



15th Annual

Investment Policy Forum

Panama City, Panama | October 25–27, 2023

Advancing reform for sustainable development



15th Investment Policy Forum

Fostering Coherence for Sustainable Investment Governance: Strengthening the institutional dimension

Forum Report

Introduction

The 15th Investment Policy Forum (IPF) was held in Panama City, Panama, from October 25 to 27, 2023. The theme of this edition was **Fostering Coherence for Sustainable Investment Governance: Strengthening the Institutional Dimension**. This year's edition reflects IPF's overarching theme for the coming years, Fostering Coherence for Sustainable Investment Governance. Guided by this new theme, the IPF aims to become a global hub for efforts to foster coherent and sustainable investment governance reform worldwide. Over 90 participants representing 41 developing country governments and eight regional and international organizations attended in person. In addition, 40 participants registered to attend the Forum online.

DAY ONE: WEDNESDAY, OCTOBER 25

Formal Opening and Welcoming Remarks

H.E. Carlos González Miranda, Minister of Economy and Finance, Republic of Panama, expressed Panama's pride in hosting this unique platform where investment negotiators and international arbitration officials gather to develop innovative solutions for sustainable investment governance. He noted that in recent years, Panama's government has successfully attracted foreign direct investment (FDI) due to factors such as the country's strategic location, responsible fiscal policies, positive risk ratings, and political stability. However, the topic nevertheless presents a significant challenge—creating and executing policies that truly serve the best interests of the Republic of Panama. In this regard, the Investment Arbitration Office of the Ministry of Economy and Finance has been instrumental in establishing mechanisms and strategies to defend national interests. It is a continuous challenge to ensure all officials are aligned with the government's commitments, which can be complicated due to obligations the state has taken on investment treaties. To address this, Panama's Ministry of Economy and Finance has prioritized the training of government officials on these obligations for the prevention and effective management of investment disputes. When it comes to implementing standards for



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arbitration and dispute prevention, forums like the International Institute for Sustainable Development's (IISD's) IPF are of paramount importance. They facilitate the exchange of experiences among developing countries, aiming to benefit everyone and ensure sustainability for the planet. Panama, a signatory of the 2015 Paris Agreement, has established a robust legal and institutional framework for climate change policy. In 2022, the country adopted a comprehensive national climate action plan and a national gender and climate change plan. These initiatives underscore the significance of protecting and promoting international investments within this strategic framework.

Nathalie Bernasconi-Osterwalder, Interim Co-President and Co-CEO, Vice-President, Global Strategies and Managing Director, Europe, IISD, warmly welcomed the participants to the 15th edition of the IPF. She extended her gratitude to the Minister and the Republic of Panama for the thoughtful words and hospitality received, mentioning that it has been a pleasure organizing the Forum with colleagues from Panama. Panama provides an ideal location to convene this diverse community, representing Latin America, the Caribbean, Asia, and Africa. The focus of this gathering is twofold: to foster mutual learning and to emphasize policy coherence at both the national and international levels. On a global scale, efforts to reduce emissions and enhance the resilience of our food systems are essential. Coherent investment policies are instrumental in achieving these goals. The evolving geopolitical landscape offers a unique opportunity for change, one that did not exist a mere decade ago.

Scene Setter

Opeyemi Abebe, Head of Trade Competitiveness, Commonwealth Secretariat, acting as moderator to the scene-setting conversation of the 15th edition of the IPF, invited Nathalie Bernasconi-Osterwalder and Suzy Nikièma, Director of Investment, IISD, to reflect on the past and to share the vision for the future of IPF, respectively. She acknowledged that IPF has witnessed remarkable progress in the past 15 years, providing the community of policy-makers and practitioners from developing countries with a valuable platform to reflect on the path taken and envision the road ahead. Our journey has shed light on the IPF's contribution, emphasizing the need for both retrospection and anticipation.

Nathalie Bernasconi-Osterwalder reflected on the origin of the IPF and how it was founded. She recalled Howard Mann's visionary ideas about the inception of IPF and the inaugural event in Singapore, taking place during a surge in investor–state dispute settlement (ISDS) cases, when investment law was seldom taught at universities. The Forum was intended as a safe space for knowledge exchange among negotiators and practitioners from developing countries. It played a vital role in raising awareness on investment regime opportunities and challenges, bridging the knowledge gap, facilitating experience sharing, and fostering reforms. Today, there is a growing consensus on the need for investment governance reform, though challenges remain, such as expanding the community of investment policy-makers and ensuring policy coherence. Progress has been made since 2007, notably in transparency and



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changing perspectives on international investment treaties. The discussions at the United Nations Commission on International Trade Law (UNCITRAL) Working Group (WG) III offer promise, but comprehensive solutions may be elusive, while the IPF remains a hub for candid conversations in this evolving landscape.

Suzy Nikièma also highlighted the IPF's positive influence in specific reform processes at national, regional, and global levels. Building on past achievements and new challenges, the IPF sets new ambitions for the future. Indeed, it will focus on foundational issues in investment governance for a set period, providing practical tools to the community to champion reform while fostering consistent engagement and accountability in progress made. This is what the new overarching theme, *Fostering Coherence for Sustainable Investment Governance*, aims to deliver, and the agenda of the 15th edition was tailored to allow the community to unpack and refine this new ambition. For the next 15 editions, Nikièma envisioned the IPF continuing to act as a platform for transformation, where the growing community of reformers is empowered to make international investment governance more coherent, inclusive, and responsible. Such new governance should make sustainable investment the new normal for all stakeholders, reduce the risk of investment disputes, and put national or regional courts at the centre of dispute resolution. In sum, the IPF's journey is ongoing, guided by a commitment to coherence, practicality, and accountability, with the potential for even greater progress in international investment governance going forward.

