

REPORT ON
The Third Annual Forum of Developing Country Investment Negotiators
8-11 November, Quito, Ecuador

Developing Countries and New Directions in International Investment Law

The Third Annual Forum of Developing Country Investment Negotiators was held in Quito, Ecuador, on 8-11 November 2009 (“the Forum”). It was co-organized by the International Institute for Sustainable Development (IISD), the South Centre and the Government of Ecuador and was attended by 60 participants from 33 countries. The agenda and background materials for the Forum are found on the IISD website, www.iisd.org.

Opening ceremony and welcome

This year’s welcome speech was given by **Mr. Lautaro Pozo**, Vice Minister of Foreign Affairs of Ecuador.

Mr. Pozo’s speech noted the food, energy and financial crises facing the world. Mr. Pozo noted that Bilateral Investment Treaties (BITs) reflect a fifty-year-old ideology that is not relevant to the current challenges facing the world today. He said that many countries signed these agreements without sufficient analysis and an understanding of their implications. Mr. Pozo stated that the current formulation of BITs does not reflect the objectives of developing states, such as the issues of environment and human rights. He discussed the transformation in his country and the formulation of a new economic model, which will serve as the foundation of a development-oriented investment framework. Mr. Pozo emphasized that Ecuador’s international commitments would have to be aligned with his country’s national development plans and that sovereignty over the state’s strategic resources, particularly energy and food, would not be compromised under BITs. He said foreign investors would have to follow minimum standards, including labour and human rights, corporate social responsibility (CSR) best practices, domestic laws and a respect for the environment. Mr. Pozo stated that Ecuador had decided not to agree to arbitrations with investors before international arbitration centres, but believed in promoting the use of regional institutions.

Mr. Pozo concluded by welcoming the delegates to Quito and thanking the sponsoring organizations for their efforts in promoting the Forum.

Keynote speech, Mr. Randall Williams, South Africa

The Forum's keynote address, entitled "Nothing Sacred: Developing Countries and the Future of International Investment Treaties," was delivered by **Randall Williams**, Chief Director, Trade Policy and Negotiations, from the Republic of South Africa (RSA).

Mr. Williams provided an account of the RSA's experience with BITs, alongside his personal experiences with treaty negotiations. He noted that the RSA started its BIT program in 1994 on the premise that it was essential to have such agreements to attract investment. Today, however, he noted that the government was questioning the very need for such agreements. He said that the RSA's first BIT with the United Kingdom was prompted by the fear that the post-apartheid government in the RSA could nationalize the property of investors. Mr. Williams stated that the UK BIT model was accepted by the RSA with little negotiation or understanding of the risks BITs place upon the host government. He also noted that the RSA government of the time adopted the UK model as a template for other negotiations, without appreciating that as a developing country the RSA's needs were different from the UK's. Today, the RSA faces a US\$250 million arbitration claim by investors under a BIT over its critical Black Economic Empowerment program.

Mr. Williams said that as a BIT negotiator, he found the unbalanced nature of BITs, where the host state has all the obligations, difficult to accept. He identified that the RSA had an additional challenge because of being both a capital exporter and capital importer, and therefore his country had undergone a period where it adopted a dual approach to BITs by continuing to negotiate them with comparatively lesser developed states. Mr. Williams noted that during this phase, the RSA softened the typical provisions, including, for example, limiting the definition of foreign direct investment by excluding short-term portfolio investment and by excluding regulatory expropriation.

Mr. Williams argued that the notion of developing countries needing BITs because they attract foreign investment appears false as a general rule, noting that the empirical evidence is at best inconclusive on this relationship. Market size, availability of skilled labour, natural resources, and tax and other legislation are the important foreign investment determinants, he argued—not BITs. He referred to a South African study that noted that legal certainty came ninth as a reason for investment, market size being most important. He also noted that the two largest capital exporters to the RSA in the last few years were the United States and Canada, neither of which have BITs in force with the RSA.

Mr. Williams also mentioned his concerns about the procedural issues in BITs. He opined that the ICSID Convention¹ restricted the ability of developing countries to review awards, in comparison to the New York Convention, and therefore, in his opinion, the RSA should not accede to the ICSID Convention.

