

REPORT ON

The Fifth Annual Forum of Developing Country Investment Negotiators

Investment and Sustainable Development: Developing Country Choices for a Better Future

October 17–19, 2011 – Kampala, Uganda

The Fifth Annual Forum of Developing Country Investment Negotiators (“the Forum”) was held in Kampala, Uganda, from October 17–19, 2011. It was co-organized by the Government of Uganda, the International Institute for Sustainable Development (IISD) and the South Centre. This year’s Forum was attended by 79 participants from 40 countries from Asia, Africa and Latin America, as well as international organizations, including the Commonwealth Secretariat, the United Nations Economic Commission for Africa (UNECA), the Caribbean Community (CARICOM) Secretariat and the Pan-African Parliament. The agenda, presentations and background materials for the Forum can be found on the IISD website: www.iisd.org.

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

Opening Ceremony and Welcome

The participants at the Forum were welcomed by **Ms. Nathalie Bernasconi-Osterwalder**, Senior International Law Advisor and Program Leader, Investment and Sustainable Development Program, IISD. She emphasized that the meeting would be conducted under the 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. The summaries of the presentations, however, are reprinted in this report and attributed, unless speakers explicitly requested that their contributions not be included.

Ms. Bernasconi thanked her co-organizers, the Government of Uganda and the South Centre. She emphasized the importance of the Forum, as it serves as a platform for developing countries to share experiences and ideas. Ms. Bernasconi stated that developing countries need to first identify the choices they wish to make in relation to foreign investment and then work toward implementing these decisions. She questioned whether the current legal frameworks imposed by treaties, laws and contracts provide the space developing countries need to make choices for a better future. She said if the current frameworks did not give developing countries the room to make these choices, then participants should discuss the appropriate design of frameworks that do allow them space to make such choices.

Mr. Offah Obale, Program Officer, Trade in Services, South Centre, referred to the South Centre’s publication on the Northern World Trade Organization (WTO) Agenda. Mr. Obale said that South Centre studies have found that developed countries have often discriminated between national and foreign investment. He said developed countries have been placing pressure on developing

countries to act in a non-discriminatory manner, when they themselves have used discriminatory measures for their own development. Mr. Obale cited the discriminatory treatment experienced by Japanese firms in the United Kingdom during the 1970s as an example.

The official opening of the Forum was conducted by **Dr. Louis Kasekende**, Deputy Governor of the State Bank, representing the **Hon. Maria Kiwanuka**, Minister of Finance, Planning and Economic Development, Government of Uganda. Dr. Kasekende welcomed the representatives of 40 developing countries to Africa. Dr. Kasekende emphasized the importance of creating the right investment and regulatory environment. He said Africa had experienced an erosion of world trade since the 1960s and that it was important to promote trade and investment in Africa. Dr. Kasekende also emphasized the importance of regional investment frameworks. Dr. Kasekende asked the Forum participants to propose recommendations for developing countries and also to consider the implementations of their recommendations. He hoped this Forum would improve negotiation skills and result in better deals on investment for developing countries.

Keynote Presentation: “Rising or Uprising? Africa’s Inward Investment, Development and Sustainable Development”

The keynote presentation was delivered by the **Hon. Ciata Bishop**, Executive Director of the National Investment Commission (NIC) of Liberia. Ms. Bishop emphasized the resource potential of Africa, the world’s second largest continent. She said that as a result of conflict and poor governance, Africa’s resources have remained under-developed. She said Africa needed an economic and social revolt to achieve the potential befitting the continent’s age and wisdom. Ms. Bishop said that African countries must work together as a continent to create a sustainable middle class. She noted the importance and urgent need for strengthening institutions in Africa. She said that Africa’s rise is possible with inward foreign investment.

Ms. Bishop summarized the stages of Africa’s investment policy. She noted that Africa’s trade and investment policy during the colonial phase was suited to the needs of the colonial powers and, in Liberia’s case, to the United States. Ms. Bishop said that in the post-colonial phase, African countries largely used protectionist policies; however, rising oil prices and conflicts put this to a halt. She said that the global financial crisis has resulted in a reconsideration of the government’s role in regulation. Ms. Bishop said after decades of civil strife, Liberia is now implementing growth-oriented policies. She noted that among African countries, Angola received the highest amount of foreign investment, followed by Nigeria and South Africa. She said US\$1.2 billion has come into Liberia, mainly into the iron ore mining sector. Ms. Bishop said that the benefits of foreign investment are often not immediate. She said that the choices countries make today in relation to investment and development will impact upon future generations. Ms. Bishop said that there need to be limits on the importation of labour and emphasized the importance of training young people in Africa. She said countries must not change their policies to please a particular investor. Ms. Bishop said that every investment decision should help the community. She also underscored the importance of regional cooperation and advocated the dismantling of regional barriers to trade, noting that importing cocoa from China was cheaper than obtaining it from Ghana and exporting goods to the United States or Europe was easier than doing so within Africa. She said a paradigm shift was required.

Ms. Bishop also noted that African history and values were based on respect, honour and sanctity. She said that good governance formed the fundamental basis of African village life, including mutual respect. Ms. Bishop said that village leaders were restrained in their decision making. She said that the word corruption did not exist in native African languages.

Ms. Bishop mentioned that Liberia had promulgated new laws and codes, including the Foreign Investment Law in 2010. She also described the role of the Liberian national bureau on concessions to ensure that investors complied with Liberian investment laws. She said that Liberia is working on its land and minerals laws. She said that Africa's growth rate is likely to be 5 per cent to 6 per cent, which shows that Africa is rising; however, there needs to be a development revolution for the people of Africa to obtain benefits from this growth.

