



## **MEETING REPORT**

### **Investment Treaties in a State of Flux: Strategies and opportunities for developing countries**

#### **Executive Summary**

The Ninth Annual Forum of Developing Country Investment Negotiators was held in Rio de Janeiro, Brazil, from November 16 to 18, 2015. Co-organized by the Government of Brazil, the International Institute for Sustainable Development (IISD) and the South Centre, the Forum was attended by participants from 48 countries from Africa, Asia, and Latin America and the Caribbean, as well as international organizations. The agenda and background materials for the Forum can be found on the IISD website: [www.iisd.org/topic/investment](http://www.iisd.org/topic/investment).

The need for investment policy reform was voiced throughout the Forum. With that in mind, participants shared their countries' challenges and successes in developing, reviewing and revising national and regional investment frameworks. Participants also discussed recent investment treaty claims and arbitration outcomes, often noting the limitations imposed by investor-state dispute settlement (ISDS) on states' right to regulate in the public interest.

In keeping with this year's theme, "*Investment Treaties in a State of Flux: Strategies and opportunities for developing countries*," the participants examined the challenges and uncertainties that international investment law faces today, and assessed the implications for emerging and developing economies. Participants highlighted opportunities for countries to rethink their strategies on how to attract quality investment to promote sustainable development, and to align their international negotiating positions with their domestic law and its policy objectives. They also identified a need to improve coordination mechanisms among various government agencies in order to better design and implement reform processes. In this regard, bilateral discussions and negotiations among like-minded countries on common principles on investment were identified as offering a practical short-term solution. Meanwhile, new multilateral mechanisms could be developed and explored.

There was convergence among the participants on developing a set of principles for like-minded countries based on the discussions and recommendations emerging from this year's Forum. Participants noted that these principles would be essential for South-South cooperation and reforming the investment regime



more generally. In elaborating these principles, and inspired by UNCTAD's Core Principles for Investment Policymaking for Sustainable Development, participants identified, among other things, the importance of: acknowledging and reinforcing the linkage between investment and sustainable development; integrating foreign investment into national development strategies; placing investment treaties in a wider context on human rights and sustainable development; acknowledging the importance of a strong domestic legal framework to protect domestic and foreign investment; ensuring a balance of rights and obligations between investors and governments to regulate in the public interest; recognizing the shortcomings of the current dispute settlement system on investment; and finding alternative treaty constructions that put greater emphasis on defining responsible business practices and investment promotion and facilitation. In terms of the concrete next steps, the participants recommended that a process be established for countries to begin developing a set of principles for like-minded countries based on the discussions and recommendations that emerged that would feed into next year's Forum. Participants also agreed to deliver common messages to their governments with respect to the need to enhance *domestic* policies to attract quality FDI to supplement international policies and to promote and intensify internal discussions of South–South principles on investment at the highest level. They also intend to convey to their governments the need to exchange experiences on the prevention of international investment disputes, while at the same time encouraging them to foster South–South capacity building and dialogue between like-minded countries and to cultivate joint work programs that formally develop the principles identified at the Ninth Forum. Finally, participants committed to drawing governments' attention to the need to review investment treaty models and previously signed treaties to ensure reflection and incorporation of the principles identified.

## Introduction

The Ninth Annual Forum of Developing Country Investment Negotiators (Forum) was held in Rio de Janeiro, Brazil, from November 16 to 18, 2015. It was co-organized by the Government of Brazil, the International Institute for Sustainable Development (IISD) and the South Centre. This year's Forum was attended by participants from 48 countries from Africa, Asia, and Latin America and the Caribbean, as well as regional and international organizations, including the Commonwealth Secretariat, the Office of the Chief Trade Adviser (OCTA), the Secretariat of the Caribbean Community (CARICOM Secretariat), the United Nations Conference on Trade and Development (UNCTAD) and the West African Economic and Monetary Union (UEMOA).

The Forum builds upon the successes of the eight previous forums, held in Singapore (2007), Morocco (2008), Ecuador (2009), India (2010), Uganda (2011), Trinidad and Tobago (2012), Indonesia (2013) and Liberia/Switzerland (2014). The theme of this year's event is "Investment Treaties in a State of Flux: Strategies and opportunities for developing countries." Participants focused on the uncertainty that faces international investment law today and assessed the meaning and implications of this uncertainty for



emerging and developing economies. The agenda and background materials for the Forum can be found on the IISD website: [www.iisd.org/topic/investment](http://www.iisd.org/topic/investment).

## **DAY 1: NOVEMBER 16, 2015**

### **Opening Ceremony**

**Ms. Nathalie Bernasconi** (Group Director, Economic Law & Policy, IISD) and **Mr. Amaury Temporal** (Director, International Business Centre, Federation of the Industries of the State of Rio de Janeiro [FIRJAN]) opened the Forum, followed by speeches delivered by **Mr. Scott Vaughan** (President, IISD), **Mr. Fernando Furlan** (Executive-Secretary, Ministry of Development, Industry and Foreign Trade, Brazil), and **Mr. Carlos Correa** (Special Advisor on Trade and Intellectual Property, South Centre). Noting the important role developing countries are playing in contributing to the global inflows and outflows of foreign direct investment (FDI), **Mr. Furlan** encouraged participants to share their experiences in developing and reforming their investment policies, which might serve as a reference for possible alternative paths to the current international investment regime. **Mr. Vaughan** noted the critical importance of international investment and trade regimes in proactively advancing the Sustainable Development Goals (SDGs), emphasizing 2015 was a critical year for shaping the global development agenda for decades to come. He highlighted three priorities in developing new models of investment agreements and reforming the existing system: 1) the need to safeguard the right of countries to regulate; 2) the need to reform investment-related dispute settlement mechanisms; and 3) the need to ensure a balanced approach between investors and states. **Mr. Correa** emphasized that FDI is not a magic tool, and that countries should ensure the FDI they attracted actually contributes to their national development objectives. These messages were echoed throughout the Forum.

### **Session 1: Recent Developments and Trends in Investment Policy and Arbitration**

**Mr. Joel Richards** (Technical Advisor, Investment and Private Sector, Office of Trade Negotiations, CARICOM Secretariat) facilitated the first session on recent developments and trends in investment policy and arbitration. **Ms. Natalia Guerra** (Economic Affairs Officer, International Investment Agreements Section, Investment Policies Branch, Division on Investment and Enterprises, UNCTAD) shared with participants the key findings of the *World Investment Report 2015* (WIR). The report noted that developing countries are reshaping the map of FDI flows around the world. For the first time, developing countries and transition economies, as a group, surpassed developed countries and contributed to more than 55 per cent of global FDI inflows. Outward FDI from developing economies also reached a record high,



contributing to 35 per cent of the global share. The report also noted recent global trends in investment policy development. At the national level, compared to restrictive measures, those geared toward investment liberalization and promotion were predominant, a change of trend since 2002. At the international level, the number of newly concluded bilateral investment treaties (BITs) continues to decrease, while the conclusion of regional and mega-regional treaties and free trade agreements integrating investment provisions seems to keep pace. In addition, pre-establishment commitments are included in a growing number of investment treaties. In terms of investor–state dispute settlement (ISDS) cases, the report analyzed the publicly available data of treaty-based ISDS cases and found that most of these cases were brought by investors from developed countries against developing and transition economies. The report also identified five types of state conduct mostly commonly challenged by investors: cancellation or breaches of investment contracts (29 per cent); legislative changes (25 per cent); direct expropriation or seizure of investment (15 per cent); tax-related measures (11 per cent); refusal to grant or revocation of licenses (8 per cent); and a host state’s abusive treatment or failure to protect investment (7 per cent).