Mr. Williams outlined the objectives of the comprehensive review of the BIT program in the RSA that commenced in 2007, beginning with a policy paper relating to the macro and micro issues relating to BITs. He said the starting point was to treat nothing as sacred with respect to BITs, and the review asked fundamental questions such as those about the purpose of the BITs and the need for the RSA to sign such agreements. He mentioned that the first workshop on the BIT policy review document was conducted within the government, but very little useful input was obtained due to the lack of understanding among the officials of the agreement's legal implications. The second version of the policy draft was circulated for comments to civil society and a workshop was conducted that resulted in diverse views, in particular on whether there was a need for the RSA to continue having BITs. A third policy draft is currently being prepared, which will include recommendations for RSA's future BIT policy. Mr. Williams also mentioned exploring alternatives to signing BITs, such as investment-specific agreements with investors and a domestic foreign investment code that local judges could apply and interpret according to national principles of fairness and equity, rather than international arbitrators unfamiliar with these concepts under South African law. He noted that the current so-called system of international investment law is a set of treaty-based rules, which should be subject to the principles of *jus cogens* under public international law.

Mr. Williams noted that a state's responsibilities were not limited to providing protection to foreign investors, but that it also owed a broader range of obligations to its citizens. He concluded by stating that it is the responsibility of each developing country to better understand the rationale behind entering BITs and to choose their approaches carefully.

Follow-up discussion

Howard Mann of IISD summarized the keynote address by highlighting the questions of the nature and purpose of BITs, in particular the contribution they make to the developing goals of developing countries. He said that developing countries must ask themselves why they need the treaty and their reasons for negotiating such an agreement, rather than entering

¹ Convention on the Settlement of Investment Disputes between States and Nationals of Other States, signed 18 March 1965, entered into force 14 October 1966 ("the ICSID Convention").

into the process because another country has requested it or an international organization claims that such agreements are needed to attract foreign investment.

The participants discussed the value of public consultation in a BIT review process, as stakeholders are likely to have radically diverging opinions. In this context, Mr. Williams noted that there was a constitutional obligation in the RSA to consult all stakeholders regarding public policy. He said that although the review process can result in diverse views, ultimately the government must decide in the best interests of the country while balancing all the views from various interest groups. He noted that Norway had gone through a similar process but in the end decided not to take the position on whether or not to continue with BITs. It was also noted that the United States BIT review process resulted in different viewpoints, in particular those from non-governmental organizations (NGOs) and businesses, but that it was important to go through the exercise.

Responding to questions, Mr. Williams spoke of RSA's efforts to create a strong regional market to improve regulatory frameworks that are unnecessarily restrictive of foreign investment and of efforts to build strong infrastructures, including road and rail. He noted that there were many determinants of foreign direct investment (FDI), of which BITs are not significant factors because they form a small part of the regulatory framework. He said it was important to review the obligations in the BITs to see how they impacted domestic policies, such as his government's Black Economic Empowerment policies. He said that the RSA BIT review would consider the possibility of allowing investors access to foreign arbitration only in exceptional circumstances.

Addressing a query on the use of schedules in BITs to preserve policy space, Mr. Williams noted that the RSA does not have BITs with pre-establishment rights, but that in his view positive list schedules were better than negative lists for developing countries, as the latter approach requires a resource-intensive exercise. It was also noted that if countries wanted to liberalize their economies, it wasn't necessary to do so in a treaty but this also could be achieved under domestic law, leaving the space to vary policies and ensure that proper safeguards are available.

Mr. Mann concluded the opening session by noting the original goals of BITs, as expressed by the authors of the first Model BIT:

Since it is now widely recognized that major steps must be taken to buttress the economic position of the free-world nations, both as a measure against Soviet moves and as a means of resolving some of the demands being made by peoples of the undeveloped nations of the world,

the notion of greater protection under international law for private investment takes on added importance. (The Proposed Convention to Protect Private Foreign Investment, Introduction, (1960), *Journal of Public Law*, 9, 115)

Participants were called to reflect upon the relevance of the goals underpinning the BIT model developed 50 years ago and to ask whether this was sufficient to underpin BITs or other investment agreements negotiated today.

Session 1: Investment law developments

This session considered recent developments in negotiations, treaties and arbitrations, as well as trends in new model agreements and developments in Latin America.

The session was chaired by Gustavo Guerra, Ecuador, and the speakers were:

- Mahnaz Malik, Senior Associate, IISD
- Professor Ximena Fuentes, Universidad Adolfo Ibáñez, Santiago, Chile

Mahnaz Malik provided an overview of the rise and nature of BIT negotiations and disputes under such treaties. She traced the development of BITs over a 50 year period, noting that over 2,700 such agreements existed in addition to over 200 investment chapters in trade agreements. She noted that in 2008–2009 BITs continued to increase but at a slower rate compared to trade agreements with investment chapters. She stated that the “hot spot” of BIT activity was Asia and involvement by African countries was on the increase; however, there was a decline in the BITs concluded by Latin American states. Ms. Malik also provided an account of the increase in investment treaty claims, noting that there were between 20 and 48 new claims every year since 2002. Ms. Malik discussed the adjustments in recent model texts and negotiated treaties to address the interpretations of arbitral tribunals of the classic, broad obligations found in BITs. She also provided an overview of the stakes for developing countries in investor–state arbitrations, noting that even if investors lost their claims, states could still face the possibility of bearing arbitration and legal costs in the range of several million dollars. She noted that an industry had developed around investment treaty arbitration, which meant that the process was likely to become more entrenched and frequent.

