

**REPORT ON**  
**The Fourth Annual Forum of Developing Country Investment Negotiators**  
**October 27–29, 2010 – New Delhi, India**

The Fourth Annual Forum of Developing Country Investment Negotiators (“the Forum”) was held in New Delhi, India, from October 27–29, 2010. It was co-organized by the Government of India, the International Institute for Sustainable Development (IISD) and the South Centre, and was attended by 70 participants from 34 countries from Asia, Africa and Latin America, as well as international organizations, including the United Nations Conference on Trade and Development (UNCTAD), the United Nations Economic and Social Commission for Asia and the Pacific (UNESCAP), the Common Market for Eastern and Southern Africa (COMESA), the Commonwealth Secretariat and the World Association of Investment Promotion Agencies (WAIPA). The agenda, presentations and background materials for the Forum can be found on the IISD website: [www.iisd.org](http://www.iisd.org).

The Forum builds upon the success of the First Annual Forum held in Singapore in 2007, the Second Annual Forum in Morocco in 2008 and the Third Annual Forum in Ecuador in 2009. The Forum was aimed at facilitating a vibrant exchange of ideas and experiences among developing country negotiators of international investment treaties. Fifty years after the first Bilateral Investment Treaty (BIT) was signed, the Forum marked an important opportunity to consider new approaches to ensuring that investment agreements support the developmental goals of developing countries.

**Opening Ceremony and Welcome**

The participants at the Forum were welcomed by **Ms. Nathalie Bernasconi-Osterwalder**, Senior International Law Advisor and Program Leader, IISD. She emphasized that the meeting would be conducted under Chatham House Rules, that is, the information and views expressed at the Forum could be used by participants but were not to be attributed to a person or government. It was stressed that no statements or views were attributable as government positions or were in any way binding on governments. She noted that the Forum wanted to encourage “out of the box” thinking on investment treaty issues. She noted that this year’s Forum had a strong interactive element following the recommendations of participants from last year’s forum in Ecuador. Ms. Bernasconi hoped that the participants would develop concrete solutions to respond to the challenges the international investment treaty regime poses for developing countries today.

In his welcome comments, **Mr. Offah Obale** of the South Centre stated that, although the world was undergoing systemic changes as power structures moved to the east

from the west, the investment treaty regime remained unchanged. He said that the so-called “core principles” in international investment treaties, for example, fair and equitable treatment (FET) and national treatment (NT), did not reflect the positions of developing countries, which often need to discriminate between foreign and domestic investors, and use performance requirements in order to achieve developmental goals. He concluded that developing countries needed to preserve the space to regulate investment robustly in international law instruments.

**Mr. R.P. Singh**, Secretary, Department of Industrial Policy and Promotion, Ministry of Commerce and Industry, Government of India, welcomed participants from over 34 countries to the Forum by commending IISD as an organization with specialist knowledge in investment that was useful for business, non-governmental organizations and other users. He also praised the South Centre’s efforts to support South-South solidarity.

**Mr. Singh** stated that the Forum focused on issues faced by developing countries with respect to international investment negotiations, developments in investment laws, options for a different model for international investment treaties and the impact of foreign direct investment (FDI). He asked whether developing countries should enter into international investment treaty, and if these agreements had any impact on FDI inflows. He noted that some countries have consciously opted out of the international investment regime, while others see this as an important part of global integration. He emphasized the importance of sharing experiences to answer questions posed by the current international investment regime, and noted the following four issues:

1. ***India’s international investment treaties***: India signs two types of international investment treaties, Bilateral Investment Promotion and Protection Agreements (BIPAs), which provide only post-establishment protection and no market access, and investment chapters in Comprehensive Economic Cooperation Agreements (CECAs), which offer both post- and pre-establishment rights, thereby giving market access to investments. Mr. Singh questioned the interplay between BIPAs and CECAs, and whether BIPAs are essential precursors to CECAs.
2. ***Nature and scope of CECAs***: Mr. Singh raised the question of the suitability of market access instruments like CECAs for developing countries whose regulatory regimes are still evolving. Mr. Singh further raised the question of evolving a model suitable for developing economies, which preserves their need to retain regulatory flexibility.
3. ***International investment treaties and development***: Mr. Singh asked whether international investment treaties have led to achieving development benefits—for example, inclusive growth, improved quality of goods and services, and better managerial practices.
4. ***Towards a new INTERNATIONAL INVESTMENT TREATY model for developing countries***: Mr. Singh raised the possibility of creating a template that is acceptable among countries that are similarly placed in terms of economic development. He also noted that Philip Morris, a company headquartered in

New York and with operations in Switzerland, recently brought a claim against Uruguay for laws regulating health warnings on cigarette box labelling, as an infringement of Intellectual Property Rights (IPRs). He noted that this case is just one example of the implications of signing BITs. Mr. Singh expressed his concerns that corporations would be able to use the IPR protections provided for in BITs. He noted that there is pressure on developing countries to include IPR in trade and investment agreements. He invited industry chambers and organizations present to consider setting up a dedicated institutional mechanism, within any existing institution, to study and analyze such investment-related issues.

### **Session 1: Breaking New Ground for the International Investment Regime?**

This session discussed and reviewed two major reports relating to investment and sustainable development, *UNCTAD World Investment Report 2010: Investment in a low carbon economy* and the 2010 WAIPA/Vale Columbia Centre on Sustainable International Investment survey, entitled *Investment Promotion Agencies and Sustainable FDI: Moving toward the Fourth Generation of Investment*. In his opening remarks as Chair, **Dr. Howard Mann**, Senior International Law Advisor, IISD, stated that investment is required to achieve sustainable development, and the mix between domestic and foreign investment will depend upon the country in question. He noted, for example, that both developing and developed countries need to promote investment in low-carbon economies. He invited **Mr. Sergey Ripinsky** from UNCTAD and **Mr. Carlos Bronzatto**, Chief Executive Officer of WAIPA, to present the findings of the two reports.

#### ***UNCTAD World Investment Report 2010***

**Mr. Ripinsky** introduced UNCTAD's work and products, before providing an overview of the *World Investment Report 2010*. Mr. Ripinsky noted that it had been 50 years since the first BIT was signed between Pakistan and Germany, and today there are over 3,000 international investment treaties. He noted the transfer of FDI competence from European Union (EU) member states to the EU could have implications for the 1,200 BITs concluded by EU member states with third states, which may need to be gradually phased out as the EU moves towards a common EU investment policy. He noted that the EU had identified Canada, India, Singapore, the Southern Common Market (MERCOSUR), Russia and China as partners in future negotiations. He stated that developing countries may find it harder to negotiate with the EU in comparison with a single member state; however, at the same time, this would also present an opportunity to review and modernize older BITs.

**Mr. Ripinsky** discussed the systemic evolution and transformation of the "spaghetti bowl" international investment regime. He said that the regional component in the international investment regime is becoming stronger, in particular the EU and the

Association of Southeast Asian Nations (ASEAN) are negotiating as a group with third countries. He also noted that the regime is evolving, as a growing number of countries are reviewing their model BITs. For example, Austria, Colombia, Egypt, France, Germany, Mexico and Turkey have updated their models, whereas the process is underway in Argentina, Bolivia, Ecuador, Morocco, South Africa, the United States and Venezuela. He noted that the review process is driven by an examination of the need for BITs, the contents of the agreements and the shortcomings in the old BITs exposed in the investor-state arbitration process. Mr. Ripinsky also spoke of the termination of international investment treaties by a number of countries, and gave the example of Ecuador's termination of nine BITs (with Cuba, Dominican Republic, El Salvador, Guatemala, Honduras, Nicaragua, Paraguay, Romania and Uruguay); Bolivia's withdrawal from the International Centre for Settlement of Investment Disputes (ICSID); and Russia's official intention not to ratify the Energy Charter Treaty. He noted that, of the 82 new BITs concluded in 2009, a quarter are renegotiated treaties. He stated that the Czech Republic is particularly active, having renegotiated 15 BITs over the past few years. He said some of the BITs have also been replaced with broader investment chapters in trade agreements.