Structured Icebreaker and Networking Session

During this session, participants were invited to reflect in groups on recent developments occurring in multilateral investment governance processes that transpired this year, specifically the United Nations Conference on Trade and Development (UNCTAD) World Investment Forum (WIF), held in Abu Dhabi, and the recent session of UNCITRAL Working Group III in Vienna. Each group discussed and shared insights from each event, highlighting what participants considered positive or challenging. Participants also explored how to develop common positions on key issues and had the opportunity to discuss these elements in plenary.

Panel Discussion 1: 15 Years of Change: The evolution of international investment law, policy-making, and arbitral practice

Makane Moïse Mbengue, Professor of International Law, University of Geneva, addressed the plenary through a pre-recorded video message presenting his perspective on the categorization of reforms in international investment governance over the past 15 years, following his own "REFORM" framework. The acronym encapsulates the evolution of investment governance. The "R" represents "reform," which began in 2005, with efforts initiated by the publication of IISD's *Model Bilateral Investment Treaty* (BIT), leading to UNCTAD's adoption of the Investment Policy Framework for Sustainable Development in 2015, focusing on awareness raising, capacity building, and persuasion. The "E" represents the "entanglement"



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and “escape” phase from 2015 to 2018, which introduced compromise, with states incorporating sustainable development provisions while some contemplated escaping from the traditional investment regime entirely. The “F” represents the “fragmentation” phase that emerged from diversifying approaches within international investment agreements (IIAs), especially between 2016 and 2019, that led to less policy coherence. The “O” highlights the importance of strengthening obligations for investors, particularly evident during the COVID-19 pandemic. The “R” emphasizes the right to regulate investments, emphasizing states’ authority in the post-pandemic phase. Lastly, the “M” signifies the resurgence of multilateral efforts, involving entities like the World Trade Organization (WTO), UNCITRAL, and the Organisation for Economic Co-operation and Development (OECD), with a need for developing countries to ensure they act as rule-makers in these processes.

Ndeye Maguatte Diouf, Director of Private Sector Development, Ministry of Economy, Planning and Cooperation, Senegal, acted as moderator for this session and invited panellists to discuss Prof. Mbengue’s proposal for a categorization framework in international investment governance reform. They were asked to share their perspectives on the most crucial phase in the reform process and identify the greatest achievements and principal challenges in the past 15 years. The coexistence of old and new generation IIAs was a topic of discussion, with a focus on key opportunities for developing countries. Finally, the panel contemplated the future of reform and envisioned the discussions that would take place in the next 15 years.

Silvina González Napolitano, Legal Expert, Bilateral and Regional Investment Treaty Negotiations, Ministry of Foreign Affairs, International Trade and Worship, Argentina, highlighted the importance of the Forum in sharing practices and partially agreed with Prof. Mbengue’s vision. She discussed the categorization of investment treaties into different generations, highlighting their evolution. She emphasized the role of non-governmental organizations and UNCTAD in the reform process and acknowledged the importance of a code of conduct to prevent conflicts of interest among arbitrators and enhance transparency. Napolitano also addressed challenges in reaching a consensus among diverse perspectives and explored innovative alternatives for dealing with BITs. She expressed a desire to strengthen dispute prevention mechanisms, improve amicable settlement, and pursue transparency, efficiency, and arbitrator impartiality in the ongoing reform process, recognizing that challenges like arbitration costs and clause refinement will persist. Even with a right-to-regulate clause, an arbitration tribunal may, for instance, still interpret a treaty in a way that renders state intention behind the clause meaningless. There is thus a need for ongoing work in reforming the arbitration system.

Chantal Ononaiwu, Director, External Trade, Caribbean Community Secretariat, discussed the transformative changes in investment governance over the past 15 years, characterized by a shift from treaty proliferation to reorientation of IIA rule-making due to increased exposure to ISDS cases and a paradigm shift toward sustainable development. She emphasized the significance of IISD’s Model



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International Agreement on Sustainable Development, which represented a reconceptualization of IIAs with sustainable development at the core. The launch of the Forum served as a critical platform for exchange of experiences and capacity building for developing countries, enabling the questioning of assumptions underlying traditional investment protection-focused IIAs, including the necessity of broad treaty-based guarantees of protection and ISDS for attracting FDI. She underscored the importance of international institutions such as UNCTAD, which has developed key policy tools such as the IPFSD, and the role of regional institutions like the Caribbean Community (CARICOM), the African Union, and the European Union, in advancing reform of international investment governance. Ononaiwu also addressed the challenge of coexistence of new progressive treaties and older investment protection-focused BITs, sharing inspiring stories of countries reforming old-generation treaties. She encouraged thinking creatively in the next 15 years, designing and implementing international investment policies for sustainable development and achieving coherence with other instruments that govern investment. She expressed hope that 15 years from now, the IPF community could declare the effective implementation of reform of international investment governance.

Margie-Lys Jaime Ramirez, Legal Advisor, Ministry of Economy and Finance, Panama, offered a different categorization perspective, highlighting key milestones and issues in international investment governance. She noted Bolivia's exit from the International Centre for Settlement of Investment Disputes (ICSID) in 2007 as a significant turning point, signalling the need for change. The early 2000s crisis in Argentina, which led to numerous ISDS cases, also underscored the problems within the system. Several Latin American countries, such as Ecuador, exited ICSID and terminated all IIAs, reflecting a backlash against ISDS. The establishment of the Union of South American Nations' regional ICSID alternative further emphasized the shortcomings of the existing system. The second phase saw countries renegotiating treaties and shifting from BITs to regional agreements, with Brazil adopting unique partnership agreements focused on cooperation and facilitation. The move to a multilateral setting in UNCITRAL WGIII indicated a broader mandate for reform, with a focus on cross-cutting issues. Jaime Ramirez also emphasized the importance of collective voices in the process and the need to translate discussions into practical actions. She noted that we are halfway through the journey, highlighting the code of conduct for arbitrators developed in UNCITRAL WGIII but expressed concerns about the interpretation of new progressive treaties. She envisioned a balanced system in 15 years that respects responsible investments and promotes a better-functioning system for all.

