to report on their experiences in applying these tools (as well as other models) during and in between forums. IISD noted that this could be done through the Investment Policy Network. Participants also enunciated the need for dialogue and institutional capacity between the negotiators and other actors. All in all, the participants saw a continuing role for the Forum in relation to other institutions working on investment issues, in terms of information sharing and bringing the concerns of developing country investment negotiators to those agencies.

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Understanding and Harnessing New Models for Investment and Sustainable Development

Meeting Report

The Sixth Annual Forum of Developing Country Investment Negotiators (“the Forum”) was held in Port-of-Spain, Trinidad and Tobago, from October 29–31, 2012. It was co-organized by the Government of Trinidad and Tobago, the International Institute for Sustainable Development (IISD), the Caribbean Community (CARICOM) Secretariat and the South Centre. This year’s Forum was attended by 75 participants from 36 countries from Asia, Africa, Latin America and the Caribbean, as well as international organizations, including the CARICOM Secretariat, the Caribbean Export Development Agency (CEDA), the Commonwealth Secretariat, the United Nations Economic Commission for Africa (UNECA), Southern African Development Community (SADC), and the United Nations Conference on Trade and Development (UNCTAD). The agenda, presentations and background materials for the Forum can be found on the IISD website: www.iisd.org/investment.

The Forum builds upon the successes of the five previous forums held in Singapore (2007), Morocco (2008), Ecuador (2009), India (2010) and Uganda (2011). This year the Forum was aimed at encouraging developing country investment negotiators to explore choices for a better future in relation to foreign investment and sustainable development, with particular focus on recently formed models.

The meeting was conducted under the Chatham House Rules; that is, the information and views expressed at the Forum can be used by participants but are not to be attributed to a person or government. The summaries of the presentations, however, are reprinted in this report and attributed, unless speakers explicitly requested that their contributions not be included.

Opening Ceremony and Welcome

The participants at the Forum were welcomed by **Ms Nathalie Bernasconi-Osterwalder**, Senior International Law Advisor and Program Leader, Investment and Sustainable Development Program, IISD.

Bernasconi thanked her co-organizers, the Government of Trinidad and Tobago, the CARICOM Secretariat and the South Centre. She provided an overview of the key issues that would be discussed at the Sixth Forum, which would centre on the ways to transition from a post-colonial 1960s investment framework to a framework that is more balanced, more modern and that promotes sustainable development. She noted that we now have several instruments to help us achieve this goal. In addition to the 2005 IISD Model Investment Agreement for Sustainable Development, we have three new tools since the summer of 2012: UNCTAD’s Investment Framework for Sustainable development, the Commonwealth Secretariat’s Investment Guide for Integrating Sustainable Development Into Investment Agreements, and the Model Investment Treaty Template for SADC states, which was elaborated by the

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investment committee of SADC. Bernasconi noted that the new models and approaches could help not only prevent negative impacts but could, in addition, actively help ensure that investment contributes to sustainable development. She said that over the three days, the Forum would find creative solutions for fixing the mistakes of the past and building a sustainable international investment framework for the future.

Ms Chantal Ononaiwu, Trade Policy and Legal Specialist, from the Office of Trade Negotiation, CARICOM Secretariat, welcomed the participants, noting that the Secretariat had welcomed the opportunity to co-host the first forum to be held in the Caribbean and more specifically a member country of CARICOM. She expressed the interest of the CARICOM countries in the theme of this year's Forum, as the region has been engaged in more recent years in negotiations of investment agreements at the intra-regional level and with external partners. She noted that this was the first year in which so many CARICOM countries were represented, and their continued participation in the Forum should be encouraged. She then introduced the Honourable Minister Indarsingh, who officially opened the Forum.

The **Hon. Rudranath Indarsingh**, Minister of state, Ministry of Finance and the Economy, Government of Trinidad and Tobago, then welcomed the representatives of 36 developing countries to Trinidad and Tobago. The Minister emphasized that the Forum was an opportunity for the participants to discuss critical international investment policy issues and to network. He noted the risk associated with negotiating bilateral investment treaties (BITs), especially for developing countries. It was his hope that the Forum would address these challenges as the participants improve their negotiation skills with the underlying objective of improving the livelihood and prosperity of its citizens keeping in mind a policy of sustainable development.

Keynote Presentation by Ambassador Luis Gallegos

The keynote presentation was delivered by **Mr Gustavo Guerra** on behalf of **Ambassador Luis Gallegos**, former ambassador of Ecuador to the United States, who expressed his regrets for being unable to attend the Forum.

In his keynote address, Ambassador Gallegos pointed out that, according to the UNCTAD World Investment Report 2012, there are currently over 3,000 bilateral investment treaties. He cited the ease with which these agreements are negotiated as the reason for this phenomenon. While these agreements are not a bad thing per se, the lack of critical perspective with regard to their content has caused states to be bound by a pro-investor regulatory framework not necessarily in line with their development policies. Ambassador Gallegos then reviewed the historical context responsible for shaping today's investment treaty regime, and identified two key phenomena: (1) the global financial crisis; and (2) greater control of the national policies of developing countries, that have opened debate on the

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importance of these agreements, and led many to work on their content with the aim that these should reflect the development objectives of states. Ambassador Gallegos emphasized the need for balance between the interests of the host states and the investors, to be achieved by combining two capacities: (1) the political capacity to coherently articulate the country's development objectives; and (2) the technical knowledge to identify the best terms to negotiate these kinds of agreements in such a way that they respond to the aforementioned development objectives. On the second point, the Ambassador highlighted the work of IISD and UNCTAD, especially both organizations' coinciding initiatives in relation to: (1) the exploration of new mechanisms for dispute settlement; and, (2) the clear identification of environmental, labour and human rights conditions to be governed by the overall framework of investment development. Ambassador Gallegos concluded his address with a brief summary of the way Ecuador is dealing with investment. In Ecuador, a new Constitution was approved in 2008, resulting in the National Development Plan and the Organic Code for Production, Trade and Investment (the "Organic Code"). Under the 2008 Constitution, Ecuador is prohibited from entering into international agreements or instruments in which the Ecuadorean state waives sovereign jurisdiction to international arbitration venues in contractual or commercial disputes between the state and private individuals or corporations, with the exception of regional arbitration venues. This mandate has led Ecuador to denounce all bilateral investment agreements it has signed thus far. This fact notwithstanding, investor protection provisions were incorporated into the Organic Code with the aim of substituting the legal protection agreed upon for investors in those agreements. Ecuador has also pushed for the creation of a settlement mechanism for regional disputes, which will likely be linked to the Union of South American Nations (UNASUR). Ecuador has also created a legal framework that promotes the respect of four forms of ethics: regarding workers, the community, the state and the environment, which must be respected by all national or foreign individuals and legal entities seeking to do business in Ecuador.

Session 1: Key Developments in 2011–2012: New Approaches for Investment Agreements and Sustainable Development

The session was chaired by **Professor Kusha Haraksingh**, Dean, University of West Indies, Trinidad and Tobago.

The first speaker in the session was **Ms Elizabeth Tuerk**, Officer in Charge, Section on International Investment Agreements, UNCTAD.

Tuerk presented UNCTAD's Investment Policy Framework for Sustainable Development (IPFSD), which was released as part of the World Investment Report. The framework sets out 11 core principles, which are then converted into guidelines for national investment policies and policy options for investment treaties. The framework aims at: (1) creating synergies between investment policies and wider economic

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development goals; promoting the integration of investment policies into development strategies; (2) fostering responsible investment and incorporating principles of corporate social responsibility (CSR); and (3) ensuring policy effectiveness in the design and implementation of investment policies.

IPFSD reflects the notion that investment policies are made with a view of attracting foreign capital, but adds to that a broader and more intricate development policy agenda of factoring in sustainable development and inclusive growth into national investment regulations and international investment negotiations. Tuerk identified core challenges in the drafting of sustainable development-friendly investment treaties and provided recommendations on how to address these challenges. She also made special note that South American countries are leading the shift towards the adoption of more innovative investment agreements. Tuerk voiced her hope that the UNCTAD framework will be used as a tool for policy-makers, noting the complementarity between and among the various models: the Commonwealth Model, the SADC Model and the UNCTAD model (see Table III:3, Chapter III, WIR 2012).

The second speaker in the session was **Ms Veniana Qalo**, Acting Head and Advisor, International Trade and Regional Cooperation Section (ITRC), Commonwealth Secretariat.

Qalo discussed the Commonwealth Secretariat's Guide entitled "Integrating Sustainable Development Into International Investment Agreements: A Guide for Developing Country Negotiators" (Commonwealth Investment Guide), which is aimed at assisting developing countries in approaching investment policy and investment negotiations from a sustainable development perspective, and is thus tied closely to developing country goals and objectives. She noted the link between foreign direct investment (FDI) and development, enumerating the ways in which this link can be strengthened. The Guide advocates a comprehensive and centrist approach to sustainable development and aims at assisting developing countries negotiate investment agreements that promote sustainable development, growth and employment. The Guide was developed over two years by the Commonwealth Secretariat, the result of a consultative and expert-group process held in the Commonwealth Caribbean, Pacific, South Asian and African regions. It aims at addressing problems arising under some existing investment agreements that make it difficult for countries to achieve essential public policy objectives, including their development goals and the maintenance of environmental, human rights and labour rights standards. The Guide also identifies best practices in the investment agreement arena, providing tips on the costs and benefits of choosing various options. It outlines new provisions designed to preserve the ability of states to regulate investment in a manner that ensures foreign investment is harnessed to achieve development objectives without creating strong disincentives to investment.

The third speaker of the session, **Mr Mustaqeem De Gama**, Director Legal, Department of Trade and Industry, South Africa representing SADC, presented via videoconference and discussed the SADC Model BIT template. De Gama observed a seismic shift among the SADC countries. He noted that while

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developing countries are also becoming capital exporters, not just capital importers, it was still critical for them to be aware of what is required to develop their economies in a sustainable manner. He also observed that there was not necessarily a link between a country's investment treaty structure and FDI inflows, but that some SADC countries would still wish to sign or renegotiate investment treaties.