**Mr. Ripinsky** noted that countries are also clarifying the scope of the international investment treaties, for example by expressly excluding taxation, subsidies and government procurement from the scope of the treaty. He said that there are also changes to the definition of investment, with more detail on excluded assets such as commercial contracts and public debt. He stated that the impact of BITs on the regulatory space of host states has also resulted in governments adopting general exceptions in BITs expressly allowing them to regulate in pursuance of certain public-interest objectives. He said that the specific obligations in the BITs, such as FET, are being worded in a more precise manner to avoid overly expansive obligations. He also noted that environmental clauses are being added in BITs, and that more detailed investor-state arbitration provisions, with narrower scope and several procedural innovations, have been appearing in recently concluded treaties. He recommended that international investment treaties should promote FDI without compromising the right to regulate, and countries should reassess their current international investment treaties. He also recommended that more collective and coordinated approaches are required in order to make the international investment system more coherent, balanced and effective, and that the Forum is a useful platform towards this end.

### ***WAIPA-Vale Survey***

**Mr. Bronzatto** provided an introduction to the work of his organization, noting that its members came from over 164 countries. He noted that the role of investment promotion agencies (IPAs) has evolved over the years, from promotion at trade fairs to targeting specific sectors and investors through leads, meetings and visits. He noted that IPAs are now also engaged in policy advocacy, including the negotiation of investment treaties. Mr. Bronzatto presented the findings from the WAIPA/Vale survey, which was based on responses from 50 IPAs. He said the survey found that, for 70 per cent of the

survey participants, the volume of investment was the primary concern, due to job generation linkages. Mr. Bronzatto added, however, that a close second was environmental sustainability, as the environmental impacts of a project are always examined when the IPAs are considering a project. He stated that an overwhelming majority of IPAs said that the sustainability issues would carry heavier weight in 5 years. He conjectured that the global economic crisis may have pushed economic recovery and job creation ahead of the longer-term sustainability issues. He concluded that the survey showed that, although IPAs are focused on the quantity of investment, there are good indicators that the quality of investment is also being considered and is likely to become more important in the future.

### **Commentary**

Dr. Mann then invited **Dr. Nagesh Kumar**, Chief Economist at UNESCAP, and **Ms. Nirmala Jeetah**, Assistant Director at Board of Investment, Mauritius, to comment on the reports and share their experience.

**Dr. Kumar** stated that he was struck by how much had changed since investment was debated at the World Trade Organization (WTO) in the Doha Round. He said the view then by Western countries, including the United States and EU member states, was that “investments are always good, and all investments are good”; whereas today, the view appears to be that “investments are generally good, and some investments are better than others.” He said this change may be due to the North American Free Trade Agreement (NAFTA) and the rise of investors from emerging economies. For example, the United States stopped a bid by Dubai World to take over a port. Dr. Kumar also noted that countries have placed capital controls, and gave the example of South Korea’s use of such measures. He stated that governments are recognizing the need for a more balanced approach. He said that pre-establishment rights for investments should be provided on a positive list basis, whereas post-establishment rights are generally formulated on a negative list basis for appropriate exclusions. He noted the need for a balance between investor rights and host state responsibilities in investment agreements.

**Ms. Jeetah** introduced the *Maurice Ile Durable* concept, which promotes Mauritius as a sustainable development island. She said that Mauritius is heavily dependent on imports for its energy requirements. Ms. Jeetah said that the *Maurice Ile Durable Fund* is aimed at reducing dependency on imports by encouraging green, renewable energy. Ms. Jeetah explained that the *Maurice Ile Durable Fund* encourages greener and cleaner policy and operational practices, for example by providing grants for the purchase of solar heaters and small-scale solar projects for households. She said the Mauritius Board of Investment is also promoting sustainable projects in Mauritius. **Dr. Mann** emphasised that Mauritius was an example of a government that was focusing on the quality of investments.

**A discussion followed the presentations.** It was stated that the primary cause of treaty review and renegotiations was the explosion of arbitration cases in the last 10 years exposing the problems in the language of BITs, and the question of how it is possible to distinguish quality from non-quality investments was raised. It was noted that a good investment: conforms with the country's national strategy, creates high value jobs, brings good corporate social responsibility practices and crowds in domestic investments rather than crowding them out. There are readily available tests to analyze such matters, as well as environmental impact assessments, for example, to consider environment-related issues.

The session concluded with the note that there is a shift from imbalanced treaty texts towards more balanced ones, and indications that governments are learning from experience rather than repeating the same language in treaties. It was noted that there is also a broad recognition now that not all investment is good, and there is a need to look at the quality as well as the quantity. Finally, it was said that and that there are concrete tools to test whether an investment was good economically, socially and environmentally in case governments wanted to use these, and the key was to retain policy space in investment treaties to enable them to do so.

### **Session 2: Critical Developments in Investment Treaties and Arbitrations: Issues facing developing countries today**

**Mr. Muzikayise Dube** of Swaziland chaired the session. **Ms. Mahnaz Malik**, Associate and International Law Advisor, IISD, provided an overview of the recent developments in investment treaties and arbitrations from recent reports. She said there are over 3,000 international investment treaties today, comprised of some 2,750 BITs and 295 other international investment treaties. She noted that there was intense activity in negotiating international investment treaties in 2009. Ms. Malik stated that recent developments in treaty negotiations included an increase in the renegotiation of BITs (almost a quarter of the new BITs in 2009); termination of BITs by Venezuela and Ecuador; withdrawal from the ICSID Convention by Bolivia and Ecuador; the transfer of competence to negotiate FDI from the EU member states to the EU; and the European Court of Justice (ECJ) judgment that found that BITs negotiated by certain EU member states (Austria, Czech Republic and Sweden) violated European Community law, as these treaties did not contain sufficient safeguards relating to capital transfers. She also noted an increase in regional cooperation and negotiations, reviews of model BITs and programs (e.g., South Africa) and the appearance of more precise language in recent treaty texts.

**Ms. Malik** then turned to the growing number of known investor-state disputes (357+) against at least 81 countries, the majority of which were brought at ICSID. She noted that the overwhelming majority of the disputes were initiated by investors from developed states against developing and transition economies. She said that the stakes in investment treaty arbitration are high for developing countries, as governments can only defend claims, and that research using a sample of 52 claims showed that, even if

successful, governments did not recover their costs in approximately 70 per cent of the cases; on the other hand, investors recovered part or all their costs in 70 per cent of the cases when successful in the action. She said that costs of the arbitration can amount to several million dollars, and investment arbitration awards can be very high, as the recent US\$700 million award against Ecuador showed. She concluded that investment treaty arbitration is becoming riskier for states, as investors now have access to third-party financing and contingency fee arrangements from law firms to fund their claims against states.

In the subsequent presentation, **Ms. Bernasconi-Osterwalder** of the IISD covered four main recent developments: the entry into force of the Lisbon Treaty, the ever-increasing expansion of investment treaty litigation, developments at ICSID regarding the possible trend towards more pro-active annulment committees and the transparency discussions currently taking place in UNCITRAL.

She explained that the competence shift on FDI from EU member states to the Union with the Lisbon Treaty (Art. 207 of the Treaty on the Functioning of the European Union, [TFEU]) affected over 1,200 existing BITs, as well as all future EU and member state agreements. She said that a shift to a U.S.-style approach to include investment protection and pre-establishment rights in free trade agreements (FTAs) is to be expected from the EU Commission, given its expanded negotiating power. This is already apparent in the ongoing negotiations of the EU with India, Canada, Singapore and MERCOSUR. She indicated that, if the new EU investment treaties or chapters included investor-state dispute settlement, the potential for investment disputes against EU negotiating partners would increase significantly, since investors from all 27 EU states could bring claims against host governments.

