

TENTH ANNUAL FORUM OF DEVELOPING COUNTRY INVESTMENT NEGOTIATORS



**SOUTH
CENTRE**

**COLOMBO, SRI LANKA
NOVEMBER 2016**

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MEETING REPORT

Reshaping Investment Law and Policy to Support the 2030 Development Agenda

EXECUTIVE SUMMARY

The 10th Annual Forum of Developing Country Investment Negotiators (Forum) was held in Colombo, Sri Lanka, from November 7 to 10, 2016. Co-organized by the Board of Investment of Sri Lanka, the International Institute for Sustainable Development (IISD) and the South Centre, the Forum was attended by participants from 47 countries from Africa, Asia and Latin America, as well as international organizations. The agenda and background materials for the Forum can be found on the IISD website:

<http://www.iisd.org/event/10th-annual-forum-developing-country-investment-negotiators>.

Under the theme of “Reshaping Investment Law and Policy to Support the 2030 Development Agenda,” participants explored various approaches on rebalancing the interests and rights of states and investors in international investment agreements in a way that contributes to the 2030 Development Agenda.

After a review of recent developments in international investment policy making as well as the new dynamics in global investment governance, participants shared their views on the relevance and the roles of principles on investment policy making. Participants received and discussed a preliminary draft of the South–South Principles on Investment for Sustainable Development, prepared based on the outcomes of the 9th Forum and subsequent inputs from various stakeholders. The discussions focused on not only substantive elements such as investor obligations and investment promotion and facilitation, but also investment-related dispute settlement mechanisms.

There was convergence among the participants on the importance of aligning investment policy making with the Sustainable Development Goals (SDGs) and on the need to develop a set of principles to foster and harness the positive contribution of investments to achieving the SDG agenda. Participants also stressed the importance of South–South cooperation and collaboration on the comprehensive reform of the investment regime.

Participants further acknowledged the importance of the South–South Principles as a firm and united multilateral statement by developing countries on investment-related issues, and requested that the Forum and its co-organizers continue to work on the principles and push them forward. In

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this regard, participants voiced concrete suggestions and supported efforts to channel the principles to regional and global forums through diplomatic processes.

Participants also saw the 10th anniversary of the Forum as an opportunity to take stock of the past achievements of the event and to strategize its potential mandate in the next decade. Recognizing the successes of the Forum in raising awareness and ensuring access to continued capacity building in developing countries regarding investment treaties, negotiations and disputes, participants shared ideas on how the Forum could become a more effective agent of change in the global South, including:

- Extending the participation of the Forum to parliamentarians and officials from different ministries.
- Enhancing the sharing of technical experiences and practices from different countries.
- Offering long-term capacity-building programs and advisory services.
- Organizing regional intersessional meetings as experience-sharing opportunities.
- Continuing to build consensus among developing countries on investment-related issues.

INTRODUCTION

The 10th Annual Forum of Developing Country Investment Negotiators (Forum) was held in Colombo, Sri Lanka, from November 7 to 10, 2016. It was co-organized by the Board of Investment of Sri Lanka, the International Institute for Sustainable Development (IISD) and the South Centre. Building upon the successes of the previous Forums, this year's event gathered participants representing 47 developing country governments, regional and international organizations, non-governmental organizations and academic institutions.¹

Under the theme of “Reshaping Investment Law and Policy to Support the 2030 Development Agenda,” participants focused on fleshing out strategic approaches, based on South–South cooperation, to re-design the international investment regime in a way that contributes to their economic and social development in a sustainable way.

The agenda and background materials for the Forum can be found on the IISD website:
<http://www.iisd.org/event/10th-annual-forum-developing-country-investment-negotiators>.

¹ The Forum was attended by participants from 37 developing country governments from Africa, Asia and Latin America and nine international institutions (the Secretariat of the Caribbean Community [CARICOM Secretariat], the Secretariat of the Common Market for Eastern and Southern Africa [COMESA], the Commonwealth Secretariat, IISD, the Office of the Chief Trade Adviser [OCTA], the South Centre, the West African Economic and Monetary Union [UEMOA], the General Secretariat of the Union of South American Nations [UNASUR], and the United Nations Conference on Trade and Development [UNCTAD]).

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Day 1: Monday, November 7, 2016

OPENING CEREMONY

The Forum was jointly opened by **Hon. Malik Samarawickrema** (Minister of Development Strategies and International Trade, Sri Lanka), **Ms. Nathalie Bernasconi** (Group Director, Economic Law & Policy, IISD) and **Mr. Manuel Montes** (Senior Advisor, Finance and Development, South Centre). Welcoming participants on behalf of the Sri Lankan government, **Hon. Mr. Samarawickrema** highlighted the importance of sustainable foreign direct investment (FDI) to Sri Lanka and the Asian region, and pointed to the importance of the Forum as a platform for sharing developing country ideas and experiences to identify common grounds in investment negotiations and dispute settlement. **Ms. Bernasconi** provided an overview of the themes to be covered during the three-day Forum, including the issue of continuing the discussion on the elaboration of South–South Principles on Investment for Sustainable Development (South–South Principles), which were initiated in the previous Forum in Rio de Janeiro. Recapturing the global economic development in the past years, **Mr. Montes** noted that, in trying to achieve the Sustainable Development Goals (SDGs), states were facing a collapsing global economic order. He further noted that the imbalances in investment treaties were being replicated and expanded in mega-regional negotiations.

Mr. Saurabh Garg (Joint Secretary, Department of Economic Affairs, Ministry of Finance, India), via videoconference, delivered the keynote speech on balancing the interests and rights of states and investors in international investment agreements (IIAs). Noting the important role of a well-functioning investment regime to protect the rights of foreign investors, he stressed that such a regime should not impede on governments' policy space and right to regulate investment for public purposes. He further called for states to act to address overly broad interpretations rendered by arbitral tribunals so that adequate consideration would be given to states' socioeconomic policy realities. In this regard, he presented key aspects of the revised Indian Model bilateral investment treaty (BIT), adopted in 2015: post-establishment investment protection; carefully defined scope with carve-outs for policy issues; non-inclusion of fair and equitable treatment and most-favoured-nation (MFN) treatment clauses; inclusion of a chapter on investor obligations; and an investor–state dispute settlement mechanism (ISDS) requiring exhaustion of local remedies and tools to prevent conflicts of interest of arbitrators. Some of the main principles addressed in the investment regime include: re-aligning the regime to ensure long-term FDI; emphasizing the customary international law principle of exhaustion of local remedies and the importance of domestic courts; changing the asymmetry in the regime by providing for investor obligations; preventing the unintended multilateralization of commitments through the operation of MFN clauses; striking a balance between costs and benefits of ISDS by ensuring transparency and reducing states' exposure to undue liability, among other measures; and correcting international distortions created by tax

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havens. Finally, Secretary Garg shared a proposal to create a task force to establish a BRICS² arbitration mechanism, which would further encourage reforms in the ISDS regime.

