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## Report

# Approaches by Developing Countries to Reforming Investment Rules; South-South Dialogue and Cooperation



*A Joint event organized by the South Centre and the Permanent Mission of Indonesia  
in Geneva at UNCTAD XIV in Nairobi, Kenya*

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## Contents

I.	Introduction .....	3
II.	Opening of the side event .....	3
III.	Keynote speech by Minister Rob Davies .....	4
IV.	Contributions of panellists .....	6
V.	Interactive discussion .....	10
V.	Conclusions .....	11
ANNEX I. Biography of speakers .....		12
ANNEX II. Photos of the side-event .....		14

## I. Introduction

1. The side event “**Approaches by Developing Countries to Reforming Investment Rules; South-South Dialogue and Cooperation**” was jointly co-organized by the South Centre and the Government of Indonesia, with the focal point being the Permanent Mission of Indonesia in Geneva. The event aimed at providing a space for reviewing the approaches adopted by selected developing countries in reforming the investment protection regime, including the treaties and investor-state dispute settlement system, and reflecting on the importance of South-South dialogue in regard to the future of the investment treaty regime.
2. The event was held on Wednesday 20 July 2016 between 13:00 and 14:30 at the Investment Village as a side-event to the World Investment Forum at UNCTAD XIV, which took place at the Kenya International Conference Centre (KICC) in Nairobi, Kenya.
3. The discussion was moderated by Dr. Manuel Montes, Senior Advisor on Finance and Development at the South Centre. A keynote speech was delivered by Dr. Rob Davies, Minister of Trade and Industry of the Republic of South Africa in his second term and a prominent figure in the development debate. Panellists included Mr. **Alexandre Parola**, Director of Economic Department, Ministry of Foreign Affairs (Brazil); Mr. **Chanchal Sarkar**, Director of National Investment and Infrastructure Fund, Department of Economic Affairs (India) and Mr. **Noorman Effendi**, Deputy Director for Trade, Industry, Investment, and IPR, Ministry of Foreign Affairs (Indonesia).

The programme was complemented with an interactive discussion. Following is a summary of the event’s proceedings.

## II. Opening of the side event

4. In his welcoming remarks, Dr. Montes underlined that there is no more controversy over whether the international regime for protecting foreign investors needs fundamental reform. Indeed, the system is broken, expensive, and in many instances serves as a hindrance to development.
5. According to UNCTAD, since 2012, at least 110 countries have reviewed their national and/or international investment policies and at least sixty countries have developed or are developing new model IIAs. UNCTAD points out that “today, the question is not whether or not to reform, but about the what, how and the extent of such reform”.
6. The question is how to approach reform. Several countries, both developed and developing, have been reviewing their approaches to investment treaties and investor-state dispute settlement, including looking at ways of balancing the rights and responsibilities of investors and safeguarding the sovereign right to regulate.
7. While the reform process of international investment protection treaties is evolving, it is still at a nascent stage. Moreover, while there seems to be a majority opinion among States that reform is needed, it is clear that approaches to proclaimed reforms substantively vary among countries.
8. Several developing economies have been withdrawing from investment treaties, and seeking to find alternatives either through national laws or through designing new investment treaty models that reflect a more balanced approach. In their reviews, they are more attentive to finding a balanced approach and reducing legal liability under investor-state dispute settlement when it comes to regulatory action taken in the public interest. During the year 2015, Indonesia continued the review of its investment treaty model. India released its new investment treaty model. South Africa adopted a new national investment law that entered into force at the end of 2015. Brazil developed its ‘Investment Facilitation and Cooperation’ treaty model.
9. Dr. Montes pointed out that the proposed reforms from developing countries are "reality-tested" based on their experiences. These reforms are not "faith-based", an approach which relies on the few exceptional times when the system appears to "work". On the other hand, many developed countries, while advocating democracy, good governance, and rule of law continue to promote a system that embodies fundamental defects contradicting these

goals. The moderator stressed that it is time for the South to cease being a rule taker and transform itself into being a rule maker.

10. The moderator also acknowledged the support of the Government of Indonesia in co-hosting the side-event. He stressed that Indonesia has also been innovating in its investment protection model agreement. He pointed out that there are many similarities between African countries and Indonesia in terms of foreign direct investment (FDI) flows, as both are focusing on mineral and extractive industries directed towards exporting markets.
11. The keynote speaker and the panellists commended the South Centre and the Government of Indonesia for organizing the side-event and for focusing on a topic of great importance for developing countries.