Professor Ximena Fuentes provided an overview of the typical provisions found in BITs. She discussed the present trends among Latin American states such as Bolivia, Venezuela, Ecuador and Brazil with respect to BITs. She noted that the large number of arbitrations against Latin American countries at the International Centre for Settlement of Investment

Disputes (ICSID) had led to awareness in the region about the expansive nature of investment treaty arbitration for developing states and led to reactions against traditional BITs and ICSID, including the recent withdrawals by Bolivia and Ecuador from ICSID. Professor Fuentes also stated that the ICSID Convention was not negotiated by developing states, as it had been drafted by World Bank officials for adoption by contracting states, and discussed the claims against Latin American countries at ICSID.

Session 2: Investment law and policy trends In developing countries: 2000–2010

This session considered the causes of and trends in policy changes over the past decade, including shifts to regional integration, rejection of standard templates, concern for the arbitration process, south-south agreements, and so forth. The development impacts of the changes were also considered.

The session was chaired by Professor Marco Romero, Universidad Andina Simon Bolivar. The speakers were:

- Michael Enow, ad hoc advisor to the Government of Cameroon
- Veniana Qalo, Economic Advisor, Economic Affairs Division, Commonwealth Secretariat
- Arun Mahendru Balraj, Senior Development officer, Department of Industrial Trade and Promotion, India

Michael Enow spoke about the recent increase in FDI flows to Africa. He noted that FDI flows were concentrated in certain African countries, particularly those in the northern part of the continent. Mr. Enow stated that 27 per cent of all BITs today are signed by African countries and questioned the nexus between these agreements and the increase in FDI inflows. He also noted that the recent large amount of FDI from Asian countries into Africa had changed the negotiating landscape because traditionally the continent was heavily dependent on investment from Europe and the United States.

Arun Mahendru Balraj spoke about investment policy reforms in India. He started his presentation by stating that India's financial institutions had withstood the impacts of the global economic crisis due to the government's strong regulatory policies. Mr. Balraj traced the country's liberalization of its economy since 1991. He noted that FDI is defined and regulated by the country's domestic law and that the liberalization process has been gradual, progressive and controlled to be complementary to, rather than substitutive of, domestic investment. Mr. Balraj provided an overview of the sectors open to investment and statistics of FDI inflows and outflows. He also noted that there had been a liberalization of outward investment and that currently India was investing abroad over US\$15 billion

annually. He noted that India had signed 75 BITs and was currently negotiating comprehensive economic agreements such as the one signed with Singapore; however, these followed India's own model, which differed from many of the treaties signed by other states.

Veniana Qalo discussed investment laws and policy trends in developing countries more broadly, including China as a case study. She said that market-led reforms were pushed in the post-world-war scenario, with growth being measured only in terms of quantitative gains. Ms. Qalo spoke about the shift of global power to India and China. She discussed the factors affecting investment, including government policies, such as tax and capital flows restrictions, the quality of human resources and intellectual property rights protection. Ms. Qalo also spoke about China's growing influence in Latin America, which was motivated by securing access to markets and reliable sources of primary products at favourable prices. She noted China offered both investment and aid and was undermining the United States as a source of political and economic force in Latin America and elsewhere, particularly in countries with anti-US regimes. She also discussed the rise in trade agreement with investment chapters in Asia, particularly the investment liberalization commitments in the agreements.

Follow-up discussion

The participants discussed the contrasting approaches to liberalization in India, which had followed a deliberate targeting of sectors in a gradual manner, in comparison with the fast-track version that had transpired in Latin America. It was noted that in Latin America, attracting FDI was based largely around major privatizations and was ultimately not sustainable. The importance of retaining the flexibility to impose performance requirements was noted. It was also stated that the empirical evidence of BITs attracting investment in the Latin American context was inconclusive. More generally, the participants discussed the importance of viewing investment in terms of sustainable development, rather than in a purely quantitative context.

Session 3: Thinking the unthinkable: Opting out is no longer just for Brazil

This session considered why some states have not entered into or are no longer entering into investment agreements. Also discussed was the issue of opting out of ICSID and international arbitration.