The SADC Model is a nonbinding blueprint for SADC countries who wish to enter into BITs. It is premised on the concept of sustainable development and the recognition that countries must be able to regulate in the best interest of economic development. SADC members believe that previous treaties were skewed towards the investor without the necessary checks and balances and thus sought to address this concern in the SADC Model. It requires a rebalancing of rights and obligations between the investors and the receiving state. In the drafting of the SADC Model, it was therefore necessary to accommodate these various objectives.

De Gama went on to give some insights into various approaches taken in the SADC Model Template. For example, SADC member states felt that most-favoured nation (MFN) provisions should not be included, but they nevertheless provided options for member states to include an MFN clause that would also include safeguards to prevent misuse. The fair and equitable treatment (FET) standard was also considered a contentious standard that should best not be included at all. However, alternative options were provided in the draft template that aims at providing a standard protected from expansive interpretations by tribunals. Another important article included in the Model template was the article on expropriation. Many of the member states felt that it may be that, under certain circumstances, the habitually applied fair market value (FMV) standard of compensation was inadequate. As a result, the Model template proposes alternative standards other than FMV. Member states also agreed on mitigation measures to address balance-of-payment and macroeconomic problems relating to currency transfers. Human rights, labour and other sustainable development standards have also been integrated, though not going beyond the pre-existing standards elaborated at the multilateral level.

The last speaker, **Ms Thembi Langa**, Senior Program Officer–Finance and Investment, SADC Secretariat, supplemented her colleague's discussion by providing a brief history of the process and analysis that led to the production of the SADC Model Template. She noted the difficulties experienced by SADC countries during their negotiations, and concluded that with the SADC Model Template, member states now have a template to assist them during their negotiations. She identified ways of making SADC more attractive to FDI, which included the initiation of a program to develop an SADC regional investment policy and move - where possible - towards a harmonization of investment regimes to reflect this policy. Langa thereafter also highlighted important key provisions in the SADC Model Template. She noted that the SADC ministers had praised the document and that it would be officially endorsed shortly. She also observed that SADC was in the process of developing the SADC Investment Policy Framework, and was looking at the OECD investment policy framework for assistance.

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Discussion

The discussion that followed reiterated the fact that investment did not necessarily follow the advent of investment treaties. New models could be used to replace the older ones and be more effective. It was pointed out during the discussion that the documents presented by the presenters complemented each other but that the SADC Model Template used highly technical legal language, and was accompanied by a commentary which could also be very useful for other developing states outside SADC.

Another point of discussion concerned the need to safeguard flexibilities relating to intellectual property rights, which were sometime curtailed through investment treaties.

Another question touched on how the OECD framework could be meshed with the SADC Model Template and other models that were discussed by the presenters. In particular, participants asked how these models could coincide with the OECD model, which focused in large part on “freedom of investment” and investment liberalization as well as how this would interact with special and differential treatment provisions and other development-oriented approaches, also at the national policy level.

Session 2: Challenges in Moving to a Sustainable Development Model: An overview

The session was chaired by **Mr Nihal Samarappuli**, Executive Director–Research and Policy, Board of Investment, Sri Lanka.

The first speaker for the session was **Mr Ignacio Torterola**, former International Centre for Settlement of Investment Disputes (ICSID) Legal Counsel, Counsellor at the Embassy of Argentina, Argentina.

Torterola observed that there was no correlation between signing investment treaties and FDI. He pointed out that the number of BITs has increased to 3,000, and that the number of disputes has increased with the number of treaties. At present, about 500 cases have been filed, though many of the cases are confidential, so the exact number is not actually known, but this number is expected to grow. Torterola pointed out that decisions are lack uniformity and are sometimes contradictory. He noted that he had previously predicted a collapse of the system, but the reverse was happening, with more and more states signing BITs and international investment agreements (IIAs). He advised, however, that countries not sign them.

Torterola provided an overview of the scale and types of cases that have been brought against Latin American states. He noted that Argentina has suffered 48 investment treaty cases with claims amounting to about US\$50 billion. The cases arose mostly out of the financial crisis in the early nineties, and there are still 17 cases pending. In the case of Ecuador, Torterola noted that when there was a spike in the

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price of oil, Ecuador decided to keep a part of these windfall profits for its people, without touching the share of the foreign investor. Last month, an ICSID tribunal awarded a foreign investor the largest award yet granted - US\$1.8 billion. In Mexico, there have been issues with landfill waste disposal. The case involved differences in the decisions between the Mexican state and federal authorities. Just recently, the countries party to the Central America Free Trade Agreement (CAFTA) in *RBC v. Guatemala* watched an arbitral tribunal interpret the FET standard beyond the international minimum standard they had expected. The main problem relies in the approaches taken by the tribunals, as they apply the same flexible interpretation typically used in commercial arbitration to investor-state disputes, and this leads to non-predictable outcomes, so that too much depends on who sits on the tribunal.

Tortorola emphasized that this system needs to be made more balanced. He stated that no country should enter into a BIT until the arbitration system was fixed, especially not one which has an investor-state arbitration clause.

He noted that free trade agreements (FTAs) appear to be more acceptable than BITs, because here at least countries could try to negotiate some reciprocity. According to Tortorola, we are living in the age of second-generation BITs. He concluded by observing that many least-developed countries (LDCs) were still bound by first- and second-generation BITs, and he recommended that these be renegotiated and replaced with more balanced third-generation BITs.

Regarding the content of BITs, Tortorola noted that BITs should clearly limit FET clauses to the minimum standard of customary international law, that they should avoid the inclusion of MFN clauses, and include some type of “exhaustion of local remedies” provision. He also recommended putting some responsibility on investors to conduct thorough due diligence before making an investment, to be held responsible for using undue means of pursuing that investment (i.e., corruption), and to respect human rights and environmental measures. Moreover, the state should have the right to pass extraordinary measures in case of necessity (a “necessity” provision), and that the necessity provision should be self-judging. He continued that compensation scheme be rethought, that the fair market value approach should be re-evaluated and should be limited to cases in which a successful and profitable investment is present. In this context, he also noted that a different compensation scheme should be used for the FET and the expropriation standards. Finally, the dispute resolution system should permit certainty and uniformity, and include the possibility of reviewing decisions through an appellate mechanism. He also suggested the formation of a commission along the lines of the NAFTA Free Trade Commission that could react swiftly in case of excess by tribunals.

A brief discussion followed Tortorola’s presentation. Participants observed that the number of BITs was declining while there was increase in the number of regional agreements. They also discussed what countries could do to renegotiate BITs. The option for investors to use investment guarantees rather

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than rely on BITs was also discussed. The group noted that, since there was no clear correlation between the number of BITs and FDI (as demonstrated by Brazil, for instance), there were other ways to achieve development other than through treaties, including through domestic legislation and policies. According to the discussion, it is impossible to achieve stability through a treaty. Finally, participants discussed the fact that, given the expansive approaches taken by tribunals, there exists a clear need for a clause limiting investment disputes to purely investment disputes and not trade disputes disguised as investment disputes.

The second speaker was **Mr Wayne Punnette**, Director–Investment, Ministry of Trade and Industry, Trinidad and Tobago. Punnette began his presentation by characterizing Trinidad and Tobago’s current investment promotion legislation as dated and noted the splintered approach to investment promotion across the various regulatory agencies, particularly in the energy sector. In order to address this challenge, all Trinidad and Tobago investment agencies are now required to work in conjunction with Invest, the national investment promotion arm.

Punnette identified the challenges that Trinidad and Tobago faced in negotiating IIAs, and similarly acknowledged several challenges for developing countries, including finding acceptable ways to include labour and environmental issues into the treaties. He also noted that there was the problem of the limited pool of skilled negotiators. Punnette explained that over the last few years the CARICOM countries have negotiated as a bloc. According to Punnette, this strategy possesses its own challenges, since countries have to negotiate among themselves before negotiating with the third-party state. He said that there was also have a lack of familiarity with BITs.

Trinidad and Tobago put a mechanism in place to overcome some of these challenges, including the adoption of an updated BIT in 2011, the adoption of a new national investment policy, the creation of a single investment promotion agency, and the use of the CARICOM template for negotiations. Trinidad and Tobago wants to see intangible long-term deliverables such as technology transfer. It also needs to work more closely with CARICOM colleagues and finalize the investment code, harmonize incentives and find common negotiation positions to prevent investors from so-called “country shopping.”

Trinidad and Tobago recommends the inclusion of specific long-term developmental provisions, increased training, greater networking with countries, and the finalization of CARICOM negotiations to facilitate negotiation as a bloc, and to take advantage of occasions such as the Forum to learn and benefit from participants’ experience in these activities.