SESSION 1A: RECENT DEVELOPMENTS IN INTERNATIONAL INVESTMENT POLICY MAKING

The first session of the Forum discussed the most recent developments in international investment policy making, reform and dispute settlement. The session was facilitated by **Ms. Chantal Ononaiwu** (Trade Policy and Legal Specialist, CARICOM Secretariat).

Ms. Elisabeth Tuerk (Chief, International Investment Agreements Section, Division on Investment and Enterprise, UNCTAD) presented the trends, based on the 2016 UNCTAD World Investment Report and other data available in UNCTAD's IIA-related databases. Noting an increase in the FDI inflows, she recalled that the volume had not yet gone back to the pre-crisis level, and did not necessarily represent real, productive investment. She stressed that investment policies must mobilize not only the right quantity, but also the right type of foreign and domestic investment to achieve the SDGs. In this context, she mentioned three tools developed by UNCTAD—the Investment Policy Framework for Sustainable Development (IPFSD), the Roadmap for Reform of the International Investment Regime and the Global Action Menu on Investment Facilitation. According to UNCTAD's statistics, 2015 saw the conclusion of 20 BITs and 11 treaties with investment provisions, raising the total number of IIAs to over 3,300. Seventy-two ISDS cases were initiated last year, a record high number. Although the share of intra-EU cases increased, the bulk of the cases initiated in 2015 continue to be against developing countries. As documented in UNCTAD's 2016 World Investment Report, reform of the IIA regime was imperative and well underway. UNCTAD tools have shaped reform areas and approaches at all levels of policy making. Approximately 100 countries have used UNCTAD's policy instruments to review their IIA networks and around 60 have used them to design treaty clauses. Despite the progress, however, Ms. Tuerk noted that much remained to be done. She recalled the challenge of addressing the existing stock of more than 3,000 "old treaties," also referred to as phase two of IIA reform. UNCTAD's high-level IIA Conference, held in July 2016 in Nairobi, emphasized the need for intensified international coordination for IIA reform and called upon UNCTAD to support the next phase of reform. Finally, Ms. Tuerk briefed the Forum on the G20 Guiding Principles for Global Investment Policymaking (G20 Principles), which can be seen as a positive move towards including sustainable development considerations into the mainstream of investment policy making. She invited participants to share their views on these principles and to formulate a developing country response.

Prof. Muthucumaraswamy Sornarajah (CJ Koh Professor of Law, National University of Singapore) stressed that, as a fundamental principle of law, the purpose of any treaty and the most

² BRICS nations include Brazil, Russia, India, China and South Africa.

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supreme law of the state is to protect the welfare of its people. Acknowledging UNCTAD's efforts in research and analysis, he proposed that, rather than putting emphasis on defending the right to regulate as a fix for the imbalances in the IIA regime, focus should be on fixing the standards of treatment contained in the treaties, their expansive interpretations and problems of legitimacy. He commended the South African solution of relying to a large extent on domestic laws, and the Brazilian and Indian experiments with dispute prevention in new treaties. He expressed concern about the neoliberal idea of coherence in investment principles as suggested by UNCTAD and the G20, and stressed the importance of taking into account each country's peculiarities, level of development and historical context.

Prof. Makane Mbengue (Professor of Law, University of Geneva) recalled that developing countries have advanced IIA reform since the 1960s and concluded that IIA reform has been discussed for a long time, with developing countries at the forefront. He expressed doubts as to whether the G20 Principles were a step forward, and encouraged developing countries to seize the opportunity of the Forum to formulate a set of South–South principles on investment for sustainable development. He reiterated Prof. Sornarajah's point that the right to regulate is inherent to sovereignty.

Participants echoed the views of the two professors on the leadership role of developing country negotiators in pushing for reform of the IIA regime. Recognizing that the right to regulate is inherent to the sovereignty of a state, some suggested that ISDS cases had limited extensively that sovereign right and thereby rendered the right to regulate an important topic in the debate on IIA reform.

Participants also debated whether investment treaties were needed. Noting investment treaties could not turn a bad investment climate into a good one or ensure sustainable development benefits, some participants raised doubts on the purpose of entering into traditional investment protection treaties. Participants also questioned whether IIA reform was feasible or whether moving away from traditional BITs could lead to a race to the bottom between countries intending to use BITs to attract FDI. In response, **Sornarajah** indicated that recent economic studies raised considerable doubt on the assumption that BITs increase FDI inflows, and that Brazil and South Africa were good examples that rebutted BITs' role in attracting FDI.

Participants further expressed concern about investment agreements in which states undertake liberalization commitments, abandoning important development tools such as local content requirements and controls on the admission of foreign investment.

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SESSION 1B: RECENT DEVELOPMENTS IN INTERNATIONAL INVESTMENT POLICY MAKING: SHARING OF EXPERIENCES

Ms. Roslyn Ng'eno (Policy Advocacy Manager, Kenya Investment Authority, Kenya) facilitated this session aimed at discussing specific experiences of countries over the past year regarding new investment treaty claims or arbitral outcomes.

Mr. Gaurav Masaldan (Director, Department of Economic Affairs, Ministry of Finance, India) shared background on India's revision of its model BIT. He clarified that, although India does not see any causal link between BITs and FDI, BITs are nevertheless important international instruments provided they safeguard policy space and the right to regulate. Following an analysis of the key features of the Indian model, Mr. Masaldan noted that it was early to discuss reactions by partners, and shared that negotiations were concluded with Brazil and are ongoing with Iran and Sri Lanka.

Recalling that Brazil never had any traditional BITs in force, **Mr. José Henrique Vieira Martins** (General Coordinator for Trade Policy, Secretariat for International Affairs, Ministry of Finance, Brazil) explained the country's new approach by developing a model focusing on cooperation and facilitation of investment. He outlined key provisions of Brazil's Cooperation and Facilitation Investment Agreements (CFIA) and shared that seven CFIAs have been signed (with Angola, Colombia, Chile, Malawi, Mexico, Mozambique and Peru) and two have been initialled (with India and Jordan).

Mr. Daniel Felipe García Clavijo (Ministry of Commerce, Industry and Tourism, Colombia) noted that, given its recent experience as a respondent in ISDS cases and learning from the experiences of Argentina, Ecuador and others, the country's negotiations are increasingly focusing on minimizing the risks of ISDS. He highlighted that Colombia's new model, among other things, expressly recognizes sustainable development as a goal for FDI, provides for state counterclaims and an appeals mechanism, conditions investment protection to the investor's real contribution to the development of the host state, limits the scope of MFN, safeguards the right to regulate and includes investor obligations. He also highlighted that the model allows the host state to deny treaty benefits to investors who have contributed directly or indirectly to armed groups and organizations that commit human rights violations or cause environmental damages.

Mr. Ariel Martins (Head, Investment Treaty Negotiation Unit, Secretariat of International Economic Relations, Ministry of Foreign Affairs, Argentina), shared that, of 59 investment treaty claims against Argentina, 15 are still pending, and that 53 BITs remain in force. He shared the outlines of a new Argentinian model, which includes provisions on sustainable development, human rights, productive (as opposed to speculative) FDI, limits to MFN, the right to regulate, state consent to arbitration, arbitrator challenges, counterclaims and appeals. He clarified that disputes may only

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be referred to the International Centre for Settlement of Investment Disputes (ICSID) by mutual agreement, absent which they may only be referred to the Permanent Court of Arbitration (PCA).