The session was chaired by Steven Mathate of South Africa. The speakers were:

- Ancelmo César Lins de Góis, Head of the Trade in Services Division, Brazil

- Marco Albuja, Ministerial Advisor, Ministry of Foreign Affairs, Ecuador
- Matthew Porterfield, Georgetown University School of Law, Washington, D.C.

Ancelmo César Lins de Góis summarized his country's view of BITs by providing counterarguments to the typical perceptions associated with the benefits of such agreements. He noted that:

- BITs are directed at the protection of investment, rather than the promotion of investments;
- BITs typically reduce the state's sovereignty to regulate foreign investment in accordance with national objectives;
- the stability and size of domestic markets are more important factors; and
- there are very few investment promotion and protection agreements between developed countries.

He referred to a United Nations Conference on Trade and Development (UNCTAD) study from 2003 that concluded there was no empirical evidence that BITs have a direct influence in attracting FDI to developing countries.

Mr. Góis stated that his country's national congress had rejected the ratification of BITs negotiated in the 1990s, but that, despite there being no BITs in force, Brazil attracted one-third of all FDI directed to Latin America. He noted that investor confidence in the Brazilian system was very high in view of positive investor surveys and remarks. He said the issue of investment treaties came before the Council of Ministers of the External Trade Chamber (CAMEX), which provided the following guidelines in 2007: Mercosur should develop provisions relating to the promotion as well as the protection of regional investment; negotiations with other South American countries should begin with the use of a model text adopted by CAMEX; and negotiations on investment with countries outside South America should be in the form of a chapter on investment in the context of a free trade agreement (FTA). Mr. Góis said that the Brazilian constitution protected foreign investors against discrimination, and replacing local courts with international arbitral tribunals would impede the development of the domestic legal system, reduce confidence in the domestic judiciary and remove pressures for further improvement. He concluded that under the CAMEX guidelines, Brazil's agreements must preserve the state's sovereign power to regulate domestic economic space and control foreign capital, ensure that foreign investors do not receive better treatment than domestic investors, remove reference to the concept of indirect expropriation, provide for arbitration only in a state-state context, and refer to the principle of special treatment for developing countries.

Matthew Porterfield discussed the implications of withdrawing from the ICSID Convention. He analyzed the relevant provisions of the ICSID Convention including Article 71, with respect to the ability of investors to rely on offers of ICSID arbitration in treaties after the state has denounced the ICSID Convention. He noted that most BITs provided a menu of options for arbitration in addition to ICSID and that therefore a denouncement of the ICSID Convention alone would not eliminate the risks of investor–state arbitration.

Marco Albuja provided a background to Ecuador’s denunciation of the ICSID Convention. He stated that the country’s new Constitution, which provided for regional arbitration, contradicted the provisions of the ICSID Convention. Among other things, he pointed out that all judicial processes under the Constitution were to be open to the public, in contrast with the ICSID Convention. He also noted that the ICSID awards had resulted in different rulings on similar facts. Finally, he emphasized that the Ecuadorian Constitution did not permit the signing of treaties in which the state consented to appear before an international tribunal, but that access to regional arbitration mechanisms was allowed. Mr. Albuja also noted that investors should exhaust domestic remedies and obtain the consent of their home state before commencing regional arbitration, which should be a cost- and time-effective transparent mechanism, with rulings given within a year.

Follow-up discussion

Steven Mathate summarized the session by focusing on the impact of treaties on a state’s sovereignty and the importance for developing states to include clauses in treaties that balance investor protection with the preservation of their regulatory authorities. The discussion revolved around the different approaches countries in Latin America and beyond were taking with respect to negotiating different BIT models and forms of dispute settlement. Among other things, the participants discussed the possibility of a multilateral forum. In responding to questions from participants, Mr. Góis of Brazil clarified that his country would not negotiate any BITs outside Latin American but would negotiate investment in the context of FTAs with countries outside the region. Mr. Porterfield noted that investment was unlikely to be included in the World Trade Organization (WTO) negotiations, as the US business community was satisfied with the favourable deals struck in the form of BITs and FTAs. He also mentioned that the US policy was to ensure that foreign investors did not receive better rights than domestic investors.

Session 4: Opting into a different model

Session 4 considered the relationship between international investment law and the right to development, the link between sustainable development and international investment law,

and a human rights approach to investment treaties. Options and tools available for implementing a different approach to investment negotiations were also considered.