The third speaker for the session was **Ms Chantal Ononaiwu**, Trade Policy and Legal Specialist Office of Trade Negotiations, CARICOM Secretariat. Ononaiwu reiterated that CARICOM countries have sought in the development of the intra-regional framework for investment (the CARICOM Investment Code) and in

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more recent external trade negotiations, to move from a traditional perspective of investment treaties to a model that is more supportive of sustainable development. Ononaiwu focused on three challenges that arise in moving towards this model. One is to determine the best model that suits the region's needs. Second, once the model is determined, there is the need to successfully negotiate features on the basis of that model. The third is to address earlier treaties or elements of earlier treaties that conflict with the new sustainable development model. With respect to the first challenge, Ononaiwu noted that none of the new models for investment and sustainable development are intended to be adopted wholesale. Countries still have to invest time and expertise in order to determine what investment treaty provisions are appropriate. In developing a template for the negotiation of investment provisions in external trade agreements, CARICOM referenced Models for Investment and Sustainable Development. However, CARICOM countries also drew on their experiences in negotiating IIAs, as well as on elements of treaties negotiated by other countries. With respect to the challenge of successfully negotiating features of the model chosen, Ononaiwu observed, that developed and developing countries may not have divergences of view with respect to all aspects of a sustainable development model. There may be convergence around some issues, such as ensuring that investor protection obligations do not undermine unduly the host state's regulatory autonomy. However, there may be divergences of view with respect to the question of whether or not more novel provisions should be included, such as those relating to investor obligations. Such obligations were already integrated in the IISD model agreement as well as in other models. But so far only a few have been successfully incorporated in actual negotiated agreements. What this tells us is that countries need to marshal cogent arguments that these provisions are indispensable to a balanced outcome. Ononaiwu pointed out that where earlier treaties have been negotiated on the basis of the more traditional perspective, countries will have to pay close attention to the terms of any MFN treatment obligations that are negotiated. One option would be to make MFN treatment forward-looking so as to guard against the incorporation of the terms of earlier treaties.

Ononaiwu ended her presentation by addressing the issue of earlier treaties. She said that it was important for countries with existing treaties to think about what provisions of those earlier treaties needed to be revisited. When termination is a potential option, it is likely to be pursued when a country determines that an earlier treaty (or elements of it) is inimical to its sustainable development imperatives. Moreover, she noted that provisions on termination in most treaties provide for the treaty to remain in effect with respect to pre-existing investments for a number of years following termination. Termination will ultimately result in the absence of a treaty framework. As for re-negotiation, unless both parties see eye-to-eye on the merit of moving in a new direction, they will end up negotiating additional concessions. Finally, there is nothing preventing countries from agreeing to issue joint interpretative statements in order to guard against unduly expansive interpretations of legal standards.

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Session 3: Investor–state Dispute Settlement: Its Growing Breadth and the Implications for Sustainable Development

The session was chaired by **Mr Howard Mann**, Associate and Senior International Law Advisor, Investment and Sustainable Development Program, IISD. The goal of the session was to look at the nature of the different arbitrations that countries are facing today. This includes the substantive nature and the major procedural questions currently being raised. The session did not examine the merits of individual cases, but focused on the question of their nature. This led to a listing of the types of cases that provided a useful tool to see how broadly investor–state arbitration can reach into issues related to sustainable development. The result, with some post-session additions, is included as Annex I to this report.

The first speaker for this session was **Mr Ignacio Torterola**, former ICSID Legal Counsel, Counsellor at the Embassy of Argentina, Argentina, who elucidated the disputes Argentina has been facing.

Argentina has faced two major categories of cases: those preceding the financial crisis and those relating to the crisis. In *CGE Vivendi v. Argentina* (not related to the crisis), the state level government decided to terminate a contract with a French company because there was opposition from the population when the water tariff for consumers was raised by 100 per cent—there was also some politics involved. The first tribunal decided that the government did not breach the treaty. This decision was later annulled, and a second tribunal ruled in favour of the investor.

When the financial crisis struck Argentina, it had a convertibility regime in place, whereby contracts with foreign investors had either been negotiated or expressed in U.S. dollars. The economy went through a tough four-year period during the crisis. At the heart of the crisis was the devaluation of the Argentine peso, which brought commercial debt repayment problems. Argentina implemented an IMF-supported program to help respond to the repayment issues. The IMF then decided to cut support and an economic crisis ensued. There are two types of claims related to the crisis: (1) Argentina changed the conditions under which investors had invested and (2) when that change affected third parties (e.g. a foreign company running a loan company to Argentine citizens, by which loans were made and received in pesos) resulting in treaty shopping by investors in order to initiate arbitrations. There have been jurisdictional objections to such indirect claims and on other issues. Argentina has also faced one of the most unusual claims, the class action arbitration initiated by Italian holders of Argentinian bonds that allowed hundreds of such bond-holders to unite into one group for arbitration purposes.

The presentation highlighted the vulnerability of a state to arbitration—over 45 claims—following an economic crisis.

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The second speaker was **Mr Gustavo Guerra**, Negotiator and Investment Assessor, Ministry of Production, Employment and Competitiveness, Ecuador. Guerra provided an overview of the cases filed against Ecuador with a particular focus on those that have been initiated in the past decade.

Guerra observed that in 2001 there was a case involving the nationalization of an oil concession. Following that, in 2002 and 2003, there were two arbitrations involving the value-added tax (VAT) relating to oil companies production. Ecuador won one and lost the other, though both were based on the same facts. Technical treaty language on the coverage or the exemption from coverage of taxation was a key factor in these cases.

Mr Guerra then noted that Ecuador passed a law in 2005 regarding the distribution of windfall profits in the oil and mining sectors. This provoked a list of cases, including *Encana v. Ecuador* (regarding windfall taxes). Currently, there is the case of *Occidental Petroleum v. Ecuador*, relating to a claim by Occidental for tax rebates against the government. Guerra noted that there are four cases related to cancellation of mining concessions. There are also two claims regarding denial of justice, one involving Maersk shipping, and another involving Chevron/Texaco, which flows from a claim by indigenous peoples for environmental damage to their Amazonian basin lands, and over which a tribunal has taken jurisdiction while the local case is actually still in progress. This case has a large public welfare dimension.

The third speaker of the session was **Mr Ricardo Ampuero**, Legal Advisor, Special Commission on Controversies in International Investment, Ministry of Economy and Finance, Peru. Ampuero presented a variety of cases in which Peru is presently embroiled.

Ampuero stated that the first type of claim for Peru concerns the regulatory capacity of the state, and includes state intervention in a bank with financing problems, a taxation case against a Chinese company where the tribunal found that measures by the taxation authority amounted to an expropriation, and infrastructure-related cases. A large mining arbitration claim involved an environmental issue.

The next category involved the economic crisis where the financial crisis was used to excuse performance. According to Ampuero, there are cases that should ideally not be litigated using the investment protection regime. In particular, he observed that Peruvian investors are now known to be associating with foreign investors in order to gain access to the treaty dispute mechanism regime as a preferable regime over domestic courts. The international investor protection system is not intended to apply to domestic investors, so having a foreign partner is seen as a way to extend the use of investor-state provisions to what are really domestic investments and investors. There is also a growing number of disputes where claimants attempt to extend the investor-state provisions by using the vague nature of the protection standards, despite the fact that they do not qualify as investments. Peru is fighting these arbitrations based on jurisdiction grounds and the definition of “investor” and “investment.”

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Ampuero stated that Peru also has an interesting case where Peru has initiated a counterclaim based on the investor's failure to meet its obligations after the investor initiated an arbitration against the government.

Overall, Peru is now facing multiple claims ranging from environmental measures, to nationalization, taxation and financial crisis management. They have also seen a growing abuse of the process by domestic investors seeking to use international partners to gain access to the ISDS process.

The fourth speaker was **Mr Eduardo Porcarelli**, Executive Director, Consejo Nacional Inversiones de Promoción (CONAPRI), Venezuela. Porcarelli shared Venezuela's experience with investment disputes.

According to Porcarelli, in Venezuela, President Chavez's decision to change the country's economic and political model resulted in the enactment of laws that have caused problems with investors. In the 1990s, the previous administration decided to open the oil sector to investors under lax conditions. However, the new Chavez government has had three national economic development plans, an important feature of which was the nationalization of certain sectors of the economy, with resulting claims related to nationalization and expropriation across the economy, including the mining, farming and food, tourism, petrochemical, banking and transportation sectors. He noted that many investors had reached settlements with the government over property claims relating to such measures, but others had chosen to go to arbitration instead. These arbitrations are generally ongoing. Porcarelli noted that the government had paid compensation in the settled cases.

These arbitrations highlight the difficulties ISDS creates in moving to different economic models, in this case even when the government was willing to pay compensation.

Mr Carlos Moreno, Director of Policy, Ministry of Trade, El Salvador, gave the final presentation of the session. He discussed three recent cases and noted El Salvador's success at resolving these cases at the jurisdictional phase.

As noted, each of these three cases was solved at the jurisdictional stage. In *Enceysa v. El Salvador*, the investor had presented illegal documents causing the government to revoke their permit. This is notable because this arbitration established the principle that investments established through fraud and illegal practice are not protected by investment treaties.

The second case involved a Canadian mining company which had alleged that mining permits were denied for arbitrary reasons. As a result, the investment had lost its value and therefore the company claimed the denial amounted to an expropriation. This was successfully defended using the denial of

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benefits clause as the company had no significant business from the state it claimed as its home state in a treaty-shopping scheme. There was no substantial business link between the claimant and the supposed home-state party to the BIT. Here, the Cayman Island company attempted to establish a link with the U.S. by moving to Nevada.

The last case involved the *Commerce Group v. El Salvador*. El Salvador had managed to prove that claimant had failed to exhaust local remedies as required under the BIT.

These three cases have been important because each was resolved at the jurisdictional stage without going through the merits stage. The need for respondent states to aggressively challenge jurisdiction is highlighted here.

The session chair then invited other representatives to give examples of issues and cases that they have experienced in their own countries.

Comments from the participants included the following:

One participant cited the example of Zimbabwe, where there are two cases. The state passed legislation that basically took over land for redistribution to black farmers, thus affecting investments in agricultural land made by some foreign investors. The state had provided compensation for the improvements made on the land, but not for the land itself. Zimbabwe lost the first arbitration. In the second case, Zimbabwe anticipates that it will lose this arbitration because the conditions are essentially the same as the first.

Zimbabwe has also recently passed a law assigning 51 per cent of the shares of mining companies to the state. They anticipate further arbitration claims from this law.

Another participant observed that Trinidad and Tobago has a case involving FW Oil. The question posed was whether the actions of a state-owned company could be attributable to the state (i.e., termination of a tender process). These also involved IP rights and allegations of fraud. The arbitration went to the end, when the tribunal decided to split the costs 50-50, but made no judgment on the merits.