**Mr. Howard Mann** (Senior International Law Advisor, IISD) noted that the global economy is still weakening in many parts of the world. In this context, he challenged the notion of so-called “FDI-led growth,” and suggested that, instead of relying solely on foreign investment as the engine for development, developing countries should rather seek to maximize the benefits of the attracted foreign investment to promote domestic investment and development. Noting the increasing number of investment treaties with pre-establishment rights, he recommended awareness of the accompanying limitations on governments’ policy space to adopt measures for development, including the ability to use foreign investment to generate local development. Turning to the data analyzed by the WIR, he noted that a comprehensive understanding of the full picture of the impact of the ISDS cases requires distinguishing between the jurisdictional decisions on the one hand and decisions on merits on the other. He indicated that investors usually face a very low bar at the jurisdictional phase and are also more likely to win against the host state once the case proceeds beyond that phase. According to Mr. Mann, this partly contributed to the regulatory chilling effect of international investment arbitrations that many have noted.

**Mr. Manuel Montes** (Senior Advisor, Finance and Development, South Centre) noted that studies have shown that without a properly balanced investment framework foreign investment has an adverse impact on local economies. He pointed to the book *Investment Treaties: Views and experiences of developing countries* (which was launched in Rio during the Forum) which suggested that even with standard bricks-and-mortar investments, the hoped-for positive net foreign exchange inflow in the immediate period is very unlikely. The problem is made worse by the fact that a large percentage of current foreign investments are portfolio investments, whose net positive impact in any particular country at any time is highly uncertain. In an October 2015 analysis, the International Monetary Fund itself indicated that for the year 2015 it expects net portfolio inflows to be negative to developing countries as whole. As a result,



curing the imbalance between investor rights and state obligations should be an essential component of any plans for reforming the existing investment policy framework. He noted that some of the reform plans raised so far—including the investment court proposal recently put forward by the European Commission—seem only cosmetic. By contrast, he commended Brazil for its recently developed investment treaty model, calling it an essential reform to the existing international investment regime.

Participants then discussed the challenges posed by survival clauses in existing investment treaties as well as the challenges arising from the multiplicity of agreements between states. Participants explored various technical options and proposals to address these challenges, including the negotiation of amendments to exclude survival clauses prior to terminating treaties and the negotiation of provisions in new regional treaty negotiations to terminate all previous existing investment treaties. It was cautioned that countries should not renounce or refrain from carrying out reform actions for fear of potential preliminary reactions of some states. It was also noted that more treaties and more detailed provisions do not necessarily lead to better results. The focus should be placed on a development-based analysis, that is, whether the provisions contained in the treaty promote and lead to development. Participants also discussed the prospects of promoting financial centres in developing countries, as well as enhancing cooperation among developing countries to increase the prospects of South–South investment flows. It was noted that, although intensified regional cooperation can play an important role, a more critical prerequisite is to establish a sound domestic investment framework, which should be tailored to each country’s specific development needs.

## **Session 2: Recent Developments in Investment Policy and Dispute Settlement: Sharing of Experiences**

**Ms. Champika Malalgoda** (Director, Research and Policy Advocacy, Board of Investment, Sri Lanka) chaired the session in which individual countries shared their experiences over the past year regarding new investment treaty claims or arbitral outcomes. Speakers also provided insights into negotiating experiences and efforts to develop new model investment treaty templates.

**Mr. Ashish Kumar** (Senior Development Officer, IC & IP [Asia-Oceania region]), Department of Industrial Policy and Promotion, Ministry of Commerce and Industry, India) provided a brief overview of India’s investment treaty policy over the past years, stating that India started signing BITs in 1994 in hopes of attracting FDI and especially foreign exchange. Earlier BITs mostly used texts proposed by developed countries. The adverse consequences did not appear until recent years, when investors challenged India in international arbitrations for alleged breaches of treaty obligations. In order to address these consequences, India began the process of revising its BIT model after the Fourth Forum, which took place in India in 2010. A revised draft investment treaty model is under the process of finalization, but a few



challenges still remain, such as the question of how to receive the desired benefits of the revised model; how to rescind existing BITs and how to deal with relevant investment chapters in integrated trade agreements as well as the multiplicity of such agreements.

**Mr. Fredy Trujillo** (Coordinator, New Financial Architecture, Ministry of Foreign Affairs and Human Mobility, Ecuador) introduced Ecuador's achievements in its policy for development-oriented investments, based on the Constitution of the Republic and a public-private normative framework in which the action of domestic and regional courts on the matter of investor-state disputes is reaffirmed. However, he referred to the lessons learned from the findings of the Commission for the Integral Citizen Audit of the Treaties for the Reciprocal Protection of Investments and of the International Investment Arbitration System (in Spanish, *Comisión para la Auditoría Integral Ciudadana de los Tratados de Protección Recíproca de Inversiones y del Sistema de Arbitraje Internacional en Materia de Inversiones* [CAITISA]), a commission created by presidential decree to audit each of the BITs signed by Ecuador. In this context, he maintained that not every investment made in the country has led to development, and that in some cases the resources brought to the country under the rubric of investment are lower than the resources that leave the country, causing imbalances in the external sector. He explained that the attraction of FDI through BITs has been mostly damaging to the public interest and to state sovereignty, as evidenced in the cases currently defended by the country against transnational oil companies. It could also be demonstrated that BITs have not been determining factors in attracting FDI—the biggest investors in Ecuador are from Mexico and Brazil, countries with which Ecuador did not sign BITs. Under the conventional format of BITs, there has been low transfer of technology assets. Finally, he noted the shortcomings of the international arbitration system in terms of conflicts of interest and affirmed the need for urgent reform.

**Ms. Niki Kruger** (Chief Director, Trade Negotiations, International Trade and Economic Development Division, South Africa) introduced the background and priorities for South Africa's investment policy review and reform process. She introduced key features of South Africa's draft investment bill, which is currently under deliberation in congress, noting the importance of a sound national legal framework when implementing reform actions.

**Mr. Moataz Hussein** (International Investment Agreements Officer, General Authority for Investment & Free Zones, Egypt) introduced Egypt's approach to reforming its BIT negotiations and revising its BIT model, emphasizing the importance of tailoring the BITs to Egypt's development objectives at national and international levels. Mr. Hussein expects the launch of the revised BIT model after its adoption in 2016 to kick off Egypt's process to renegotiate and revise the substantive content and language of some of its existing investment treaties that do not fit Egypt's development objectives.

**Ms. Mariana Lozza** (National Directorate of International Affairs and Disputes, National Treasury's Attorney-General's Office, Argentina) shared the country's continued struggle in an attempt to understand



one of the most commonly examined clauses in ISDS—the fair and equitable treatment (FET) clauses. Drawing mainly from the *El Paso v. Argentina* decision rendered by an arbitral tribunal in 2011, she demonstrated how the current international investment governance regime allows private arbitrators to create laws at international and domestic levels, seriously limiting the host state’s power to regulate matters relating to public interest.

