Second round of break-out sessions: the SD dimension of IIAs
Effective rules for promoting sustainable development-friendly investment[1]

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Kick-off speaker: Ms. Champika Malalgoda
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The experts participating in the break-out session had a very rich discussion on this topic, which has so far received relatively little attention in debates about the international investment agreement (IIA) regime.

At the beginning of the discussion, an expert commented that this was perhaps “the most important issue of the whole expert meeting”, because the very aim of IIAs is (or should be) to promote investment for sustainable development. The issue was considered to be particularly topical now as the international community is negotiating a set of Sustainable Development Goals (SDGs) to guide global efforts to promote sustainable development in the period 2015-2030. Proposed SDGs include ending poverty, eradicating hunger, and promoting education and healthy lives, among others.

Yet, most existing IIAs promote foreign investment for sustainable development mostly indirectly through the protection that they offer to foreign investment – the assumption being that legal protection will encourage investment and that more investment will promote sustainable development. Most treaties do not contain specific commitments for the State parties to proactively promote investment – most only include hortatory language on the encouragement of investment, for example in the preamble and/or in non-enforceable provisions on investment promotion. And relatively few IIAs contain provisions that aim to ensure that foreign investment promotes sustainable development.

In this context, the experts discussed whether a new generation of IIAs might include more proactive sustainable development-oriented investment promotion and facilitation provisions. They also discussed what these provisions might look like.

Discussions covered four main issues. Firstly, several experts emphasized that IIAs are only one policy tool for investment promotion. There was a concern about placing too much expectation on IIAs alone. Some experts felt that national investment promotion strategies must play a central role, for instance in identifying priority sectors and incentives; and that national law should be centre stage, not least because it is more flexible than IIAs and can more easily be adjusted to evolving socioeconomic contexts. One expert emphasized the need for more policy dialogue, rather than more rules.

[1] The opinions expressed in this paper are those of the author and do not necessarily reflect the views of the UNCTAD Secretariat or its Member States.

Secondly, the group discussed the potential reverberations of 'traditional' IIA provisions on promoting sustainable development-oriented investments. Opinion in the break-out session was divided. One expert stressed that investment protection is important in promoting sustainable development-friendly investment, mentioning ongoing arbitrations linked to the reversal of policy incentives for renewable energy in Europe. However, another expert questioned whether IIAs do promote foreign direct investment, and yet another stressed that investment protection standards can in fact constrain measures to promote sustainable development (considered in its economic as well as social and environmental aspects). The example was given of IIA provisions restricting the use of performance requirements aimed at ensuring that investment creates positive backward and forward linkages with the local economy.

Thirdly, there was discussion about more explicit provisions on investment promotion for sustainable development that might be included in IIAs. Specific proposals discussed by the group included:

- Making explicit references to the SDGs in treaty preambles;
- Provisions to facilitate exchange of information about investment opportunities, to establish a joint committee for information sharing and policy dialogue, and to provide for technical cooperation and capacity building, along the lines of the provisions included in Egypt's new IIA model;
- Establishing a joint committee to oversee the realisation of core labour and environmental conventions, along the lines of provisions included in the sustainable development chapter of the EU-South Korea Free Trade Agreement;
- 'No lowering of social and environmental standards' clauses, building on and further advancing treaty practice already developed by several States;
- Conditioning investment protection to compliance with specified international standards (an analogy was made with recent export credit agency reforms in the Netherlands, where export credit is now apparently conditioned on adherence to the Organization for Economic Co-Operation and Development Guidelines on Multinational Enterprises).

Fourthly, several experts highlighted that rules for promoting sustainable development-oriented investment is a topic that has been little explored in research and policy debates, particularly when compared to the extensive research on investment protection standards. There were calls for more research on this topic, and for initiatives to share knowledge and experience – an issue that UNCTAD might consider picking up in moving forward.