Sri Lanka had the first recorded ICSID decision, involving a prawn farm and a claim of full protection and security for destruction of the property during the period of civil strife. There are also a series of cases involving HSBC, Deutsche and Citibank involving identical financial issues relating to price and foreign currency hedging practices, but these have led to different outcomes based on the exact same facts. All of these involved breach of contract, though one of the arbitrations went to arbitration under a treaty instead of the contract.

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In Chile, the first arbitration was a case related to fishing quotas with the investor. The second arbitration involved a Malaysian investor who thought that its investment was going to be approved and sought approval for a rezoning application, which was denied by the local government. The third case involved an expropriation of a newspaper business under the military regime. These cases highlight the range of activity that can be covered by arbitration claims.

Mann cited cases involving tobacco regulations (Australia, Uruguay, Canada) brought by Philip Morris. There is a public welfare issue of reducing smoking, as well as breach of IP rights, such as taking away of trademark packages. In terms of jurisdiction, these are also cases involving treaty shopping practices by Philip Morris, with the Uruguay arbitration under a Swiss–Uruguay BIT and the Australian under a Hong Kong–Australia BIT.

The participants then discussed the ramifications of a series of cases involving third-party funding, a new phenomenon in investor–state arbitration. There is an interesting element to these because in the most recent case the tribunal had set a deadline and yet the claimant (represented by Freshfields) was allowed to extend the deadline twice to allow it to get third-party funding, against the objections of the host state. According to the participant, this is a very unusual, frightening situation because the company repeatedly broke its deadlines, yet the tribunal granted extensions to enable the claimant to proceed with the annulment proceedings.

Participants also looked at Pakistan, which has a few cases, one of which involves a potentially large gold mine. In this case, exploration contracts were given to an investor from a country that did not have a BIT with Pakistan. A non-governmental organization challenged the granting of the permit alleging bribery and foul play. Pakistan’s Supreme Court cancelled the licenses. Interestingly enough, some of the shareholders came from a country with which Pakistan had a BIT. Relying on that BIT, they made an expropriation claim. The second Pakistani case is an FET claim involving a trading matter relating to public bidding for agricultural products. These products were not compliant with Pakistan’s standards and so payments were withheld. The claimants then brought an FET claim under the BIT.

The session chair noted how the threat to bring different matters to arbitration has caused governments to back down with respect to prospective legislation. He emphasized that this is not unique to developing countries. This use of investment treaties is not addressed in any statistics about how many cases are won or lost, as the threats take place.

In other cases, Swedish company Vattenfall has recently instituted arbitration proceedings against Germany because it decided to discontinue its nuclear energy policy. The Canadian Province of Newfoundland and Labrador is now embroiled in a Chapter 11 NAFTA proceeding for imposing

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performance requirements on off-shore oil drilling companies, in this case to undertake specialized research and development in the province.

The panel noted that there is also an investment treaty case brought by a Chinese investor against Belgium for the measures taken during the most recent financial crisis, concerning the closing of a bank based on widely recognized prudential measures to protect consumers. This dispels the preconception that China will not use the BIT regime to bring a claim. Here, the bank the Chinese company owned failed the stress test applied in Europe after the financial collapse (i.e., survivability of the banks). The Belgian government took it over and did not give it full compensation. The Chinese investor argues that such a measure was not necessary and is seeking full compensation, over US\$2 billion.

From the discussion arose the fact that there are also cases brought against South Africa over its black economic empowerment program, as well as a set of denial of justice claims involving the United States courts by Canadian investors. One participant made an interesting point regarding the Philip Morris Australia case.

The full mapping of the cases noted in this panel is found in the Annex to this report. What this highlights is the breadth of substantive issues being captured, seen even in a brief session of experience sharing among the participants. In addition, the session highlighted the growing efforts by the private sector to expand the scope of investor–state disputes through treaty shopping, class action claims, the use of third party funding, domestic investors using international partners, broad definitions of investor and investment, and other tools to continuously increase recourse to the system. This suggests that states should anticipate that use of the system will increase over the next few years, with a resulting increase in the range of issues that one can expect to see covered. The range of issues covered was seen as remarkable by many participants, again noting the small sampling size the session reflected.

Session 4: How to Implement Sustainable Development into Investment Agreements 1: FET and Expropriation

The session was chaired by **Ms Sanya Reid Smith**, Affiliate, South Centre.

The first speaker for the session was **Ms Nathalie Bernasconi-Osterwalder**, Program Leader and Senior International Lawyer, Investment and Sustainable Development Program, IISD.

Bernasconi began by explaining that expropriation is one of the main protection provisions in BITs. Expropriation has today become something different from the understanding of expropriation in the 1960s, and the increasing importance of “indirect” expropriation is a major difference. According to Bernasconi, BITs usually do not provide a definition of expropriation, leading to different interpretations

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by tribunals. As a result, there is no certainty or predictability regarding how it will be interpreted, and the outcome will depend entirely on the composition of the tribunal. What is undisputed today is that a state has the right to expropriate, and a treaty does not take away that right, but it does require compensation. She observed that it is therefore crucial to demonstrate what is (and what is not) an expropriation because only actions amounting to expropriation is compensable in this context.

There are two categories—direct expropriation and indirect expropriation. Direct expropriation is generally not controversial. According to Bernasconi, what is more problematic is indirect expropriation (i.e., destruction of economic value without transfer of ownership). To determine what is an indirect expropriation is not always easy, she observed, since a wide range of measures could qualify as indirect expropriations according to tribunals. The biggest problem in this context is the regulatory framework taking issue (health, public welfare, labour rights, environment).

Bernasconi noted that tribunals have taken different approaches in this respect. The first is the injurious effect on investment test (also referred to as the substantial deprivation or sole effect test) (as in the case *Metalclad v. Mexico*), pursuant to which the tribunal looks primarily or only at the *effects* of the measure. The second is the proportionality test (as in the case *Tecmed v. Mexico*), pursuant to which the tribunal looks at the impact of the measures, the legitimate expectations of the investor as well as the objective of the measure. The third approach is the so-called police power exceptions approach (as in the case *Methanex v. USA*), pursuant to which certain types of measures are carved out of the definition of indirect expropriation. This approach has found its way into investment treaties in different versions. Police power measures can include measures relating to sanitary, environmental and human rights violations.

In a review of cases of the last year, we had nine cases in which expropriation was invoked. Of those nine, the investor was successful three times. Most of these claims did not survive under the effects test. If the impact on the investment was not substantial enough, no expropriation was found. In *El Paso v. Argentina*, a carve-out approach was adopted (i.e., that general regulatory measures do not constitute expropriation).

Bernasconi then turned to the SADC Model, explaining that it defines what constitutes expropriation (Art. 6.6.A and 6.7.A) and carves out general regulatory measures, thereby providing guidance to the tribunals about which test to apply to determine whether or not a measures amounts to expropriation.

The SADC model also addresses the controversial issue of the concept of “fair market value” for determining the amount of compensation in case of an expropriation. Bernasconi noted that the problem with applying the predominant fair market value approach was that it does not consider the host state situation, the duration of the investment, the profits already made by the investment, etc. To

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address these concerns, the SADC Model provides three drafting options, including alternatives to the traditional fair market value approach.

Bernasconi then moved on to the FET standard. This standard is causing a lot of problems, as tribunals are expanding its scope and it has become an ideological battleground. Its origins are found in customary international law, but the language of FET was introduced in the 1960s model. Today, FET is a complex legal standard, serving as a type of catch-all provision). Despite its casual-sounding nature, it is a legal obligation on states, not a policy statement. The standard has been successfully invoked by investors for a wide range of measures, as tribunals have enlarged the scope of the words “fair and equitable.” The precise meaning of the standard is still unclear. This uncertainty works in favour of lawyers and arbitrators, but is not helpful for host states or even investors who need predictability and clarity.

Bernasconi observed that states are trying to address this problem in the way they draft their investment treaties. For example, states have tied the FET standard to customary international law, in an attempt to reign in its scope, but this has been largely ignored by a number of tribunals. The SADC Model has responded to this concern. It provides two options in case treaty parties wish to include FET in the first place. If included, the SADC proposes to link FET to customary international law and in addition spells out a test inspired by *Neer v. Mexico*. The second option is the Fair Administrative Treatment approach which focuses more on the process rather than the substance. According to Bernasconi, this would avoid challenges to legitimate policy measures and laws.

The second speaker was **Mr Ahmad Aslam**, Counsellor, Permanent Mission of Pakistan to the WTO, Pakistan. Aslam pointed out that the real problem with the provisions lies in how they are implemented through tribunals. He explained that we now have seven or eight definitions of FET, leading to glaring inconsistency. A part of this inconsistency emerges from the fact that most countries became progressively cautious when negotiating FET after the Argentinean crisis, and began trying out new approaches. Even today, new approaches are still being explored. The UNCTAD and the Commonwealth Models also provide alternatives. The Commonwealth model, for instance, links FET to customary international law, but adds additional safeguards against expansion. Aslam noted that the Commonwealth approach also creates an exception (i.e., carve out) and informs the tribunals that the host state has the freedom to regulate, taking into consideration the level of development and economic conditions of the host state. Aslam also pointed out that this looks very good on paper, but what happens when a counterparty is unwilling to include the language desired by the host country? He argued that this is why it is important to identify what a host state’s interest and redlines are in order to negotiate successfully.

The participants discussed the importance for governments to have redlines and to put boundaries between what is or is not negotiable. One participant pointed to the IPFSD options, notably UNCTAD’s

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preferred option (include an exhaustive list of state obligations under FET) as well as the "no" option. There was also discussion about regional approaches and how they might strengthen negotiation positions. Another participant also raised the question of whether it might be useful for an international organization to determine the definition of FET and indirect expropriation. Participants and speakers found this an interesting idea but suggested that a good outcome might not be very likely, given the very opposing views on these issues.