Ms. Bernasconi thanked Ms. Bishop for her speech and noted the importance of developing countries finding their own ways, rather than acceding to investor demands without considering national objectives.

Session 1: The Role of Foreign Direct Investment in Promoting Economic Growth and Sustainable Development Strategies

This session was chaired by **Dr. Howard Mann**, Senior International Law Advisor, IISD.

Foreign Investment and Sustainable Development: Some Aspirations

Dr. Mann said that virtually all the negotiators and officials he had met had stated that the objective of foreign direct investment (FDI) is to achieve sustainable development. He noted that investment was required to achieve development objectives, including maximizing employment, food security, transfer of science and technology, local entrepreneurship and developing respect for human rights. Dr. Mann noted that the origins of international investment treaties lie in western investment protection concepts rather than development objectives. Dr. Mann said that the Forum will look at the choices available to developing countries in treaties, contracts and domestic laws to harmonize investment with sustainable development objectives.

Mining and Sustainable Development: The Africa Mining Vision

The first speaker in the session was **Ms. Marit Kitaw**, Governance and Public Administration Officer, Sub-regional Office for Eastern Africa, of the United Nations Economic Commission for Africa. Ms. Kitaw spoke about the African vision on mining and sustainable development. She said that proper and efficient management of mineral resources can lead to sustainable development and poverty reduction through increased fiscal flows from taxes and royalties, foreign exchange generation, upstream and downstream opportunities, job creation, technology creation and infrastructure development. Ms. Kitaw also noted the prevalence of corruption in the mining sector. She noted that the post-colonial history of this sector started with large-scale nationalization in the 1960s and 1970s, followed in the late 1980s and 1990s by widespread privatizations prompted by the Washington consensus. She said that the commodity price boom in the early 2000s did not produce expected development benefits in Africa because the reforms had been narrowly designed and geared toward the foreign investor, rather than the

development paradigm. Ms. Kitaw said there is a need for a new social contract in the mining sector today. She said minerals are a finite product and that, therefore, the creation of sustainable wealth and development is a challenge.

Ms. Kitaw said that the African Mining Vision is based on an equitable and transparent framework that promotes good governance, encouraging the participation of citizens and communities, and fostering environmental and social mining practices and the achievement of development benchmarks. She said the vision recognizes the fiscal advantages of mining, but considers other important benefits, such as employment and transfer of technology. She said today African countries are able to negotiate better deals, as India and China are prompting demand and competition for these resources, in an improved governance environment in Africa. She said that the African Mining Vision was developed by African leaders. She said this vision can be implemented by improving the quality of Africa's resource potential data, improving the African capacity to negotiate contracts to ensure fairer deals, and by enhancing the capacity to administer financial flows through improved regulation and monitoring. Ms. Kitaw concluded by stating that more needs to be done to ensure change, including designing legal and regulatory frameworks that enable equitable participation by local business, communities and other stakeholders.

How to Invest in Africa? The Response of Members to the Issue of "Land Grabbing"

The second speaker in this session was the **Hon. Jean-Marie Mokole**, Member, Pan-African Parliament (PAP), and Rapporteur, PAP Committee on agriculture, rural economy, environment and natural resources, who spoke about investments in land and agriculture in Africa. Mr. Mokole said that 50 million hectares of land in Africa have been leased to foreign investors without taking into account benefits for the local communities. He identified the three types of investors that were interested in land: First, Asian investors looking for food security; second, food exporters; and third, funds using public or private sector monies to secure land rights. He said that these land acquisitions came at the expense of local communities. Mr. Mokole noted that studies have concluded the following: First, that land rights are being abused; second, investment agreements between investors and governments relate to land that is currently being used by communities; third, parliamentarians do not have access to these agreements; fourth, the communities are not consulted properly and, in particular, women's land rights are being abused; fifth, investors rarely respect the promises to give benefits to the communities or the country; sixth, states have the responsibility to respect human rights of the communities; and seventh, the land acquisitions have hindered rural development programs and poverty reduction.

Mr. Mokole said that investors obtain strong rights under the contracts, domestic laws and treaties. He noted investors' rights have included rights to export all the produce; existing laws are often too vague and insufficient to regulate large-scale foreign investment. He said parliamentarians should act as watchdogs to ensure these contracts are transparent and strike a fair deal. He said there should be a commission to examine all such contracts. He recommended that parliamentarians have a role in ensuring governments make these contracts and deals transparent; he provided the example of Liberia, which had made such contracts transparent. He stated that there should also be land reforms to ensure that traditional rights to land are binding,

and that capacity building should increase; he recommended that large-scale acquisitions of land should be last resorts, with preference given to local–foreign partnerships on a small-scale basis.

Dr. Mann highlighted two points from the presentations: First, the Washington consensus approach led to an investment boom in terms of volume, but failed to benefit Africa from a qualitative perspective. Second, none of the agricultural investment contracts have delivered benefits to the communities in which those investments were made. He noted that the responses by the two initiatives in mining (the mining vision) and the agricultural sectors (declarations by the Pan-African parliamentarians) are moving in complementary directions.

Comments from the participants included the question of whether there should be a threshold on land acquisitions that justifies the involvement of parliaments. Another participant noted that corruption was at the root of the problems related to land and mining deals. Another participant asked how local communities could be involved in monitoring the rehabilitation of land.

Ms. Kitaw stated that the Africa Mining Vision had provisions relating to the protection of communities, including requirements that they be consulted in certain cases.