Reflections from the room emphasized that as participants contemplate the future they should consider the structural reforms of institutions, particularly the proposed appellate mechanism, and how it will impact the system. We, as a community of practitioners, need to ask ourselves why we are pursuing reform, recognizing that different countries are at various stages. We also need to bear in mind that reform must ensure inclusivity, consider innovative provisions, protect Indigenous People's interests, and implement regional reforms to prevent fragmentation. Capacity building is vital for effective negotiation



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on different platforms, and the quest for coherence and transparency is a challenge all countries must address. Participants also expressed a need for caution, as a multilateral appellate court might not solve all problems and could potentially create new ones.

World Café: Creating a shared vision of the international investment system that works for the people and the planet

This session was meant to have participants share their vision of the international investment system in another 15 years and what changes they would want to see. It was also an opportunity to explore how the IPF can support the realization of those changes, taking into account the Agenda for Coherence from the 14th edition.

Participants were presented with three questions: (1) What is your definition of change to international investment governance? (2) What has been the biggest obstacle to changing international investment governance and what would it take to have this change? and (3) What specific forms of support and collaboration with IISD (within the Forum and beyond) would have a significant positive impact on your visions of “change” (i.e., be an added value and meet your requirements and expectations)?

In plenary, some comments that emerged from the room pointed out that the legacy of older, first-generation IIAs will continue to be problematic as long as these IIAs coexist with more progressive agreements and instruments that safeguard the right to regulate and seek sustainable development outcomes. It was also stressed that the arbitration ecosystem is still steeped in the traditional legal practice where lawyers’ duty is bound to the client when interpreting treaty text. Moreover, participants noted that further capacity-building and legal assistance from IISD and institutions sharing similar goals is needed, in addition to the convening of a safe space for negotiators from developing countries that is offered by the IPF.

DAY TWO: THURSDAY, OCTOBER 26

Panel Discussion 2: Unpacking the IPF Overarching Theme—Fostering Coherence for Sustainable Investment Governance

Isaac Gitone, Senior Economist, National Treasury, Kenya, opened the panel discussion by emphasizing the importance of coherence as the central theme of the 15th edition of the Forum and explained that this year’s focus was on institutional coherence. He encouraged discussions in various areas of coherence and proposed the development of guidelines to achieve coherence across different levels. Isaac stressed the importance of high-level policy briefs from the Forum partner organizations to effectively convey the message and called for the development of indicators to measure guideline implementation across countries. He cited an example from Kenya that illustrated the challenges of achieving coherence within the same government when specific IIAs conflict with national policies.



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Gitone also raised questions about the future focus of the IPF on the overarching theme and the measurement of progress using indicators.

Florencia Sarmiento, Policy Analyst, IISD, highlighted the shift toward recognizing the need for reform in investment governance and the challenge of making that reform meaningful. She explained that coherence, a concept that arose from the 2022 Abuja Forum, can be seen from three perspectives: (1) **institutional**, increasing coordination across various government agencies that have a competency in investment governance; (2) **horizontal**, ensuring alignment across various policy areas interconnected to investment policy, including environmental and social; and (3) **vertical**, in the harmonization of rules and procedures at different levels of investment governance, from local and national to regional and international. She also mentioned that all sessions of the Forum are geared toward producing an outcome. This outcome would consist of a two-part checklist aimed at mapping the relevant investment processes, instruments, and responsible departments or institutions within a government involved in investment governance and different coordination mechanisms to ensure coherence. Based on this exercise, participants will be able to identify the relevant coordination mechanisms to put in place to improve institutional coherence and drive action and report back in future editions of the Forum.

Gary López Vélez, Lawyer, National Directorate of International Affairs, State Attorney General's Office, Ecuador, addressed the power imbalance between developed and developing countries, advocating for common positions among developing nations to enhance their negotiating strength. He highlighted the conflicting interests of those promoting investment and lawyers representing states in dispute settlement, citing Ecuador's experience with investment contracts and the need for improved communication, information exchange, and coordination. He stressed the importance of addressing temporal coherence limitations while exploring the concept of coherence and expressed hope for sharing experiences and developing a document of best practices within a year, leading to implementation in 2 years, with ongoing efforts to achieve both horizontal and temporal coherence.

Angela Pretorius, Deputy Director, Division of Investment Policy, Ministry of Industrialization and Trade, Namibia, voiced support for the proposed dimensions of coherence and emphasized the significance of temporal coherence, especially during crises. She detailed Namibia's reform-oriented approach, involving the National Action Programme on Investment and the creation of a multi-sectoral working group for investment reform priorities. She stressed the importance of minimizing bureaucracy and involving all stakeholders at the national level to achieve harmonization and coherence. At the international level, she endorsed continued capacity building and highlighted UNCTAD's role in representing all countries while overseeing investment governance at the multilateral level. Pretorius acknowledged that determining a specific timeframe for achieving coherence is challenging and may vary across policy areas, and the measurement of coherence levels could be intricate in practice, underscoring the importance of sharing national-level experiences.



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Opeyemi Abebe, Head of Trade Competitiveness, Commonwealth Secretariat, raised questions about the sequence of achieving coherence in investment governance and its alignment with other sectoral policies. She stressed the importance of clarity in defining objectives and recommended focusing on a practical tool for end users to complete and report on. Abebe introduced the acronym “PPP,” representing “People,” “Process,” and “Priorities” (or “Principles”). She highlighted challenges in collaboration between those responsible for the design of various policies and regulatory frameworks under “People.” Under “Process,” she noted differences in international forums where the discussions regarding these sectors are taking place and the participation of country representatives who might be unfamiliar with investment regulations. Regarding “Priorities” or “Principles,” Abebe provided examples of aligning investment policies with national development plans and proposed that to achieve horizontal coherence, countries should consider using their national development plans (NDPs) as the underpinning foundation for all government/sectoral policies. Where there is no NDP, then the United Nations Sustainable Development Goals (SDGs) could be a useful guide. She emphasized that achieving horizontal coherence goes beyond the scope of the Forum and its participants and requires the collaboration of various government bodies.