Breakout Session 1: Comparing and Selecting Draft Provisions on Expropriation and FET in different Models

The participants were divided into five groups to consider provisions on expropriation and FET using different tools, including the UNCTAD Investment Policy Framework for Sustainable Development, the Commonwealth Guide and the SADC Model.

The groups' recommendations in relation to expropriation provisions included the following:

- The state must retain the right to expropriate, while respecting minority rights. The issue is whether compensable expropriation should be limited to direct expropriation.
- Greater focus should be given to the question of regulatory expropriations and whether such measures constitute an expropriation. The general direction is that measures taken for public welfare purposes do not (or normally do not) constitute an expropriation. The expropriation issue thus needs to be carefully drafted.
- If indirect expropriation is covered in the investment treaty, governments should define indirect expropriation and steer the tribunal to make a fact-based inquiry, taking into account the measures, economic impact, level of interference in investment and calculation of measures in light of the legitimate public purpose. There should also be a carve-out from compensable expropriation for health and environmental measures.
- Compensation should be based on fair and adequate value rather than fair market value alone.
- Consideration should also be given as to whether or not investors have "clean hands."

The groups' recommendations in relation to FET included:

- The groups considered two options: (1) exclude FET; (2) consider including FET, if capital exporting, but disallow the tribunals from making interpretation, and instead give direction on how to interpret the clause.
- If included, there are two ways to provide guidance: to define the standard in accordance with customary international law or to provide a separate definition. The reference to customary international law could be complemented through a threshold requirement that the act be "serious,

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egregious, manifestly arbitrary, etc.” To refer just to “fair and equitable” is insufficient, because in the final analysis, the definition of FET would be determined by an international tribunal, rather than the parties to the treaty. The SADC Model provides useful example clauses.

- Other clarifications to put in the treaty include:
 - Termination of a contract or breach of another provision in the treaty does not equate to a breach of this standard.
 - The FET standard should not be expanded to limit the ability of states to legislate.
- The inclusion of public interest might be problematic. As such, negotiators should look into other standards such as Fair and Adequate Treatment (FAT), among others.

Session 5: How to Implement Sustainable Development into Investment Agreements: Investment liberalization, pre-establishment rights and performance requirements

The session was chaired by **Professor Carlos Correa**, Director CEIDIE, University of Buenos Aires and Special Advisor on Intellectual Property and Trade, South Centre.

Professor Correa began by stating that pre-establishment rights are the maximum level of investor rights, because they are given even before the investments are made. In order to have quality investments, performance requirements are a useful tool for developing countries. There are many performance requirements that are not addressed by the WTO rules. In terms of investment agreements, one thing that is particularly relevant is to study what these performance requirements are and how to establish these requirements.

The first speaker for the session was **Mr Howard Mann**, who began his presentation by distinguishing between pre-establishment and post-establishment rights. Pre-establishment rights mean that the foreign investor can invest on the same terms and conditions as a domestic investor in that sector. In other words, governments cannot apply rules or conditions that are more arduous to foreign investors than existing laws and regulations that apply to domestic investors. This is in contrast with post-establishment rights.

Mann noted that performance requirements refer to the ability of a government to set out economic performance requirements on the foreign investor: (1) levels of employees to be engaged; (2) training of human resources; (3) research and development by the investment; and (4) local purchasing of goods and services, etc.

Traditional BITs have covered post-establishment rights only. Recent BITs, and most U.S. and Canadian BITs, now cover pre-establishment rights. According to Mann, the first and most critical thing to note is

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that one does not need pre-establishment rights to liberalize the economy. It comes from domestic law and policy. Investment treaties, however, will prevent changes being made. One important question is “What are the goals of the specific demanders of investment liberalization provisions?” These are markets seeking for services and retail goods for their own companies, as well as access to natural resources (seeking legal rights of access to minerals, energy and water) for their manufacturing and extractives sectors. These goals are not about development in the host state. Combined with prohibitions on performance requirements, liberalization provisions create the risk of a real conflict between the freedom of investors and the ability of governments to manage investments within a sustainable development model.

What are the options? These include: (1) no provisions; (2) admission in accordance with law; (3) national treatment provisions; (4) positive lists and negative lists; (5) the exclusions of sectors; and (6) other measures. The national treatment provision including the “establishment, acquisition, etc.” language in the national treatment clause is a global commitment.

Options for Performance Requirements include: (1) their prohibition; (2) no mention; or (3) enabling performance requirements by directly or indirectly carving them out of national treatment (and MFN) obligations.

In conclusion, Mann noted that if a state gives up control over entry into its domestic markets, and the ability to enhance the development contribution of investments to the economy, then the ability to ensure such benefits is radically diminished.

The second speaker for the session was **Mr Gustavo Guerra**, Negotiator and Investment Assessor, Ministry of Production, Employment and Competitiveness, Ecuador. Guerra opened his discussion on investment liberalization and performance requirements by outlining the common policy lines among the South American countries. These included efforts to design long-term development strategies, responsible macroeconomic management and structural reform, improving the correlation between investment and productive development. Priority areas for investment were natural resources, infrastructure and industry. He noted that among the South American states, there has been a shift towards regional or multilateral treaties over bilateral agreements, as well as the inclusion of an investment chapter in Free Trade Agreements (FTA) over BITs. He pointed out that some FTAs, based on the EU model, have an additional chapter like the General Agreement on Trade in Services (GATS)—singling out access and non-discrimination for FDI in services—while others do not. Some liberalize “establishment” for both services and goods. With respect to investment liberalization, he notes the adoption of provisions that reduce or eliminate barriers to the entry, establishment and operations of investments. As for performance requirements, Guerra reported that the practice among the South American states was to include all operational measures imposed by host countries to gain more benefits

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from investment. This means that these should be used only as necessary to achieve legitimate public policy purposes, should be subject to compliance with international and multilateral obligations such as the Trade Related Investment Measures (TRIMS) Agreement, and should preferably be imposed as conditions of special incentives. He then gave examples of evidence of these trends, which include Peru's FTAs with Panama, Mexico, Costa Rica and Guatemala, the Japan–Colombia BIT, Mexico–Central America FTA, EU with Colombia and Peru, as well as the EU–Central America treaty. He particularly noted that the BITs between Japan, Colombia and Peru have a larger scope with respect to performance requirements.

The third speaker was **Ms Angela Dau Pretorius**, Acting Deputy Director, Investment Centre, Namibia. Pretorius observed that the objectives of the Namibian Investment Law was to emplace a modern and clear law taking into consideration the various interests of the government and other stakeholders. She also noted that the Namibian FIA had opened up the economy. As a result, new changes have been made to restrict sectors for certain investors using four different classifications: government only, Namibian only, foreign with a Namibian joint venture partner, and open sectors. Another change made was to require a system of prior notification in connection with changes in ownership. The new law also required the compulsory registry of all investors. Under the current FIA, the performance requirement criteria only applied to investors considering a Status Investment Certificate. The new Act will allow for a consideration of a full range of economic and social development performance requirements as part of the initial review and authorization of larger investments.

The next speaker, **Mr Ahmad Aslam**, Counsellor, Permanent Mission of Pakistan to the WTO, noted the linkages between performance requirements and the trade in services. He observed that the global trade in services is governed by the WTO and proceeded to ask two questions: (1) how does this work with the issue of BITs? and (2) how does it impact the idea of liberalization? For the moment, there are two models: the U.S./ Canadian model and the European model. The difference between the first and the second is the North American model's emphasis on trade in services.

How is trade in services regulated? It is regulated through domestic linkages (e.g., whether a state opens exploration rights to foreigners). Nonconforming measures, when listed, lock in your legal provisions (i.e., the level of liberalization at the bound and not the applied regime). The other thing that happens is that countries rely on their GATS exception in the WTO.

BITs do not stand alone. The cross-referencing between treaties has led to contesting legal interpretations. Aslam noted that the second thing that happens is the degree of closure of nonconforming space. The last thing we are beginning to see is that GATS still has a softer landing spot in the special and differential treatment—GATS discipline is creeping into the application of BITs.

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Comments from the participants included a question on whether there is a measure to monitor that requirement and how this double standard can be addressed. If there is a performance requirement issue, states have a choice to restrict it, to say nothing or to ensure any performance requirement will survive challenge. Another participant also referred to: (1) the IPFSD which also includes the "no" option and (2) the WIR 2011, Chapter III, which discusses the importance of preserving policy space for industrial policy tools (i.e., no PRs), and gives information on how countries have used reservations to preserve policy space for industrial policies.

On pre-establishment rights, one participant pointed to the IPFSD, which: (1) includes a discussion on pre-establishment, while noting that most IIAs do not go into pre-establishment issues; (2) notes that it is an important policy choice to decide whether to extend the IIA to pre-establishment matters and, if so, to find a right balance between binding international commitments and domestic policy flexibility; (3) notes that the negative list approach is more demanding.

Breakout Session 2: Comparing and Selecting Draft Provisions on Pre-establishment Rights, and Performance Requirements in Different Models

The groups' recommendations in relation to Pre-establishment Rights:

- The first choice for all groups was to not make any pre-establishment commitments in investment treaties. All groups considered it not to be in the best interests of developing countries to do so. This reflected the view that many governments continue to reserve sectors of the economy and limit access to others, and this flexibility should not be removed by treaties. While it was recognized this may be difficult, this view was consistent.
- Investment protection should only become active when an investment has become rooted in an economy, not before.
- Participants generally saw no benefit to developing countries from the inclusion of pre-establishment rights. A state should thus accord protection only when the investment is actually up and running in the host state. Protection should be reserved for post-establishment.
- However, if pre-establishment rights are to be included, it should be done through a positive list approach as opposed to a negative list approach.
- The automatic ratcheting up of treaty commitments such that any sector liberalized by a government unilaterally after the treaty enters into force automatically becomes a liberalized sector under the treaty, should be avoided, since it prevents subsequent re-adjustment by a state.
- Where pre-establishment is considered, it was suggested that there should be a reference to levels of development given the asymmetry in size of the economies between many treaty parties, following WTO-style approaches.