Mr. Thierry Kalonji (Director, Investment Promotion and Private Sector Development, COMESA Secretariat) shared information on the process to review the Investment Agreement for the COMESA Common Investment Area (CCIA Agreement). Mr. Kalonji outlined elements of the revised text of the CCIA Agreement: enterprise-based definition of investment; emphasis on the economic presence of the investor in the host state; scope of the discrimination provision to allow preferential treatment for sustainable development, small and medium enterprises (SMEs) and local sourcing; investment facilitation; environmental protection, management and improvement; socio-political obligations; and investor obligations on bribery and corruption. Finally, he highlighted the work of the COMESA Secretariat in building capacity in the region for negotiations of investment treaties and contracts and for conflict prevention and management.

Participants asked how Brazil reconciled its approach, based on state–state dispute settlement only, with the Indian approach, which allows for ISDS, and whether Brazil experienced an adverse impact on FDI inflows as a result of its new model. In response, **Mr. Martins** clarified that only state–state dispute settlement was included in the Brazil–India treaty on cooperation and facilitation of investments, which was based on the same model of other CFAs negotiated by Brazil. He further clarified that two main adjustments negotiated related to the MFN clause, where India had sensibilities linked to its past agreements, as mentioned by Mr. Masaldan, and the inclusion of the *Salini* test in the definition of investment. He also denied any negative impact of the new agreements on FDI inflows to Brazil. He noted that the CFAs signed by Brazil were still not in force—they are currently pending ratification by Congress—and that Brazil kept receiving large FDI inflows, maintaining its position as one of the main receivers of FDI, even without any investment agreement in force, which further exemplified the absence of a direct causal link between BITs and FDI flows. **Mr. Masaldan** also supported the absence of such a causal link, and highlighted that India–Brazil negotiations were very successful.

Participants further discussed the relationship between portfolio investment, FDI flows and the evolving IIA regime. Noting that certain national and regional treaties and models exclude portfolio from the scope of the agreement, some participants explained that exclusion was an intentional decision, as their countries did not see portfolio investment leading to their growth and development. Overall participants showed great interest in learning about the different models fellow developing and emerging economies were adopting.

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SESSION 2: NEW DYNAMICS IN GLOBAL INVESTMENT GOVERNANCE: MEGA-REGIONALS, PLURILATERALS, THE WTO, AND THE EMERGENCE OF PRINCIPLES

Mr. Howard Mann (Senior International Law Advisor, IISD) moderated the session that looked at the development, state of play and impacts of mega-regional and plurilateral trade and investment agreements; discussed developments at the World Trade Organization (WTO) regarding investment governance; and analyzed the G20 Principles as well as the draft South–South Principles. Mr. Mann first invited panelists to comment on how developing countries should reconcile political and regional tensions in mega-regional and plurilateral negotiations, including the Comprehensive Economic and Trade Agreement (CETA), the Trade in Services Agreement (TiSA), the Transatlantic Trade and Investment Partnership (TTIP), the Trans-Pacific Partnership Agreement (TPP), the Regional Comprehensive Economic Partnership (RCEP) and the Energy Charter Treaty.

Ms. Opeyemi Abebe (Trade Adviser, Trade Competitiveness Section, Commonwealth Secretariat) suggested that developing countries had united to block the introduction of new issues in the Doha Development Round. Developed countries seemed to respond by moving the conversation out of the WTO to megaregional trade negotiations, undermining the efficiency of the WTO regime. She suggested that developing countries should continue their active participation in determining the negotiating agenda.

Mr. Nugrahadi Hendro Yuwono (Directorate for Treaties of Economic, Social and Cultural Affairs, Directorate General for Legal Affairs and Treaties, Ministry of Foreign Affairs, Indonesia) emphasized that the push for megaregional negotiations by developed countries could serve as an incentive for developing countries to find a unified position on the way forward. He also briefly shared Indonesia's considerations to potentially acceding to the TPP.

Mr. Steven Mathate (Deputy Director: Legal International Trade and Investment, Department of Trade and Industry, South Africa) expressed that discussing issues in multiple bilateral, regional and plurilateral processes makes it difficult for African states to have a voice, to claim their space and to resolve issues of trade imbalances. He nevertheless believed that there should be leeway for developing countries to participate in and benefit from these megaregional negotiations.

Prof. Carlos Correa (Special Advisor on Trade and Intellectual Property, South Centre) analyzed that, in megaregional negotiations, developed countries could exploit the asymmetries between countries, which they could not do in the WTO context due to the fundamental limitations of WTO's mandate, which excluded investment. He did not see a legal possibility for the WTO to become a forum for investment discussions.

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Following up on Mr. Yuwono's comment on Indonesia's possible accession to the TPP, **Mr. Mann** recalled that Indonesia was not involved in the TPP negotiations and had also previously announced that it would terminate or not renew its BITs with ISDS. However, shortly after the TPP was concluded, Indonesia indicated that it would accede to that agreement. He asked Mr. Yuwono and other panelists to comment on what made the package deal desirable and on the extent to which Indonesia looked at the need to join TPP as negotiated by others rather than to negotiate a more satisfactory treaty.

Mr. Yuwono clarified that Indonesia's announcement was a political gesture, and that it would take time to study carefully how to harmonize key issues in the TPP with conflicting domestic policies. He assessed that this process would take at least five years before a further decision could be made, and admitted that it would be very difficult to renegotiate the agreement.

Mr. Mathate mentioned that, like Indonesia, South Africa was terminating treaties and would not consider acceding to a treaty that runs counter its development strategies. Voicing South Africa's openness to join mega-regionals, he stressed the need to study their advantages and disadvantages and to make reservations regarding certain chapters (for example, ISDS). He referred to the Continental Free Trade Area Agreement (CFTA) being negotiated by African countries as an alternative.

Prof. Correa recalled cases of countries that acceded to treaties after their conclusion—such as the Dominican Republic's accession to the Central American Free Trade Agreement (CAFTA). Acknowledging cases where developing countries were successful in renegotiating aspects of certain chapters, he cautioned against relying on transition periods tailored for different countries, as these periods by themselves would not resolve the underlying issues.

Ms. Abebe questioned what Indonesia would gain from joining the TPP and why it would join an agreement with ISDS. She questioned the rationale of bargaining for market access and trade preferences by giving away the right to regulate. She expressed doubt as to Indonesia's leverage to renegotiate what had been agreed, and worried that Indonesia might have to take the agreement as it stood, or even give more concessions to be able to accede to it.

Bringing the discussions to a higher level, **Mr. Mann** asked panelists about the role of different sets of principles: the G20 Principles and the draft South–South Principles.