Participants expressed concerns about maintaining international coherence amid government changes and diverse policy approaches. They raised issues regarding combating monopolies and economic imbalances with developed countries. The suggestion to use the SDGs as an investment policy guide received support, but challenges of fragmentation were acknowledged. Proposed coordination mechanisms included establishing a consultation mechanism with dispute resolution bodies and providing training sessions for officials, particularly in federal countries. Challenges were highlighted when powerful actors operate beyond national laws, emphasizing the need for coherence in mining-related IIAs. The African Continental Free Trade Area (AfCFTA) Protocol on Investment was mentioned as an opportunity to achieve coherence by aligning with national laws, setting best practices, and recognizing the importance of international alignment.

Panel Discussion 3: Practical Tools to Achieve Greater Institutional Coherence on Substantive Aspects

Patience Okala, Expert Investment Advisor, AfCFTA Secretariat, stressed the importance of cohesive collaboration among different government agencies involved in various aspects of the investment cycle, such as investment promotion, generation, and dispute settlement, instead of working in isolation. She emphasized the need for capacity building for individuals engaged in investment treaty negotiations who often have diverse expertise. Okala highlighted the positive impact of the AfCFTA Investment Protocol, which aligns with more progressive IIAs, uniting 54 African countries under a common position. In the next 5 to 10 years, all countries and regional economic communities are expected to adhere to the



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AfCFTA Protocol on Investment, ultimately eliminating intra-African BITs. She also posed a question to the panel about the common challenges faced by developing countries when engaging in rule-making across different levels, seeking insights into the issues encountered as these nations work on shaping investment agreements and rules. Okala shared the African experience, focusing on the AfCFTA Investment Protocol, which includes a chapter on investment facilitation and encourages coordination among national focal points and the creation of one-stop shops. She referred to the Pan-African Investment Agency and asked panellists to share their experiences and emerging trends in investment facilitation at different levels and whether a one-size-fits-all approach to international investment facilitation, similar to the recent WTO agreement, was feasible.

Vincent M. Beyer, Associate Expert, Legal Affairs, UNCTAD, discussed emerging global trends in investment governance, emphasizing the distinctions between investment protection, facilitation, and promotion. He highlighted the increasing focus on investment facilitation and the blurring of lines between promotion and facilitation, with centralization within Investment Promotion Agencies (IPAs) to enhance coherence. Beyer noted that coherence can be achieved by building on existing structures and stressed that this challenge extends to both developing and developed nations. He provided examples of disputes arising from divergence in policies at different governance levels, citing the case of *Vattenfall* related to a coal power plant investment. Beyer pointed out similar challenges in Africa, emphasizing the need to harmonize national investment laws and clarified that policy divergence at different levels of policy-making does not necessarily imply incoherence. He discussed UNCTAD's tools and approaches to address practical challenges, such as templates for websites (UNCTAD's iGuides, eRegulations, and eRegistrations) and administrative procedure mapping, which help countries understand investment processes from an investor's perspective. UNCTAD's research indicated the increasing incorporation of facilitation provisions, including transparency clauses and coordination mechanisms in IIAs, reflecting the importance of ongoing communication between parties. He suggested that investment facilitation, compared to protection, may be more effective in attracting investments and expressed some disappointment that the WTO's Investment Facilitation for Development Agreement (IFDA) lacks robust sustainability considerations. He outlined the three categories of obligations in the IFDA and suggested that a binding WTO agreement may add limited value, given the progress already observed in various regions and countries. UNCTAD's mapping of national and international activities confirms substantial progress in investment facilitation.

Mariana Pinto, Legal Advisor, Investment, Department of Services and Digital Economy, Undersecretariat of International Economic Affairs, Chile, provided insights into Chile's experiences with fragmented competencies in the investment field. She highlighted the importance and the need for coordination with other agencies and ministries to ensure coherence in the policy-making process and shared their experience in coordinating policies related to lithium, energy transition, and green hydrogen. She also described the negotiation of international investment agreements by Chile's



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Undersecretariat of International Economic Affairs (Ministry of Foreign Affairs), emphasizing the importance of coordination with other agencies and ministries to ensure coherence. Pinto highlighted the role of her team in leading international investment negotiations, whether bilateral or multilateral, and noted the importance of maintaining access to records of previous negotiations. She also discussed their engagement with the Investment Promotion Agency (IPA) when negotiating the IFDA, and with the Ministry of Finance and the Investment Arbitration team when negotiating at UNCITRAL WG III. Regarding the WTO's IFDA, she considered that the agreement prevents more fragmentation in international investment law. Pinto considers the IFDA to be a positive step that contributes to the WTO's development agenda.

Yuanita Ruchyat, Senior Officer, Services and Investment Division, Association of Southeast Asian Nations (ASEAN) Secretariat, discussed the coordination of investment governance in the ASEAN region by the ASEAN Coordinating Committee on Investment. She highlighted the focus of investment agreements in the region on both investment protection and facilitation, with fewer challenges in these areas. The primary issues in ASEAN arise from complex top-down mandates and reporting processes involving multiple ministries. Ruchyat emphasized the role of the ASEAN Secretariat in preserving institutional memory by keeping records of countries' positions and their evolution over time to maintain coherence within the organization. She mentioned the priority given to investment facilitation in ASEAN, driven by the impact of COVID-19 and the implementation of the ASEAN Comprehensive Recovery Framework and the adoption of a non-binding framework with 11 guiding principles in 2021 (the ASEAN Investment Facilitation Framework). This framework encourages national-level regulation and coordination, promoting convergence among member states, and includes a non-binding reporting mechanism to motivate slower implementers. She expressed ASEAN's interest in observing the implementation of the WTO IFDA and its potential as a best practice for the region despite the absence of sustainability considerations in it.