**Ms. Bernasconi-Osterwalder** also discussed the European Commission Communication on future EU investment policy and the Draft Regulation on the transitional arrangements for existing EU BITs, both released in July 2010. The aim of the Commission is to improve market access for EU investors in target markets, and to create equal opportunities for EU investors. The Commission also proposed to automatically and without review authorize all member states' BITs with entry into force of the regulation, but retain the power to withdraw authorization when existing agreements do not comply with EU law, overlap with future EU investment agreements or "constitute an obstacle to the development and implementation of the Union's policies relating to investment." Both the Communication and the Draft Regulation are currently being discussed in the European Council and the European Parliament.

**Ms. Bernasconi-Osterwalder** then discussed investment arbitration as a growing business for international law firms, and pointed to the phenomena of the rise of third-party funders specializing in investment disputes investing US\$5–15 million in lawsuits up front, and the increasing popularity of contingency fees for investors' lawyers. She concluded that the consequence of these developments is higher risks for host states, and low-to-no risks for investors bringing suits against states.

On annulment, **Ms. Bernasconi-Osterwalder** noted that between September 1, 2009 and September 1, 2010, ICSID annulment committees issued eight annulment decisions. The decisions confirmed the limited power of annulment committees. However, Ms. Bernasconi noted that annulment committees did take a surprisingly bolder stance in two recent decisions. In *Sempra v. Argentina* and *Enron v. Argentina*, the annulment committees annulled parts of the tribunals' decisions on the basis that the tribunals had manifestly exceeded their powers by failing to distinctly apply the applicable law.

Finally, **Ms. Bernasconi-Osterwalder** drew the participants' attention to the process that officially began in October 2010 in the UNCITRAL Commission's working group on arbitration and conciliation (Working Group II), which is tasked with adopting new rules on transparency in investor-state arbitrations—an issue that is strongly supported by many developing countries.

### **Session 3: India's International Investment Treaties: A new way forward**

This session provided an overview of the approaches and thinking of the Indian government on investment frameworks and international investment treaties. The session was chaired by **Dr. Neeru Chadha**, Director of the Indian Ministry of External Affairs. The first speaker, **Mr. V.L. Kanta Rao** of the Indian Ministry of Commerce and Industry stated that India has signed 30 FTAs. These treaties are restricted to trade in goods, and only recently evolved to become more comprehensive agreements, which included not only trade in goods, but also services and investments, referred to asCECAs. Mr. Rao said that India signed its first CECA with Singapore in 2005. He said India is negotiating 16 new CECAs to contribute to a non-discriminatory, international rules-based system. He said that the studies conducted by the Indian government before entering into FTAs mostly indicated that a comprehensive agreement with investment is preferable to a “goods only” deal. He noted that the India-ASEAN FTA signed last year was restricted only to goods, but that there are ongoing negotiations with respect to services and investment. He noted that the concessions in the FTAs with ASEAN countries cover 95 per cent of India's total trade with ASEAN. He added that, at present, a third of India's total trade is subject to FTAs (both signed and under negotiation). He concluded by stating that trade and investment are complimentary and therefore investment rules should be included in the more comprehensive agreements.

The chair, **Dr. Chadha**, added that India's BIT program, which commenced in the 1990s as part of a new economic policy, comprises over 90 treaties. She said India's BITs incorporate standard elements such as FET, protection of investments, guidelines for expropriation and access to international arbitration of disputes. She said that, by contrast, India is more cautious in its FTAs, particularly with respect to FET.

**Dr. Ram Upendra Das**, Senior Fellow at the Research and Information System for Developing Systems (RIS), stated that India believes that a policy framework is one of



the variables determining the inflows of investment. He said that treaties provide a framework for the interaction between the private sector and government. He added, however, that research is not conclusive on the connection between international investment treaties and FDI inflows or FDI and development. He said that the linkage between FDI and development is not automatic, and therefore treaties need to be formulated to encourage this relationship. He said that investments also take place without an investment treaty in place, and provided the example of Indian investment into Sri Lanka, which was encouraged by the Sri Lanka-India FTA as well as by the English-language workforce and the infrastructure in Sri Lanka. He noted that Indian investments established themselves in Sri Lanka to export back to India and to other countries such as Pakistan.

**Dr. Das** compared India's BITs (referred to in India as BIPAs) and CECAs, noting that the latter are broader than the former, as they include market access provisions. He also stated that CECAs are narrower than BIPAs in some instances because they exclude provisions such as taxation, government procurement (for example, the Korea-India CECA) and FET (Singapore-India CECA). He also noted that the market access rights in CECAs are not subject to investor-state arbitration.

**Mr. Deepak Narain**, Director at the Department of Industrial Policy and Promotion (DIPP), Ministry of Commerce and Industry, Government of India, provided further details relating to India's BIPAs and CECAs, noting that there are 75 BIPAs that provide protection to investment. He said India signed its first CECA with Singapore, which was followed by the CECA with Korea. He noted that, at present, only India's CECAs with Singapore and Korea contains investment chapters, but that there are ongoing negotiations with other countries on similar terms. He explained that the comprehensive investment agreements under CECAs omit the most favoured nation (MFN) treatment clause, even though this is present in India's BIPAs. He stated that India has used different approaches to providing market access in its CECAs with Singapore and Korea: India's commitments in the former were concluded on a positive list basis, whereas the parties agreed on negative listing in the latter agreement. He said it is important for developing countries to retain policy flexibility for the future, and, in this regard, the possibility of carving out new and emerging sectors from the coverage of such agreements is an area that needs discussion. He said there is no conclusive study confirming that FDI inflows increased because of an investment agreement, although India's experience is that it had received significantly increased investment from Singapore following the CECA between both countries.

**Mr. Prabhaskar Ranjan** of King's College, University of London, compared India's BIPAs with the investment chapters in its CECAs. He noted that the narrower scope of investment protections in India's CECAs with Singapore and South Korea has not been adopted in the BIPAs. He explained that the India-Singapore CECA was concluded in the aftermath of the investment treaty dispute GE/Bechtel brought against the Government of India. Mr. Ranjan explained that investment treaties are about government regulation and foreign investment protection. He emphasized that the core regulatory

acts of a government are subject to challenges by investors under BITs, and pointed to the example of Argentina's measures taken during its financial crisis. He emphasised that investment treaties are, thus, not only about market access or protection, but that they limit the power of the host state to regulate. He said that India continues to undertake international commitments in investment treaties to bind its ability to regulate even though no study has confirmed that investment inflows are a result of India's BITs. He noted that Indian policy-makers have not appreciated the full implications of the BITs, stressing that damages in investor-state disputes could equal a government's health or education budget.

He said that 53 out of 63 Indian BIPAs or BITs contain expansive capital flows provisions, and that there are no exceptions included in the agreements that allow governments to exercise control over the capital flows. He explained that this broad undertaking in these agreements is inconsistent with the International Monetary Fund (IMF) (which allows restrictions on capital accounts), as well as with Indian legislation that permits the Reserve Bank of India to regulate certain capital flows. He explained that if an investor brought a claim under a treaty, India would not be able to rely on its domestic legislation as a defence.

The session concluded with practical ideas to improve India's international investment treaties, including a better reflection of domestic policies in the treaty texts and a review of the BIPAs in view of national concerns and policies. It was noted that the "innocent" phrases in BITs have been interpreted in an expansive manner, different than what was intended, and that India needed to modify these provisions in its international investment treaties.

### **Breakout Session 1: Defining Developing Country Goals in International Investment Regimes**

The participants were divided into three groups to develop ideas on the objectives that should be embedded into international investment treaties. Each group then reported back to the plenary. The recommendations on objectives are contained in Annex 1.

### **Session 4: South-South Regional Agreements: What is different from the post-colonial North-South template? What should be different?**

This session discussed South-South agreements, including regional agreements, such as ASEAN, COMESA and selected BITs. It was chaired by **Mr. Thierry Mutombo**, Senior Investment Promotion Officer, COMESA.