Mr. Mathate acknowledged the critical importance of developing South–South Principles in igniting debate on right to regulate and sustainable development, and expressed his aspiration that someday, these non-binding principles would become binding commitments. He also saw these principles influencing the debate in various forums dealing with investment. He commended the draft South–South Principles for their emphasis on the issue of policy space, and welcomed more debate on investor obligations.

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Prof. Correa concurred on the importance of a set of South–South Principles. Acknowledging the G20 Principles contained interesting elements, including the recognition of a right to regulate, he cautioned that other questionable premises and concepts expressed in the G20 Principles might not be the desirable approach or framework for developing countries. He further cautioned that bringing investment into the WTO would allow forum shopping between mechanisms under BITs and the WTO. He also regarded the WTO Agreement on Trade-Related Investment Measures (TRIMs) as problematic in that it narrows down the scope for industrial policy.

Considering there was no defined space for investment discussions, **Ms. Abebe** saw the draft South–South Principles as a precious opportunity for developing countries to express their voice. Although the G20 Principles contained some progressive elements on sustainable development, she felt the effort had not gone far enough. She suggested that developing country members of the G20 could push for further development of the G20 Principles as well as take the lead in ensuring that the draft South–South Principles could cover the missing aspects.

Mr. Yuwono saw the useful guidance the non-binding principles could offer to developing countries in investment negotiations.

Mr. Mann invited comments on balancing the negotiations with respect to environment, trade and development, and on the areas that developing countries should emphasize at the regional and multilateral levels.

Prof. Correa commented that development negotiations generated some soft-law instruments such as declarations relating to financial issues and debt, but lacked binding resolutions. He also questioned the assumption that increasing trade necessarily leads to economic growth and social development.

Ms. Abebe stressed the importance of performance requirements for developing countries, and the importance for them to identify the ingredients needed to drive their development objectives. She suggested that countries should focus on domestic regulations and development strategies before moving to multilateral negotiations.

Mr. Yuwono concurred with Ms. Abebe, adding the importance of looking at the linkages between economic and environmental agreements and their relationship to national policies.

Mr. Mathate commented on the importance of conducting internal analyses prior to negotiations to ensure that intended goals could be achieved. He stressed that having domestic legislation regarding developmental issues would strengthen a country's negotiating position, giving it security to leave the negotiation when interests are not in line with the country's priorities.

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Finally, **Mr. Mann** invited panelists to comment on the value of mega-regionals and whether they offered substantial benefits that justify the policy space issues arising from them.

Mr. Correa addressed the reality from the perspective of trade negotiations. He noted that certain negotiating teams lacked information and expertise, while others are very competent. In addition, even negotiators who knew their red lines and refused to negotiate against their national interest would often give in to political pressures to sign an agreement. He further added that asymmetries in bargaining power of the negotiating parties played a very important role.

Mr. Yuwono seconded Mr. Correa's points on bargaining power asymmetries and the need for capacity building. He also highlighted the need to take into account the detrimental effects of signing a treaty, the exposure to claims and the price tag of maintaining one's policy space.

Ms. Abebe noted that since developing countries now understood better the implications of the agreements, those days when signing a BIT was considered a major political achievement were coming to an end. She said the Forum was an opportunity to learn and translate other countries' experience and knowledge into policies.

Mr. Mathate stressed the need for research and stakeholder consultation at the domestic level before entering negotiations at the international level.

Some negotiator participants also seconded that due to domestic political pressure, they often did not have a choice and were forced to join treaty negotiations without a proper cost-benefit assessment, and that some negotiating teams did not even have a clear idea of the relationship between ISDS and the undertakings in trade and investment agreements.

BREAK-OUT SESSION 1: THE ROLE AND EMERGENCE OF PRINCIPLES ON INVESTMENT

Ms. Bernasconi (IISD) set the context for the first break-out session by recapping the process of the adoption of the G20 Principles, as well as the background that led to the preliminary draft of the South-South Principles (see Annex 1), and invited participants to engage in group discussions focusing on the following three questions:

1. What do you think were the goals behind the G20 Principles, and what do they mean for developing and emerging economies?

Participants recognized that the G20 Principles were aimed at facilitating investment flows for sustainable development under a stable and predictable environment, as well as achieving common grounds between states to take into account domestic policies, balancing FDI flows between developing countries and ensuring states' ability to regulate corporate behaviour. Some participants opposed the idea of ensuring broad coherence at the international and regional levels. Commending

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the reference to sustainable development in the preamble of the principles, some expressed concern about the potential burden imposed on developing countries when reading the principles on investment facilitation. Others had concerns with the potential limitation of policy space that the principles may entail from a developing country perspective. Noting the non-binding nature of the principles, participants cautioned that they would become too intrusive if incorporated into or interpreted as binding commitments. There was a general understanding among the participants that, while the principles tried to strike a balance by providing useful guidance, there was still room for states to go further, and that developing countries should be more proactive when negotiating agreements.

2. Given the current landscape, how relevant and important is it for developing and emerging economies to have a concerted voice on international investment for sustainable development, for example in the form of a set of non-binding South–South Principles? What would be the overarching objectives of such principles coming from developing countries?

Participants emphasized that it was crucial for developing and emerging economies to develop a common understanding on investment and sustainable development, to provide guidance for investment policy-making, to strengthen the negotiating positions of developing countries, and to engage all stakeholders with a view to harnessing and maximizing the positive contribution of high-quality productive investment to advance sustainable development. Others added that the policy framework for foreign investment should be based on the needs of developing countries, taking into account their different stages and strategies of development. Participants also mentioned that the principles should rebalance obligations between states and investors, by explicitly calling for investor obligations, aligning with the SDGs and reaffirming states' right to regulate through domestic law.

3. Does the zero draft of the South–South Principles cover the issues desired? Are there issues missing? Should some issues be deleted?

While expressing general agreement that the zero draft covers the issues desired, participants noted several areas that could be further improved. Participants commended the attempt of the draft to address the particular circumstances of least-developed countries (LDCs) in Principle 3, and suggested adding references to selected SDGs such as poverty eradication. Others sought to clarify the meaning of the expression “disguised protectionist measures” in Principle 4. Some suggested including language in Principle 5 calling for unconditional respect for human rights. Regarding Principle 7, participants sought clarification on the types of legal standards that may not be lowered as incentives to attract investment, and requested a specific mention to human health standards in this context. Participants also commended Principles 9 and 10, which acknowledge the shortcomings of the ISDS regime, and, in this context, suggested a recognition of the importance of intra- and inter-regional mechanisms for the settlement of investment disputes. Participants gave

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ideas on additional principles, such as the non-use of natural resources to the detriment of future generations, and the need to reinforce cooperation between home and host states.

SESSION 3: NEW DIMENSIONS IN INTERNATIONAL INVESTMENT NEGOTIATIONS: INVESTOR OBLIGATIONS

Mr. Yuwono (Indonesia) moderated the session, which elaborated on the new approaches to investor obligations and responsible business conduct, including bribery and corruption.

