

Towards a Repository of Policy Options for IIA Reform

Meeting

Eighth Annual Forum of Developing Country Investment Negotiators¹ⁱ

International Institute for Sustainable Development (IISD), 5-7 November 2014, Montreux, Switzerland,
Ms. Nathalie Bernasconi-Osterwalder,
Group Director,
IISD

The Eighth Annual Forum of Developing Country Investment Negotiators (Forum) was held in Montreux, Switzerland, from November 5 to 7, 2014. It was co-organized by the Government of Liberia, the International Institute for Sustainable Development (IISD) and the South Centre. This year's Forum was attended by 99 participants from 54 countries from Africa, Asia, Eastern Europe, and Latin America and the Caribbean, as well as international organizations.

In keeping with this year's theme "Investment Treaties and Economic Development: Growing conflicts and options for coherence," the Forum examined the challenges arising in the relationships between investment treaties and economic development, with particular focus on industrial policy, investment liberalization and performance requirements (PRs).

Following is a summary of issues discussed at this year's Forum:

- Recognizing the "winds of change" in both developing and developed countries regarding investment issues and rules within the context of economic development, the initial presentations of the Forum **questioned some of the foundations of the existing international investment agreement (IIA) regime and discussed the need to look at options for reform or alternatives.**
- In this context, the participants saw the **need to legitimize the decision of some governments to opt for the termination or non-renewal of investment treaties to transition to a new system and framework**, including reviewing and modernizing their domestic laws and frameworks relating to investment.
- The participants also recognized the need of governments to **make informed choices based on thorough evaluation and experiences shared from around the world** relating to investment treaty cases and negotiations.
- The need was expressed for each country to adopt a **coherent and single investment strategy** applicable at all levels of government, based on an overall investment plan with strategic objectives, defining sectors to open or keep closed.
- It was generally accepted that **industrial policy and performance requirements (PRs) were essential to the host state's sustainable development.** Participants shared the benefits and challenges of PRs and other industrial policy tools used in their countries and discussed various types of PRs that were successfully adopted by countries around the world, noting that not only developing countries, but also developed countries were using PRs. On the other hand, participants recognized

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.

that the effectiveness of PRs depended on many factors and should be sector-specific, especially considering the fact that PRs, as conditions for providing incentives, were a key part of government's policy space, which unfortunately was increasingly restricted by IIAs and by interpretations of those IIAs as rendered by arbitrators.

- Presentations and discussions focused on a series of questions relating to the structure and nature of investment liberalization commitments while raising a number of associated high risks in the context of investment liberalization and performance requirement prohibitions. **Participants formed a clear consensus on the important role of economic policy space for development - sustainable development in particular - and on the need for states to preserve a range of economic policy tools.** Nevertheless, participants also acknowledged that, due to a variety of internal and external reasons and pressures, **a number of governments continued to engage in negotiations of IIAs with investment liberalization and related commitments**, despite the risks.
- With these two competing realities as background, the participants engaged in dialogues about **workable solutions for governments**, while recognizing each country's differences. Among other things, they agreed that:
 - **in order to define the scope of liberalization, governments should look to local capacity within each particular sector and the importance of the sectors within the national economy;**
 - **liberalization could be effectively achieved through domestic laws and policies;**
 - **liberalization commitments should not be permanent, and that a mechanism should be developed to allow the review, renegotiation and withdrawal of an agreement while maintaining the stability of the investment environment;**
 - **it was important to reserve future policy flexibility for “new sectors” for developing countries, and that the term should be carefully defined within the treaty;**
 - **there were no close relations between PRs and liberalization, and that a country could liberalize while still adopting PRs to create linkages between foreign investment and local economy; and**
 - **sustainable development should be the condition for investment in the country.**

ⁱ This is a summary report excerpted from the official IISD Report of the same Forum. This summary is prepared for the purpose of the upcoming UNCTAD Expert Meeting on the Transformation of the International Investment Agreement Regime, 25-27 February 2015. The official IISD Report as well as the agenda and background materials for the Forum can be found on the IISD website: www.iisd.org/investment/dci/dci_forum_2014.aspx.