### **III. Keynote speech by Minister Rob Davies**

#### **12. Keynote speech by Dr. Rob Davies, Minister of Trade and Industry of the Republic of South Africa.**

13. Minister Davies began by expressing his gratitude to the South Centre and its director Mr. Martin Khor. Minister Davies noted Mr. Khor's support to the government of South Africa in the journey of addressing development problems. He recalled Mr. Khor's visits to South Africa on a number of occasions, and the role of the South Centre as a source of input to the government.
14. Minister Davies noted that there have been competing paradigms in regard to investment flows and investment protection. South Africa was persuaded at one stage to adopt the prevailing dominant paradigm. In the period of the first democratic government in 1994 and the development of the constitution, the country had to face many questions pertaining to uncertainties about the intentions of the new democratic government in regard to the treatment of investors. Eventually, officials were persuaded to follow a model providing extensive protections to investors against the possibility of direct or indirect expropriation. The hope was that this would lead to inflows of foreign investment that would help to diversify the economy. Consequently, South Africa became part of the architecture that UNCTAD describes as proliferation or multiplicity of more than 3.000 bilateral investment treaties (BITs). South Africa signed a number of BITs and ratified a number mostly with developed countries and with some developing countries. These agreements were based on the OECD model, which provided imprecisely defined standards of protection, including 'fair and equitable treatment' and national treatment. Many of these treaties provided for automatic renewal, unless timely notice of termination was given.
15. The problem of these treaties became evident when public policies, such as black empowerment, were challenged by investors under investor-state dispute settlement cases. It then became apparent that the government could not afford the continued use of these treaties as basis for its relationship with the investors. Around the year 2007, South Africa commenced a comprehensive review of its investment policies and treaties. The outcome of the review is the basis on which it has been operating.
16. First, South Africa studied the correlation between BITs and FDI flows. The analysis found no appreciable inflows of FDI from countries with which South African have signed investment treaties. Conversely, there were sizeable inflows from countries that South Africa had not signed such treaties with, such as the US and Japan.
17. Secondly, an analysis of the investor-state dispute settlement system, including the record under the International Centre for Settlement of Investment Disputes (ICSID), highlighted the pattern of increasingly costly cases. Expansive interpretation by arbitral tribunals of standards of protections, such as indirect expropriation or 'fair and equitable treatment' attracted "rogue" investors to introduce frivolous claims. Several of these investors do not contribute to developing productive capacities in host countries. One of the most outrageous of these cases is that brought by a tobacco company against Uruguay challenging tobacco control measures, which showed that States could be found in a vulnerable situation when exercising their public policy responsibilities. In this case, the tribunal ruled in favour of the government. Minister Davies also spoke about the case brought by a mining company against South Africa in relation to a mining license, whereby the investor alleged indirect expropriation.

18. After its review, the South African government decided to change the model of investor protection, focusing on investment promotion, a similar approach of that adopted by Brazil.
19. The South African approach addresses the reality of the foreign investment landscape, whereby the bulk of foreign investment has shifted into portfolio investments. Most of the FDI flows result from mergers and acquisitions. Minister Davies questioned the need to attract and promote such kinds of volatile, footloose investment.
20. Minister Davies pointed to several elements that together guide the South African investment framework. The first one is sectoral programmes part of South Africa's industrial policy, which creates an environment that will attract investors in particular sectors. The Minister suggested that identifying a package of development policies around sectoral programmes can be more effective in attracting investments than protections as provided by investment treaties. Minister Davies gave the example of the automotive programme, which needs incentives and some tariff protections. He gave the example of Australia, which after abolishing such incentives, found that the automotive sector is about to close down. In South Africa, the sectoral automotive programme has led to significant investments. The country has also developed a renewable energy programme. A number of investors are coming to South Africa to invest in these sectoral programmes. The lack of BITs has not affected opportunities for the development of the industrial policy through such sectoral programmes.
21. Second element in the South African investment framework is investment facilitation. South Africa has been acting more efficiently to facilitate targeted investors in the sectoral programmes and to facilitate investments in these sectors. A committee chaired by the President oversees the work of investment agency. It coordinates with legislative bodies' committees and sets targets for decision making.
22. Third a key element in the South African investment framework is a new law that provides a set of guarantees for all foreign and domestic investors. The government tried to balance between the rights of investors, protection against expropriation, and the right of the government to regulate. When it was proposed, the law received significant opposition. It was a time during which South Africa started to discontinue many BITs, despite the survival clauses that will extend the protections of the BITs for 10 or 15 additional years for investments existing at the time of treaty termination. Moving away from BITs has not resulted in a reduction in investment growth. The investment facilitation efforts combined with the domestic law have contributed to a firm environment for investments.
23. Dr. Davies stressed the importance South Africa gives to the regional context; South Africa's destiny is interlinked with the continent. Efforts for the promotion of regional trade and investment in the continent are part of the diversification and industrialization efforts. In this regard, South Africa has been undertaking efforts to increase its investments in the region. In doing this, South African companies have a code of conduct which includes paying taxes and observing local laws.
24. Dr. Davies called attention to the ongoing strong push towards resurrecting the OECD-led multilateral investment model. Some of the outcomes of the WTO Ministerial Conference in Nairobi and the 'new issues' being promoted for discussion, such as e-commerce, and competition, could end up being overseen by a strong multilateral investment agreement. Dr. Davies also pointed to the ongoing discussions at ICSID, the debate about a world investment court and the G20 non-binding Guiding Principles on investments, proposed at a very high-level of generalisation and abstraction.
25. Ways of introducing responsibilities on the part of investors, the right of governments to regulate, the policy space needed for development and industrialization, and reforms in the investor-state dispute settlement mechanisms are all issues that need to be further discussed. Dr. Davies shared news on ongoing discussions with Brazil in regard to a potential new model for South-South investment treaty. Such a treaty could help put into place alternative approaches to investment protection and promotion, which will be very different from that of the OECD model.