Mr. Mokole said it was difficult for parliamentarians to obtain access to contracts, due to the separation of powers between the executive and legislature; however, parliamentarians need to be vigilant and ready to challenge the executive on contracts. He said that, additionally, parliamentarians should introduce laws in order to ensure more equitable land deals—for example, reducing the duration of leasehold tenure.

Session 2: Regional Developments on Investment Treaty Negotiations and Consultations

This session was chaired by **Mr. Offah Obale**.

The first speaker in this session was **Mr. Okilangole Okware Patrick**, Assistant Commissioner, Division of Regional and Bilateral Trade, Ministry of Tourism, Trade and Industry, Uganda, who spoke about the difference in investment in services and trade in services. Mr. Patrick said that the United States has offered the East African area a Trade and Investment Framework Agreement. He explained that Uganda has signed a trade and investment agreement with South Africa, but that issues of immigration are not being dealt with in economic agreements.

Recent Efforts Aiming at Consolidating International Investment Rules in Eastern and Southern Africa

The second speaker, **Mr. Thierry Mutombo Kalonji**, Acting Director, Investment Promotion and Private Sector Development, Common Market for Eastern and Southern Africa (COMESA) Secretariat, commenced his presentation by explaining the tripartite initiative among COMESA, the East African Community (EAC), and the Southern African Development Community (SADC). Mr. Kalonji said there were various layers of agreements and that the consolidation of Bilateral Investment Treaties (BITs) signed by 19 COMESA countries and 26 tripartite initiative countries is a complex task. He said that eight countries belong to both COMESA and SADC, and four countries belong to COMESA and EAC, and therefore there are significant overlaps. He provided

an overview of the BITs signed by COMESA, EAC and SADC countries, noting that Egypt had the largest number of BITs, followed by South Africa and Mauritius. He explained the main and common features of the treaties concluded by SADC and COMESA countries. He explained that the regional investment rules consisted of the SADC Investment and Finance Protocol, which is similar to those existing in the COMESA Common Investment Area. Mr. Kalonji said there was a need to consolidate the existing rules in the tripartite initiative.

Next, **Prof. Dr. Lawan Thanadsillapakul**, Professor of Law, Sukhothai Thammathirat Open University, Thailand, traced the origins of the Association of Southeast Asian Nations (ASEAN) back to the 1950s, until the creation of ASEAN in 1967.

ASEAN is an economic group comprised of the countries of Southeast Asia. ASEAN and the Asia-Pacific has been the most dynamic and fastest growing region in the world. But the 1997 Asian crisis sent the “Asian Tigers” into turmoil. The rise and fall of Asia clearly reflects the interdependence of East Asian countries and the world economy and also reflects the impact of the changing global, legal and economic environment on these countries. ASEAN countries have gone through a volatile period and thus have embarked on deeper integration to strengthen regional economic self-reliance while committing to an open market orientation. A new direction for ASEAN, “Open Regionalism,” will balance regional integration and global liberalization.

ASEAN is going to test the feasibility of implementing “Open Regionalism” in reality. Regionally, ASEAN has launched new integration schemes to liberalize trade, investment and services using a hybrid model of liberalization based on most favoured nation (MFN) status and national treatment (NT) with negative lists, but subject to standstill and rollback principles. Preferences granted to ASEAN members would be enjoyed by non-ASEAN enterprises through the concepts of “ASEAN Investor” and “ASEAN Service Provider” under the ASEAN Investment Area and ASEAN Framework Agreement on Services, through the “ASEAN Rules of Origin” under the ASEAN Free Trade Area (AFTA), and through the ASEAN Industrial Cooperation Scheme (AICO), as well as through “Short-Term Measures” adopted in 1998. ASEAN has kept margins of preference as low as it can to encourage inflows of trade and investment into the region. Nationally, ASEAN countries are reinforcing their openness by unilaterally liberalizing their trade and investment regimes, complying with WTO regulations. By all these means, ASEAN can both strengthen regional integration and encourage outsiders to invest in ASEAN due to economies of scale.

ASEAN has adopted concerted unilateral liberalization and negative integration, but the strengthening of its legal and institutional framework through regulatory networks and layered governance will be fundamental to its success. The implementation of ASEAN integration proving that ASEAN can resolve the dichotomies between regionalism and global liberalization—and the successful achievement of a balance between the two—would further propel global economic development and narrow the gap between North and South.

Prof. Thanadsillapakul further said that the aim of ASEAN is to remove trade and investment barriers. Thus, ASEAN has launched the new schemes to create an ASEAN single market and production base, enhancing free flow of goods, services and investment within the ASEAN area. She also focused on the main characteristics of investment agreements in ASEAN. However, she

stated that there was asymmetry in liberalization obligations in ASEAN. She noted that investment measures and development benefits should be connected.

Investment Treaties in the West African Economic and Monetary Union (UEMOA): State of Play

Next, **Ms. Henrique Suzy Nikiema**, International Law Advisor, Investment and Sustainable Development Program, IISD, stated that Economic Community of West African States (ECOWAS) countries were most active in signing BITs in 2001. She said Burkina Faso and Mali, among others, signed some 18 BITs during one of “the UNCTAD [United Nations Conference on Trade and Development] BIT rounds.” She noted that, interestingly, there were no treaties with France even though it was the main colonial power in the region. She said that there were few intra-regional BITs, and that the first BITs were with Germany and Switzerland in the post colonization era. Ms. Nikiema stated that, although there have been discussions regarding the ECOWAS investment code, they have not yet been concluded.