Ms. Ononaiwu (CARICOM Secretariat) examined the provisions governing investor behaviour in the CARIFORUM–EU Economic Partnership Agreement (CEPA) and those under consideration in the draft CARICOM Template for Investment Chapters in external trade agreements. With respect to the CEPA, she highlighted the parties' obligations to ensure that investors conform to certain standards of behaviour and the prohibition on the encouragement of FDI through lowering domestic environmental, labour and other standards. She also reviewed the provisions in the draft CARICOM Template on the behaviour of investors and maintenance of standards. In particular, she noted that the draft template imposes directly on investors obligations to comply with certain standards, allows host states to bring counterclaims in respect of investors' non-compliance, and conditions the initiation of arbitration on the investor's consent to those obligations and their consent to arbitrate counterclaims. Finally, she suggested that, when negotiating investor obligations, countries should assess how prescriptive they wish to be and that agreements should incorporate mechanisms to make those obligations effective.

Mr. Barrack Ndegwa (Regional Integration Secretary, State Department of East African Affairs, Kenya) presented the East African Community (EAC)'s approach and its perspective on investor obligations. Approached by developed countries to negotiate investment agreements, the EAC started to think about the issues and developed the EAC Investment Model as a reference for its member states. The model includes articles on compliance with domestic laws, obligations against corruption, provision of information, investor liability, and transparency of contracts and payments.

Prof. Mbengue (University of Geneva) noted that although African states were often presented as rule-takers, they had been innovative in terms of incorporating investor obligations into IIAs. First, he pointed to the approach followed by the Southern African Development Community (SADC), which adopted a model investment agreement for sustainable development in 2012. He noted that this was the first model to explicitly incorporate investor obligations. He referred to the Pan-African Investment Code (PAIC) as a second approach, which includes investor obligations as well as enforcement mechanisms.

Prof. Correa (South Centre) recalled the asymmetries in traditional investment treaties, in which only states had obligations, and the difficulties for individuals and communities harmed by human rights and environmental violations to seek redress against foreign investors. He then noted that,

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to address this gap, Human Rights Council resolution 26/9 of 2014 mandated the negotiation of a legally binding instrument to ensure that transnational corporations can be held accountable for abusing human rights. He suggested that the future instrument should encompass principles of limited liability (shareholders' limited liability for the acts of the company) and separate entities (subsidiary as separate from the parent company).

Mr. Masaldan (India) also addressed the asymmetry between investor rights and obligations from India's perspective, referring to its own experience with the Bhopal disaster. He mentioned that India incorporated investor obligations in its recent model, which included a chapter specifically devoted to investor obligations, mandating compliance with domestic laws and corporate social responsibility, and prohibited bribery and corruption. He indicated that the model also encompassed labour, environmental, human rights, community relations and other issues.

Some participants followed up on the possibility for states to bring counterclaims, and asked whether this could be triggered by a contract breach. In response, **Ms. Ononaiwu** noted that one of the jurisdictional requirements for counterclaims under the ICSID Convention is that counterclaims must arise directly from the subject matter of the dispute, which could limit the state's ability to bring a counterclaim. Others noted that states should have the ability to bring claims, not just react to claims initiated by investors. In this regard, some referred to the CCIA Agreement as an example where the state could initiate a claim against the investor before the COMESA Court of Justice. **Prof. Mbengue** recalled that the SADC model also provides for counterclaims, and suggested that, in order to make a counterclaim feasible, attention should be paid to jurisdictional clause to ensure broad coverage of investment-related disputes (encompassing both treaty and contract claims).

Day 2: Tuesday, November 8, 2016

SESSION 4: AN ANATOMY OF INVESTOR OBLIGATIONS: CONCEPTS, CASE LAW

Prof. Mbengue (University of Geneva) facilitated the in-depth debate on investor obligations, looking at case law and discussing different options as to how to incorporate them into frameworks governing investment.

Mr. Mann (IISD) presented on concepts and cases involving investor obligations. First, he pointed to many treaties that require investments to be made "in accordance with the law," which tribunals have interpreted to cover corruption, fraud and deception, but could potentially cover environmental, financing and other issues. He stressed the importance of determining whether even small and inconsequential mistakes disqualify the investment: in some cases, the breaches were a matter of international public order and deprived the tribunals of jurisdiction, but other tribunals

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regarded the breaches as trivial and part of doing business. He also discussed the issue of whether international law should recognize the illegality of the contract or rehabilitate its existence. He then presented text from the CETA and the draft revised COMESA CCIA Agreement, both including provisions prohibiting corrupt investors from resorting to ISDS. Referring to the treaties such as the 1980 Arab Investment Agreement as well as case law, Mr. Mann noted that tribunals have understood investor obligations to matter during the investment. Investor obligations during the investment were traditionally not present in Western, African and Asian treaties, but are now being included in comprehensive economic treaties such as the CETA, as well as in the PAIC, the draft revised COMESA CCIA Agreement and the SADC model. Turning to the enforcement issue, he explained that investor obligations can be enforced by the government (through means such as their incorporation into domestic law, termination of contracts and counterclaims in arbitrations) or, in more limited circumstances, by other actors. Post-investment obligations could also be included in investment agreements, particularly for certain sectors, such as mining. Finally, Mr. Mann discussed how to ensure investor liability for damages through domestic civil remedies in the home state or in the host state.

Mr. Pablo Menacho (Director General, Legal Defense, Office of the Attorney General, Bolivia) presented Bolivia's experience in changing its legal framework to impose more obligations on investors. He explained that Bolivia, after a period characterized by privatizations and major social unrest in the early 2000s, withdrew from ICSID, renationalized natural resources, and restructured the regulatory framework on investment around key domestic legal instruments. Mr. Menacho stressed that most re-nationalizations were settled, and that, despite the changes, Bolivia has experienced an increase in FDI inflows.

Mr. García (Colombia) raised the legal issues related to imposing investor obligations in an international treaty: as an agreement between the states, it may be difficult to initiate claims against investors who were not part of the original deal. He noted that, while Colombia favours including investor obligations in treaties, as this might be useful for the assessment of damages, the country considered that it would not necessarily prevent cases from going to the merits phase or reducing arbitration costs. Putting emphasis on dispute prevention, Mr. García showcased the denial-of-benefits clause in the Colombian model as a means to enforce investor obligations, preventing the initiation of ISDS cases in certain instances based on investor behaviour.

Mr. Carlos Andrés Sevilla Albornoz (Senior Analyst of Regulations and Settlement of International Disputes of the Ministry of Trade, Ecuador) noted that, suffering from devastating environmental damage caused by transnational corporations, Ecuador had made it a mandatory requirement for foreign investors to comply with and to accept Ecuadorian laws, including the use of clean technologies and the polluter-pays principle. He explained that Ecuador had stopped negotiating BITs and had constitutionally rejected settling investment disputes through international arbitrations. In addition, Ecuador was in the process of adopting domestic regulations

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on foreign investment and public–private partnerships. Mr. Sevilla also emphasized the need to conclude an international binding treaty on human rights applicable to private entities.