Participants shared diverse reflections. Some mentioned experiences addressing policy fragmentation through a national investment development and promotion policy. The complexities of achieving coherence at regional and international levels were acknowledged, with emphasis on retaining benchmarks in areas like the environment, along with social aspects. A participant mentioned its ombuds agency for investment facilitation and expressed support for a multilateral agreement. Participants described a centralized online portal for investors that streamlines inquiries through different ministries. Learning from peer countries in managing institutional coordination was emphasized, suggesting alternative mechanisms to avoid unnecessary bureaucracy.



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Breakout Session 1: Reflecting on practical and political approaches to enhancing institutional coherence

In the breakout session, participants were placed in groups to work on a fictional scenario of a developing country that is in the process of reforming its investment governance framework while facing ISDS cases. In the context of this scenario, participants were asked to identify the main challenges in coordinating state agencies in charge of investment governance, provide a practical recommendation, and propose one initiative at the global level that could assist the fictional developing country in implementing institutional coherence.

During the plenary session, rapporteurs from different groups emphasized the challenges stemming from fragmentation in investment governance, which arise due to the absence of a common objective linking various agencies involved in investment governance, leading to overlapping competencies and the proliferation of instruments. Additionally, the lack of alignment between older- and newer-generation treaties was highlighted. The recommendations included the establishment of a multistakeholder negotiation team to enhance coherence and the creation of a coordination framework with defined technical-level rules. Strategies were proposed to align older generation IIAs with newer model treaties and the SDGs. Furthermore, it was suggested that an interministerial negotiation group be set up and capacity training be provided for government officials. The discussion included topics such as aligning national and regional treaties with UNCTAD's IPFSD, which was deemed important, and a focus on amicable dispute settlement mechanisms, enhanced government-investor relations, the development of investment laws incorporating regional standards, and the exploration of mutual agreement treaties for the termination of older generation treaties. Coordination support from IISD was seen as valuable to institutionalize coordination across developing countries.

Panel Discussion 4: Practical Tools to Achieve Greater Institutional Coherence on Procedural Aspects

H. E. Michael Imran Kanu, Ambassador and Permanent Representative (Designate), Permanent Mission of Sierra Leone to the United Nations prompted panellists to consider the procedure continuum from prevention to management and litigation, focusing initially on dispute prevention and management. He sought insights from the panellists regarding effective dispute prevention and management strategies in their respective countries and regions. The question was raised whether the failure to prevent disputes could be viewed as a governance failure. He highlighted the tools made available by UNCITRAL WGIII, particularly in Working papers 228 and 235, to aid in dispute prevention. Kanu then invited participants to share their experiences in effective dispute prevention within their country and regional contexts. He also inquired about the experiences in optimizing centralization and



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coordination response systems for investment dispute prevention and management in Colombia and Sri Lanka.

Ana María Ordoñez Puentes, Director, Directorate of International Legal Defence, National Agency for the Legal Defence of the State, Colombia, highlighted that effective dispute prevention is more complex than it may seem. She identified three types of disputes: (1) fabricated, unmeritorious, or frivolous disputes, incentivized by the financial benefits available to the arbitration industry; (2) disputes that are unavoidable and must be faced; and (3) disputes with legitimate investor concerns that can be resolved with interinstitutional coordinated legitimate measures and actions of state entities involved in the concerns. Colombia has established an in-house legal team to handle frivolous claims at a low cost, contracting external lawyers only for large genuine cases to discourage the business of international arbitration. Cases that were successfully defended and won serve as important deterrents. The second line of prevention involves training officials and providing legal support to policy decision-makers to avoid regulatory chill. Here, the legal team takes an enabling perspective supporting decision-makers with their policy objectives. The third line focuses on facilitating the resolution of legitimate concerns without altering the country's laws. Colombia's use of early dismissal under ICSID rules is a successful example. Ordoñez emphasized the importance of strong institutions, technical capacity, and effective defence models to withstand political changes and maintain interinstitutional coordination. She advocated for a multilateral instrument aligned with the SDGs and cross-cutting principles, including the denial of benefits, to ensure coherence. Ordoñez also called for regulating damages and for emphasizing proportionality in state responsibility for investment arbitration.

Raveendra Deshapriya Opita Pathirana, Additional Solicitor General, President's Counsel, Attorney General's Department, Sri Lanka, emphasized the importance of institutional coherence and procedural aspects in investment governance for dispute prevention and management. Sri Lanka has experienced only six investment disputes, with two wins, two losses, and two pending cases among its 20 IIAs. Pathirana stressed the need to identify the root causes of disputes and shift the focus to prevention. He highlighted the inherent mistrust between investors seeking profits and states aiming to preserve sovereignty. Establishing institutional coherence within the government is vital in building trust and avoiding investor–state disputes. Pathirana noted the success of the one-stop shop in attracting FDI to Asia and the potential of internal prevention mechanisms to deter ISDS cases. He aspired to create a national investment dispute prevention and management authority, focusing on conciliation as the preferred approach while addressing challenges related to costly foreign arbitration and jurisdictional complexities in the Sri Lankan context.

Participants discussed the significant issue of third-party funding in investor–state arbitration and the problematic incentives it creates. The concern was highlighted, citing strategies like refusal to pay ICSID administrative fees for frivolous claims, causing financial strain on an investor that could not continue to



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pay for the arbitration procedures. It was noted that UNCITRAL rules mandate claimants to disclose third-party funding. A participant proposed asking for security for costs, emphasizing that if the claimant does not cover their expenses, the state should not be responsible for those costs. An overarching goal was to make arbitration less profitable, possibly by addressing the issue of damages and third-party funding, and by considering the role of a public mechanism in this context.