#### ***South-South regional arrangements***

**Mr. Obale** of the South Centre began his presentation by looking at the current changes in global trade, noting that the nature of global competition has changed. He said that as a group, developing countries' exports are growing faster than the world average. Mr. Obale said that post-colonial North-South regional trade agreements (RTAs) mostly

focus on market access provisions, giving the right to provide services through a commercial presence in the host country. He said that these new generation North-South RTAs reflect far more variation in their scope and content, ranging from trade in goods to services and investment liberalization and competition policy (e.g., the CARIFORUM-EC Economic Partnership Agreement—EPA). He noted that these RTAs constitute a challenge to regional integration, and limited space for development policy and efforts to diversify trade relations in the future.

**Mr. Obale** emphasized the interface between the RTAs and BITs through MFN obligations, noting that most BITs do not create strong pre-establishment rights for investors. Taking the example of the EC-CARIFORUM EPA, he noted that if a European investor secures a right to establish a commercial presence under the EPA, the investor might be able to enforce this right by invoking the investor protection and investor-state enforcement mechanisms under an applicable BIT.

**Mr. Obale** stated that the new South-South RTAs in Africa focus on building trade and investment relations across the continent, building effective regional markets, enhancing production capacities, and sustaining regional integration and cross-border infrastructure development through spatial development initiatives. He said that the tripartite COMESA—East African Community (EAC)—Southern African Development Community (SADC) FTA accounts for about 57 per cent of the African Union’s combined population, and represents an important departure from the post-colonial North-South, as it envisions integration through the development of common trade and industrial policies, and requires common views on the direction of future trade relations and the development of infrastructure.

He concluded by stating that the new South-South FTAs offer possibilities to construct regional cooperation based on relative strengths and to avoid destructive competition. He said these agreements could provide new possibilities for sectoral cooperation for industrial development, FDI and technology sharing.

### ***South-South BITs: The same old story?***

**Ms. Malik** of IISD commenced her presentation by explaining the history of BITs, noting that first known South-South BIT was signed between Iraq and Kuwait in 1964. She noted that about a quarter of all BITs today are South-South BITs. Ms. Malik explained that the rationale behind North-South BITs has its roots in the Northern countries’ desire to protect their assets in a post-colonial era amidst fears of rising communism. She said that South-South BITs are concluded on the premise that treaties promote investment. She noted that even though the South-South dynamic typically takes place without the traditional negotiating imbalance in North-South BITs, the treaties are virtually identical to North-North BITs. Ms. Malik stated that South-South BITs may not differ from North-South BITs for reasons that may include: economic disparities in the South-South dynamic, which may mirror that of the North-South if one Southern partner is economically stronger than the other, and the failure of Southern countries to

fully appreciate the implications of adopting a standard template used in North-South agreements. She noted, however, that there are a few common features that are more likely to be present in South-South BITs, such as the greater use of exceptions and post-establishment rights only (outside of regional arrangements). She concluded by stating that South-South deals are likely to increase, and there may be more bespoke agreements in the future as the knowledge of the implications of such instruments increase.

### ***Kenya's BITs with Arab states***

**Ms. Roslyn Ngeno** of the Kenyan Investment Authority provided an overview of her agency's work and Kenya's BITs. She noted that Kenya has signed two BITs with Arab states. She said that Arab countries are pursuing investments in Kenya and are requesting BITs to protect planned or existing investments. She said that Arab investments typically result from high-level state visits. Ms. Ngeno noted that there are certain deficiencies in existing Kenyan-Arab treaties. She said that the preambles to these treaties are devoid of development objectives, and instead exclusively focus on promoting and protecting investments. She said Kenyan BITs with Arab countries create only post-establishment rights, and that Kenya initially wanted pre-establishment rights but is reviewing this policy. She noted that Kenya's BITs with Arab countries prohibit performance requirements, even though Kenya desires to encourage investors to use local resources. She said Kenya's BITs with Arab states expressly include regulatory measures in the expropriation provisions, making it difficult for the host state to introduce new regulations that impact upon the value of investments.

**Ms. Ngeno** also noted that Kenya's BITs with Arab states contain transparency provisions that oblige states to promptly publish judicial decisions. She said these provisions could expose Kenya to potential claims in case there are delays in publishing judicial decisions. She also noted that there were severe time constraints and pressures in negotiations—often only one to two days were available—but that it is important not to rush through the provisions in view of the implications in the form of investor-state disputes. She said that she had learned more about the implications of international investment treaties at an IISD training course in Arusha, and is now recommending a review of Kenya's BIT template.

### ***Investment in regional trading arrangements***

**Dr. Kumar** of UNESCAP spoke about investment rules in regional agreements. He said regional arrangements are designed to encourage the overall competitiveness of the region by exploiting efficiency-seeking industrial restructuring. He said that Asian countries are late in creating regional economic blocs, as they had previously been relying on a multilateral system. He noted that FTAs by Asian countries grew from 25 to 191 between 2000 and 2006, and, of these, 84 FTAs were among regional partners. Dr. Kumar said that the major concentration of regional agreements is in South East Asia. He found that investment is covered in 26 of the 56 RTAs, and these are mainly with

capital exporting countries. He said that most of the investment chapters define investment broadly, whereas others expressly exclude portfolio investment.

He concluded by stating that Asia is catching up with the trend of regionalism, but is taking a cautious approach with staged liberalization. He said ASEAN is a major driver of such agreements in the region; however, India is now becoming more active.

### ***The Brazilian experience with BITs***

**Mr. Ancelmo César Lins de Góis**, Ministry of Foreign Affairs, Brazil, discussed the Brazilian approach to BITs. He said that, from 1994 to 1999, Brazil negotiated 14 BITs in the traditional model; however, in 2002, the National Congress decided not to ratify any of these treaties. He said that the Brazilian National Congress identified concerns in relation to the definition of investment, NT, MFN, expropriation, dispute settlement and the right to regulate.

**Mr. Góis** explained that the National Congress found that the definition of investment in BITs is excessively broad, covering virtually any investor, thereby making it difficult for the state to select FDI according to public policies for development. He said that the National Congress wanted to see a specific clause on the right to regulate, and to remove the treaty's application to indirect expropriation in order to minimize the risk of regulatory measures being covered by the expropriation provision. He stated that the National Congress had three main concerns relating to the investor-state arbitration mechanism in BITs: First, this would place the state at the same level as a private company, whereas a state is not a commercial institution; second, this would be an inverse of the NT position, giving foreign investors more rights, as they could bypass domestic courts if they wished, and choose between domestic courts and arbitration; and third, if investors could avoid domestic courts, it would signal a lack of confidence in the Brazilian legal system.

He stated that a panel of experts found that there is no empirical evidence linking BITs and increases in FDI, noting that other considerations, such as market size and the political situation, are more important. He said the large FDI flows between China and the USA are not protected by a BIT, and that Brazil, without having any BITs in force, is receiving large amounts of FDI.

He said that the following guidelines were established for Brazilian investment negotiations:

1. Brazil may negotiate investment treaties with other South American countries provided these treaties conform with Brazilian national interest and are subject to the five criteria listed below.
2. Brazil may not negotiate BITs with countries outside South America, but may agree to investment rules as a chapter in a comprehensive economic agreement subject to the five criteria listed below.