Recent Developments in Investment-Related Negotiations in CARICOM

The final speaker was **Dr. Chantal Ononaiwu**, Trade Policy and Legal Specialist, Office of Trade Negotiations, CARICOM Secretariat, whose presentation focused on external trade agreements involving CARICOM countries that feature provisions on investment. Her presentation focused on three developments: First, the Caribbean Forum–European Union (CARIFORUM–EU) Economic Partnership Agreement; second, the CARICOM–Canada negotiations for a Trade and Development Agreement; and third, the development of a draft template for investment chapters in CARICOM’s external trade agreements. She explained that 14 CARICOM States and the Dominican Republic were signatories to the Economic Partnership Agreement (EPA). She said that the CARIFORUM–EU agreement focused on liberalization in relation to the establishment of a commercial presence. She said that some of the key features of the investment provisions in the EU agreement were driven by the CARIFORUM countries, who wanted to include provisions encouraging corporate social responsibility on the part of investors—for example, refraining from acts of corruption, and adherence to core labour standards. She noted that there is also a focus on development cooperation, including enhancing the capacity of investment promotion agencies. She stated that the CARIFORUM–EU EPA also permits investors to access the more favourable treatment under investment agreements between individual EU Member States and CARIFORUM countries. She noted that some individual EU Member States and CARIFORUM countries are negotiating BITs because the EPA has limited provisions on investment.

Dr. Ononaiwu said that the CARICOM–Canada Trade and Development Agreement is currently under negotiations, with three rounds having been held to date. She said that the scope of the negotiations on investment was much broader than the EU–CARIFORUM EPA, although the core perspective was the same, that is, an investment framework that is supportive of sustainable development.

She then turned to the third development, that of a template for investment chapters in CARICOM external trade agreements. She noted that the experience of CARICOM countries is similar to that of Western Africa, in that an intra-regional framework for the protection, promotion and facilitation of investment has been discussed but has not yet materialized. She

said that even though there is no such intra-regional framework in CARICOM, the development of a coherent approach to the negotiation of investment in external trade agreements is important. She said that individual CARICOM countries will continue to negotiate bilateral investment agreements, and therefore the template could also serve as an important tool for such negotiations. She supported her co-presenter from COMESA in advocating the importance of a common regional approach to the negotiation of investment agreements.

Session 3: Case Studies – Moving Investment Goals and Policies beyond Freedom to Invest

This session was chaired by **Mr. Valentine Ogwang**, Deputy Director, Investment Facilitation and Aftercare Division, Uganda.

Incorporating Sustainable Development Agenda into Domestic Investment Regimes – Sri Lankan Experience

The first speaker was **Dr. Indrasoma Nihal Samarappuli**, Executive Director (Research and Policy Advocacy), Board of Investment of Sri Lanka, who spoke about the Sri Lankan experience of incorporating sustainable development into the country's investment policy. He first described his country's sustainable development goals and then discussed their incorporation into domestic laws/regulations and investment contracts. He said that the government's sustainable development goals include economic development in terms of a higher growth rate, increasing the per capita income and improving income redistribution. He said the goal was to increase FDI into certain sectors, including food security, and to control trade imbalances. He said the social development goals included access to land, housing, water, education and skills development. He added that the environmental development objectives included the conservation of land, water, forest, coastal belts, plants/animals, air pollution and waste management. He said that the Sri Lankan investment laws contain entry restrictions to keep out unwanted investments.

Dr. Samarappuli said that recent legislation was designed to preserve the environment. He said the government has had to pay damages of over US\$100 million to a Malaysian enterprise because the company's manufacture of medium-density fibreboard (MDF) would have resulted in the over-felling of rubber trees. He said his country also faced cases by three banks for damages of US\$600 million in arbitration under a BIT with Germany. He highlighted the importance of proper and strong regulation before opening a sector to foreign investment, citing the example of potential foreign investment into the casino industry in Sri Lanka.

Mining and Sustainable Development – Some Lessons from Ghana

The second speaker was **Mr. Charles Afeku**, Senior Legal Officer, Ghana Minerals Commission, who explained that mining in Ghana is governed by legislation, contracts and international conventions. Mr. Afeku emphasized the importance of mining in Ghana and provided an overview of the economic, environmental and social issues in mining investments. He said that in Ghana surface rights can be owned by communities or individuals; however, mineral rights belong exclusively to the state. He explained that the institutional arrangements in Ghana have improved; there is a minister responsible for mining, supported by a mining commission. He said initially the environmental protection element in mining investments was weak; however, today

environmental assessments and a public hearing are required before a project is granted. He said that mining companies are also required to comply with certain environmental and operational standards.

Mr. Afeku said that the contracts for mining are, technically, public documents; these are published on the Internet in English. He noted that the utilization of mining revenues is audited, including the use of any royalties. He said that mining companies have been publishing what they pay to governments. Mr. Afeku noted that the majority of Ghana's investment came from countries with which it had no BITs.

Moving Investment Goals and Policies beyond Freedom to Invest – Case of Ecuador

The final presentation for the day was made by **Mr. Gustavo Guerra**, Negotiator, Investment and Services Trade, Ecuador. He explained that Ecuador's development goals were articulated in the constitution and both the domestic and international legal frameworks were being designed to reflect those goals. He spoke about the major institutional and legal transformation in Ecuador from 2007 to 2011. He said the constitutional goals included building a fair, democratic, productive, mutually supportive and sustainable economic system based on egalitarian distribution of the benefits of development, means of production and the creation of decent employment. He said that the constitution describes investment as a tool to achieve development goals.