Some participants expressed concern about potential reactions from the international community on their reform agenda. Countries with experience noted that, although there might be some reaction from other governments upon the announcement of investment regime reforms, once the reforms were actually carried out, investors’ reactions were mostly very positive. This reaffirms the understanding that there is no correlation between signing investment treaties and receiving foreign investment. Participants noted that in practice very few investors base their decisions to invest on the existence of an investment treaty between the home and state states; rather, the decision is usually dominated by economic considerations. Participants also discussed the need to impose certain performance requirements on investors in order to achieve a country’s development objectives. As a result, it was noted that it is important to preserve policy space for the government to implement these requirements and to communicate clearly with investors on government’s expectations.

## **Breakout Session 1: Case studies: Selected arbitration cases**

**Mr. Howard Mann** (IISD) introduced the decision recently rendered by an arbitral tribunal in *Clayton v. Canada (Bilcon decision)*, where a group of U.S. investors submitted claims to an international arbitral tribunal against Canada on its decision not to issue relevant permits and authorizations necessary for these investors to carry out their project to develop a quarry and marine terminal in the Province of Nova Scotia. The tribunal found Canada in breach of its obligations under the North American Free Trade Agreement (NAFTA). Mr. Mann focused on the tribunal’s interpretation of the FET clause in NAFTA and its potential impact, including to potentially accelerate the scope for arbitrators to expand FET even further. Participants were asked to break into groups to discuss the potential impact of the *Bilcon* decision on their countries’ investment approval process.

Participants shared experiences from their individual countries. Although many countries have one-stop services assisting investors, most countries still carry out multi-stage investment approval processes involving multiple government agencies, all entrusted with approving investments in accordance with national laws. In certain countries, the exact approval processes of each particular project may differ according to the nature and scale of investments. In general, however, all projects are subject to environmental impact assessments, which are usually carried out and enforced by environmental agencies; some also require social impact assessments. These impact assessments are prerequisites to obtaining investment approval in some countries, failure of which would generally result in the



disapproval of the investment. In other countries, investment approval is granted prior to (but also subject to) a successful impact assessment, and failure to pass the assessment would result in the revocation of any licenses granted.

Participants further noted that, in many countries, the roles and powers of investment promotion agencies cover only the pre-establishment phase, while in others they extend to post-establishment. Some agencies are responsible for designing national policies for FDIs, some are responsible for determining incentives for specific investments, and others are more focused on investment facilitation and on coordination among different government agencies. In some countries these roles and powers are carried out by private agencies upon the authorization of the government.

Participants generally acknowledged that investment agencies tend to use encouraging statements in order to attract investment. Under the *Bilcon* tribunal approach, this could be interpreted as creating expectations for potential investors, making aspirational expressions into binding promises, thereby creating international obligations on host states. However, by making it clear to the investor either through national legislation or other contractual arrangement that they have a duty of due diligence before investing in the host state, participants hope this would alleviate to a certain degree the challenges of the type raised in the *Bilcon* decision. Participants also noted that another situation that could lead to treaty breach under a *Bilcon*-type approach would be when different government agencies gave different signals in the investment approval process. In this context, participants stressed the need for better communication, coordination and transparency among different agencies.

Participants also asked whether a *Bilcon*-type scenario was only covered in treaties that grant investors pre-establishment rights. It was noted that it was unclear at what point an “investment” started to be covered and protected by a treaty. Could this be *before* permit approval? The participants also discussed whether to include pre-establishment rights. Many of the countries represented have not granted pre-establishment rights in their investment treaties. However, participants generally agreed that, if the treaty were to include pre-establishment rights, it would limit government’s policy space to impose market access limitations on certain types of investment. On the other hand, if used properly, especially with a positive-list approach, pre-establishment rights for specific investments in alignment with national development objectives could be seen as a more targeted approach in terms of investment promotion.





## **Session 3: The Politics of International Investment Law and Policy – The Clash of Models**

### **Session 3A: Implications and Impacts of Mega-Regional Trade and Investment Deals for Emerging and Developing Economies (TPP, TTIP, RCEP, TISA etc.) and the Development of New Models and Approaches**

### **Session 3B: USTR on TPP: “This is intended to be an agreement that’s a model for the rest of the world”**

**Ms. Angela Dau-Pretorius** (Deputy Director, Namibia Investment Centre, Ministry of Industrialisation, Trade and SME Development, Namibia) and **Mr. Carlos Correa** (South Centre) chaired the two sessions in the afternoon. These sessions focused on the political use of investment treaty models by the European Union, the United States, and others, and the desire of certain players to impose their models on other countries and regions. The sessions included strategic discussions about the models, especially considering that some developed countries, in the context of negotiations of mega trade blocs, aim to have a head start to win territory for their models.

Participants first looked at the development of mega-regional trade and investment deals, and discussed issues on how they are negotiated and how they relate to national and regional initiatives on investment-related treaty making. **Professor Muthucumaraswamy Sornarajah** (Professor of Law, Faculty of Law, National University of Singapore) noted that the United States has always been the driving force behind international investment law. From the first iteration of minimum standards under customary international law in the early 20<sup>th</sup> century to the current age of regional treaties, the United States has been imposing its preferred rules over the rest of the world. Even the new wave of treaty reform—seeking more balanced treaties such as preserving government’s regulatory space and providing exceptions for measures relating to the public interest—took place when the United States started to be involved in international investment arbitrations. In addition to influences from the United States, international investment law is heavily shaped or even invented by a small group of private arbitrators. In this context, Professor Sornarajah suggested these so-called “balanced treaties” are of little or no use to developing countries; while these treaties would continue to erode the sovereignty of host states, there was no evidence linking the signing of those treaties to foreign investment inflows.

Drawing from her own experiences, **Ms. Opeyemi Abebe** (Trade Advisor, Commonwealth Secretariat) shared with participants the dynamics of comprehensive trade and investment deals, and how they are negotiated as a single package with trade-offs between trade and investment issues. She pointed out that, among other things, these trade deals seek to define the rules of the global architecture of investment



promotion and protection. She cautioned participants that these mega-regional deals could reduce the influence of developing countries in the rule-making process of international investment governance in the future, including at the World Trade Organization (WTO). She stated that developing countries need to build capacity to engage on these “new” issues, formulate their country-specific positions so that they are better prepared to participate in future discussions with their trade partners.

**Mr. Abdulkadir Jailani** (Diplomat, Ministry of Foreign Affairs, Indonesia) noted that the current state of the international investment regime is highly imbalanced and vague, with an increasing interplay between international investment law and other areas of international law. Therefore, reform is needed to rebalance the relationship between host states and investors, and to enhance the rule of international law in managing this relationship. Many countries have developed new models in response to this reality. Unfortunately, few models have been tested and many still face practical challenges. Meanwhile, mega-regional treaties are still being negotiated and concluded, and their terms, despite some new formulations, still fall short of solving the sustainable development concerns raised by developing countries. Taking the recently concluded Trans-Pacific Partnership Agreement (TPP) as an example, he noted that the international investment regime is reaching an “imbalance of the new balance,” and called on developing countries to adopt a more consistent and solid position to express their common interests. Mr. Jailani's “imbalance of the new balance” theory was further supported by a presentation delivered by **Ms. Sanya Reid Smith** (South Centre). In her presentation, Ms. Smith provided an overview of some of the potentially far-reaching elements of TPP, noting some striking resemblances between the texts of TPP’s investment chapter with the latest U.S. model BIT.

