WORLD INVESTMENT FORUM
Expert meeting
The Transformation of the International Investment Agreement Regime
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## Second round of break-out sessions: The SD dimension of IIAs
## Investment incentives[1]

**Chair: Mr. Gert Kodra**
Albania
**Kick-off speaker: Ms. Saloua Hsoumi**
Tunisia
**Kick-off speaker: Ms. Tilani Silvia**
Sri Lanka

**Rapporteur: Ms. Krista Nadakavukaren**
Professor
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The Chair introduced the topic of investment incentives, defined as fiscal, financial or regulatory measures offered to attract investments. In the context of sustainable development, such incentives are an important topic due to the need for governments to attract investment that enhances SD. In looking toward a reform of international investment agreements (IIAs), the issue arises whether or not investment incentives should be explicitly covered by IIAs.

Experts considered that the topic of investment incentives needs to be examined closely. Different views were expressed as to whether incentives should actually be regulated by IIAs. While there was strong support for preambular language to address the need for incentives to be used in compliance with sustainable development goals, diverging opinions were expressed as to whether substantive provisions on incentives need to be included in IIAs.

As regards IIAs that only cover the post-establishment phase contracting parties remain sovereign in their incentives policy concerning the attraction of new investment. For incentives in the post-establishment phase, investors are, in principle, protected by the non-discrimination standard. Also,. the question arises of whether a withdrawal of an incentive could be considered either an expropriation or a violation of the fair and equitable treatment standard.

The incentives, recalled some, are usually focused on economic growth rather than on social or environmental goals. Because of this, a race to the top in incentives can be economically harmful to developing countries' sustainable development objectives.

In considering how to shape incentive policies domestically, States should consider the source of incentives (federal or subnational level of government) and the competences of the different layers of governments to offer incentives to potential investors. The decision of what types of incentives and which types of investments will qualify is key to ensuring that incentives support sustainable development.

[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.

It was considered that transparency in the use of incentives is important for achieving sustainable development goals. Transparency will allow for accountability as well as predictability. One expert noted that the government of her country makes such decisions through interministerial committee meetings and the resulting decisions are published on agency websites. This allows the public to know and respond to what projects are receiving support.

There was a broadly shared view that a race to the bottom is inherently harmful to sustainable development. Yet, while a race to the bottom should be prohibited, there were a number of concerns as to whether such a provision in an IIA would be enforceable. The structure of investor-State dispute settlement would make any such claim unlikely, given that only the investor who benefited from the incentive would be in a position to complain about it. This underlines the importance of good national environmental and social rules and strong enforcement of these laws. These should not be relinquished to attract an investor, but the experts were not convinced that the IIA could accomplish this in an effective manner.

There were different views, on the other hand, about the use of exceptions to incentives to ensure sustainable development. While one approach was to allow for specific exceptions to rules on incentives based on types of investment in order to protect policy space (this could assist States that want to offer small and medium-sized companies preferences, for example), others felt that as long as an investment is contributing to the host's development, the source of the funds should not make a difference in terms of whether it is permitted to benefit from incentives.

Different opinions were also expressed as to the target of IIA rules on incentives. A majority considered that only the use of regulatory incentives should be restricted. A number of other experts, however, felt that a restriction of fiscal incentives may also be necessary to ensure sufficient government funds are available to pursue sustainable development.