The discussion focused on the fact that no economy had developed in a fully open manner, including the example of China. It was said that investors are likely to come to resource rich countries and are lining up to go to China despite its protectionist policies. It was noted that 20 per cent to 25 per cent of the North American Free Trade Agreement (NAFTA) text is comprised of exceptions from NT, both pre- and post-establishment. It was also noted that whether a particular project is sustainable will depend upon the country in question, and that the key was to have a framework or assessment mechanism for a government to make a decision on whether a project is sustainable or not, in line with social, economic and environmental priorities.

In responding to a question from the floor, **Dr. Samarappuli** stated the existing Sri Lankan BITs do not adequately reflect sustainable development concepts, but current proposals do incorporate these objectives. He said the Sri Lankan government is very strict about the granting of land, as the government owns 70 per cent of all land and is presently only granting leases of 33 years, with no rights to soil or water. **Mr. Afeku** stated that the majority of Ghana's investment came from countries with which it had no BITs. **Mr. Guerra** stated that Ecuador's existing BITs do not reflect development objectives/goals.

Session 4: Investment Treaties and Linkages to Development Strategy – Some Specific Legal Issues

The session was chaired by **Prof. Thanadsillapakul**. The first speaker, **Mr. Offah Obale**, South Centre, explained that MFN and NT obligations are sometimes also granted in the pre-establishment phase, such as those found in the treaties of the United States and Canada. He said that pre-establishment NT obligations restrict the state's ability to restrict access to its

market. Mr. Obale said that any exercise of public authority that distinguishes between a foreign and domestic investor can trigger a violation of NT. He said that some investment treaties also contain prohibitions on performance requirements. He said such prohibition can also be found in the WTO TRIMS (trade-related investment measures) agreement. He said that it is likely that such performance requirements will be found in future EU treaties. He said that performance requirements restrict the ability of the state to place pro-development obligations on investments. He ended by stating that by concluding treaties that prohibit the use of performance requirements, developing countries are denying themselves the ability to use tools that developed countries have used in their industrial development strategies.

Expropriation

Then, **Ms. Suzy Nikiema**, IISD, spoke about indirect expropriation and regulatory takings and the classical language found on expropriation in BITs. She explained that expropriation is the most serious injury to property rights and is the most common injury complained of by investors. She explained that BITs do not define expropriation and that this was leading to uncertainty for host states. She said that the most controversial category of indirect expropriation is the so-called regulatory taking. She explained that the expropriation provision in treaties can be interpreted broadly to restrict a state's policy space to regulate in the public interest, including environmental and health protection. In that context, she referred to the tobacco giant Philip Morris's challenge of anti-smoking laws in Uruguay. She noted that the COMESA Common Investment Area contains a useful police powers exception in article 20.8. She said states should consider two immediate clarifications in their treaties: First, a carve-out from the definition of expropriation for a specific category of measures designed to protect public interest measures, and second, a list of elements for tribunals to consider to determine if there is indirect expropriation.

In response to a question from one of the participants, **Ms. Nikiema** stated that successive governments will be responsible for the conduct of a previous government under international law. She also noted that taxation is usually covered in BITs; however, in some BITs taxation is carved out.

Free Movement of Capital and Development Objectives

Ms. Sanya Reid Smith, Affiliate, South Centre, spoke about the free movement of capital provision in BITs and development objectives. She said that capital controls are a useful development tool. She said countries can unilaterally open their capital accounts; however, the issue lies with locking this openness in a treaty, which a country cannot change unilaterally. She explained the reasons why countries use capital controls, for example, controlling interest rates, investments in real estate, and hot money, among other reasons. Ms. Smith explained how Malaysia had employed capital controls in a financial crisis. She noted that Thailand also used capital requirements to control hot money coming into the country. She also referred to China, which initially placed controls on money leaving the country, and post accession to the WTO controls were placed on money coming in. She said that the European Court of Justice held that promising complete capital flows freedom is illegal under EU law. She said that there is also a possible conflict between International Monetary Fund requirements and the prohibition against

employing capital controls in BITs. She said that treaty negotiators should consult their Central Bank to make sure that the treaty obligation on capital flows does not deprive them of the tools they need employ to manage the economy, particularly in a financial crisis. She noted that Kevin P. Gallagher's paper suggests that developed countries are also interested in creating space in treaties to impose capital controls, and therefore may be open to renegotiations.

Breakout Session 1: Drafting Provisions on the Definition of Expropriation, Performance Requirements, and the Free Movement of Capital

The participants were divided into four groups to consider provisions on expropriation, performance requirements and free movement of capital.

The groups' recommendations in relation to the **Expropriation** provision included the following:

- Carving out public interest measures from the expropriation provision.
- The introduction of a balancing test between public interest and private interest in finding compensation payable of expropriation.

The groups' recommendations in relation to **Performance Requirements** noted that there should be no such restrictions in treaties, as these run contrary to development policy.

The groups' recommendations in relation to the **Free Movement of Capital** included the following:

- Free movement of capital must be "subject to" domestic law and regulations.
- Domestic law and regulation must be designed carefully.
- In addition, the treaty should include express reservations for capital flows in certain types of scenarios such as criminal proceeds and balance of payment safeguards.

Session 5: The Investment Law Construct: Domestic Law, Investment Contracts, Investment Treaties

The session was chaired by **Mr. Thierry Mutombo Kalonji**, Acting Director – Investment Promotion & Private Sector Development, COMESA Secretariat.