3. Brazil's negotiation of rules on investment either in an investment treaty or a broader economic agreement must meet the following five criteria:
  - a. Definition of investment: Coverage to be provided only to direct investments; portfolio investments to be excluded
  - b. MFN and NT with exceptions: The MFN and NT provisions must have detailed exceptions for the right to regulate
  - c. Coverage to only direct expropriation: indirect expropriation to be excluded
  - d. Coverage only to state-state dispute settlement: exclusion of investor-state arbitration
  - e. The right to regulate is repeatedly mentioned throughout the text of the agreement

**Mr. Góis** referred to the *UNCTAD World Investment Report 2010*, noting that countries are reviewing their model BITs to adopt clearer rules that are more consistent with public interests. He said investment flows to developing economies are increasing and almost half of FDI flows would be destined towards developing countries in 2010. He said that this year, for the first time since 1947 when Brazil's Central Bank began keeping records on FDI, the bank recorded the same levels of FDI inflows and outflows for Brazil. He concluded by stating that it is important that a state's model BIT reflects concerns of *all* stakeholders, taking into account that such agreements impose real obligations upon the state. He said BITs should not be used as photo ops for visiting dignitaries, because these agreements impose obligations on the state, which can lead to serious implications. He pointed to the cases brought by investors against Argentina during its financial crisis, triggering compensation awards equal to 15 per cent of Argentina's gross domestic product (GDP). Mr. Góis also referred to a public statement on the international investment regime by 20 professors from leading universities, noting the harm done to public welfare by the current international investment regime and the general principle that a state's fundamental right to regulate should not be subordinate to the interests of investors in treaties. He said states should review their treaties with a view to renegotiate.

#### **Session 5: Investment Protection: Recent developments in fair and equitable treatment**

This session provided an overview of recent developments on the concept of FET and gave a snapshot of some of the approaches taken by individual countries. **Mr. Gustavo Guerra**, Ministry of Foreign Affairs, Ecuador, chaired the session.

**Dr. Mann** provided the overview of the developments relating to FET, followed by presentations by **Mr. Ranjan** of Kings College, London, and **Mr. Tewodros Tamiru Habteselassie**, Investment Agency, Ethiopia.

#### ***Finding a safe harbour for states in relation to the FET provision***

**Dr. Mann** said his presentation would provide an overview of the FET concept and the most recent developments in case law. Dr. Mann discussed the relationship between the FET obligation and regulatory change, and reviewed different formulations of FET provisions in treaties, identifying three approaches: 1) vague and broad standalone FET clauses, which state simply that host states will treat investors fairly and equitably; 2) broad FET clauses that include an additional reference to international law; and 3) FET clauses that include an additional reference to the customary international law minimum standard of the treatment of aliens. He stated that the first two approaches are the most risky in terms of allowing tribunals to impose very broad obligations on host states. By contrast, the reference to customary international law standard on the treatment of aliens is the more specific since it is grounded in customary international law. He explained the contours of the customary international law standard on the treatment of aliens as reflected in the 1926 *Neer* case. In that case, a breach of the standard would only be found where government action amounted “to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency.”

However, as explained later in his presentation, Dr. Mann noted that in light of recent case law, even linking the FET obligation to customary international law is not without risks.

**Dr. Mann** noted that a balance needs to be struck in the FET provisions between the utility it provides for investors, which is a right that protects them from certain types of nefarious government conduct, and the need for a safe harbour for states so that governments are comfortable that their conduct will not violate the standard in the treaty.

He discussed three NAFTA and three non-NAFTA cases, all decided in the last two years, to discuss the various standards applied by tribunals in interpreting the FET provision. He explained that the tribunal in *Glamis Gold v. United States (NAFTA)* held that the burden is on the investors to show that the state’s conduct had violated the customary international law standard. Dr. Mann said the tribunal in *Glamis* noted that the investor must prove that the conduct of states is out of a sense of legal obligation. Dr. Mann said that bad faith is not required to prove FET, but would be conclusive.

He noted that the standard of behaviour, that is to say, “shocking and egregious,” is still the same according to *Glamis*; however, the tribunal held that what we may find shocking and egregious today may have changed since the 1920s. By contrast, in the immediately subsequent NAFTA case of *Merrill Ring v. Canada*, the tribunal stated that there is still a broad and unsettled discussion on the proper law applicable to the customary international law standard, which is in the process of evolution. That tribunal found that no general rule of customary international law can be found in the *Neer* standard, beyond the strict standard to be applied with respect to personal safety. He explained that the tribunal found that the customary international law minimum

standard of treatment of aliens in relation to business, trade and investment is more liberal than the *Neer* test in relation to personal safety. Dr. Mann noted that *Chemtura v. Canada* follows the *Merill* approach.

**Dr. Mann** stated that, in the non-NAFTA case of *Kardassopoulos v. Georgia*, the tribunal found that the independent FET standard in most treaties is not tied to customary international law and should be interpreted in the context of its neighbouring provisions and the preamble. A broad and open interpretation was given there. This was in contrast to *AES v. Hungary*, in which the tribunal held that the FET provision is not a stabilization clause, and that a legal framework is, by definition, subject to change as it adapts to new circumstances.

**Dr. Mann** said that the cases showed no consistency, that even a reliance on the customary international law standard of “minimum standard of treatment of aliens,” the most limited phrasing of the FET standard to date, does not provide complete comfort to states, and that the choice of arbitrators on the panel could affect the interpretation of the standard significantly.

#### ***Reflections from Ethiopia on the fair and equitable treatment provisions***

**Mr. Tewodros** of Ethiopia stated that there is no problem with the ordinary usage of the term FET; however, its use in BITs has emerged as extremely controversial. He said there is ambiguity in the criteria to be applied to the FET standard, as there are inconsistent arbitral decisions and a lack of jurisprudence providing clear rules on the scope of this standard. He noted that his study of 12 BITs signed by African countries and least developed countries (LDCs) found that these treaties contained open-ended FET provisions without reference to any criterion. Mr. Tewodros stated that Ethiopia has 28 BITs, of which, the majority are ratified. He said almost all of Ethiopia’s BITs contain open-ended language in the FET provision, and reference to this phrase is also present in the preambles of two treaties (Netherlands and South Africa). He said that the threshold this standard may place on states can be very high, and this provision is now being used “a backup” for all treaty claims. He said that the adverse effects of FET clauses include a denial of policy space for states to take action as part of their inherent right to regulate, and the high litigation costs to fight claims that investors can mount under such a broad standard.

**Mr. Tewodros** stated that, before negotiating a treaty, the question of whether one needs a BIT to attract FDI to meet national developmental objectives needs to be considered by the government. He said it is extremely important to use language knowing its implications and advocated drafting model text in view of national priorities. He also emphasized the importance of saying “no” in a negotiation.

**Mr. Tewodros** concluded that FET is best omitted from a BIT, but that, as a fall-back in negotiations, the standard could be linked either to customary international law or the MFN or NT standard. He said that if the FET standard is linked to the customary



international law minimum standard of treatment of aliens, it should not be subject to investor-state arbitration.

### ***Fair and equitable treatment in India's international investment treaties***

**Mr. Ranjan** of Kings College, London, stated that his study of India's international investment treaties consisted of 68 BITs and 2 CECAs. He found that 66 out of 68 BITs include FET. He noted that 32 of India's BITs mirror the FET provision in India's model BIT, which is a self-standing and vague standard to provide FET at all times to investors. He noted that the FET standard gives arbitrators significant space to interpret this obligation in different ways. Mr. Ranjan stated that the second type of FET provision in India's BITs is accompanied by the full protection and security standard. He noted that the intent of the parties could be interpreted to give importance to FET in order to protect investment rather than preserve the state's right to regulate. He noted that the third type of FET provision in India's international investment treaties is linked to the minimum customary international law standard for the treatment of aliens, and is only present in the investment chapter of the India-Korea CECA and the India-Mexico BIT. He also noted that these treaties additionally state that a breach of another provision of the international investment treaty or another treaty does not in itself mean a violation of the FET standard.

**Mr. Ranjan** concluded by recommending that FET should not be included in treaties. He noted that a few academics, including Professors Schreuer and Jose Alvarez, have stated that FET in treaties is now part of the customary international law, whereas Professor Sornarajah took the opposite view. He noted that customary international law is challenged by developing states as part of the New International Economic Order (NIEO) platform, as it is seen as an imposition by developed countries.

### **Breakout Session 2: Fair and Equitable Treatment: Is it fair? Is it equitable? Is it necessary?**

In this second breakout discussion session, participants were again divided into three groups to design recommendations on what approach to the FET standard might be most useful, given the significant differences in drafting in many existing agreements and the inconsistencies that continue to emerge in interpretations in even the most recent cases dealing with FET. The recommendations are set out in Annex 1.