Participants shared the experiences in their countries in reviewing, renegotiating and terminating BITs that encroach on policy space, replacing them with domestic legislation on responsible business conduct and corporate governance in order to balance investor rights and obligations and ensuring the optimal use of natural resources. Furthermore, participants stressed that environmental, labour and Indigenous Peoples’ rights cannot be relaxed to attract foreign investment. Participants expressed that the presentation by the panelists underscored the importance of putting in place instruments that empower local peoples to have a voice and participate in global value chains in order to prevent social unrest.

Referring to some of the treaties referenced by Mr. Mann, participants questioned whether a state could make reference to an international instrument in an investor–state arbitration even if it was not a party to that particular instrument. **Prof. Mbengue** noted that, although certain investment tribunals have failed to consider international human rights law instruments, their applicability is clear from public an international law perspective.

Participants also questioned whether Bolivia’s process of nationalizing resources affected the country’s capacity to attract investment. **Mr. Menacho** replied that his country did not experience any reduction in its capacity to attract FDI. Instead, after the reform was completed, in 2014, Bolivia received a record inflow of FDI. In his assessment, three domestic laws enacted as a result of the reform—the law on investment promotion, the law on state-owned companies, and the law on conciliation and arbitration—helped maintain Bolivia’s attractiveness for FDI.

Responding to questions posed by Mr. Mann, **Mr. García** clarified that it is necessary to define the thresholds for denial of benefits and ensure that the clause was not abused. The trigger for such denial should only be serious human rights violations, environmental damages, money laundering or acts of corruption, among others. Noting that decisions rendered by judicial or administrative authorities of the home or host state and by international human rights courts should be given weight in this determination, he cautioned that arbitrators should not be empowered to become human rights or criminal judges.

BREAK-OUT SESSION 2: SETTLEMENT OF INVESTMENT-RELATED DISPUTES

In this break-out session participants worked in groups to discuss different national, regional and international remedies available to different stakeholders in a given fictitious case.

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SESSION 5: RE-DESIGNING INVESTMENT-RELATED DISPUTE SETTLEMENT – POSSIBILITY OF A MULTILATERAL MECHANISM

Ms. Ononaiwu (CARICOM Secretariat) moderated the session, focusing on existing and alternative investor–state dispute settlement mechanisms.

Prof. Sornarajah (National University of Singapore) questioned the legitimacy of resorting to international arbitration as a means to resolve investment disputes. Arbitral tribunals had offered expansive interpretations on the scope and nature of investment protection standards, particularly fair and equitable treatment (FET) and indirect expropriation, and had produced rules that states never intended to create. Even when states prevailed in a case, they would have to spend significant resources in legal defense. One type of reaction of states to this legitimacy crisis, he noted, was to withdraw altogether from arbitration and ICSID; others have refused to negotiate treaties with ISDS clauses, and a third reaction was to carve out certain areas from ISDS. Prof. Sornarajah raised serious doubt on the EU proposal of an investment court system (ICS), noting that this approach would be more likely to result in a system of precedents.

Ms. Bernasconi (IISD) provided an overview of possible options to settle investment-related disputes at the multilateral level, including investor–state, state–state and multistakeholder. These could be structured as arbitrations or as judicial proceedings, and could be subject to appeal or not. Exclusive access to national courts and special mechanisms at the domestic level (such as ombudsmen and bilateral committees) could also be options. She then turned to the EU proposal to establish an investment court system, which moves ISDS from an arbitration model to a more judicial one. She noted that the proposed investment court system departed from party-appointed arbitrators, strengthened ethical standards and introduced an appeals process, thereby addressing some of the most important criticisms of the investor–state arbitration system. At the same time, she pointed to the fact that the EU proposal continued to allow only a single group of actors— foreign investors—to access international justice, by circumventing domestic legal systems—an issue of continued contention in Europe. She concluded in noting that, as discussions on a multilateral mechanism have already begun in the CETA context and in the United Nations Commission on International Trade Law (UNCITRAL), states should engage in the discussions and track the process closely to ensure they were well informed and consulted on the development.

Mr. Kalonji (COMESA Secretariat) presented the restructured dispute settlement provisions of the COMESA CCIA Agreement. The agreement offered four options to resolve disputes, and accorded great importance to mediation and negotiation. An inter-ministerial committee would intervene in disputes at the administrative stage. Local courts were also among the options envisaged. He explained that, upon showing that domestic courts were not a reasonable possibility, the agreement allowed the investor to bypass them and resort to the COMESA Court of Justice or,

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upon the specific written consent of the disputing parties, to submit the dispute to international arbitration. Another option was to resort to one of the African arbitral institutions. **Mr. Mutombo** also announced that the COMESA Court of Justice was being restructured to be able to sit as an arbitration tribunal, offering a roster of arbitrators.

Ms. Tania Arias Manzano (Legal Director, UNASUR Secretariat) introduced the work of the UNASUR High-Level Working Group on the settlement of investment disputes, in particular, a draft agreement to create a specialized, independent and impartial dispute resolution centre, including facilitation, conciliation and arbitration services. The draft agreement proposed that UNASUR member states must grant their prior express consent to submit to the jurisdiction of the institution. Ms. Arias Manzano noted that agreement had been reached with respect to a significant majority of the texts, and that only seven articles were still in consultation.

Participants discussed practical aspects of how an investment court could function in the context of a mega-regional agreement, and debated whether and how it could be multilateralized at a later stage. Participants stressed the need to look beyond a regime limited to investors against states, and suggested that a desirable mechanism should be open to different stakeholders, such as Indigenous communities affected by investment activities, and holding transnational corporations liable for human rights violations rather than just claims based on investment treaties or contracts. Furthermore, participants cautioned that due attention must be given to the composition of any court, ensuring broad geographical representation.

Questions were also raised regarding the possibility of establishing a multilateral dispute settlement mechanism for investment without first establishing substantive rules on investment. Participants expressed that changing the dispute settlement process was an essential but not sufficient element to change the outcomes, unless rights and obligations of all actors were also improved. **Prof. Sornarajah** cautioned that a multilateral court would be dangerous and detrimental to the interests of developing countries, as it would develop substantive rules on investment, which should rather be negotiated by states.

Participants also discussed the idea of establishing an appellate mechanism, whether ad hoc or permanent, and questioned whether the idea would be well accepted by investors. **Ms. Bernasconi** noted there had been some negative reactions from the industry, mainly criticizing the extra costs and time linked to the appellate proceeding. Nevertheless, the existence of such an appellate mechanism would in general bring more certainty to the regime. **Prof. Sornarajah**, in turn, cautioned that an appellate mechanism presupposes that the current regime works, which is not the case with investment disputes. Participants questioned who would be the members on an appellate body (whether the same arbitrators or judges, or others). Some participants suggested that having two separate courts might not be necessary; instead, the same court could have a first instance and an appellate chamber.