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- If pre-establishment rights are included, they should not be subject to the dispute settlement mechanism.

The groups' recommendations in relation to Performance Requirements:

- There was a consensus against the inclusion of prohibitions on performance requirements. Indeed, participants called for recognition and respect for the use of a certain number of conditions such as localization of economic benefits.
- Participants noted that the imposition of performance requirements was successful in some cases, such as the case of Thailand's car manufacturing industry, with Thailand becoming the world's third-largest exporter of automobile parts. Developing countries should therefore reserve the right to use performance requirements.
- Performance requirements can be made a precondition to admitting the investment. Participants argued that there should be a national screening process requiring registration of the investment with an investment board. Alternatively, governments can make the performance requirement a condition of fiscal incentives, including the provision of jobs, research and development, job training, etc.
- Some sectors may require different forms of performance requirements. In agriculture, impose labour or employment requirements would be desirable.
- There were also discussions on linking performance requirements to increased engagement with disadvantaged groups, minority groups and to address gender equity issues.
- Participants also favourably discussed the listing of certain types of performance requirements as protected under the treaty.
- Participants also cautioned against including any performance requirement prohibitions in relation to Trade-Related Aspects of Intellectual Property Rights (TRIPS) and against extending any elements of TRIMS.
- Allowing an exclusion from such prohibitions for non-conforming measures was also considered.

In summary, it was clear is that the groups agreed that there should be no pre-establishment rights in the BITs and there should be flexibility regarding the use of performance requirements. If pre-establishment rights were to be considered, the preferred approach should be a positive list. Everyone was also clear that pre-establishment rights, if included, should not be subject to Investor state Dispute Settlement (ISDS).

On performance requirements, it was unanimous that there is a strong opposition to the inclusion of prohibitions on performance requirements in FTAs. In addition, the ability to use them should be carved

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out and made an exception from National Treatment (and any MFN provisions). Incentive schemes, where used, should also be tied to performance requirements

Session 6: How to Implement Sustainable Development into Investment Agreements 3: Investor obligations

The session was chaired by **Mr Lincoln Price**, Private Sector Liaison at Office of Trade Negotiations, CARICOM Secretariat.

The first speaker for the session was **Ms Elisabeth Tuerk**, Officer in Charge, Section on International Investment Agreements (IIAs), UNCTAD. She highlighted corporate governance and responsibility as one of the 11 core principles for investment policy-making. CSR is proliferating at different levels. According to Tuerk, CSR guidelines are soft and voluntary, but they could be strengthened through other tools, such as IIAs. Tuerk stated that there is a perceived view that IIAs are unbalanced insofar as they give rights to foreign investors without also setting out obligations or responsibilities. Including CSR could thus provide a better balance. But there are also objections to the introduction of CSR into IIAs. One reason is that there are fears that this would reduce countries' attractiveness to FDI, an instance of so-called "green protectionism."

Tuerk went on to explain how CSR has in the past been integrated into IIAs. Some treaties have references to CSR in the preamble (e.g., Norway and Austria). CSR has also been incorporated in the institutional set-up (CCIA Committee). Tuerk listed three issues to consider when going further in integrating CSR into IIAs. One issue to consider is to whom to direct the obligation—state or investor? The second question relates to the content of obligation (domestic laws and regulations, universally recognized standards, applicable CSR standards). The third issue relates to the enforceability or sanctions (deny treaty protection, interpretation, counter-claims).

She then considered several possible options, besides the option of not addressing CSR at all: (1) require that investors comply with host-state law at the entry or at operations stage; (2) comply with universally recognized standards; (3) encourage investors to comply with CSR standards; (4) call for cooperation between the parties to promote observance of applicable CSR standards; and (5) encourage home countries to condition outward investment promotion incentives on investors' socially/environmentally sustainable behavior.

Sanctions for Option 1 include to: (1) deny treaty protection for investments made in violation of host-state law; (2) deny treaty protection to investments operating in violation of certain host-state laws; and

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(3) allow for counter-claims, an area that has gained much attention recently. For Options 2 and 3, the tribunal should consider non-compliance in assessing violation or determining compensation.

Tuerk highlighted the fact that that some of these suggested provisions have been referenced in various models (such as the SADC Model), and various country model BITs. IPFSD considers the need to balance rights and obligations of states and investors as one of the three key challenges in international investment policy-making (see Table 2, IPFSD).

The second speaker, **Ms Veniana Qalo**, Acting Head and Advisor, International Trade and Regional Cooperation Section (ITRC), Commonwealth Secretariat, focused on the Commonwealth Model and explained how it addressed the issue of investor responsibilities. She explained that in the Commonwealth Investment Guide, the question posed was how sustainable development could be integrated into IIAs, with an additional focus on the fact that investor accountability had to be part of this.

Qalo identified the following obligations as among those provisions in the Commonwealth Investment Guide that address sustainable development, namely the: (1) investor obligation to comply with the laws of the host state; (2) investor obligation to respect internationally recognized human rights and undertake human rights due diligence; (3) investor obligations to refrain from the commission of, or complicity in, grave violations of human rights; (4) investor obligation to comply with core labour standards; and (5) investor obligation to refrain from acts of or complicity in bribery, and briefly noted that these obligations could be introduced into investment treaties in various ways.

She followed this listing with a question, asking how developed country opposition to investor obligations could be overcome. She observed that, from the point of view of investors and the capital-exporting states, these obligations on the investor appear onerous. There is, however, a need for these provisions in order to get to more balanced agreements. Traditional IIAs focus on a host state's obligations to the investor without any requirements for the investor. This imbalance could be redressed by requiring investors to protect communities and the natural environment in which they operate. How can these be made effective and enforceable? Qalo noted that the Commonwealth Investment Guide enumerates the following enforcement mechanisms to ensure investor compliance with their obligations: criminal sanctions, adoption of a grievance procedure, a process to deal with non-compliance with a management plan produced as a result of a sustainability assessment, civil liability, and counter-claims by states in investor-state arbitration.

In the Commonwealth Investment Guide, the main obligation of the investors is to comply with the law of the host state. Qalo pointed out that host states have the option of either omitting or including such an obligation in their IIAs, but she emphasized the benefits of incorporating such provisions because they

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clarify expectations on investors and raises the obligation to an international level. They also allow the host state access to treaty-based compliance mechanisms.

Concerning the investor obligation to respect human rights and undertake human rights due diligence, Qalo listed the following options: (1) not requiring foreign investors to respect human rights or undertake human rights due diligence; (2) using existing domestic laws, (3) the incorporation of said obligation into domestic law; (4) the incorporation of a provision in the IIA recommending that states encourage their investors to include internationally recognized CSR standards in their corporate policies, and finally, (5) the integration of the obligation into IIAs.

Regarding the obligation to refrain from the commission of, or complicity in, grave violations of human rights, Qalo observed that the Commonwealth Investor Guide gives states the option to: (1) not prohibit foreign investors from committing, or being complicit in grave violations of human rights; (2) use existing domestic laws to address such concerns; (3) incorporate such an obligation into domestic law; or (4) integrate such obligation into an IIA.

On the obligation to comply with core labour standards, Qalo noted that the most protective approach would be to incorporate this obligation into IIAs, but the following alternatives were also available: (1) not requiring foreign investors to comply with core labour standards; (2) using existing domestic labour laws to regulate investor activity; (3) the introduction of stronger domestic labour laws consistent with a state's international labour law obligations; (4) the integration of language on labour rights into the IIA (i.e., in the preamble, language addressing "race to the bottom" labour standards, an obligation among investors to comply with core labour standards).

Regarding the last obligation to refrain from acts of or complicity in bribery, Qalo enumerated four options: (1) not require foreign investors to refrain from acts of or complicity in acts that bribery and corruption; (2) the use of existing domestic law to regulate and sanction bribery and corruption; (3) the introduction of new legislation to prohibit and punish bribery and corruption consistent with a state's international obligations; and (4) the integration of anti-corruption provisions in the IIA (i.e., language in the preamble, obligation among states to cooperate to ensure investors are prohibited from, and effectively sanctioned for, engaging in corruption, obligation on investors to

The last speaker for the session was **Ms Michelle Walker**, Head of Legal Unit, Ministry of Foreign Affairs and Foreign Trade, Jamaica.

Walker opened by discussing Jamaica's experience in negotiating BITs, noting that between 1989 to 2008, Jamaica negotiated 17 BITs (16 of which are in force) with both developed and developing countries, none of which contained investor obligations. She pointed out that for later BITs, both

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developed and developing country partners proved unwilling to assume investor obligations. Jamaica's first experience in negotiating investor obligations provisions was the investment chapter proposed by CARICOM in the Economic Partnership Agreement (EPA) with the European Union. These investor obligations provisions were originally extensive, covering areas that included compliance with domestic laws, harmonizing management policies to contribute to the development objectives of the host state, using Environmental Impact Assessment (EIA) screening criteria based on the highest standards, conducting social impact assessments, anti-corruption measures, post-establishment obligations for respecting human rights, environmental and labour standards, adherence to best practices for corporate governance, and corporate social responsibility.

However, the EU was not receptive to the CARICOM proposed text, citing issues of competence (i.e., only member states had competence with respect to investment promotion and protection, not CARICOM). After several years of negotiation, the end result was a chapter on commercial presence that dealt with the market access component of investment with some elements of CSR included. The present version of the EPA contains two articles on investor obligations covering anti-corruption measures, maintenance of labour, environmental standards and establishment of community liaisons for the projects in natural resources industries.