### **Session 6: Arbitrators and the Arbitration System: Systemic disarray?**

This session examined developments on arbitrator independence in investment arbitration and recent annulment decisions. **Ms. Sanya Reid Smith** of the South Centre chaired the session.

### ***Challenges to arbitrator appointment and conflicts of interest***

**Ms. Bernasconi-Osterwalder** of IISD provided an overview of the investment arbitration system, particularly the role of arbitrators in investor-state arbitration and their selection and appointment process. She pointed to several issues of concern. First, she noted that arbitrators are not, like judges, attached to a particular court, but, rather, are selected by the parties to the dispute (or the relevant appointing authority) on a case-by-case basis. Party appointments raise, in themselves, issues with respect to impartiality. In addition, the problem is amplified by the fact that lawyers practising in commercial law firms can be counsel in one investment arbitration and appointed as arbitrators in another. This could have an impact on an arbitrator's independence and impartiality, because interests for a client in one case might affect the impartial reasoning of a person as an arbitrator and developer of investment arbitration law in another. In addition, the dual function can lead to situations where counsel in one case might appoint a colleague as arbitrator, hoping that the favour will be returned in a future case. The dual function has been addressed in arbitrator challenge proceedings, but their outcomes do not show much consistency on the issue of arbitrators changing hats between acting as counsel in one investment treaty arbitration and as arbitrator in another.

Second, Ms. Bernasconi-Osterwalder pointed to the fact that in an ICSID arbitration challenge, decisions are typically decided by the two remaining arbitrators. She noted that deciding upon a colleague's impartiality could be problematic.

**Ms. Bernasconi-Osterwalder** then discussed the standard for challenging an arbitrator under the ICSID, UNCITRAL and International Chamber of Commerce (ICC) Rules, noting that the ICSID standard appears to be the highest, making successful arbitrator challenges more difficult. She noted, however, that the International Bar Association (IBA) Guidelines relating to conflicts for arbitrators have been referred to in various cases, and that as a consequence, the different standards have not appeared to be treated so differently after all.

**Ms. Bernasconi-Osterwalder** concluded by suggesting various options to address the dual role problem in view of the important role arbitrators play in interpreting broad investment treaty provisions. She also raised the possibility of institutional reform and changes to the arbitration rules to make the process of appointing and challenging arbitrators more transparent with stronger conflict of interest rules. Finally, she raised the idea that some academics have suggested: setting up a world investment court with appointed judges to decide investor claims against states.

### ***The Argentine experience with challenging arbitrator appointments***

**Mr. Norberto Ariel Martins Mogo** of the Office of the Attorney General in Argentina explained why his country is facing over 40 investment claims from different investors. It all started with a serious financial crisis Argentina went through from 2001 to 2004. He

explained that, prior to that crisis, Argentina had concluded a number of BITs that included investor-state arbitration. He said that, in order to manage the financial crisis, the government had abandoned the pegging of the peso to the dollar, and as a result, the peso floated and was devalued. He explained that contracts between the Argentine government and investors referred to dollars, rather than pesos, and noted that, by 2003, Argentina found itself defending more than 20 cases. Given the number of cases, the government decided to create an in-house legal team to defend these cases rather than hiring international law firms. Mr. Martins explained that when the Argentinean legal team started, they were not familiar with the personalities or views of arbitrators, and soon found that some arbitrators had conscious or subconscious biases due their associations with corporations.

**Mr. Martins** explained the process of challenging arbitrators, which can also include the party's own arbitrator. He said that the ICSID standard for challenging an arbitrator is high, requiring a "manifest lack of qualities" (Article 14(1)). By contrast, UNCITRAL Rules require there to be "justifiable doubts" for independence and impartiality. He also referred to the duty of arbitrators to disclose certain circumstances that may give rise to lack of impartiality and independence (e.g., Article 9 of the UNCITRAL Rules). He explained that the IBA guidelines categorize different situations as conflicts of interests, and address the requirements to disclose them. He explained that parties challenging an arbitrator's appointment must do this promptly after learning about the circumstances that have given rise to justifiable doubts.

**Mr. Martins** shared Argentina's experience in challenging arbitrators with the participants. He stated that in many instances, Argentina was not successful. In *Siemens v. Argentina* and *Azurix v. Argentina*, Argentina's challenges to Andres Rigo Sureda, who was the president of both tribunals, failed. He said that in *National Grid v. Argentina*, Argentina's challenge to Judd Kessler, based on certain statements made by him during the merits hearing, which amounted to pre-judging the facts in Argentina's view, was dismissed.

He said that, in *ICS v. Argentina*, Argentina was successful in challenging arbitrator Stanimir Alexandrov, who was also acting as counsel for claimants in *Vivendi v. Argentina* at the same time. He also discussed Argentina's unsuccessful challenge to Professor Kaufmann-Kohler in *Suez v. Argentina* on the grounds that she was a member of the board of directors at UBS, a major shareholder in both *Suez* and *Vivendi*, and had failed to disclose this to the parties and to ICSID.

**Mr. Martins** noted the difficulties in challenging arbitrators under the current rules. He said that a member of the *Vivendi* annulment decision panel had strongly criticized Professor Kaufmann-Kohler for not having disclosed her link to UBS. He also noted that one member had pointed to improper influence by ICSID counsels who tried to influence the annulment decision in relation to the impartiality.

**Mr. Martins** called for transparency in the challenges of arbitrator proceedings; strong binding rules on disclosure by arbitrators; a code of ethics for arbitrators, counsel and the ICSID secretariat; and a change in the rule that the challenge to the arbitrator should be decided by the unchallenged arbitrators on the panel.

**Mr. Martins** said that it is difficult to understand why Argentina concluded so many BITs in the 1990s, even though the link between investment promotion and BITs is disputed. He said Argentina had decided to face all 47 investment treaty claims brought against it. He said that foreign investors saw the investment regime as a self-contained regime isolated from other parts of public international law, ignoring the state's duty to regulate its economy.

He said that BITs should not be used as photo opportunities given that they are legal documents, with long-term and significant impacts. He explained that Argentina's experience could help other countries learn an important lesson. He said that the large number of BITs signed by Argentina provide investors multiple opportunities to bring claims with respect to the regulatory measures Argentina had to take during a serious financial crisis. He said that, when Argentina concluded these BITs, it never expected that it could face these claims, and it is no surprise that investors welcome BITs because it gives them an extraordinary and powerful tool in the event of a controversy. He said it is critical to negotiate each word in a treaty, that, otherwise, the broad obligations could be read as a "blank cheque," and that it is important to preserve the state's power to regulate. He said that Argentina was sued for adopting emergency regulatory measures to manage a difficult financial crisis in 2001, when the peso fell from 1 to 4 pesos to a dollar. He explained that it would have been impossible for the households and other users to pay for utilities like electricity and water under the original conditions set out in the contract. Mr. Martins said that this triggered several claims by foreign investors, as the BITs signed by Argentina only contained a catalogue of rights for investors and no provisions for state's right to regulate; this made Argentina's defence difficult in these claims.

He concluded by stating that the investor-state arbitration system is like a closed club, and that there is a need to make it more transparent and to introduce more arbitrators with public international law backgrounds. He said states can gain control of the process by designing the investor-state arbitration clauses in the treaties with rules on transparency and conflict of interest codes for arbitrators.

In the discussion, it was noted that the main problem in the investment arbitration process is that the system is based on using commercial arbitration rules to resolve regulatory disputes. It was suggested that the current system should be replaced with a permanent court like the WTO Appellate Body.