DAY THREE: FRIDAY, OCTOBER 27

Panel Discussion 5: Institutional and Horizontal Coherence—Spotlight on taxation and investment governance

Kudzai Mataba, Policy Analyst, Tax and Investment, IISD presented the Revisiting Tax Incentives as an Investment Promotion Tool, shedding light on the evolution of tax incentives and re-examining their foundational principles. The presentation emphasized the importance of strengthening tax bases in developing countries and the momentum of the global minimum tax. She delved into what tax incentives are and how they differ from other investment incentives, their effectiveness in attracting investments, and the impact of the OECD global minimum tax. Key takeaways included a mixed track record for tax incentives, the need to consider sectoral differences and business size, and the challenge of isolating the effects of tax incentives amid other business-friendly measures. Mataba focused on the global minimum tax (to come into force in 2024) as an additional driver for countries to rethink their use of tax incentives. She underscored that offering tax incentives below the global minimum effectively results in a gift of tax revenue to the company's home country. Her presentation also addressed legal considerations for reforming tax incentives, including their sources, the impact of stabilization clauses, interaction with investment treaties, and the increasing focus on their relationship with IIAs and other tax agreements. Finally, the future of tax incentives was discussed, emphasizing the need for an economic rationale, the role of financial models, and the importance of transparency and interagency coordination for effective implementation. Collaboration among developing countries in reforming tax incentives was encouraged. She ended by stating that IISD is working in collaboration with many countries, helping them to understand the rules, as well as supporting them in assessing their tax frameworks and providing policy options.

Danish, Programme Officer, South Centre, introduced a new UN process for cooperation on tax incentives, noting the complexity of dealing with various instruments covering tax in international agreements and the differences in expertise and capacity across government agencies. He directed some questions to the panel, asking them to share their experience in coordinating among the different government agencies with a competence on tax incentives in their countries and how countries compete by offering attractive tax incentives. Lastly, Danish inquired about the potential effects of the OECD



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global tax on the panellists' countries and what they are considering preparing for this international policy change.

Omar Chedda, Senior Director, Investment Unit, Ministry of Industry, Investment and Commerce, Jamaica, discussed his country's history of providing tax incentives and acknowledged that their effectiveness varies. For example, tax incentives have been successful in attracting investments in sectors like call centres and the business process outsourcing (BPO) industry. Jamaica has reduced corporate tax to 12.5% in special economic zones for these industries, which is higher than some countries but still attracts businesses. However, Chedda emphasized that tax incentives are not the primary reason for choosing an investment location. Factors such as market size, proximity to export markets, the business environment, and the available workforce play a more significant role in determining FDI. Despite offering incentives, Jamaica's FDI inflows peaked in 2015 and have since declined, especially after the COVID-19 pandemic. In 2004, Jamaica established a tax policy review committee and introduced comprehensive reforms based on International Monetary Fund recommendations. This reform highlighted the importance of consultations and stakeholder buy-in to create a cohesive tax framework, which replaced old laws to eliminate fragmentation and streamline the institutional framework. However, Omar pointed out that fragmentation still exists at the technical level due to inadequate communication between IPAs, the finance ministry, and line ministries dealing with investment, resulting in coordination challenges. Regarding the global minimum tax, Jamaica's special economic zones have a tax rate as low as 7.5%, which is below the 15% global minimum. Managing this global minimum tax alongside multinational enterprises presents challenges for Jamaica. One recommendation is to consider raising the tax rate to 15%, but further studies are required to determine the best course of action.

Isaac Munjunga, Principal Economist, Ministry of Finance and Planning, Zambia emphasized the mixed results of tax incentives and pointed out that assessing their effectiveness involves considering both the income generated and the costs. He noted that while tax incentives can work, their impact varies and requires a deep understanding of the industry. In Zambia, efforts are being made to evaluate the post-ante effectiveness of incentives in terms of their overall economic benefits. Regarding the tax policy review committee, Munjunga highlighted that periodic reviews have occurred since the comprehensive tax framework changes in 1995. He mentioned that previous decisions on incentives were also influenced by the power dynamics between the Ministry of Commerce, Trade, and Industry and the Ministry of Finance, but these have now been resolved. Balancing incentives with the revenue generated is crucial, and joint collaboration among different government agencies is essential for effective policy formulation and implementation. Munjunga also addressed the challenge of tax incentives becoming a race to the bottom in an effort to outcompete global or European competitors. Minimizing this race to the bottom is crucial, especially if tax incentives fall below the 15% global minimum that has been proposed. Smaller countries and those with structural issues may be significantly affected.



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Lincoln Blake, Director, Investment Policy and Compliance Unit, Ministry of Investment, Belize, explained that his country had a business tax regime that exempts exporters, but it has made amendments to its relevant incentive regimes to comply with the OECD and WTO criteria on ring fencing and export subsidies, although this has brought about challenges and requests from the private sector. Some sectors, such as the BPO industry, are seeking additional forms of incentives beyond the fiscal ones, such as improvements in cybersecurity and additional services, including allowance in the duty-free approved area of daycare facilities. The incentive program has been modernized to accommodate micro, small, and medium-sized enterprises (MSMEs), recognizing that many of them operate from home without fixed assets. Belize has specific procurement regulations earmarking 20% of government purchases to MSMEs. In attracting investments, Belize competes with other Central American countries, making incentives one of many other key considerations for investors. He explained that the Ministry of Investment submits proposals to the Cabinet for approval, and the Minister of Finance plays a pivotal role in the decision-making process after considering the recommendations of his technical staff. The benefits of FDI go beyond tax revenue and include employment and technological spillovers. Belize has observed a shift toward local managers and entrepreneurs, diversifying the economy from agriculture to services such as BPOs, especially targeting small and medium-sized ones. An amnesty program was introduced in 2023 to encourage MSMEs to formalize their businesses, reducing the informal sector. Regarding taxation, clear and enforceable rules are crucial to ensure compliance. Incentives exist in developing countries to address structural problems, but there is a need for global agreement on standard taxation and compliance to shift focus toward resolving these structural issues.