The session was chaired by Professor Ximena Fuentes. The speakers were:

- Veniana Qalo, Economic Advisor, Economic Affairs Division, Commonwealth Secretariat
- Professor Laura Garcia, Universidad Colegio Mayor de Nuestra Señora del Rosario, Colombia
- H. E. Ambassador Luis Gallegos, Ambassador of Ecuador to the United States

Veniana Qalo provided the background on the Commonwealth project relating to the development of an Investment Treaty Template focused on the goal of sustainable development. She began by stressing that the question of whether and how to negotiate investment treaties was an important policy issue for states. Ms. Qalo mentioned that the “great bargain” of BITs had been doubted by many critics, particularly due to the weak link between BITs and FDI inflows. She noted that critics also have identified the constraints that developed country BIT models place on host states to regulate foreign investment in the public interest. She said that the Commonwealth template would provide a menu of options for countries to use in negotiations should they decide to negotiate BITs.

Ms. Qalo noted that the template’s two core objectives were to increase FDI inflows, as well as to support efforts of host developing countries to regulate FDI inflows to contribute to sustainable development. She said the template attempts to adopt and consolidate emerging best practices in International Investment Agreements (IIAs). She noted that the weak link between IIAs and FDI flows showed there was a need to draft provisions to make this nexus stronger and positive. For example, the Commonwealth Template includes provisions that require home states to facilitate investment by their investors into the host state. She explained that the template also attempts to encourage the regulation of investment without creating disincentives and provides a text for developing countries to use as a model. She noted that the template had considered the practices in the model BITs of the United Kingdom, India, Canada, United States and Norway, as well as in the IISD Model Investment Agreement for Sustainable Development, the Common Market for Eastern and Southern Africa (COMESA) Investment Agreement and the Southern Africa Development Community (SADC) Finance and Investment Protocol (FIP). Ms. Qalo concluded by explaining that the template contained nuanced and balanced versions of the obligations typically found in BITs. She said that the current text of the template was being revised in response to the opinions expressed at an expert meeting, after which it would be submitted to states. She said the template would be converted into a user-friendly handbook and a computer-based menu of options that would be publicly accessible.

Professor Laura Garcia of Colombia discussed the right to development under international law and the challenge of balancing the interests of investors, states and communities. She traced the evolution of the right to development as a fundamental human right under international law, including the formulation of the UN millennium development goals. She noted that the right to development entailed the participation of states, individuals and communities in economic development whilst respecting social and cultural rights, including the right to protect and preserve the environment. She said that the Declaration on the Right to Development of 1986 established the right and duty of states to formulate and implement policies in support of the right to development. She noted that the system also provided a right to investors, but that the key was to balance the interests of all participants. Professor Garcia referred to the compensation of expropriation in BITs and stated that when interpreting regulatory expropriations, the motives of the state should be taken into account. She concluded by stating that it was not impossible to reconcile the interests of foreign investors with those of domestic investors, communities and states, but the need was to identify new proposals and models that facilitated such a balancing exercise.

H. E. Ambassador Luis Gallegos, Ambassador of Ecuador to the United States, in a recorded interview, discussed human rights in the context of investment treaties. He stated that transnational corporations should be obliged to follow laws protecting human rights, including, for example, labour rights. He noted that governments must ensure human rights in their laws; companies must respect such laws and international norms; and there should be a treaty that would require corporations to pay for damages arising out of activities that have harmful impacts on the environment as a result of business activities. He said investment treaties should have a social dimension and a framework to ensure that companies investing in countries respect human rights.

Follow-up discussion

Professor Ximena Fuentes summarized by stating that the quest for sustainable development required states to develop a fundamentally new model in which the state adopts an active role, whereas under the liberalization model, the state's role was marginalized. The participants discussed the inclusion of obligations on companies in investment treaties.

Professor Garcia noted that the IISD Model Investment Agreement had valuable ideas on incorporating obligations in an investment treaty. It was also noted that the conceptual notion of imposing obligations on investors had been crossed in practice and that there were at least three arbitrations in which the claims of investors had been denied on the

premise that the investors had acted corruptly or in bad faith. Therefore, investor obligations had been interpreted into treaties even though there were no specific clauses to that effect. It was noted that investment treaties needed to be drafted to express the sustainable development dimension and states should start measuring investment on a qualitative basis, rather than solely relying on a quantitative criteria.

Responding to a question from participants, Ms. Qalo identified three features from the Commonwealth template that promoted sustainable development and quality investment: first, the requirement of environmental and social impact assessments for substantial investments; second, imposition of obligations on investors, including respect for local laws, such as refraining from bribery; and third, sanctions for investors that violated obligations in the treaty. She noted that under the Commonwealth template, both the home and host states were required to provide criminal liability for human rights abuses and corruption, and civil liability for damages caused by the investment or the breach of investor obligations. She noted that a state could make a counterclaim for relief in the form of damages due to the investor's conduct in an investor–state arbitration under the Commonwealth template.