**Session 7: Gaining control of the international investment regime: What needs to be done?**

This session considered the discussions that were held throughout the Forum and identified who could take these issues of concern forward, and how. The session was chaired by **Ms. Veniana Qalo** of the Commonwealth Secretariat. She began the discussion by asking the panel and participants to consider the following questions:

1. To what extent have investment agreements met your country's national objectives?
2. Have your contracts, treaties, trade agreements and BITs reflected national objectives and policy?
3. Is there a need to review and modify these BITs?
4. Is there a need for reform to resolve the systemic issues with arbitration under ICSID and UNCITRAL rules and processes?

**Ms. Qalo** said that countries need to identify *what issues* need to be resolved within the international investment law regime, and then discuss *who* could take these concerns further at the national, inter-governmental and international organization levels.

**Dr. Das** noted that treaties provide a useful framework, but that they should be improved to remove the deficiencies. He said that the policy framework should be designed to harness good quality investments and encourage quality regulation as well. He said that, at a national level, there should be better coordination between research institutions, the private sector and government departments. He said governments should work together on a regional level, and that academic and research papers should inform this process.

**Ms. Veronica Maseda Beaumont**, Proinversión (Agency for the Promotion of Private Investment), Peru, said that, previously, Peru had signed broad and vague provisions in its BITs. She noted that the FTA negotiations with the United States were a learning experience, and that now Peru has a model international investment treaty with clearly defined obligations. She noted that Argentina had had an unfortunate experience, but that any country could suffer the same fate in the event of a crisis, and could be sued under BITs, since the provisions in the old-style BITs are the same.

**Ms. Maseda** noted that, previously in Peru, the Ministry of Foreign Affairs would negotiate BITs. Today, however, there is a negotiating commission comprising the Ministries of Finance, Trade and Tourism, Foreign Affairs and the Agency for the Promotion of Private Investment. She said having four state entities involved gives the negotiations greater legitimacy. In addition, she noted that consultations are also made with other governmental departments, such as labour and justice, which produce opinions on compliance with the laws and policies of Peru. She said that the commission has created some guidelines, which include a list of provisions on BITs that are important for Peru, and has set out the country's position on BITs. This was helpful in responding to the frequent requests by the Foreign Affairs Department, which wanted to encourage BITs during high-level state visits. She said the responses to the countries' requests for signing BITs also included an analysis of FDI flows with the potential treaty

partner. Ms. Maseda said Peru is also prepared for an investment dispute against the government, and that a special commission has been constituted for that purpose. This commission includes mostly the same members as the negotiating commission and has a mandate to hire lawyers in the event of a claim and to obtain information from other government departments. She said it is useful and important that the commission oversees the disputes, as the lessons learned during the claims can then be reflected in the treaty negotiations.

**Mr. Hasan Aslan Akpinar**, Ministry of Treasury, Turkey, stated that governments should enhance their capacities in this area by recruiting trained professionals in public international law, investment treaties and international economics. He said that Turkey received several demands to negotiate BITs, but refused approximately 70 per cent of such offers due to limited human resources and financial budgets. Mr. Aslan said Turkey has signed 81 BITs, of which, at least 50 need to be renegotiated. He said every country should have its own model suited to their national interest, as there is no “one size fits all.” Mr. Aslan stated that governments should consider the type of investment they wish to attract and the nature and scope of the agreements they wish to sign. He said that, while formulating provisions, the arbitration decisions interpreting these provisions should be reviewed and taken into account. He said government departments should be in sync to respond to pressure in negotiations. Mr. Aslan said that there should be an increase in the sharing of knowledge and experience between countries in this area. He added that international organizations should guide countries in this area, but should not attempt a multilateral initiative.

**Mr. Suon Sophal**, Council for the Development of Cambodia, Cambodia, stated that Cambodia believed in regionalism and international cooperation. He said Cambodia has signed 20 BITs, and although there is no study confirming the link between investment inflows and BITs, most of the investment into Cambodia comes from countries with which it had BITs. He said there is a joint committee to implement the Cambodia-Japan BIT, which worked to bring investment and facilitation. He said developing countries need to coordinate closely with each other, and that it would be useful to have a multilateral forum to reflect the development agendas of developing countries. He also said there should be greater public-private sector discussion in relation to government regulatory measures and policies.

The above recommendations, as well as a number of other recommendations brought forward by other participants, are set out in full in Annex 1. **Ms. Qalo** also explained her organization’s role in supporting policy development, and offered assistance to governments if they choose to undertake cost-benefit analysis in relation to BITs, as recommended by several participants.

## **CLOSING SESSION**

**Ms. Bernasconi-Osterwalder** concluded the proceedings of the Forum by announcing that the next forum is likely to be in Africa and invited participants to consider allocating

resources for travel in their budgets. She also mentioned that IISD's advisory services on international investment laws can assist with in-country training and awareness programs, as well as provide strictly confidential advice on treaty negotiations and model texts.

**Mr. Dushyant Thakur** of Invest India thanked the organizers, and noted that the host country had benefited greatly from the Forum, and that the issues raised in relation to India's BIT program would now be discussed within the Indian government.

## **ANNEX 1: RECOMMENDATIONS OF 4<sup>th</sup> ANNUAL FORUM OF DEVELOPING COUNTRY INVESTMENT NEGOTIATORS**

### **BREAKOUT SESSION 1: Defining Developing Country Goals in International Investment Negotiations**

In Breakout Session 1, the participants were divided into three groups to develop ideas on the objectives that should be embedded into international investment treaties. Each group then reported back to plenary. The recommendations below provide a rich source of ideas for negotiators, as well as for international organizations examining the future of the international investment regime. Each group is presented independently, and no single consolidation was undertaken.

**Group 1** agreed on defining an overall goal in negotiating international investment treaties, which should be reflected in the preamble, and to then include a more detailed “Objectives” clause in the main text. It was also agreed that the preamble should recognize the right of the host country to regulate the investment in line with its national policies and interests.

#### (1) Overall goal (Preamble)

To promote and to attract FDI for sustainable development.

#### (2) Specific objectives article

- a) To promote economic and social development and environmental sustainability;
- b) To protect investors and their investments with provisions on direct and indirect expropriation, discrimination and settlement of investment disputes;
- c) To achieve overall balance between the rights and obligations/responsibilities of investors, on one side, and the host state’s national interests, on the other, without compromising the regulatory power of the host country;
- d) To promote technology transfer through FDI;
- e) To promote access to the international market through FDI, and to promote linkages with local investors;
- f) To promote the productive use of natural resources through value addition; and
- g) To promote job creation, and to reduce the rate of unemployment.

On NT, two specific issues were also noted:

- To raise the concern/right for the host country to promote and encourage local small and medium enterprises (SMEs) by specific policies;



- To raise the concern/right for the host country to regulate land access/ownership (national interest).

**Group 2** recommended the following goals for international investment treaties:

- Attracting more FDI, focusing on both the quality and quantity of FDI;
- Opening trade markets, liberalizing and protecting investment;
- Identifying methods of promoting FDI, for example through public-private meetings;
- Balancing obligations between both treaty parties;
- Clarifying the responsibilities of investors and host governments, including encouraging corporate social responsibility;
- Adding definition and clarity in the treaty to the term “sustainable development”; and
- Promotion and protection of human rights, for example in mining activities.

**Group 3** argued that it was important to have coherence between domestic laws and policies, and obligations under international law. Group 3 stated that the objectives of International investment treaties should be broadly stated:

- Preamble: all economic, social (including perhaps labour and human rights) and environmental goals should be reflected. Recognition of the different levels of development, the need for policy space and the right to regulate should also be included.

Group 3 then made a series of related points to “redefine” the scope of the international investment regime or specific agreements:

- “Investment” should be defined through an exhaustive list of types of FDI rather than a non-exhaustive, open-ended list. The definition should not include portfolio investment, intellectual property, etc.
- The definition of “investor” should be tight (e.g., seat of company, or substantial business activities, or 51 per cent ownership by nationals, or as determined by host government etc).
- There should be no pre-establishment/establishment rights (as governments can always unilaterally open sectors for investment).
- The BIT or FTA chapter should include exceptions to post-establishment NT (as industries in developing countries are still at the infant industry stage,

and they need to be able to offer subsidies, benefits, bailouts, etc. to domestic companies only).