Elyjean DC Portoza, Director, Legal and Compliance Service Board of Investments, Philippines discussed her country's tax incentive system, which was initiated in the 1960s with cost-based incentives. In the 1980s, there was a reform focusing on income tax bases, but it had a specific time frame. In the 1990s, the country witnessed the growth of special economic zones, leading to the extension of incentives. Multiple promotion agencies were created within the Philippines, with the Philippine Board of Investments office regulating areas outside the special economic zones. Although the country has in the past lost up to USD 80 million in revenue annually due to incentives, they have led to job creation and economic spillover effects. The recent reform, the Create Act, introduced a single menu of incentive options, limiting perpetual incentives. The Philippines has the highest corporate income tax in the ASEAN region, at 35%. Incentives are offered to priority sectors aligned with the strategic investment priority plan, featuring both cost- and income-based incentives. Despite this reform, the Philippines remains competitive in the ASEAN region, with the reform showing positive results in investment in priority sectors after the pandemic. Portoza identified two areas for collaboration in tax incentives. The first is determining priority sectors that deserve incentives and acknowledging the associated revenue losses. The Board of Investment determines the priority sectors. The second is the actual granting of financial incentives, where the IPA recommends deserving companies, but multiple agencies participate in the



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granting process. Agencies must embrace the need for reform, find compromises, and ensure continuous communication among them. For example, during the pandemic, allowing companies to work from home required compromise to prevent them from violating economic zone regulations.

Participants reacted to the panel discussion and provided some input. A representative from the Democratic Republic of the Congo (DRC) commented that his country provides incentives to various sectors, including energy, electricity, mining, and fossil fuels. However, some investors in these sectors have found loopholes to avoid paying taxes for many years, leading to concerns about the need to simplify the tax framework and centralize incentives. A question was raised about how to achieve this simplification. The Comoros also offer a variety of advantages to investors, including tax incentives. In 2020, the islands reformed their investment code to simplify the tax regime, setting a minimum rate of 15%. Concerns were expressed about the potential for a race to the top of offering more attractive incentives, primarily by developed countries, creating a situation where developing countries could not compete. Vincent Beyer from UNCTAD pointed out that while the discussion mentioned a race to the bottom, there was also the risk of a race to the top in terms of incentives. This could put developed countries in a stronger position to provide more attractive incentives, potentially leading to unequal competition. The role of international law in preventing this race to the top was considered. Michael Kanu, from Sierra Leone, noted that international law is responsive, and there might be a push to reconsider double-taxation agreements as another factor to address in this context.

Participants reacted to the panel discussion and provided input. One participant noted their country's incentives across various sectors but raised concerns about investors exploiting tax loopholes, prompting a discussion on the need to simplify the tax framework and centralize incentives. Another mentioned offering tax incentives with questionable results in attracting more investment. Concerns were expressed about a potential race to the top in offering incentives, primarily by developed countries, creating unequal competition. Another participant highlighted the risk of this race to the top and discussed the role of international law in preventing it. It was noted that international law is responsive, suggesting a reconsideration of double-taxation agreements as a factor to address in this context.

Panel Discussion 6: A New Tool to Enhance Coherence in Investment Governance: Launching IISD's Model Contract Clauses for Responsible Investment in Agriculture

Sarah Brewin, Associate, IISD, introduced, in a pre-recorded video, the new IISD model clauses that update the guide to agriculture investment model contracts developed in 2014. Significant changes in responsible investment in agriculture drove the need for this update. It reflects evolving principles and guidelines from various regional economic communities and intergovernmental organizations. The model clauses emphasize gender equality and environmental conservation. Appreciation goes to the Swiss Agency for Development and Cooperation for funding the work.



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Nyaguthii Maina, Associate, IISD, presented a new tool to enhance coherence in investment governance, particularly focusing on responsible agricultural investment. The rationale for developing these clauses lies in the potential of agriculture to rapidly reduce poverty, but the sector faces challenges because of inadequate and low-quality investments in modern agricultural systems, as responsible business conduct remains rare in this sector. IISD's model contract clauses are significant because institutional and capacity challenges have historically hindered developing countries from achieving sustainable legal reforms, many investment laws and contracts do not address contemporary challenges, and most instruments governing foreign investments favour investors over host states. These model contract clauses, integrating international and regional guidance developed over a decade, complement domestic laws instead of replacing them and serve as a checklist for contract considerations. To enhance their usability, there is a web-based version available. Countries can use these clauses to map their regulatory frameworks across the investment cycle, identify legal gaps, and align with international and regional principles and guidance. Maina queried the panel about the key government institutions and stakeholders responsible for ensuring responsible agricultural investment in their respective countries and regions. She also asked the panel about their views on developing national or regional investment contracts as a way to build coherence and how the model clauses could be used to advance climate and gender considerations in responsible agriculture investment.

Motoko Aizawa, author and independent researcher, expressed gratitude for IISD's alignment with international standards, notably the Commonwealth guidelines on investment provisions for sustainable development. A pressing issue is food security, with one in three individuals in the D.C. region experiencing it, a problem also affecting one in eight people across the United States. Motoko highlighted the challenge of increasing affordable food production while pushing planetary boundaries and causing ecosystem and biodiversity degradation, especially in developing countries. The pressure on food systems, particularly in developing nations, has surged. They can learn from existing good practices, such as Colombia's comprehensive policy and legal framework for toll roads, which fosters predictability and efficiency in the investment process and is received well by investors. In the context of climate change, all evolving climate data, engineering innovations, and financial tools must be considered at the outset of projects. Three types of climate risks in agriculture need assessment: those impacting the project, those caused by the project, and those affecting third parties, especially project-affected communities. The IISD model clauses can help evaluate these risks. Motoko agrees that improved climate data can make climate events more predictable and thus no longer force majeure events. The discussion also touched upon the risk of countries being sued by investors for environmental protection measures (such as the case involving Italy), underscoring the need for timely dispute resolution through dialogue. In terms of advancing gender equality, she mentioned that the gender perspective was well integrated throughout the contract clauses and not treated as an isolated issue, and for that, she commends IISD.