One participant emphasized the ability of states to impose performance requirements where necessary to direct investment flows to meet national objectives. Another participant noted that the efforts to “fix” investment agreements to reduce risks for states should be accompanied by provisions that promote better conduct by investors and greater development-oriented investments.

Session 5: Optimizing investment negotiations for developing countries: The question of forum

Session 5 dealt with the multiplication of investment negotiations and fora, asking the question of what might be the best option for developing countries in investment negotiations. Participants discussed the pros and cons of bilateral investment negotiations, bilateral FTA regional negotiations, and possible multilateral negotiations.

The session was chaired by Howard Mann, IISD. The speakers were:

- Offah Obale, Programme Officer, South Centre (regional investment and FTA processes)
- Nathalie Bernasconi, Senior International Lawyer and Program Leader, Investment and Sustainable Development Program, IISD

Offah Obale analyzed the growing popularity of investment provisions in FTAs and discussed US and EU approaches. He noted that the EU FTAs restrict themselves only to state–state

arbitration processes, whereas the US FTAs provide for investor–state arbitration for investment disputes. He stressed the importance of the fact that FTAs addressed a broader range of subjects compared with BITs, as the latter restrict themselves to investment. He noted the general resistance by developing countries to negotiating investment, particularly with respect to determining conditions on investment, entry requirements and performance requirements, but that often the resistance had been eroded at a bilateral level, as FTAs included such binding rules on investment. He concluded that if developed countries were to re-invigorate the question of negotiating investment in the WTO, developing countries would be in a weak position to continue opposing this, as they have conceded to such demands on a bilateral level in a large number of FTAs.

Nathalie Bernasconi discussed the problems in the current unpredictable, complex and secretive investor–state dispute settlement system under investment treaties. She noted the “spaghetti bowl” of substantive and procedural rules in treaties on a bilateral regional and sectoral basis, which has allowed for a menu of multiple procedural fora and processes such as those under ICSID, the United Nations Commission on International Trade Law (UNCITRAL), the Stockholm Chamber of Commerce and ICC, among others. Ms. Bernasconi traced the growth of investment treaty arbitration, from 19 claims in 1997 to over 325 claims today. She identified the following three areas as problematic in the context of investor–state arbitration: first, the lack of accountability of arbitrators, in particular the conflict of interest in arbitrators acting as counsel and arbitrator in similar cases; second, the lack of transparency in the investor–state arbitration process; and third, the inconsistent decisions of arbitral tribunals on similar facts. Ms. Bernasconi noted that arbitrators should not be permitted to act as counsel for a specific period of time after serving as arbitrator, to protect against the temptation of deciding cases in a manner that favours the interests of their existing or potential clients. She stated that parties could address this issue in investment treaties by including guidelines on the qualifications of arbitrators, such as, for example, a prohibition on acting as counsel for a period of three years. Similar outcomes might also be achieved through changes in procedural rules or declarations of like-minded countries opposed to this practice.

Ms. Bernasconi also noted that treaties could provide for transparency with respect to the investor–state process, including the disclosure awards, pleadings and other documents. Finally, she discussed various options, and their respective advantages and disadvantages, for promoting coherence in investment treaty awards. She noted the options of interpretative statements, as utilized by the North American Free Trade Agreement (NAFTA), the establishment of an appellate mechanism and the creation of a world investment court.

Follow-up discussion

Howard Mann opened a discussion on the possibility of a multilateral treaty on investment, and whether it would be able to redress the procedural and substantive problems in the current BIT system. He suggested that such a treaty, if it were negotiated, would have to be outside the WTO or any other existing forum and become a dedicated organization for investment. One view was that a multilateral agreement on investment could complement the WTO as part of a global economic law regime, but with a more balanced and holistic approach to the investment issues. Others expressed the concern that many of the problems arising under the bilateral system could also arise in a multilateral context. Moreover, a multilateral system with investor–state arbitration could greatly increase the risk to exposure of being challenged by investors from the world over, especially for those states that do not have BITs now with the investor–state process, or those that no longer include this process in new treaties.

Several participants expressed the view that whether an investment agreement was at a bilateral or multilateral level, the fundamental questions relating to the usefulness of entering into an investment treaty remain the same for developing countries. It was also noted that the capacity constraints on developing countries to negotiate on investment would remain at a multilateral platform, although it was arguable whether these were greater in the bilateral negotiating context than they would be in a multilateral context.