- The right to impose any kind of performance requirements should be maintained. This may mean adjusting other provisions such as NT and not including provisions explicitly restricting the use of performance requirements, such as those seen in the US Model BIT 2004.
- Indirect expropriation should be excluded, and the scope of expropriation and the rate of compensation should be limited to those available under domestic law to ensure coherence between domestic and international law.
- There should be a strong safeguard of the right to regulate.
- There should be balance of payments safeguards in relation to all capital transfers (i.e., align the BIT with what you can do under domestic law to restrict capital inflows/outflows).
- Investor-state dispute settlement should only be available for certain categories of investment that contribute to development; for example, those that have met all performance requirements undertaken in relation to the investment.

**Additional comments from the participants** included suggestions that governments should work towards creating strong institutional structures and standards in the agreements to encourage investment, and to establish ongoing communication channels during the life of the treaty.

**Collectively**, the group reports and subsequent discussion clearly demonstrated the desire to develop country negotiators who are able to reformulate the objectives of international investment treaties, moving away from simply protecting the investments of investors to enhancing a broader range of the potential positive impacts of FDI and addressing, with a view to minimizing, a broader range of potential negative impacts of FDI.

### **BREAKOUT SESSION 2: Fair and Equitable Treatment**

In the second breakout session, participants were again divided into three groups, this time to develop recommendations on what approach to the fair and equitable treatment standard might be most useful for developing countries. The recommendations represent the outcomes of each of the three groups.

**Group 1** identified two approaches for addressing FET in treaties:

- The predominant recommendation was not to have the FET clause.

- If FET is required in a treaty, countries should both refer to their regulatory powers in the preamble, and the proposed FET should be provided in accordance with the customary international law minimum standard of treatment of aliens.

Group 1 also noted that different states have different standards of justice and governance, and may not be able to achieve the same standards at the same time. Thus, the FET standard should be seen not in absolute terms of a single global standard, but also in relative terms based on the actual state of development of the host state.

**Group 2:**

- Group 2 recommended that FET should be included in the treaty, but its meaning and content clarified. In particular, Group 2 wished to tie the standard to a requirement of the government to act in accordance with the rule of law and national law, provided that national law itself is bona fide and not arbitrary.
- It was also noted by Group 2 that it should be made clear that a breach of another provision of an international agreement (including a provision of a broader FTA in which an investment chapter might be found) does not constitute a breach of the FET provision.
- Group 2 decided against referring to customary international law on the minimum treatment of aliens, as this standard is also open to different interpretations in view of recent case law.

**Group 3** made three primary recommendations:

- First, to exclude the FET clause from the treaty;
- Second, that, if a FET clause were included, then it should be in accordance with the customary international law minimum standard of treatment of aliens; and
- Third, that this standard then be expressly defined to mean a denial of the principles of natural justice and complete lack of due process.

Overall, each of the groups recommended against the “old-style” drafting of a loose and open-ended FET article. Two groups recommended no FET article as the primary option, and an expressly limited FET clause if one were needed. The other group adopted an approach that reconstitutes the FET concept into one of a government acting within the rule of law as constituted by the host state, as opposed to an uncertain international standard.

**Gaining Control of the International Investment Regime**

Session 7 recommendations encompass those from the panel presenters and other participants. They are grouped into four categories below: recommendations for governments on content; recommendations for governments on processes; recommendations relating to international organizations; and recommendations concerning the Forum.

### **Recommendations to governments on content:**

It was recommended that:

- The policy framework should be designed to harness good quality investments and encourage quality regulation as well.
- Governments should have their own model international investment treaty suited to their national policies and interests, as there is no “one size fits all.”
- This model BIT should address developmental goals and concerns, accommodate and reflect the right to regulate, define provisions clearly and restrict investor-state arbitration.
- Governments should consider in advance of any negotiation(s):
  - the type of investment they wish to attract (FDI only or portfolio?);
  - whether and which commitments would be given at a pre- or post-establishment level;
  - whether there is a need to impose performance requirements;
  - the need to retain a state’s right to regulate; and
  - whether investor-state arbitration should be available for all investment disputes.
- When formulating provisions, the arbitration decisions interpreting these provisions should be reviewed and taken into account.
- The state should review all its BITs in comparison with their model to decide on renegotiation and termination.
- The key policy provisions in the model should be approved internally in the government so that these then become non-negotiable.

### **Recommendations to governments on processes to apply:**

It was recommended that:

- At a national level, there should be better coordination between research institutions, private sector and government departments.
- Governments should work together on a regional level, and academic research should inform this process, bringing greater depth of analysis.
- States should develop representative inter-agency committees to support negotiating teams and decisions, and implementation of the agreements,

including in the event of investor-state disputes. This allows for more effective consultations with other agencies when needed, and more effective responses to negotiating pressures.

- States should conduct a cost-benefit analysis relating to its BITs, and establish review processes for existing BITs.
- States should create a list of provisions in BITs that are important for the state, and set out the country's position on BITs.
- Committee processes should be used to encourage research to be done to respond to requests for negotiations, including an analysis of FDI flows with the potential treaty partner.
- Governments should enhance their capacities in this area by recruiting trained professionals in public international law, investment treaties and international economics.
- Governments should act within their human resource limits and refuse to negotiate when it is not a priority and when negotiations would over-extend limited human resources and financial budgets.
- There should be greater public-private sector discussion in relation to government regulatory measures and policies.
- There should be an increase in the sharing of knowledge and experience among countries in this area.
- Governments should consult with all relevant stakeholders while preparing their model BIT.
- Developing country governments should consider how to establish strong dispute prevention regimes in their respective countries.
- Developing countries should coordinate more closely with each other and encourage more regional approaches.
- States should consider a declaration by governments, which may influence the interpretation of certain provisions.

**Recommendations relating to international organizations:**

It was recommended that:

- International organizations should only guide countries in this area, and should not attempt a multilateral initiative.

- It would be useful to have a multilateral forum to fully reflect the development agendas of developing countries.
- Developing countries should consider and assess the benefits of regional approaches, such as the COMESA Investment Agreement for Eastern and Southern African countries.

**Recommendations concerning the annual forum:**

It was recommended that:

- There should be a declaration highlighting the flaws in the current regime.
- The discussions and declarations in the Forum should be widely distributed, and ICSID should be invited next year.
- IISD should continue to organize regional training and in-country training for technocrats, politicians and government officials on the implications of BITs.
- IISD or the South Centre (or both) should represent and voice the participants' concerns and recommendations at the World Investment Forum, which has high-level government officials attending from developing and developed countries.

## List of acronyms

ASEAN	Association of Southeast Asian Nations
BIPA	Bilateral Investment Promotion and Protection Agreement
BIT	Bilateral Investment Treaty
CECA	Comprehensive Economic Cooperation Agreement
COMESA	Common Market for Eastern and Southern Africa
EAC	East African Community
ECJ	European Court of Justice
EPA	Economic partnership agreement
EU	European Union
FDI	Foreign direct investment
FET	Fair and equitable treatment
FTA	Free trade agreement
GDP	Gross domestic product
IBA	International Bar Association
ICC	International Chamber of Commerce
ICSID	International Centre for Settlement of Investment Disputes
IISD	International Institute for Sustainable Development
IMF	International Monetary Fund
IPA	Investment promotion agency
LDC	Least developed country
MERCOSUR	Mercado Común del Sur (Southern Common Market)
MFN	Most favoured nation
NAFTA	North American Free Trade Agreement
NIEO	New International Economic Order
NT	National treatment
RTA	Regional trade agreement
SADC	Southern African Development Community
SMEs	Small and medium enterprises
TFEU	Treaty on the Functioning of the European Union
UNCTAD	United Nations Conference on Trade and Development
UNESCAP	United Nations Economic and Social Commission for Asia and the Pacific
WAIPA	World Association of Investment Promotion Agencies
WTO	World Trade Organization