A second panel of speakers looked at the race between countries to win ground for one model over the other. **Ms. Roslyn Ngeno** (Ag. Policy Advocacy Manager, Kenya Investment Authority, Kenya) shared her experience negotiating bilateral and regional investment agreements as well as the development of investment models. She noticed a sad reality that, until recently, in attempting to outrun each other by coming up with a model, countries seemed to have forgotten that many of the elements were overlapping and in contradiction with each other. Even when a model was eventually negotiated and adopted, it was seldom put into use in real negotiations of investment agreements. This was due in part to the lack of alignment between the model and host countries’ domestic investment framework. To address this challenge, Kenya is taking a holistic and complementary approach, organically incorporating elements suitable for its development objectives into its revised investment agreement model, which is to be implemented not only at national and bilateral levels, but also the regional level. At the regional level, member states from the East African Community (EAC) and the Common Market for Eastern and Southern Africa (COMESA) are also discussing review options and trying to align each member’s interest in developing revised regional models. Meanwhile, member states of the African Union are also looking at options to establish a Pan-African Investment Code. Ms. Ngeno believed the development of these



complementary models and mechanisms gives African states opportunities to carry out effective reforms benefiting their development objectives.

**Mr. Erivaldo Gomes** (Deputy Undersecretary, Secretariat of International Affairs, Ministry of Finance, Brazil) shared the experience of Brazil as a major emerging economy without traditional investment treaties, and presented how the development of the new model has been perceived by domestic stakeholders. Over the years, Brazil has become (and maintained its position as) a leading recipient of FDI despite the absence of investment treaties in force. In order to further improve conditions for cross-border investments, Brazil took a new approach on drafting and negotiating investment agreements by adopting its model Investment Cooperation and Facilitation Agreement (in Portuguese, ACFI). Mr. Gomes introduced some key features of treaties recently concluded based on the ACFI model, which was designed and drafted from the beginning to imbed objectives of promoting friendly solutions and long-term relationships between the parties. He noted that considering the global economic reality, countries should keep their options open and seek alternatives to replace traditional investment treaties. He also warned that the predominant model today was based on litigation and carried significant risks for countries, especially in times of financial and other crises, which can lead to a surge in legal actions.

**Mr. Ahmad Aslam** (Counsellor, Mission of Pakistan to the World Trade Organization, Pakistan) spoke on the current dynamics in negotiating mega-regional treaties. He began his presentation by identifying three trends that have resulted in a significant change to the landscape of investment treaty negotiations: 1) mega-regionals are now part of the trade policies of developing countries; 2) trade deals have an increasingly broad scope to include disciplines much beyond trade; and 3) global FDI in services has witnessed a steady increase in the past two decades. Within this context, he drew parallels between the recently concluded TPP negotiations and the ongoing Trade in Services Agreement (TISA) negotiations, and identified some similarities between the two mega-regional negotiations: the way the negotiations are happening, the way normative standards are evolving, and the institutional arrangements. He noted that these mega-regional negotiations are usually by invitation only and many were carried out secretly. In most cases, these negotiations raise standards and include mechanisms leading to substantial liberalization and erosion of regulatory space. More importantly, developed countries are using mega-regional negotiations to strengthen their negotiating positions and forcing partners with less negotiating power to accept their terms.

During the discussions, some participants expressed reservations about establishing a global investment model, while others suggested such reservations should not prevent like-minded countries from leveraging their common understandings of the need for reform based on commonly accepted principles.

In particular, **Mr. Moataz Hussein** (Egypt) suggested that developing and emerging economies could confront the attempts of the world economic superpowers (mainly the United States and the European



Union) to reshape the international investment regime through the harmonization of investment rules according to their own objectives and models through the negotiation of South–South or Mega-Regional Economic Agreements. This process could be initiated through a joint statement from the developing countries on the principles of international investment that supports sustainable development and inclusive growth. This first “soft-law” step in the form of principles could govern future negotiations between developing countries in South–South economic agreements or at the mega-regional level.

Discussions focused on reform priorities. It was noted that, although it is important to reform the texts of the treaties and limit the causes of action for international arbitration within the current investment regime, it is similarly important to reform the international dispute settlement mechanisms for investment-related disputes. Questions were also raised as to how developing countries can increase their influence in future investment treaty negotiations. It was noted that, although the room for developing countries to influence negotiations was shrinking, it had not yet entirely disappeared. Some were of the view that developing countries should proactively engage in the negotiations of mega-regionals before their conclusion to protect their interests rather than joining these treaties after the terms have been prescribed. Others stressed the need for developing alternative approaches among like-minded developing and developed economies and not rush to participate in ongoing negotiations dominated by certain developed states. Participants also addressed the importance of increasing public awareness and transparency of ongoing negotiations. They also called on the private sector to be more engaged in the consultation process.

## **DAY 2: NOVEMBER 17, 2015**

### **Session 4: The New Emerging Models of Investment Treaties and Alternatives**

**Ms. Suzy Nikièma** (International Law Advisor, IISD) opened the second day of the Forum by facilitating a panel presenting the new emerging models of investment treaties and alternatives. The panel was composed of **Ms. Nathalie Bernasconi** (IISD), **Mr. Pedro Cavalcante** (Secretary, Trade in Services Division, Ministry of External Relations, Brazil), **Mr. Abdulkadir Jailani** (Indonesia), **Mr. Ashish Kumar** (India), **Professor Makane Mbengue** (Associate Professor of International Law, Faculty of Law, University of Geneva) in his capacity as the lead expert for the African Union for the negotiation and drafting of the Pan-African Investment Code, and **Mr. Wamkele Mene** (South Africa). Before moving into substantive issues and introducing the respective approaches taken in their jurisdictions to address various issues in the existing investment regime, each panellist first shared the background and context of their jurisdiction’s reform actions.



After facing various challenges initiated by foreign investors in international arbitral tribunals, India and Indonesia began to reconsider their existing investment treaties, which are based on traditional models developed when the global economic picture and the needs of the countries were drastically different from now. While Indonesia is focusing on limiting risks by circumscribing investors' access to international arbitration, India puts more emphasis on the definition of investor and covered investments, so that the treaty can provide protection for the kinds of investors and investments that will contribute to India's development objectives.

South Africa began to terminate investment treaties and revise its domestic legal framework on investment after realizing that certain provisions of its existing BITs were in violation of its constitution and circumscribed the government's policy space. This echoed Brazil's long-time view that traditional investment treaties give foreign investors unjustifiable preferential treatment as well as unnecessary protection that had already been granted under the domestic legal framework. For these reasons, Brazil had always refused to join the International Centre for Settlement of Investment Disputes (ICSID) or ratify traditional BITs. As more and more Brazilian investors begin to invest abroad, Brazil began to assess their real needs, and started to develop a non-adversarial model of investment treaty that attempts to align the interests of investors and host states.

Meanwhile, developed countries are also witnessing many changes. There has been a fundamental shift in the debate on investment issues within the European Union since it was granted the competence to negotiate investment issues on behalf of member states in 2009. Around the same time the European Court of Justice held some of the member states' treaty language not in conformity with EU laws. Pressured by the European Parliament and the voices of civil society organizations, the European Union has been exploring different options for innovation, especially in area of dispute settlement.

Panellists discussed different approaches adopted by various jurisdictions on issues such as expropriation, FET, non-discriminatory treatment and investor obligations. All panellists agreed that many arbitrators have rendered problematic interpretations on indirect expropriation. In order to address this issue, some countries include in their treaty models detailed guidance on how to interpret indirect expropriation provisions and provide express carve-outs for certain types of measures. Others either expressly exclude indirect expropriation from the coverage of the treaty or intentionally omit the reference to indirect expropriation.