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BREAK-OUT SESSION 3: INVESTOR OBLIGATIONS IN THE DRAFT SOUTH–SOUTH PRINCIPLES

During this break-out session, participants were invited to analyze in greater depth the elements of the draft South–South Principles (see Annex 1) concerning investor obligations, and to suggest specific language improvements. Comments raised by participants tended to focus on the following areas:

- More express reference of human rights obligations in the principles
- Further balancing the rights and obligations of both states and investors
- Ensuring the social implications of the investment policy-makings are considered together with their environmental implications
- Enhancing the enforcement of investor obligations
- Further exploring meaningful remedies for victims

In addition, participants also generally requested broadening the scope of the principles and placing greater emphasis on certain concepts, such as state sovereignty, sustainable development, socially and environmentally responsible development, spiritually considerate development, respect for government philosophy, future generations, local participation and cooperative relationships with domestic companies. Other suggestions also included replacing references to “must” with “should” considering the non-binding nature of the instrument.

Day 3: Wednesday, November 9, 2016

SESSION 6: PROMOTING AND FACILITATING INVESTMENTS FOR SUSTAINABLE DEVELOPMENT

Ms. Abebe (Commonwealth Secretariat) moderated the discussions on how to maximize the positive contributions of private investments when promoting and facilitating investments.

Mr. Montes (South Centre) questioned whether standard investor protections were consistent and compatible with the SDGs and the Paris Agreement on climate change, as well as their relation to industrial policy, arguing that BITs including ISDS hindered rather than advanced sustainable development. He considered that BITs and other agreements such as the TPP restricted performance requirements, thereby denying states’ access to industrial policy tools that are fundamental to achieving sustainable development in specific sectors and regions and to reducing greenhouse gas emissions.

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Ms. Tuerk (UNCTAD) suggested that investment facilitation—making it easier for investors to establish and conduct their investment—could help address the gaps in productive investment needed for achieving the SDGs. Among the key components of facilitation were transparency, predictability in rule-making and application, efficiency in regulatory procedures, stakeholder engagement with local communities and affected communities, and provision of services to investors once established (aftercare). Ms. Tuerk presented the UNCTAD Global Action Menu for Investment Facilitation, launched in January 2016. She explained that the tool grouped together issues related to facilitation in 10 non-binding action lines and more than 40 options for countries to adapt as they wish and adopt for their national, regional and international policy needs.

Mr. Martins (Brazil) presented the investment promotion, facilitation and cooperation elements of Brazil's CFIA, as Brazil prioritized its efforts on improving the business environment to attract high-quality FDI. The Focal Points or Ombudsmen, the Joint Committee and the provisions on information exchange were the main facilitation elements of the CFIA model. Mr. Martins announced that Brazil had now established its Ombudsman, which would make it easier for foreign investors to address specific concerns and to find answers to their questions about regulation once the CFIA comes into force.

Discussing what the incentive would be to advance the facilitation model in countries that already have traditional BITs in force, it was noted that investment facilitation may prove to be a viable long-term alternative to BITs. Participants also debated how far governments could go with the promotion and facilitation of foreign investment without discriminating against domestic investors. At the same time, it was noted that many of UNCTAD's Action Lines would benefit both foreign and domestic investors. While investment promotion can yield positive results if the sectors to be promoted are carefully chosen, it was also noted that foreign investors tended to require more imports and that, in the long run, they repatriate the original investment. The potential result is a lower impact on the domestic economy than that of measures aimed at domestic investors.

BREAK-OUT SESSION 4: INVESTMENT FACILITATION AND LIBERALIZATION IN THE DRAFT SOUTH–SOUTH PRINCIPLES

In the fourth break-out session participants analyzed the investment facilitation and liberalization elements of the G20 and the draft South–South Principles (see Annex 1) and suggested specific language improvements.

Participants reconfirmed states' right and policy space to determine their desired level of liberalization in light of their economic circumstances, in line with their domestic development strategies, and within their capacity and level of development. Opposing the "open-ended" approach adopted in the G20 Principles, participants generally favoured including a response in the draft South–South Principles to the effect that states would focus instead on those foreign investments that contribute positively to their sustainable development. Instead of the reference to "openness"

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in conditions for investment, as phrased in the G20 Principle No. II, participants suggested emphasizing cooperation and collaboration. Participants further suggested language to ensure balance between access to markets and the SDGs, which may require market access restrictions.

Regarding policies to enhance cooperation on the promotion and facilitation of investment, participants suggested adding to the existing draft language on the need to consider existing international commitments, the SDGs and priority areas of interest to individual countries. Express references to transparency and stakeholder engagement in the policy-making process were also suggested. In addition, some suggested that exchange of information, experience and capacity-building could also be listed as specific areas of cooperation. Participants urged developed economies to adopt measures to encourage their companies to invest in developing countries. Participants also supported the idea that states should move forward in harmonizing regional investment policies within different regions. Others suggested enumerating the difference between promotion and facilitation, and cautioned against the risk of a race to the bottom as a result of promotion measures, such as fiscal incentives. Furthermore, participants generally agreed to incorporate into the draft South–South Principles the language of Principle VII of the G20 Principles, but without the reference to “effective and efficient” policies.

SESSION 7A: SOUTH–SOUTH COOPERATION ON INVESTMENT FOR SUSTAINABLE DEVELOPMENT

Ms. Bernasconi (IISD) moderated this panel discussion focused on the need, possibility and modality of enhancing South–South cooperation for a comprehensive reform of the investment regime, and explored the role of different forums and platforms for South–South cooperation.

Ms. Anisong Soralump (Chief, International Investment Agreements Section, Department of International Economic Affairs, Ministry of Foreign Affairs, Thailand) expressed Thailand’s support to the draft South–South Principles as a concerted effort to foster quality investment for the SDG agenda. In view of countries’ different approaches to investment treaties, effective coordination and consultation was needed to ensure that they work in tandem with and enable the implementation of national development agendas. She also highlighted the need to work in partnership and transparently with the private sector and civil society to advance the SDGs. As more developing countries became capital exporters, they had greater responsibility, and should encourage investors to adopt CSR standards abroad.

Mr. Mathate (South Africa) also referred to the need to ensure that the SDG agenda was at the forefront of the investment policy agenda. Considering that these issues were not clearly articulated in the G20 Principles, as countries had to compromise on some points, and that the debate in the G20 was finalized, a set of South–South Principles would be the best alternative for like-minded developing countries to ensure that sustainable development, the right to regulate and policy issues were brought to the table. He also expressed hope that, with the passing of time, the South-South

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Principles could be crystallized in hard law, achieving more balance between host states and investors, as well as setting the tone for the way forward in African initiatives.

Mr. Martins (Brazil) highlighted that cooperation was a fundamental aspect of Brazil's model in response to the problems caused by the adversarial, non-cooperative approach of traditional BITs. He reckoned that the draft South–South Principles were in line with Brazil's model—particularly with respect to balancing the rights and obligations of states and investors, transparency, dialogue and cooperation among states) and offered Brazil's support in the process. Beyond the inclusion of cooperation mechanisms and clauses in IIAs, Brazil also considered cooperation through benchmarking in international organizations and forums, such as UNCTAD, the G20 and the Annual Forum of Developing Country Investment Negotiators Forum. This approach had helped Brazil, which benefited from inputs from previous forums, and could help others.