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Maria Andrea Echazú Agüero, Human Rights Officer, Office of the United Nations High Commissioner for Human Rights (OHCHR), emphasized the importance of responsible investment, especially in agriculture, considering the human right to food. She pointed out the increasing role of international agribusiness, rising living costs, food prices, and growing inequality, all while underscoring the significance of agriculture for sustainable development and climate change. Collaboration with UN partners, such as UNCTAD and FAO, is crucial in integrating responsibilities for investors. OHCHR supports the development of international human rights instruments and norms for businesses, like the negotiations on a legally binding instrument on transnational corporations and other business enterprises and a draft Covenant on the Right to Development. At regional and national levels, OHCHR provides technical assistance and advice to states aimed at achieving policy coherence with human rights obligations. Echazú Agüero also discussed the need for meaningful stakeholder participation in the design of investment contracts or agreements rather than a mechanical process of copying/pasting suggested provisions from the model contract presented by IISD. She emphasized the role of ministries of justice and national human rights institutions in contract negotiations, considering their knowledge of various human rights instruments and recommendations. She stressed the need to avoid, address, and de-escalate human rights issues in large-scale agriculture investments, particularly those related to land grabbing and forced evictions. Echazú Agüero praised the positive aspects of the IISD clauses, such as obligations for social and environmental assessments, while suggesting the inclusion of human rights assessments. She further highlighted the importance of a free, participative, prior consultation process with Indigenous communities and commended the numerous references to gender equality, women's participation, and participatory grievance mechanisms in the clauses, especially for addressing labour rights concerns.

Providence Mavubi, Director, Industry and Agriculture, Common Market for Eastern and Southern Africa (COMESA) Secretariat, highlighted the critical role of responsible investment in agriculture, affecting not only financial aspects but also the social well-being of Zambia, where 70% of the population relies on agriculture. Responsible investment, in addition to its financial benefits, promotes social participation and inclusiveness, aligning with the SDGs. As a regional IPA, COMESA collaborates with national investment authorities, ministries responsible for trade, agriculture, environment, and land management, as well as farmer organizations and academia. For Rwanda, which has comprehensive development plans, the model contract clauses for responsible investment serve as a valuable tool for mapping, assessing, and informing adaptations, considering potential regional harmonization. Mavubi believes the model contract clauses will attract responsible investors capable of addressing climate change and social risks, such as Unilever's collaboration with some governments to relocate local communities and design income-generation solutions. This model contract clauses can also aid in integrating gender equality into agriculture investment by addressing issues like women's land rights, which remain a concern in some regional countries, even when domestic legal frameworks fall short.



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Participants commented during the discussion. One participant emphasized the need for policy coherence across climate change and human rights within a model contract while acknowledging potential increased investment costs. The role of financiers using environmental, social, and corporate governance measures in due diligence was mentioned as influencing investments toward sustainability. Proper preparation of investment projects by countries was stated to be vital to reducing dispute settlement costs, suggesting comprehensive and coherent regulatory frameworks can ultimately decrease expenses. Others raised questions about ensuring state compliance in agriculture contracts, emphasizing transparency for civil society and human rights agencies. International mechanisms, including treaty body reviews and consumer organizations, were discussed for accountability. Questions about counterclaims and their relationship with ISDS were raised, with participants commending IISD's efforts in facilitating negotiations in various sectors.

Breakout Session 2 and Structured Plenary Reporting: Take-home actions on institutional coherence

Josef Ostřanský, Policy Advisor, IISD facilitated the breakout session that introduced the outcome checklist tools to participants and invited them to review the practical tool that aims to improve institutional coherence in their individual country context. Participants will also decide how to report back on progress made on implementation at the next edition of the IPF. Participants were divided into groups to go over the IISD proposed checklist tool; they then identified the challenges of implementing them and features that could be complemented or improved. Afterwards, the group proposed ideas for tools for institutional coordination, explaining the policy concerns they will address and their pros and cons.

Closing Ceremony

Suzy Nikièma, on behalf of IISD, expressed gratitude to all participants for their active engagement in sharing experiences and contributing to the development of tools aimed at enhancing investment governance for sustainable development. She acknowledged the accomplishments in reform while remaining aware of the ongoing and emerging challenges. The goal is to ensure that the Forum remains a safe space and valuable platform for the community of investment governance officials from developing countries. During this edition of the Forum, a toolkit has been initiated and will be further refined for practical utility. A central theme revolves around maintaining community engagement between forums. As participants concluded their time at this event, Nikièma expressed the hope that they carry with them a renewed sense of energy and optimism for international investment governance reform. She extended appreciation to the government of Panama for hosting the event, as well as to H.E. the Minister of Foreign Affairs and H.E. the Minister of Economy and Finance for their hospitality and support. She also extended gratitude to the IPF donors, as well as partners (UNCTAD, OHCHR,



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Commonwealth Secretariat, CARICOM Secretariat, ASEAN Secretariat, COMESA Secretariat, and the South Centre). Finally, thanks were offered to the panellists, the IPF Steering Committee, and IISD staff.

Margie-Lys Jaime Ramirez, on behalf of the government of Panama, extended sincere thanks to the IISD team. She recalled conversations a year ago in Abuja, where the idea of Panama hosting the next Forum was born. Panama was honoured to have been selected as the IPF host. The discussions touched on crucial topics shared by all countries. The importance of working together to have a unified voice in international forums like UNCTAD and UNCITRAL III was emphasized. The need for coherence in substantive aspects of investment treaties, contracts, and laws was discussed. The challenge of interinstitutional coordination was highlighted. Forums like IPF are crucial to building and maintaining a shared vision of international investment policy governance that respects the environment and leads to sustainable development. Thanks were given to all participants and the organizing team. The message concluded on a positive note of hope for improving the welfare of participating countries.