In terms of the FET clause, some countries have attempted to limit arbitrators' room for interpretation by defining the FET through an exhaustive list of instances that amount to a breach of the FET standard. Some tried to replace the FET clause with other equivalent protection available at the same level to domestic



investors and investments, for example, fair administrative treatment. Other countries completely removed any reference to FET and any equivalent protections.

All of the models and approaches discussed included national treatment provisions, some available only at the post-establishment phase, some also extending to the pre-establishment phase. Those opting for the latter stated a preference for a positive-list approach. Some jurisdictions do not include most-favourable-nation (MFN) treatment in their treaty model. Those models with MFN included a carve-out or clarification to ensure that investor guarantees under other pre-existing investment treaties could not be imported through the MFN clause. It was noted that this was also the case with the Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union, but that TPP allowed for substantive guarantees to be imported from older treaties.

All panellists emphasized the importance of balancing investors' rights and obligations in the investment treaty. Some models discussed included binding obligations for investors, enforceable through host- as well as home-state mechanisms. Some embedded investor obligations in the form of denying benefits granted under the treaty. Others limited the scope of the treaty to cover only those investors and investments acting in alignment with the host state's development objectives.

During the discussion, some participants noted the challenges faced by smaller economies when negotiating with stronger partners in terms of negotiating power on the use of models. It was noted that this is also an issue for some of the larger economies, especially when they are negotiating with the United States, which is pushing and rushing to conclude treaties using its preferred terms. Participants noted that countries are in a race to set the global standard. It is therefore important to build alliances at regional and mega-regional level to make individual countries less vulnerable to negotiating pressures. Participants also emphasized the importance of aligning domestic legal frameworks with international treaty development as well as improving coordination mechanisms among various government agencies. Participants noted that referring to national law in the treaty is a much more effective way to reserve policy space than relying on interpretative notes or statements.

Questions were raised regarding where to draw the line between the pre-establishment and post-establishment phases, especially for sectors without formal approval requirements. In this regard, it was noted that treaty negotiators and drafters need to ensure the language they use is as specific as possible to avoid misinterpretation in the future.

## **Breakout Session 2: Models and Alternative Approaches**

In this breakout session, participants analyzed the emerging models and alternatives, and identified similarities and trends in more depth.



## **Investment Promotion and Facilitation**

In terms of investment promotion and facilitation, participants identified the following measures that could be included in an investment treaty:

- cooperation between investment promotion agencies
- transparency and exchange of information
- facilitation of administrative processes
- dispute-prevention mechanisms, including contact points
- compliance provisions linked to treaty benefits.

Participants generally agreed that provisions on investment promotion and facilitation should be non-binding in nature and be drafted using “best endeavour” language when possible in order to reserve government’s policy space to regulate. On the other hand, participants also noted that concrete provisions on which investors actually relied when making investment decisions should be binding in nature. Participants also agreed that, while existing investment promotion agencies at the national level should be responsible for investment promotion and facilitation activities, regional coordination agencies should be established to complement the roles of national agencies.

## **Investor Obligations**

In terms of investor obligations, participants agreed that the following should be included in an investment treaty:

- obligation to comply with national laws and regulations and relevant international standards
- obligation to contribute to the host state’s economic and social development
- obligations to comply with corporate social responsibilities and responsible business conduct
- obligations to combat corruption and bribery.

Participants generally regarded these obligations as binding in nature, and agreed that their content should be based on national laws, unless there is a commonly accepted higher international standard, in which case the obligations should meet international standards. These obligations should be enforced through national mechanisms of the host state and in some areas in the home state as well. In addition, proper monitoring mechanisms and contact points should be established to ensure investor compliance. The treaty should also link investor performance to the benefit of the treaty.



## Dispute Settlement

Noting that the ISDS mechanism is based on the commercial arbitration system, participants identified various concerns states face with treaty-based investor–state arbitration, including high costs, lack of transparency, conflicts of interest, lack of accountability, arbitrators’ ability to create and rewrite domestic law, chilling effect on states’ power to regulate, and treaty shopping by investors. Participants explored different alternatives, including resolving disputes at the state–state level, submitting disputes to a court system, and resorting to regional arbitrations. Participants discussed the advantages and disadvantages of each alternative.

## Liberalization Commitments

Some participants saw the benefit of including investment liberalization commitments in investment treaties, especially when this is done using an exhaustive positive-list approach identifying the sectors the country is ready to liberalize in order to achieve its development objectives. Other participants had concerns about including any liberalization commitments in treaties, noting the need for flexibility. In general, however, participants agreed that the treaties should not contain provisions prohibiting performance requirements. Instead, in order to ensure that the investment attracted is in alignment with the host state’s development objectives, the treaties should specify certain performance requirements as investor obligations, and link investor compliance to incentives or benefits granted by the host state. Participants also agreed that none of the disputes relating to liberalization commitments should be subject to ISDS; rather, they should be resolved exclusively through local remedies.

## Session 5: The State of Flux – An Opportunity for developing and emerging economies?

Following the sharing of country-specific experiences, it was acknowledged that international investment law is in perhaps the most significant state of flux in 50 years. Participants discussed the opportunities and challenges this state of flux presents to the developing countries. **Professor Makane Mbengue** (University of Geneva) chaired the session in the second afternoon of the Forum.

**Mr. Carlos Correa** (South Centre) saw this state of flux as a major opportunity for developing countries to seek alternatives to the options designed by developed countries for their own interests. Recalling that many countries have long established domestic legal frameworks in regulating FDIs before entering into BITs, he suggested they should avoid blindly following the approach of developed countries and should pull out from the existing BIT regime, which is heavily influenced by models designed by developed countries. Reiterating that investors’ decisions to invest are not determined by the number of investment





treaties signed but by market assessment and profitability, he noted that developing countries should focus on their own domestic legal framework for investment, rather than rushing into BIT or mega-regional negotiations, which will significantly limit their policy space. He also emphasized the need to coordinate among developing countries, especially on issues regarding incentives, to avoid a “race to the bottom.” He noted that countries must recognize that FDI is not a magic tool. Each country needs to ensure a sound domestic legal system that can attract and maintain quality investment for development. Mr. Correa also informed participants that, in the upcoming WTO Ministerial Conference, developed countries are seeking to put investment and procurement back on the negotiation agenda. He called on all developing countries to form a clear position on these issues to prevent the developed countries from strong-arming the formation of universal standards on these issues based on their preferences. In this regard, he noted that some of the approaches taken by Brazil, India and South Africa could be a starting point.

Remarking on the significant increase in contributions developing countries are making to global FDI inflows and outflows, **Mr. Ashish Kumar** (India) reiterated the changing landscape of the international investment regime, and called on developing countries to take this opportunity to modify their policies to reflect such changes and advance their demands in international treaty negotiations for their own benefit. One way to move ahead, he suggested, is to conclude new types of investment treaties to provide real examples reflecting developing countries’ philosophies and approaches to international investment agreements. On the other hand, he also cautioned that countries should not fall into the false belief that international investment agreements are a predominant factor for attracting investments. Rather, more efforts should be carried out in creating better business environments and enhancing international economic cooperation.