Mr. Sevilla (Ecuador) commended the timeliness of the discussions on a set of South–South Principles. He noted that, as currently drafted, the principles were in alignment with Ecuador's investment policy objectives, particularly regarding sustainable development. He stressed that Ecuador's domestic law specifically supports sustainable development and the need for FDI to promote it. The draft principles addressed many of Ecuador's investment-related concerns, as they recognized the need to reform ISDS, promote stakeholder participation and safeguard the right to regulate. Finally, Mr. Sevilla characterized the principles as an important instrument to guide further legislation to improve and to advance Ecuador's national development objectives.

Participants recognized the need to revisit the traditional approach to BITs and reflected on better approaches to harnessing investment for sustainable development. In this regard, they highlighted the need for a set of principles to safeguard states' inherent right to regulate. Others expressed that these principles must incorporate the views of LDCs, many of which were landlocked and constrained in resources.

Turning to the content of the draft principles, **Ms. Soralump** expressed Thailand's overall agreement with the content of the principles, and stressed the need to balance public and private interests, as well as the need to impose responsibilities on both host and home states. **Mr. Mathate** pointed to several areas where improvements would be welcome: emphasizing the balancing of rights, policy space, and equal but differentiated responsibilities in accordance with different levels of development; expanding the language on promotion and facilitation, particularly for LDCs; finding alternative wording for "disguised protectionism," as the expression read negatively; pointing to the improvement of domestic judicial systems and the acceptability of exhaustion of local remedies; and reflecting technology transfer, industrial policy and the issue of local and regional value chains in the principles. **Mr. Martins** suggested that it would be important to include in the principles some language on "risk mitigation" for the benefit of investors. **Mr. Sevilla** suggested specifying the list of legal standards that may not be lowered to attract FDI, which should include human rights and labour standards.

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Participants also commented that the principles should govern private investment generally, including both domestic and foreign investment, to prevent discrimination against domestic private sectors. Others suggested incorporating a principle of dynamic policy making to find the right regulatory approach in light of the changing framework, and to highlight the importance of national development strategies.

In terms of taking the process forward, **Mr. Sevilla** suggested that, once a more advanced copy of the draft principles were produced, efforts could be exercised to gather collective support to channel the principles to diplomatic forums such as the G77 for formal adoption. **Ms. Soralump** concurred and suggested that upon the development of an advanced draft, a resolution on the principles could be proposed at a G77 summit. **Mr. Martins** supported the circulation of the principles for consultations with other stakeholders, including inviting comments from developed economies. **Mr. Mathate** supported the idea of further elaborating and consolidating the principles for formal adoption. He reminded that, once the principles were taken to other platforms, they would be further debated and improved. He agreed that G77 is the appropriate platform in this regard.

Participants welcomed the constructive discussions on the principles during the Forum. Additional suggestions advanced included revising the title for broader global reach, elaborating detailed guidelines based on the principles for investment negotiations and producing action plans or specific recommendations based on the principles.

Recognizing the challenges in reality, in order to obtain broad support for various stakeholders, participants stressed that cooperation would be essential within regions and among developing country states. Participants urged the G20 developing country members to take the lead to push the process forward. Noting a recent EU proposal to certain African countries for a non-binding document with principles on sustainable development, participants agreed that developing countries and regions must move quickly to reach agreement on common grounds on investment for sustainable development before moving forward and negotiating with developed countries.

SESSION 7B: SOUTH–SOUTH COOPERATION AND THE ROLE OF THE NEGOTIATORS' FORUM

Mr. Mann (IISD) led a plenary discussion on the achievements of the Forum in the past 10 years and on its potential mandate in the next decade. He took stock of the successes of the Forum in raising awareness and ensuring access to continued capacity building in developing countries regarding investment treaties and negotiations, and outlined the Forum's challenge of becoming an effective agent of change in the global South.

In discussing the role of investment treaties in today's context, some participants shared that their countries continued to negotiate investment treaties because their governments are made to

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understand by their negotiating partners that foreign investment will not come into the country otherwise. Accordingly, they tried to negotiate new forms of treaties with lesser risks. One participant also mentioned that his country understood investment treaties to be a means to improve relationships with foreign investors and home states, including by establishing effective mechanisms to deal with investment-related problems.

Many participants acknowledged that the Forums have helped participating officials to learn from their peers, to gain increased knowledge on international investment law and raise awareness within countries and regions. It has also helped them to rethink and establish their positions on issues relating to foreign investment regulation, to evolve towards meeting their national development goals and agendas and to build the capacities of key negotiators. Several shared their experiences about how the Forum and IISD were instrumental in their countries' processes to prepare or revise domestic or regional investment treaty models.

While acknowledging that significant change is already taking place at the national, regional and global levels regarding foreign investment law and policy, participants acknowledged that there is a need for further change and that developing countries need a strategy for cooperation in this respect. Participants put forward several ideas on how the contribution of the Forums could be further enhanced to achieve the change needed.

They suggested the Forums should keep the current format, but suggested increasing the number of Forum participants, possibly extending invitations to parliamentarians and officials from different ministries. Participants acknowledged the significant challenge of financing Forums with broader participation.

Participants also suggested issues and research areas that future Forums could focus on: preparing analyses and country comparisons to allow countries, particularly the smallest ones, to have technical arguments about benefits and costs of concluding investment treaties; integrating new challenges (such as the SDGs) in the Forum themes; enhancing the sharing of experiences on how countries and regions are handling investors, how they feel negatively affected by investment treaties and how to harmonize investment policies within regions; and identifying how to improve investment environments in countries and regions, particularly in LDCs.

Participants also emphasized that the Forum and its co-organizers could help by building the capacity of arbitrators to limit perverse interpretations of existing investment treaties, offering continuous capacity building to allow officials to anticipate international trends and to be prepared for their impacts. The Forum could also provide advisory services for government officials during investment treaty negotiations, organizing regional intersessional meetings as experience-sharing opportunities.

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Finally, participants acknowledged the importance of the South–South Principles as a firm and united multilateral statement by developing countries on investment-related issues. These could be useful to counter models and approaches that run counter the interests of developing countries. Accordingly, participants requested that the Forum and its co-organizers continue to work on the principles and push them forward. One participant suggested preparing a detailed commentary on the principles, elaborating on them and suggesting practical measures that could be adopted to achieve them. Most participants endorsed that the principles should first be circulated for commentary and go through a multilateral drafting process, after which national and regional champions should support holding ministerial discussions with a view to their adoption by the G77, facilitated by Thailand (incumbent chair) and later by Ecuador (forthcoming chair).

CLOSING CEREMONY

Ms. Nathalie Bernasconi (IISD) and **Ms. Champika Malalgoda** (Sri Lanka) formally closed the Forum by thanking the co-organizers and co-sponsors for their support, as well as the participants for their active engagement in the discussions throughout the three-day program. They invited participants to the IISD workshop to be held the fourth day of the Forum on how to attract high-quality and sustainable agricultural investment and the role of legal frameworks, as well as the networking and cultural event.