Session 6: Forum recommendations: The scope of international arbitration clauses

This session began with an introductory presentation on the scope of arbitration clauses and was then split up into three breakout groups to develop peer-to-peer best recommendations on the “scope of arbitration” provisions in investment treaties. The three groups discussed the following: what should and should not be covered, and the relationship between contract and treaty-based arbitration. Umbrella clauses and other expansions of jurisdiction were also discussed. The introductory session was chaired by **Daniel Guerrero of Ecuador** and the topic was introduced by **Nathalie Bernasconi, IISD**.

Ms. Bernasconi discussed various formulations of investor–state arbitration clauses that could be interpreted to bring breaches of contract and domestic law before an investment treaty tribunal. She also discussed the different and contradictory findings of investment treaty tribunals on “umbrella clauses.” She said three major approaches in interpreting the umbrella clause could be identified among the awards: first, that the host state is bound by the umbrella clause to observe “all” its legal obligations; second, the text of the typical umbrella clause could not be given such an expansive meaning without further elaboration or guidance in the clause; and third, that the umbrella clause referred only to the state’s

treaty obligations. She also spoke about the role of fork-in-the-road clauses in preventing forum shopping by investors in multiple proceedings.

Breakout sessions

The participants were divided into three groups to report to the plenary on the scope of dispute resolution clauses, umbrella clauses, fork-in-the-road provisions and exhaustion of local remedies. The participants expressed their personal views while debating the issues, and their conclusions were relayed to the plenary.

The three groups reported back to the plenary and then the participants agreed, acting solely in a personal capacity and with no binding implications for any governments, on the recommendations contained in Annex I.

Session 7: Workshop on preparing for international investment negotiations

Session 7 provided a peer-to-peer process to review best practices for entering into and concluding IIAs that reflect the national interest of developing countries. This session was split into two stages. First, the participants shared their experiences on the functioning of their own inter-departmental processes—on the establishment of their national objectives and on preparing ministers and heads of government for negotiations. Second, the participants discussed how to develop negotiating tools and manage the negotiation process, and compared BITs versus trade and investment negotiations.

Randall Williams of South Africa provided some introductory comments and chaired the discussion. He discussed the need for effective inter-department processes, establishing national objectives with respect to investment and the importance of preparing ministers in anticipation of investment treaty negotiation. He stated that previously, there was no clear plan with respect to the negotiations for BITs in the RSA and that the conclusions of treaties were often used simply as photo opportunities for Ministers. Mr. Williams noted that the inter-department process had not traditionally been very effective in the RSA.

Other participants shared the national framework governing investment treaty negotiations in their respective countries. One participant mentioned that in his government a single ministry dealt with both negotiations and investor complaints, and that the country was in the process of developing a document that sets out the country's goals with respect to foreign investment, including a list of negotiable and non-negotiable clauses and a list of priority countries with which treaties are to be included.

Another country representative noted that the new BITs must be approved and mandated by the cabinet after considering the advantages and disadvantages of the treaty, and that an inter-departmental team looks at all the clauses with one department taking the lead. Another participant noted that the investment negotiations are carried out by a sub-committee within a ministry that has both public and private sector representations, including members from the chamber of commerce and government ministries such as finance, foreign investment and trade. Similarly, another participant noted that a ministry takes the lead in drafting the negotiating text but circulates this to other ministries and private sector chambers of commerce for comments before finalizing the draft and submitting it to the law ministry for final approval. One participant noted that the ministry of law drives the negotiation of investment treaties. In contrast, another participant noted that the treaty is negotiated solely by one department within the country's constitutional framework and other government departments or private sector bodies are not involved in the drafting or negotiating process.

Mr. Williams stressed the importance of conducting substantive reviews of a country's BITs, which were more important than the processes for concluding such agreements. He emphasized the importance of determining national goals for investment and briefing ministers on the meaning and implications of the treaties before negotiations commenced. He said that states should employ negotiating tools such as model BITs and guidelines for negotiations, including redlines that would consist of non-negotiable provisions. Mr. Williams provided an overview of the process for negotiating BITs in the RSA, noting that trade and investment negotiations are handled differently. He said that trade negotiations employ a consultative process with civil society organizations, whereas BITs are concluded by the legal unit at the Department of Trade and Industry.

One participant noted that their country's preference was to negotiate investment as part of an FTA wherever possible. Another participant stated that trade negotiations were conducted at a regional forum, whereas BITs were concluded on a bilateral level. Another participant stated that their country wanted to avoid investment chapters, particularly those with pre-establishment provisions in trade agreements.

Mr. Williams advised countries to create a written policy framework for negotiation, including development objectives, upon which a draft model BIT text could be based. He noted that in most countries, one ministry took the lead with other ministries providing comments on drafts.