The first speaker of this session was **Ms. Mahnaz Malik**, Associate and International Law Advisor, Investment and Sustainable Development Program, IISD. She began her presentation by discussing the importance of understanding the dynamics between domestic law, contracts and international investment treaties. She highlighted the importance of contracts, as these are critical in altering the applicable law by adding or reducing the obligations of the investor or state; for example, they can provide exemptions from laws for investors and can include stabilization clauses.

Ms. Malik then explained the link between domestic law, contracts and investment treaties. She noted that while contracts may have choice of forum and choice of law clauses, these can be

effectively overridden by investment treaties through the operation of “umbrella clauses,” through the interpretation of treaty obligations to include contract obligations, or through broad dispute settlement clauses.

She discussed how to align the three instruments to achieve a desirable investment law regime. She said that the alignment of sustainable development goals in all three bodies of law can be performed by clarifying the relationship among these instruments. She suggested that treaties could exclude the contract claims and narrow the scope by removing the umbrella clause. She said contracts could contain a waiver of treaty claims and remove stabilization clauses. She said states should also have strong coherent domestic laws and a robust domestic justice system.

Review of Investment Act of 2010 (Liberia)

The next speaker was the **Hon. Ciata Bishop**, Executive Director, National Investment Commission, Liberia. Her presentation provided an insight into the Liberian approach to foreign investment. She explained that the National Investment Commission (NIC) had a vision to ensure that the investment contracts and investment law incorporated the domestic law. She said that every investment contract over \$10 million has to be ratified by the Parliament. She noted that the main objectives of the NIC are to attract FDI, promote a vibrant and sustainable domestic private sector and create a favourable business environment through reducing barriers.

She stated that Liberia does not have international investment treaties and that her country was developing a commercial code to deal with any investment disputes that may arise. Ms. Bishop stated that the Investment Act of 2010 aims to treat foreign investors in the same manner as domestic investors; however, it does contain a threshold for foreign investment, i.e., to qualify, a foreign investment must bring \$1.5 million of “new” capital into Liberia, whereas a domestic investor only requires \$300,000.

Ms. Bishop said that the only way a country can grow sustainably is if the investment law and domestic law mimic national economic policies.

Domestic Law, Investment Contracts and Investment Treaties: Understanding the Linkages

The final presentation in this session was by **Mr. Robert Kirunda**, Law Academic, Makerere University Law Faculty, Uganda. He discussed the increasing role of sovereign welfare funds. He stated that it was crucial to bear in mind the domestic regulatory autonomy while negotiating an investment treaty. He said that states must consider balancing investor rights, development objectives and protection of public goods; legitimacy; transparency; accountability and maximization of financial gain and knowledge transfer.

He stated that states should avoid negotiating BITs for politically motivated purposes; avoid overzealous investment related provisions in regional initiatives; avoid vague obligations and commitments in regional treaties; beware of stringent models and uneven bargaining power; pay attention to variables like rule of law, access to information and independence of the judiciary; and ensure a level playing field between local and foreign investors.

Mr. Kirunda was of the view that countries need to go back to the negotiating board and rethink their treaties rather than blindly following templates or model treaties.

Session 6: Changing Claims in Investment Arbitration: Negotiators Beware!

This session was chaired by **Dr. Howard Mann**, IISD, and aimed to highlight some of the new issues and concerns for developing countries with respect to investment arbitration.

Eight Observations about Investment Treaty Claims

Prof. Gus Van Harten, Associate Professor, Osgoode Hall Law School, Toronto, Canada, gave a presentation on investment treaty arbitration, warning states not to consent to investor–state arbitration unless they fully understood the system. He presented eight observations about the risks and liabilities of investor–state arbitration:

1. Issuance of non-monetary orders: He noted that tribunals may order states to enforce or decline to enforce decisions of domestic courts or other arbitration tribunals. Thus, tribunals are beginning to resemble a new form of extra-territorial “supreme tribunal.”
2. Wars of attrition with transnational corporations (TNCs): TNCs may resort to multiple arbitrations against the state (under different treaties) in order to entangle it in a tedious, expensive litigation as a pressure tactic to settle.
3. Risk of a catastrophic award: Instances of large awards are shaping the bargaining powers of investors that pressure states to agree with their terms by threatening them with lawsuits. He also highlighted the need for states to have a strong internal capacity to defend if they agree to investor–state arbitration.
4. Costs of victory: Even though a state may win the dispute, the legal and arbitration costs are rarely awarded in favour of the winning side. This leaves the state at a losing end since it is always the one facing a claim and left to incur the costs of the arbitration.
5. General good faith measures are not immune: He pointed out that the policy trajectory that emerges from investor–state arbitral tribunals is to restrain the state from introducing laws, policies and regulations in the public interest. The investors use the threat of lawsuits to stifle such measures—environmental, health, human rights, labour, etc.
6. Trends in arbitration activism: He noted the trend among many arbitrators to push the boundary of the treaty language to expand the compensatory promise of the system for investors.
7. What lies beneath the tip of the iceberg: With certain institutions facilitating opaque processes of investor–state arbitration and not all information being available in the public domain, he urged the governments to beware, including regarding such arbitration rules in their treaties in the absence of any transparency reforms.
8. Lastly, he raised concerns over the fact that only the investor can bring a claim, as it has the potential for creating economic dependencies for arbitrators to decide in a particular manner. In a nutshell, he provided data to show that frequently appointed arbitrators appear more likely to decide in favour of the claimant’s interests.

Commentary

Commenting on Prof. Van Harten's presentation, **Ms. Malik** reiterated the observation that the odds in investor–state arbitration are clearly in favour of the investors, given the broad obligations undertaken by states in treaties and the non-recovery of costs in most cases.