Concurring with some of the arguments put forward by the co-panellists, **Mr. Fredy Trujillo** from Ecuador noted that now is the opportunity for the developing countries to radically change the investment regime and the international investment arbitration system and to explore other approaches that are more linked to regional initiatives and that more clearly address the needs of developing countries. In this context, he emphasized the importance of enhancing South–South cooperation so that developing countries can send coherent, consistent and previously coordinated messages when facing pressures from negotiation partners from (or based in) developed countries. This requires initiatives such as the Southern Observatory on Investment and Transnational Corporations (in Spanish, *Observatorio del Sur sobre Inversiones y Transnacionales*). This Observatory, which is currently being established and counts on support from some South American and Caribbean countries, is needed to identify the common issues facing states when disputes arise with investors under traditional BIT formats. It is essential to have cooperation from the most basic levels (such as exchange of information) to deeper coordination levels (such as harmonizing policies in investment agreements), which would avoid having investment made at the cost of a regulatory “race to the bottom” between potential host states. In addition, he noted host states should also engage



in more dialogues with investors to understand their expectations and requirements and to provide alternatives in the framework of a balanced relationship and of mutual benefit between investor and host state.

In the discussion, participants concurred with the importance of improving domestic legal frameworks on investment on the one hand, and enhancing South–South cooperation on the other. Some participants also raised concerns about the imbalanced negotiating power among countries, especially when larger economies begin to leverage their trade advantages to strong-arm smaller economies into concessions on investment issues. One example is the U.S. determination to suspend South Africa’s African Growth and Opportunity Act (AGOA) benefits on agriculture, partly as a response to South Africa’s reform of its investment regime. Participants noted the urgency to explore effective and realistic alternatives, including South–South cooperation mechanisms to counterbalance the agenda put forward by major capital-exporting nations.

## **DAY 3: NOVEMBER 18, 2015**

### **Session 6: Identifying New Prospects and Alliances for Developing and Emerging Economies**

On the last day of the Forum, speakers and participants discussed reform options and alternatives, and identified platforms and processes for alliances for developing and emerging economies to engage and propose reform of the global investment frameworks. The panel was chaired by **Professor Muthucumaraswamy Sornarajah** (National University of Singapore).

**Ms. Natalia Guerra** (UNCTAD) shared the statistics gathered by UNCTAD and its proposal of the way forward concerning the reform of international investment agreement (IIA) system. UNCTAD studies have found that the IIA regime has evolved from an era of proliferation to an era of reorientation, reflecting the three key lessons learned by the countries during the years: 1) IIAs “bite”; 2) IIAs have limitations, as investment promotion and facilitation tools, but also underused potential, as their main focus currently is investment protection and litigation; and 3) IIAs raise a range of challenges for policy and systemic coherence, and capacity building. In response to these challenges, UNCTAD proposes a roadmap for IIA reform aiming to improve global investment governance. The roadmap consists of six guidelines (harness IIAs for sustainable development, focus on critical reform areas, act at all levels, sequence properly, have an inclusive and transparent process, and ensure multilateral support structures), and addresses five areas (safeguarding the right to regulate, ensuring responsible investment, promoting and facilitating investment, reforming investment dispute settlement, and enhancing systemic consistency) at national,



bilateral, regional and multilateral levels. UNCTAD highlighted the increased use of sustainable development provisions in treaties, as well as the challenges to reforming investment dispute settlement, dealt with either by reforming or replacing the existing investor–state arbitration mechanism or introducing new features, such as alternative resolution or appeal instances. She also noted that 1,598 BITs will reach their termination phase by the end of 2018. So far, UNCTAD has registered in its database (the IIA Navigator) the termination by mutual consent or unilateral denunciation of 61 BITs. Some other 116 treaties have been terminated and replaced by other treaties (mostly free trade agreements). UNCTAD also mentioned that, in the framework of the new Sustainable Development Goals (SDGs) and in order to continue effectively assisting policy-makers, it published in 2015 an updated version of its Investment Policy Framework for Sustainable Development.

**Mr. Carlos Márcio Cozendey** (Undersecretary-General of Economic and Financial Affairs, Ministry of External Relations, Brazil) noted that the Forum showed great convergence among participants in terms of taking advantage of the state of flux in the international investment law regime. He proposed that, going forward, the main strategic objective should be maintaining the current state of flux. Although there are some opportunities for change, the stock of existing agreements poses great challenges for these proposed changes. The new models being developed by developing countries are just beginning to appear. It is therefore in the interest of the countries looking for solutions to keep the flux active. Mr. Cozendey called on countries to share their considerations in developing the models and to try to understand each other's positions. At the same time, he cautioned that countries should avoid attempts to force convergence on one another.

**Mr. Abdulkadir Jailani** (Indonesia) emphasized the importance of keeping options open. Instead of trying to develop a multiparty model investment treaty, the focus should be more on certain essential elements on which like-minded countries can achieve consensus. Bringing investment governance issues at global and multilateral level might not be a desirable action in the near future. In terms of moving forward, he identified challenges such as how to terminate existing investment treaties, how to deal with the survival clauses embedded in investment treaties, and how to best use newly developed model treaties in future negotiations.

**Ms. Niki Kruger** (South Africa) also noted that, although there seemed to be a convergence in acknowledging the existence of the problems, there was still lack of convergence in terms of how to solve them. She proposed to start the development of some common principles among a group of countries. The principles proposed include: 1. recognition that foreign investment can make positive contributions to sustainable development when integrated into national development strategies; 2. recognition of the importance of placing investment treaties in a wider context for human rights and sustainable development; 3. recognition of the importance of balancing the economic requirements of investors with the sovereign rights of governments to regulate in the public interest; 4. recognition that a robust national



legal framework can assist in protecting domestic and foreign investment; 5. recognition of the shortcomings in international investment protection regime in terms of dispute settlement; and 6. recognition of the importance of looking at alternative types of treaty constructions to give greater focus on defining responsible business practices, and to give more attention to investment promotion and facilitation. If a country needs to start negotiating new investment treaties, it should start with another country that shares similar views. Ms. Kruger did not think this is yet the time to discuss investment issues at the WTO.

During the discussions, participants asked whether it would be helpful to start getting like-minded countries together to negotiate or whether bilateral negotiations are a better option. **Mr. Cozende** acknowledged that the multiparty conversation should be the way for the future, but he felt that bilateral negotiations are probably a more practical solution for now, noting the difficulty in proposing new models in forums such as the G-20 and the WTO. Participants also explored options for incorporating regional arbitration centres into investment treaties and investment contracts. Questions were raised regarding the implementation of the new models, in particular the resources and infrastructure needed to realize the benefit of the new models. It was noted that, in most cases, the proper implantation of the treaties negotiated based on new models would require the support of a solid domestic framework, without which the benefits of new models would not be fully realized.

In terms of the development of common principles, participants agreed that like-minded countries can gather together and express their shared values and objectives in the form of joint declarations, but also expressed their concerns about the effectiveness of these non-binding principles, which might be limited due to their nature. Meanwhile, participants noted that countries, in developing their investment framework, can make use of existing principles developed by international organizations, particularly UNCTAD's Core Principles for Investment Policymaking for Sustainable Development.

**Mr. Moataz Hussein** from Egypt expressed appreciation of Ms. Niki Kruger's proposal for the substantive content of the principles, highlighting their important endorsement of sustainable development objectives and the right of states to regulate. He also suggested the drafting of these principles could be inspired by a wide range of existing bodies of international law, treaties and declarations, in addition to those core principles proposed by UNCTAD.