Closing session: The future of the Forum

The last session re-affirmed that the concept behind the negotiators' Forum was to provide a neutral platform for developing country negotiators to discuss issues of concern to them. The participants agreed that the Forum was valuable and useful for developing country negotiators. In particular, the participants noted their appreciation of meeting people from different countries and having an opportunity to learn about different negotiating processes, cultures and goals. The participants also discussed the structure the Forum should take in the future, in particular whether it should have a permanent secretariat. The organizers noted the constraints of finding funding for this year's Forum due to the global financial crisis.

Recommendations included the assignment of tasks well in advance to the participants so they could be better prepared and present information from their respective countries. One participant requested that there be more discussion on the development and social aspects of investment in the next Forum, together with a focus on investment chapters in FTAs. Participants recommended the study of different treaty models and specific case studies of the result of actual negotiations at the next Forum.

One participant recommended that this year's participants become the informal ambassadors of the Forum in their countries to encourage their governments to support the project. Ms. Qalo from the Commonwealth Secretariat expressed an interest in exploring the possibility of the Commonwealth assisting with the funding of the Forum, should its members find it valuable. One participant advocated the involvement of regional organizations such as the Andean Community and Mercosur. Several representatives stated that countries should fund the travel of their representatives if they can afford to do so, as this will enable lesser developed countries to attend in view of limited funds available. IISD and the South Centre were also invited to arrange meetings during the year on a regional basis to promote the Forum among developing countries.

In response to a suggestion for organizing the next Forum in India, the participant from India stated that he will explore the possibility of his country co-hosting the Forum once the firm proposal is received from IISD. One representative suggested that the participants write with suggestions on how they could assist with the continuation of the Forum and nominate facilitators so that the process could be followed up. The participants discussed the possibility of a listserv or a webpage to keep in contact. Participants also suggested that coordination with regional organizations may assist with funding and organization of the next forum.

The Third Annual Forum concluded with a recommendation to hold the next Forum under the organization of the IISD and the South Centre, and to liaise with India as the possible host country.

Annex I: Recommendation of the participants of the Third Annual Forum of Developing Country Investment Negotiators, Quito, 11 November 2009, on the scope of dispute settlement in investor–state arbitration

The participants at the Third Annual Forum of Developing Country Investment Negotiators, **having** considered the issues concerning the scope of investor–state arbitration under bilateral and other investment treaties,

noting that states may choose not to negotiate investment treaties as a legitimate policy choice or not include investor–state arbitration at all in investment treaties that they do negotiate,

believing that investor–state arbitration processes should be given a narrow scope to address issues relating to the breach of a treaty and should only be a last means of resort for other issues,

wishing to reflect the overall views of the participants as they relate to the scope of investor–state arbitration for states that choose to enter into treaties with such clauses, and

acting in their personal capacities only,

recommend that developing country governments:

1. Ensure that investment treaties contain specific and clear language as to the scope of investor–state arbitration processes;
2. Seek the adoption of interpretive notes with existing treaty partners, or amendments to existing treaties, to clarify the scope of existing provisions where needed;
3. Promote the use of local judicial remedies as the primary approach to the resolution of disputes under contracts and administrative processes;
4. Consider a requirement for the exhaustion of local remedies as a primary requirement to establishing jurisdiction in investor–state arbitration, unless it is clearly demonstrated that the dispute concerning the underlying measure cannot be resolved through domestic courts;
5. For those treaties that do not require the exhaustion of local remedies, consider utilizing a “fork-in-the-road” provision that directs the investor to choose either a domestic

forum or international arbitration as the exclusive forum for its claim, thereby preventing multiple recourses for the same underlying measure or government act;

6. Seek technical advice and financial assistance, where necessary, to build capacity among judges in international investment matters to ensure effective and efficient resolution of disputes relating to investments;
7. Carefully consider the appropriate forum for disputes relating to the implementation of an investment contract or other investment authorization instrument and seek to promote domestic judicial fora where possible;
8. Expressly require that treaty-based tribunals respect the choice of forum when any dispute under a treaty has as its underlying facts the alleged non-compliance with an investment contract or investment authorization that contains a choice of forum clause; and
9. Abstain from using umbrella clauses. (Umbrella clauses typically require the host state to abide by “any obligation it may have entered into with regard to the investment” as part of its treaty commitments, thereby bringing potentially all forms of domestic administrative, regulatory or contractual commitments under the “umbrella” of the treaty. These commitments can thereby be brought into the investor–state arbitration process under the treaty even when they are most suited for domestic dispute settlement processes, or otherwise would be subject to a choice of forum clause in the contract.)