She added that investors had access to a large number of treaties and, increasingly, third-party funding. She said that the large sums of damages awarded in investor–state arbitration can potentially wipe out a developing government's health budget! She said that in 70 per cent of cases where jurisdiction was denied, the state was not able to recover its costs. She said that even if the investor had no claim to start with, a state ends up spending a few million dollars in costs.

Ms. Malik asked the rationale behind states providing broader protections than those given in political risk insurance policies. She asked why countries choose to allow three arbitrators to override their Supreme Court or the Constitution. She said that ultimately it is the states who give the arbitrators this power in their treaties, and therefore they must restrain that power in the treaty itself.

She closed with the following observations: First, treaties should have provisions that take into account third-party funding. Second, treaties should include guidance on the type of damages that can be recovered, instead of giving a free hand to the arbitrators to decide this issue. Third, treaties should include terms that make the investor bear all the costs of arbitration if it loses on jurisdiction. Lastly, she said treaties should include transparency provisions so arbitrators deciding the claim know they are being watched.

Session 7: Renegotiation, Termination and Interpretation of Investment Treaties: Opportunities and Challenges

The session was chaired by **Ms. Nathalie Bernasconi-Osterwalder**, IISD.

Renegotiation, Termination and Interpretation of Investment Treaties: Opportunities and Challenges

Ms. Bernasconi stated that a number of countries negotiate investment treaties without being fully aware of the actual implications of the words in the treaty. She said the awareness of the implications and risks is a relatively new phenomenon because of the recent alarming growth in the number of disputes brought under these treaties. She noted that a country often only realizes the mistakes made in the language of the treaty once a claim is brought against it. She said that the focus of the session was to explore the options that countries can keep in mind while negotiating future treaties, as well as ways in which they can remedy the existing treaties.

She discussed six possible ways in which a country can undo its earlier mistakes in negotiating imbalanced treaties: First, virtually all treaties permit either party to terminate the agreement after a certain period of time; however, she pointed out that, this would not protect countries from investor claims in all circumstances since the treaties typically contain post-termination

protection for a certain period after termination period for existing investments. Second, parties to a treaty can amend the treaty through renegotiation. She went on to give a detailed account of the European developments on renegotiations of treaties in order to align them with EU law. Third, parties can denounce the International Centre for Settlement of Investment Disputes (ICSID) Convention, which has been done by countries such as Bolivia, Ecuador and Venezuela. This does protect states from being sued under other arbitration rules, however. Fourth, countries can agree to issue a joint interpretation of the treaty as seen in the NAFTA context on the scope of fair and equitable treatment (FET), transparency, and non-disputing parties. Fifth, a country can move to issue a unilateral interpretation of the treaty; however, in order for it to have some value before the tribunals, such a unilateral interpretation should be done before an investor claim is brought, and it should not be opposed by the treaty partner. She noted that countries can also refuse to ratify treaties that no longer fulfill the expectations and standards of the state party (as was the case for Brazil, which has not ratified a single investment treaty to date).

The next speaker, **Ms. Ama Ayivor**, Deputy Director, Department of Trade and Industry (Legal International Trade), South Africa, provided an overview of the South African BIT regime. She said that the Government of South Africa had recently mandated a review of all BITs signed since 1994 in light of South Africa's changing investment landscape with its emergence as both a capital importer and exporter. She said this resulted in the BIT Policy Review Framework, which considered both macro and micro levels. She said that while the macro analysis delved into the policy and strategic considerations applied to the reasons for concluding BITs, the microanalysis aimed at developing a policy framework that would determine future negotiations. She noted that the key observation of the Policy Review Framework was that there was no or little evidence to suggest a concrete linkage between the conclusion of BITs and subsequent FDI flow that may be attributed directly to the conclusion of such BITs. She said that the recommendations of the BIT Policy Review Framework included establishing a South African Investment Act; that the terms and conditions set out in the BIT Policy Review Framework would apply to existing and future BITs; that future BITs should not be in conflict with the Constitution of South Africa, give clear provisions on NT exceptions, MFN, expropriation; that provision should be made for exhaustion of local remedies and that investor obligations should be emphasized.

She also pointed out that a Cabinet Decision in 2010 set out that there has to be an intra-governmental process to establish the National Investment Act. She said that the Cabinet decision required that new BITs should only be entered into in the future on the basis of compelling economic or political reasons. She said that the decision recommended the development of template.

Improving the Investment Treaty Framework: The Challenges – Case of Ecuador

Mr. Gustavo Guerra, Negotiator, Investment and Trade in Services, Ecuador, was the next speaker. His presentation provided an overview of the current status of BIT and free trade agreement (FTA) negotiations in South America, with a special emphasis on Ecuador and the challenges it faces to revise its investment treaty program. He began by highlighting the recent trend of denouncing BITs and ongoing treaty claims against certain South American countries such as Venezuela, Bolivia and Ecuador.

He also noted that BITs do not work as a substitute for institutional quality or economic conditions. He mentioned that Ecuador's new constitutional framework contains new rules on sovereignty over strategic resources (mineral, oil) and special sectors (water, telecommunications) and a limitation on international dispute resolution through regional forums. He said the Ecuadorian review, like the South African review, concluded that BITs did not attract FDI.

Mr. Guerra recommended two alternative solutions for improving the investment treaty program: First, denounce existing BITs; second, negotiate chapters on investments within the framework of Trade Agreements for Development.