Discussion was also carried out in terms of whether the WTO could be a better forum for discussing investment issues. Participants noted that the WTO system is fundamentally different from the existing BIT system both in terms of design and culture. Although participants noted that a multilateral system has some advantages over the existing bilateral system (and may be an option for future investment governance), many shared their concerns that adding any new agenda items to the WTO would heavily burden its process for negotiating its current agenda. Meanwhile, participants also noted that the WTO is



not the only option for addressing the investment issues at the multilateral level, and that new mechanisms could be developed and should be explored.

The difficulty of withdrawing from integrated trade agreements was also discussed. Participants cautioned that there was a need to examine the terms of these integrated agreements carefully before including investment provisions in these trade agreements. Participants shared their experiences in refusing the integration of investment issues in trade negotiations. Suggestions were also made to negotiate a partial withdrawal clause, giving parties a way out in case investment issues have to be included.

### **Breakout Session 3: Identifying Opportunities**

Groups discussed and identified potential areas for joint or coordinated policy-making as well as possible ways forward in terms of processes, institutions, and next steps. Participants agreed on the need for reform. The discussions witnessed the emergence of convergence on a set of actions:

At the domestic level:

- Assess the state of play of BITs in countries and regions
- Terminate problematic BITs, where legally possible, including South–South
- Renegotiate on the basis of new models (in some cases)
- Strengthen domestic courts
- Build capacities for officials and negotiators

At the regional level:

- Strengthen existing initiatives and consider new ones at the regional level
- Consider a moratorium of new negotiations, including in particular investment chapters in FTAs
- Build or strengthen regional domestic courts

At the multilateral level:

- Give preference to South–South initiatives when developing countries contemplate new international investment negotiations
- Develop a set of South–South principles

### **Session 7: The Way Ahead and Next Steps**

Noting that the six principles Ms. Niki Kruger proposed in the morning session were an excellent starting point, participants continued discussions on additional areas relevant for the elaboration of principles and



modalities to enhance South–South cooperation in reforming the investment treaty regime. **Professor Makane Mbengue** (University of Geneva) facilitated the plenary session.

There was convergence among the participants that the principles proposed and discussed earlier were essential for South–South cooperation:

1. Recognition that foreign investment can make positive contributions to sustainable development when integrated into national development strategies.
2. Recognition of the importance of placing investment treaties in a wider context for human rights and sustainable development.
3. Recognition of the importance of balancing the economic requirements of investors with the sovereign rights of governments to regulate in the public interest.
4. Recognition that a robust national legal framework can assist in protecting domestic and foreign investment.
5. Recognition of the shortcomings of the international investment protection regime in terms of dispute settlement.
6. Recognition of the importance of looking at alternatives of treaty construction to give greater focus on defining responsible business practices, and to give more attention to investment promotion and facilitation.

A discussion then followed on additional principles that were of particular relevance from the perspective of developing and emerging economies and South–South cooperation:

7. Recognition of the overall shortcomings of the traditional investment treaties.
8. Recognition of the need to strengthen the domestic legal regime relating to investment, including the judiciary.
9. Recognition of the asymmetry of size, capacity, stage of development and resources of governments.
10. Recognition of the need for collaboration on the transfer of know-how, experiences and capacity when necessary.



11. Recognition of the importance of ensuring that South–South investment contributes to the sustainable development of all parties involved.
12. Recognition of the importance of ensuring that investors comply with the national laws and regulations of the host state.
13. Recognition of the need to comply with relevant international legal instruments.
14. Recognition of the need to improve the business environment.
15. Recognition of the importance of not relaxing relevant standards for the purpose of attracting investment.

Other important issues discussed by participants in the discussion on principles included transparency, state-owned enterprises, competition among states on incentive structures, tax issues, home state obligations, and investor obligations.

In terms of the concrete steps to begin the process of developing deeper and broader South–South cooperation, the participants recommended that a process be established for countries to begin developing a set of principles for like-minded countries based on the discussions and recommendations that emerged during this year’s Forum that would lead into next year’s Forum.

In addition, participants agreed to deliver the following messages to their governments:

At the national level, countries should:

- further enhance *domestic* policies to attract quality FDI to supplement international policies
- promote and intensify internal discussions of South–South principles on investment at the highest level.

At the international level, countries should:

- exchange experiences on prevention of international investment disputes
- foster South–South capacity building
- foster dialogue between like-minded countries to develop joint work programs to formally develop the principles identified at the Ninth Forum
- review investment treaty models and previously signed treaties to ensure the principles are reflected and incorporated.



## Closing Ceremony

**Mr. Carlos Márcio Cozendey** (Brazil) congratulated the participants for the successful completion and productive outcome of the Forum. He reiterated that the state of flux exists and is expanding, opening up opportunities for countries to rethink their strategies to attract quality investment to promote sustainable development. He noted that there is room to improve the current investment treaty regime so that more can be delivered on the sustainable development side and be less problematic for states' power to regulate. This can be achieved by developing good definitions, knowing the boundaries, and building dispute settlement mechanisms that are fair for all affected stakeholders.

**Mr. Manuel Montes** (South Centre) expressed gratitude to all speakers and participants for their active engagement in the Forum. He noted that a community is being built through the exchanges at the Forum, and that there are common bases for this community: the current international regime on investment treaties is broken, and members of the community are united in looking for ways to reform the existing system, on the premise that all members welcome quality investment that will support their long-term and sustainable development into their countries. Developing countries are being described as having an interest in investor protection because they are increasingly capital exporters. This is too simple-minded a view since, aside from their governments' accumulated international reserves for balance-of-payments self-insurance, developing countries' external flows are mainly in operational investment projects—not portfolio flows. Protecting these bricks-and-mortar projects is different from blanket protection from all kinds of investment, including trademarks, which is the approach of the U.S. model. This is why the Indian proposal to define investment as an "enterprise" rather than "any kind of asset" could be seriously considered. Finally, Mr. Montes expressed gratitude to the co-hosts and FIRJAN. Recognizing Brazil as a true innovator and important player in South–South cooperation and global governance, Mr. Montes commended the actions taken by Brazil in developing the ACFI model, which marked an essential change moving from a protection-focused model to a model focusing on promotion and facilitation. Mr. Montes expressed his optimism in seeing developing countries improving the international system for their own interests in the near future.

**Ms. Nathalie Bernasconi** (IISD) thanked all speakers, participants, co-hosts, facilitators and supporting staff for their contributions to the Forum. Noting next year's Forum will be held in Asia, she encouraged countries in the region to volunteer to host the event.

Finally, on behalf of all participants, **Mr. Ahmad Aslam** (Pakistan) thanked the organizers for organizing the event and providing the platform for exchanging ideas, reflecting upon experiences and thinking about ways forward.