According to Walker, the investor obligations provisions, while less comprehensive, were nevertheless a good starting point for further discussions. The anti-corruption and labour provisions of the EPA were linked to existing international obligations and were to be enacted into domestic legislation. The reference to community liaisons is also a significant gain as a precedent for future negotiations. However, the issue of enforcement of these had yet to be tested.

Walker posed some questions that needed to be asked moving forward:

- If the EU was willing to include the minimum standards of investor obligations in the commercial presence text, why did the EU not agree to more comprehensive provisions?
- Does this suggest that the resistance to the CARICOM text was not based entirely on jurisdictional issues within the EU?
- What does this mean for CARICOM member states (and Cariforum) as they attempt to negotiate an EU-wide agreement?
- Will there be an opportunity for Cariforum to seek to expand on the investor obligations since the EU now has competence over investment promotion and protection?
- Should the negotiations be limited to provisions that are considered acceptable by the EU (e.g., expropriation) or should the CARICOM push for provisions regarded as controversial but desirable for sustainable development objectives?

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She noted that the timing of the negotiations will depend on the clarifications received from the EU, but it was critical for the Caribbean Region to choose carefully what additional areas it wished to have included in such an agreement. Based on previous and current experiences, she admitted that it would be difficult to persuade the EU to include the more controversial sustainable development provisions in an EU/Cariforum investment agreement.

The EPA was signed in 2008 and is now being provisionally applied. CARICOM is currently in negotiations with a developed country. The lessons learned in negotiating the investment chapter of the 2008 EPA are being applied, but Walker admits that the Caribbean Region faces additional challenges in these negotiations. The CARICOM's current proposal bears some similarity to the original EPA proposal, but it strikes a better balance for the Caribbean Region.

Walker ended her presentation by stating that there were no clear solutions for the Caribbean Region, only more work as the member states seek solutions to drafting an agreement which would create a rule-based environment for investments while leaving adequate policy space for host states to attain their development objectives in a sustainable manner.

Discussion

One participant underscored the need for cooperation between the host state and the investors, and the need to promote investment insurance and investment promotion schemes.

There was some discussion about the fear of some countries that investor obligations would dissuade investors from coming. Participants noted that since the treaties do not demand more than what is already required at the national level or as international standards, the point of dissuasion did not really make sense. In fact, there was nothing in the various models that leading companies are not already doing right now. If there is resistance from investors, countries should ask whether they want that investor in the first place. The critical reality is that it is the investments right now that will affect those coming 15–20 years from now, and these issues and standards are intended to reflect what is already good corporate practice.

In sum, all three panelists agreed that there is merit in incorporating these investor obligations into the various IIAs. These are all important tools. Discussions focused on the various options on how investor obligations can be enforced (denial of treaty protection, counter-claims, criminal sanctions, among others) and an approach where the tribunal is asked to look into investor behaviour when addressing issues of injury (i.e. the "Clean Hands" Principle). Participants discussed various reasons why capital exporting countries are at odds with developing countries in incorporating elements of investor obligations. The reasons mentioned included the novelty of the provisions, so that seasoned negotiators

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would be resistant to incorporating them into a new BIT. Another possible reason noted was that they are difficult to enforce, and finally, that they meddle too much in the way investors manage their operations. Also discussed was an interesting experience from the Jamaican approach regarding CSR, which they are seeking to infuse into treaties as an investor obligation, even if they do not have legislation at present to address CSR at the national level. It was concluded that there was significant information of a practical nature available through the proposals from UNCTAD, the Commonwealth, the Jamaican government, the IISD model treaty, and the SADC template, and that with these we can no longer say as developing countries that we do not have any resources to help us.

Breakout Session 3: Comparing and Selecting Draft Provisions on Investor Obligations and their Enforcement

The groups' recommendations in relation to investor obligations:

- Investment agreements must not only give rights to the investors but should link those to investor obligations and the interests of the country. There must be balance in the agreements. It is therefore necessary to include investor obligation provisions. In this area, a minimum position is that investors must conform to the laws of host states.
- Participants recognized that treaties cannot impose specific obligations similar to regulatory type measures applied at the national or state levels by governments. There is no one-size-fits-all template in this regard. There are also issues of who should be subject to the treaty obligation—investors or host states? Though there are complex issues, treaties can be used to signal and ensure proper space for such measures and minimum levels of obligations in generic terms. These should be in areas such as labour, the environment, human rights, etc.
- Investments must be linked to sustainable development. Development is a prime objective and investors should respect the social, development and economic policies of developing countries.
- In terms of the issues to be addressed in investment treaties, participants discussed the following:
 - Investors must provide information in a sufficient manner without committing fraud prior to any investment being authorized. They must also provide sufficient information on their operations and impacts.
 - Investors must consider the environmental impact of their actions and ensure that their activities do not harm the environment.
 - Investors must respect human rights and labour rights.
 - Investors must accept both domestic and international laws regarding transparency and accountability, including transparency in terms of payments (transparency is a key point with respect to royalties and taxes due to the state).
 - Liaison processes and collective agreements should be established between investors and other stakeholders.

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- A reference to CSR should be included in treaties and there should be domestic legislation to set an outline.
- It should be clear that investors can be liable for damages in civil court cases. They must respond to the state for infractions.
- Many participants also noted that it is important for governments not to rely just on treaties, which can be difficult to negotiate. States must therefore ensure an adequate domestic framework to regulate investors, and at the very least the clause: “in accordance with domestic law” should be integrated in the treaty.
- Some approaches might be enforceable and mandatory, while others might be in the form of persuasive principles. Some might be subject to ISDS, others not.
- Participants also discussed the question of sanctions which can be imposed for breach. Several noted that relying just on CSR and good corporate practice was insufficient. Sanctions for breach of an obligation through the investor were necessary.
- The issue of counterclaims was also raised as an important issue.

Session 7: What Tools and Institutions do Developing Countries Need to Lead the Transition to Investment for Sustainable Development?

The final session was chaired by **Ms Veniana Qalo**, Acting Head and Advisor, International Trade and Regional Cooperation Section (ITRC), Commonwealth Secretariat.

The first speaker was **Mr Howard Mann**, Associate and Senior International Law Advisor, Investment and Sustainable Development Program, IISD. Mann began his presentation by asking the following questions:

- Are the tools reaching the right audience?
- What processes are required to make these tools more effective?
- What are the additional types of outreach that should be done?
- Is there a role for the annual forum steering committee?

Mann thereafter pointed out that there are two elements to this panel. The first is the international dimension. The other is leading the development of the concept of sustainable development within each of the participants’ countries. He pointed out that one of the things in the three new tools that have come out this year—the SADC Model, UNCTAD IPFSD, the Commonwealth model—is that these are not just guidelines for treaties but also helpful for domestic legislation. He emphasized the importance of knowing how the international roadmap compared with the domestic roadmap. He then raised a series of questions that he hoped will trigger some inputs from the panel and the participants as stakeholders.

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Mann explained that the IISD Model Agreement was a non-governmental document and noted that this was a watershed year in terms of the availability of the foregoing documents coming out of governmental processes. The timing is very fortuitous and suggests a broad trend that is visible today. The question is the utility of these tools. He then proceeded to ask the following questions: Are the tools and messages reaching the right audience—at the bureaucratic level or high-level ministers? Will these kinds of tools resonate with them? What other uses can be made of these tools? Can they help inform those debates and discussions? What kinds of communication strategies or institutional processes are needed to put them within reach?

In institutional terms, he pointed to the Forum for developing country investment negotiators. He noted that there was a growing sense that this Forum was the only process just for developing countries. He then asked whether or not there should be a preparatory meeting. Mann also noted that this year the organizers were looking at the issue of dispute settlement institutions and then suggested whether one could structure some kind of preparatory meeting around that in some way. He then noted the existence of a steering committee that helped with the process and asked several questions: Is this worth pursuing? How do we make it more productive? What kind of communications should we use for the Forum? Should the Forum have a representative to the UNCTAD? (which would not necessarily mean that there needs to be a consensus on everything). What additional kinds of outreach can be done? At an institutional level, what can be done to reach the decision-making level? Broadly speaking, there has been a huge improvement for capacity-building in relevant ministries but it is not necessarily getting to the decision-making level. Are there opportunities to have regional meetings to have a better type of outreach for ministers and their deputies?

The next speaker was **Ms Marit Kitaw**, UNECA Secretariat, Kigali, Rwanda.

Kitaw spoke about the natural resource curse and the need to reverse this trend. Many African countries are mineral-rich, but most mining operations are enclaves integrated in external economies, with few connections to local economies. Inputs are externally sourced and products externally consumed. It is a non-renewable resource. While there is potential, this is largely untapped. African countries face challenges, including non-tariff barriers, procurement policies, and the lack of provisions in laws and regulations to promote linkages.

However, Kitaw argued there is still hope because there exist windows of opportunity. What are they? Africa's risk profile has improved. It is a major FDI destination. Kitaw observed that the demand for mineral resources has increased and there is now a more favourable political economy. There is a tax shift that is giving more fiscal space to governments. Mining companies, she noted, are increasingly driven by the triple bottom line approach (i.e., their success is now measured against good economic,

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environmental, and corporate social performance) that reflects the need for investors to also have a social license to mine.

Finally, Kitaw noted that there has now been the advent of the Africa Mining Vision (AMV)—a credible framework to promote “transparent, equitable and optimal exploitation of mineral resources” from a sustainable development perspective. The AMV was drafted by a technical taskforce composed of the African Union (AU), the United Nations Economic Commission for Africa (ECA), the African Mining Partnership, the African Development Bank (AfDB), UNCTAD and UNIDO. It was approved by various African heads of state at the February 2009 AU Summit. One of its focus areas is the development of a diversified and globally competitive African mineral industry which contributes to broad economic and social growth through creation of economic linkages, among others. Citizens should participate in the wealth generated by the mineral assets. This must be a redline for negotiations pertaining to any foreign investment. Since mineral resources are finite, there has to be some intergenerational responsibility. Bearing this in mind, she stressed the need to include resource rehabilitation as well as other CSR elements as preconditions to access for mining and other resource-intensive sectors. At the end of the day, it is better to negotiate these in the beginning than try to fix a contract later.