He concluded with a final overview of Ecuador's achievements and regional proposals: creation of UNASUR (Union of South American Nations); creation of a regional mechanism to deal with investment disputes; major changes to International Financial Architecture; and activation of the interpretation/state-to-state mechanisms of BITs.

The chair concluded the session with the remark that both the South African and Ecuador examples show that when mistakes are made while negotiating treaties, it is very difficult to change them.

Breakout Session 2: Capacity Building for Investment Negotiators in an Evolving Context

Participants were divided in four groups. The **groups recommended** that capacity building and technical assistance would be useful in the following areas:

- To develop a better understanding of investment provisions
- To articulate domestic policies on investment that are beneficial for the host country
- To better manage and avoid investment disputes
- To strengthen and build capacity at the regional level
- To elaborate a guide on handling negotiations on a step-by-step basis, for example, a guide to securing national interest in negotiations
- To produce an analysis of costs and benefits of investment treaties
- To enhance internal capacity to handle international arbitration claims
- To track investment treaties and awards
- To have access to a platform to share information
- To enhance capacity of negotiators and other actors involved in BIT and investment contracts
- To train parliamentarians

Session 8: The Development Country Investment Negotiators Forums from 6-10: Who, What, Where and How?

This session was chaired by **Ms. Veniana Qalo**, Economic Advisor, Economic Affairs Division, Commonwealth Secretariat. Ms. Qalo said that this Forum provided a platform for developing countries to discuss choices for a better future in the context of the role of FDI. She said that countries should aim to minimize risks/costs and maximize benefits in a world where capital flows are changing. She said that there were technical and practical challenges to maximize development benefits into treaties and these include lack of capacity. She said that the Forum was a useful platform to build this capacity and the aim of this session was to hear the participant's vision for its future.

Investor Negotiators' Forum: Where we have come from, where we need to go

Next, **Dr. Mann** spoke about the origin of the Forum and explained that in 2005, IISD recognized that sustainable development is an investment problem, whatever sector it is, because the only way to move from unsustainable to sustainable development is through investment—and it is not governments, but investors, who can do this by making the right investments. He said that IISD's Investment and Sustainable Development Program had three components: research, communication and capacity building and outreach (Investment Negotiators Forum was the flagship proposal). He said the goals for a Forum dedicated to developing countries only (no developed country negotiators) included: networking and the sharing of experiences; capacity building and training (by identifying issues in order to begin the process of knowing what we don't know); constituency to build change (in order to promote the view that investment should be linked to sustainable development); and provide a platform for the voice of developing country interests and views to give it legitimacy and feed it into other broader, intergovernmental initiatives.

He said that over the last five years, the Forum has shifted from a lecture format to peer-to-peer learning sessions. He said IISD manages all the fundraising for the Forum; however, states are increasingly contributing to it by covering the delegates' costs of travel and accommodation.

Dr. Mann asked the participants to **identify the future goals of the Forum**. The participants' comments included the following:

- Capacity building and learning
- Updating on developments in investment law and policy, including arbitration
- Experience sharing
- Implementing recommendations
- Networking
- Forum for change
- Additional developing country involvement in the organization, ownership, agenda setting
- Assistance with actual negotiations
- Official recognition for participants for attending the Forum (certificate)

- Improving coordination among developing countries in relation to the EU BIT policy and the demands this will place
- Countries to set aside budgets for travel and accommodation for Forum participants

Recommendations for themes for the next forum included:

- Safeguards in relation to pre-establishment rights
- The appropriate structure for the management and settlement of investment disputes

The participants also believed that there should be a committee or secretariat of developing countries to assist in the organization of the next Forum. Swaziland, CARICOM, Lesotho, Ecuador, Angola, Uganda and Liberia agreed to be part of the committee.

Closing Ceremony

Mr. Patrick Bitature, Chairman of the Board of the Ugandan Investment Authority, provided closing remarks. He said that the Forum provided an important opportunity for negotiators to discuss priorities that will enhance efforts to improve social and economic development.

He described Uganda's efforts to become a competitive market for investment, including an advisory committee and reducing the cost of doing business. He said there should be strong legal and regulatory systems to attract investment. He said the decisions made on investment today will determine the future of countries. He said that in order to ensure that future is bright requires critical choices. He said that states should not feel powerless to make sure that investments make positive contributions to the host state economy.

Mr. Bitature said that the Forum had recognized that there are risks associated with investment treaties and that these instruments can no longer be treated as diplomatic tools. He said that treaties must be negotiated with caution and sovereign interests must be protected. He said states should not repeat mistakes made in past treaties. He said states now know the problems and risks associated with treaties and, therefore, there is now an urgent need to design better investment deals that will lead to progress and prosperity.

List of acronyms

ASEAN	Association of Southeast Asian Nations
BIT	Bilateral Investment Treaty
CARICOM	Caribbean Community
CARIFORUM	Caribbean Forum
COMESA	Common Market for Eastern and Southern Africa
EAC	East African Community
ECOWAS	Economic Community of West African States
EPA	Economic Partnership Agreement
EU	European Union
FDI	Foreign direct investment
FET	Fair and equitable treatment
FTA	Free trade agreement
ICSID	International Centre for Settlement of Investment Disputes
IISD	International Institute for Sustainable Development
MFN	Most favoured nation
NAFTA	North American Free Trade Agreement
NIC	National Investment Commission
NT	National treatment
PAP	Pan-African Parliament
SADC	Southern African Development Community
UEMOA	West African Economic and Monetary Union (Union économique et monétaire ouest-africaine)
UNCTAD	United Nations Conference on Trade and Development
UNECA	United Nations Economic Commission for Africa
WTO	World Trade Organization