## Final Agenda

<b>DAY 1</b>	<b>MONDAY, NOVEMBER 16, 2015</b>
8:30	<b>Registration</b>
9:00	<p><b>Opening Ceremony</b></p> <p><b>Moderator:</b> Nathalie Bernasconi, IISD</p> <ul style="list-style-type: none"> <li>• Amaury Temporal, FIRJAN</li> <li>• Carlos Correa, South Centre</li> <li>• Scott Vaughan, IISD</li> <li>• Fernando Furlan, Brazil</li> </ul>
10:00	<p><b>Session 1: Recent Developments and Trends in Investment Policy and Arbitration</b></p> <p>This session will discuss the most recent developments in the area of investment treaty making, investment reform, as well as dispute settlement, based on the 2015 UNCTAD World Investment Report and other data collected.</p> <p><b>Chair:</b> Joel Richards, CARICOM</p> <p><b>Speaker:</b> Natalia Guerra, UNCTAD</p> <p><b>Discussants:</b></p> <ul style="list-style-type: none"> <li>• Howard Mann, IISD</li> <li>• Manuel Montes, South Centre</li> </ul>
10:45	<b>BREAK</b>
11:15	<p><b>Session 2: Recent Developments in Investment Policy and Dispute Settlement: Sharing of Experiences</b></p> <p>This session will discuss specific experiences of countries over the past year regarding new investment treaty claims or arbitral outcomes. Speakers will also provide insights into negotiating experiences and efforts to develop new model investment treaty templates.</p> <p><b>Chair:</b> Champika Malalgoda, Sri Lanka</p> <p><b>Speakers:</b></p> <ul style="list-style-type: none"> <li>• Ashish Kumar, India</li> <li>• Niki Kruger, South Africa</li> <li>• Fredy Trujillo, Ecuador</li> <li>• Moataz Hussein, Egypt</li> <li>• Mariana Lozza, Argentina</li> </ul>



12:15	<p><b>Breakout Session 1: Case studies: Selected arbitration cases, including the <i>Bilcon</i> case</b>  <b>Moderators:</b> Nathalie Bernasconi and Howard Mann, IISD</p>
13:00	<b>LUNCH</b>
14.00	<b>Reporting back from Breakout Session 1</b>
15:00	<p><b>Session 3: The Politics of International Investment Law and Policy – The Clash of Models</b>  Sessions 3A and 3B will focus on the political use of models by the United States, the European Union, and others, and the desire of certain players to impose their models on other countries and regions. These sessions will include strategic discussions about the models, especially in light of the fact that some industrialized countries, in the context of negotiations of mega trade blocs, aim to have a head start to win territory for their models.</p> <p><b>Session 3A: Implications and Impacts of Mega Regional Trade and Investment Deals for Emerging and Developing Economies (TPP, TTIP, RCEP, TISA etc.) and the Development of New Models and Approaches</b>  Session 3A will look at the development of mega-regional trade and investment deals. How are they negotiated and how do they relate to national and regional initiatives on investment-related treaty making?  <b>Chair:</b> Angela Dau-Pretorius  <b>Speakers:</b></p> <ul style="list-style-type: none"> <li>• Muthucumaraswamy Sornarajah, Professor of Law, Faculty of Law, National University of Singapore</li> <li>• Abebe Opeyemi, Commonwealth Secretariat</li> <li>• Abdulkadir Jailani, Indonesia</li> <li>• Sanya Reid Smith, South Centre</li> </ul>
16.15	<b>BREAK</b>
16.45	<p><b>Session 3B: USTR on TPP: “This is intended to be an agreement that’s a model for the rest of the world”</b>  Session 3B will look at the race between countries to win ground for one model over the other. Where are the battles taking place and is there space and appetite to develop new approaches?  <b>Chair:</b> Carlos Correa, South Centre  <b>Speakers:</b></p> <ul style="list-style-type: none"> <li>• Roslyn Ngeno, Kenya</li> <li>• Erivaldo Gomes, Brazil</li> <li>• Ahmad Aslam, Pakistan</li> </ul>
18.00	<b>End of DAY 1</b>



<b>DAY 2</b>	<b>TUESDAY, NOVEMBER 17, 2015</b>
9:00	<p><b>Session 4: The New Emerging Models of Investment Treaties and Alternatives</b></p> <p>This session will allow each model to be presented briefly. After the brief introduction the speakers will focus on specific substantive areas covered in the agreement and discuss the different approaches.</p> <p><b>Chairs:</b> Suzy Nikièma, IISD</p> <p><b>Speakers:</b></p> <ul style="list-style-type: none"> <li>• Ashish Kumar, India</li> <li>• Pedro Cavalcante, Brazil</li> <li>• Abdulkadir Jailani, Indonesia</li> <li>• Wamkele Mene, South Africa</li> <li>• Makane Mbengue, University of Geneva</li> <li>• Nathalie Bernasconi, IISD</li> </ul>
10.45	<b>BREAK</b>
11.15	<b>Session 4 continued</b>
12:30	<b>LUNCH</b>
13:30	<p><b>Breakout Session 2: Models and Alternative Approaches</b></p> <p>In this breakout session, participants will have an opportunity to analyze the models and alternatives, identifying similarities and trends in more depth. How are the newer models different from the traditional approaches? What is the development impact of these differences? What are the elements incorporated and how are they dealt with (investment liberalization, economic development, investment promotion and facilitation, sustainability, investor obligations, dispute settlement, etc.)? What political issues are addressed? Etc.</p>
15:00	<b>BREAK</b>
15:30	<p><b>Session 5: The State of Flux – An Opportunity for Developing and Emerging Economies?</b></p> <p>This session will focus on the major state of flux in international investment law, perhaps the biggest state of flux over the last 50 years. What does this state of flux and uncertainty mean for developing countries? Is this state of flux an opportunity for developing countries to recapture the system? Is there an opportunity for more consistency and coherence from developing countries (considering that Brazil, India, Indonesia, and South Africa have been going different ways), without being prescriptive?</p> <p><b>Chair:</b> Makane Mbengue, University of Geneva</p> <p><b>Speakers:</b></p> <ul style="list-style-type: none"> <li>• Carlos Correa, South Centre</li> <li>• Ashish Kumar, India</li> <li>• Fredy Trujillo, Ecuador</li> </ul>
17:00	<b>End of DAY 2</b>



<b>DAY 3      WEDNESDAY, NOVEMBER 18, 2015</b>	
9:00	<p><b>Session 6: Identifying New Prospects and Alliances for Developing and Emerging Economies</b></p> <p>This session will discuss reform options and alternatives, and identify platforms and processes for alliances for developing and emerging economies to engage and propose reform of the global investment frameworks. This includes a discussion of new models for promoting sustainable investment flows, responsible investor behaviour, and rethinking dispute settlement, including a discussion of current investment proposals such as the investment court being discussed in the TTIP context, and regional dispute settlement initiatives.</p> <p><b>Chair:</b> Muthucumaraswamy Sornarajah, Professor of Law, Faculty of Law, National University of Singapore</p> <p><b>Speakers:</b></p> <ul style="list-style-type: none"> <li>• Natalia Guerra, UNCTAD</li> <li>• Abdulkadir Jailani, Indonesia</li> <li>• Carlos Márcio Cozendey, Brazil</li> <li>• Niki Kruger, South Africa</li> </ul>
10:30	<b>BREAK</b>
11:00	<p><b>Breakout Session 3: Identifying Opportunities</b></p> <p>Groups will discuss and identify potential areas for joint or coordinated policy-making as well as possible ways forward in terms of processes, institutions, and next steps.</p>
12:30	<b>LUNCH</b>
13:30	<p><b>Session 7: The Way Ahead and Next Steps</b></p> <p>The final session will be a moderated plenary discussion of suggestions coming out of the morning session.</p>
15:30	<p><b>Closing Ceremony</b></p> <ul style="list-style-type: none"> <li>• Nathalie Bernasconi, IISD</li> <li>• Manuel Montes, South Centre</li> <li>• Carlos Márcio Cozendey, Brazil</li> </ul>
16:00	<b>End of DAY 3</b>