Kitaw then enumerated a number of success factors for the AMV, which has now become the standard for setting mining policy goals across Africa. It was developed by African Leaders for Africa and is their reference framework. It suggests a collective ownership by government, regional institution, private sector and civil society. The AMV is an integrated strategy for using the natural resources endowment for sustainable development, including economic, social and environmental components. Partnerships are critical. It is recognized by the EU as a basis for EU–AUC partnership cooperation programs on mining investments. As Kitaw noted, demand for minerals continues to be strong, so Africa has now more bargaining power to negotiate better deals.

Possible strategies include improving the level or quality of Africa’s resource potential data, the fight for more fiscal space, and the adoption of innovative licensing schemes. Other strategies Kitaw mentioned include the boosting of Africa’s capacity to negotiate contracts and extract better deals. She observed that there is also a need to review and renegotiate existing mining agreements. African countries can also manage mineral wealth better, develop African junior resource companies, unbundle the minerals complex, address infrastructure constraints, promote mineral clusters and support small- and medium-sized enterprises (SMEs) as they enter the supply chain.

As a way forward, UNECA has an action plan. The next step is the establishment of an African Mining Development Center, set for 2013. They also recognize the need to strengthen institutional capacities and competencies at government and other levels for efficient long-term planning, prudent management and smart spending, saving and investment of mineral wealth, and the negotiation of better deals to

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achieve sustainable development. The process is also being supported by training programs and the provision of technical and legal support to governments.

Overall, the AMV is developing an institutional process to ensure its implementation through regional and national institutions that are integrated around the AMV, providing a consistent set of goals to the implementation and institutional components.

The next speaker was **Ms Mariama Williams**, Senior Research Fellow, South Centre.

Williams noted the current shift from the Freedom of Investment Model to a sustainable development model. She explained that the Freedom of Investment Model was based on the assumption that all investment is good. This was the underlying motivation for the first-generation BITs. Williams emphasized the need to understand the motivation for attracting FDI and granting protection for those investments. She observed that the discussion on the shift from the Freedom of Investment Model to the sustainable development model needs to be placed in the wider context of good corporate governance (similar to transfer pricing avoidance and tax avoidance initiatives). Moreover, she articulated that technology transfer is more than a principle, but a specific provision that can be enforced in IIAs.

Williams argued that the technical issues we have been grappling with here also reflect the need to demystify the stranglehold the investment issue has on the mind frame of many developing countries. Shifting from the Freedom to Invest Models pushed by the OECD towards a Sustainable Development Model is an important part of this process.

The context that has brought us here (including the BITs and IIAs) is that the many countries that are involved in BITs now allow ISDS instead of resorting to national courts. This has generated a kind of backlash. According to Williams, this has a lot to do with the most egregious provisions that have helped make these BITs actually become fiscal tools against developing countries. The mechanism for enforcing these BITs has set up a legal regime that privileges corporate over developmental interests. There is a clear need to stop private firms from exploiting BITs.

The Freedom of Investment Model (all investment is good and therefore liberalize the investment regime as well) that underpins the first generation of BITs has to be unpacked and revised. The data will show that there is no correlation between the number of BITs and the inflow of FDI. BITs and IIAs are not decisive in attracting FDI.

There is a related need to demystify this whole orientation towards FDI for our decision makers. Without looking at FDI like trade, even if there was a link between FDI and export, we have to disaggregate the policies, look at different sectors and look at how these impact economic development, social

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development, etc. Williams suggested that investment has multiple aspects that we need to reformulate even in the context of the new models we are looking at here. It is linked to competition policy and restrictive business policies. We know that FDI is critical and important. It is how developing countries can make the most out of this—as a conduit for technology transfer, higher level job skills, broader economic growth, etc.—that we must address. There are other related issues, such as the whole issue of transfer pricing and putting it in the bigger context of investor obligations towards the host state. And there is also the important context of the needs of local communities and local governments.

At the national level, Williams noted the need to develop appropriate guidelines which emphasize the quality, not just the quantity of investments as the basis of new policies, as well as the need to establish within each country what are yellow light and green light measures and focus on sub-regional issues and the kind of issues COMESA, ECA is working on.

She suggested that rethinking the shift from the Freedom of Investment Model towards a Sustainable Development Model should also help identify what can practically be implemented. Finally, Williams also stressed the importance of global advocacy so that some of the messages can be taken on by leaders at that level.

Discussion on ways forward

The participants first discussed several issues relating to investment in the mining sector. Several participants spoke about their challenges in the sector and noted that there was dependence on the expertise of foreign companies in its development. A discussion followed about the AMV and the related institutions that were tasked to implement it, and what type of work, processes, etc. were being developed. Marit Kitaw gave a brief sketch of the institutions being developed under the AMV, which was completed in 2009 and adopted by heads of government. Institutions are just now being organized and developed which would aim at assisting developing countries in addressing a host of challenges in the mining sector.

With respect to a question on conflict minerals, she noted how certain mining companies were now subject to regulations such as the US Dodd–Frank Act, which requires listed companies to disclose where the minerals originate. She said that at the regional level in Africa, there were also provisions for stopping the illegal exploitation of natural resources. With respect to a question on mine rehabilitation, Howard Mann pointed to the Model Mining Development Agreement (MMDA), which is a model contract developed by the International Bar Association (IBA) that takes into consideration the rehabilitation of mines. Some of the provisions in the MMDA require a fund established by the investor that the government can tap into if the closure plan is violated.

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The participants then discussed how the issues and concerns raised and addressed in the Forum for Developing Country Investment Negotiators could be channeled into intergovernmental processes and reach decision makers. Besides the regional process under the African Mining Vision, participants discussed other institutional mechanisms that can be pursued to take the concerns of the Forum forward at the international level. The Commonwealth Secretariat, for example, is sitting in the Monetary Review Committee for LDC performance. A second avenue is through the G20. The Chairperson, Veniana Qalo, noted that there is a post-2015 SD paper to pool messages that can be fed to the G20 or UNCTAD. Other UN Forums were brought up that could be tapped to raise the concerns and conclusions discussed at the Forum. For example, there was the UNCTAD World Investment Forum, held every two years, which would be a good event at which the Forum could raise some of their issues with policy-makers.

In relation to the different tools available to negotiators, such as those developed by UNCTAD, the Commonwealth and SADC, it was suggested that the next step is to use these tools when negotiating future investment treaties. Participants also noted that it would be useful to report on both the success stories and the failures when applying these and other tools and models, in between and at the Forum. IISD noted that this could be done through the Investment Policy Network (IPN).

It was noted that the idea of the Forum was not to promote the negotiation of new BITs, but that this is an issue for individual states to determine. Part of the Forum's role could be seen as creating alliances to renegotiate the BITs. This is something to think about.

One participant also stressed that there was a need to communicate the messages of the Forum to the attention of technical and political actors at the national level and to coordinate with them.

Participants suggested that developing countries have been following a developed country agenda and that there was a sense of encouragement that the Forum talked about the link between development and investment and a new paradigm. Some participants acknowledged that they may not focus sufficiently on what is the fundamental purpose of those negotiations. Participants noted the need for dialogue and institutional capacity between the negotiators and other actors, and that the negotiation structures in governments were not always optimal. Several examples of this were discussed. For example, Qalo put forward the experience of the Commonwealth in trade agreements. The technical persons negotiating do not always work with the parliamentarians to bridge the gap between the technical and political level. If the participants can agree in this Forum that those stakeholders should be involved, then the next step would be to produce materials that would reach them.

Overall, the participants sought a greater continuing role for the Forum in relation to other institutions working on investment issues, in terms of information sharing and bringing the concerns of developing country investment negotiators to those agencies. There was also a sense of a need for other institutions

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working on investment issues to be better informed about the issues relating to investment treaties and how they can constrain the achievement of development objectives, such as those expressed in the African Mining Vision.

There followed a brief discussion about the theme for the next Forum. Suggested themes included (i) the question of how to manage the various investment models and model treaties at the regional level to make a leap towards a sustainable development focus and (ii) the issue of investor–state arbitration and how it might be reviewed, revised or reformed. In this context it was pointed out that it was necessary to keep the 3,000 BITs and 500 cases in mind when thinking about dispute settlement reform over the next decades. These would be the basis for future disputes which will only become more frequent with an increasing number of lawyers specializing in investment disputes and third-party funding becoming more common. UNCTAD’s work on dispute avoidance, and ultimately, the management of those disputes would also have to be addressed. One participant encouraged other participants to share experiences with their own cases in between Forums, to discuss specific dispute settlement modalities and lessons to incorporate into one’s own policies or treaty negotiation.

The Chair concluded by asking for volunteers for the Forum steering committee for next year. Volunteers included:

1. Mr Barnabe Agossou (Benin)
2. Ms Champika Malalgoda (Sri Lanka)
3. Ms Chantal Ononaiwu (CARICOM Secretariat)
4. Mr Sam Beausoleil (Haiti)
5. Ms Samantha Rolle (The Bahamas)

Closing Ceremony

Chantal Ononaiwu from the CARICOM Secretariat, Nathalie Bernasconi from IISD, Wayne Punnette from the Government of Trinidad and Tobago, and Mariana Williams from the South Centre closed the Forum. They thanked all the government participants, organizers and representatives from intergovernmental organizations, and the key persons who made the Forum possible.

Participants were urged to earmark their budgets for the next forum which will take place in Asia in late October 2013.

Countries and organisations considering co-hosting the next Forum in Asia are encouraged to informally express their interest to IISD as soon as possible. The co-hosting of the event does not entail a significant financial contribution by the host state.