26. Minister Davies also mentioned that discussions are also ongoing on the future of investment agreements with traditional developed country partners. The EU expects that in the next EU-Africa summit there will be some kind of movement towards an EU-Africa investment agreement. There are also discussions on the future of the African Growth and Opportunity Act (AGOA) and its potential replacement. Minister Davies stressed that the challenges of the African continent, such as infrastructure development and investment, must be at the centre of these discussion. Efforts have to be given in these agreements to boost productive capacities of African countries, otherwise the trade agreement will not make a difference.

## IV. Contributions of panellists

27. **Mr. Alexandre Parola, Director of Economic Department, Ministry of Foreign Affairs (Brazil)**

28. Mr. Parola started his intervention with a brief remark referring to the notion of ‘change of paradigm’ brought up by Minister Rob Davies. The Brazilian official was of the opinion that all existing paradigms are defective, not only those in the investment area. He encouraged participants to have a close and serious look at what has happened in the international economy since 2008, which is a great proof of the need for a change in paradigm. The symptoms are all there, he said, and what is needed is finding the right type of diagnosis. Many countries are having zero interest rates, which is not normal from a long term perspective. There is huge liquidity, which nobody knows how to use, except for asset price speculation. According to Mr. Parola, we face today a situation of de-globalization; during the past five years, the global economy has been growing more that trade flows and this is an important indication of de-globalization. He also addressed the issue of global value chains, pointing out that it should be handled carefully as it could be a new and very unfair international division of labour.
29. Mr. Parola provided an overview of the Brazilian approach to international investment agreements. In recent decades, he said, many efforts have been undertaken to create a comprehensive international regulatory framework for foreign investment. Owing to a lack of consensus between capital exporters and importers, bilateral investment treaties (BITs) emerged as an alternative to multilateral negotiations.
30. According to the United Nations Conference on Trade and Development (UNCTAD), during the 1990s, there has been a proliferation in the number of BITs signed, which currently exceed 3,000 treaties. The increase in this period encouraged several critical analyses about the limitations of BITs, including in regard to: restrictions on the regulatory autonomy and the ability of States to adopt public policies; more favourable treatment of foreign investors relative to domestic investors; high economic and political costs of arbitration proceedings; imposition on States of costly damages; and lack of transparency of arbitration awards.
31. These agreements include specific provisions of protection, which aim to give greater assurances to foreign investors, for example, against indirect expropriation, and which consider regulatory measures that adversely affect an investment as an act tantamount to indirect expropriation. These agreements establish investor-state dispute settlement (ISDS) mechanisms, which create an exclusive forum for claims of foreign investors against host States; and broad definitions of investment, including portfolio investment, such as investments in the financial market. Such concepts are red lines for Brazil.
32. The significant volume of BITs has led to more than 600 publicly known ISDS cases, and the number of countries that responded to at least one dispute has reached 98. Three-quarters of these cases were brought against developing countries and transition economies, whereas the countries of Latin America and the Caribbean account for the largest share of the total cases (29%).
33. Excessive litigation resulting from BITs affects the business environment and the effort to attract investments to developing countries, as well as the regulatory capacity of the State to pursue legitimate policy interests of the population in areas such as health, environment and public safety. In this context, dispute prevention becomes a preferred and superior choice, both in attraction and in the maintenance of the investment.
34. Over the past few years, the negative experience of many countries has exposed the limitations of these agreements and in particular the inadequacy of ISDS. Countries such as South Africa, Indonesia, India,

Australia, among many others, have put their BITs under review and, in some cases, have even proceeded toward their termination.

35. Within this context, the Brazilian government has developed a new investment agreement model with a more constructive approach that seeks to foster institutional cooperation and the facilitation of mutual investment flows between the Parties. The proposal, entitled Cooperation and Facilitation Investment Agreement (CFIA), was developed on the basis of discussions with international organizations and extensive consultation with the Brazilian private sector.
36. The CFIA, unlike traditional BITs, seeks to meet investor needs in a concrete, pragmatic and proactive manner, while at the same time, respecting the development strategy and the regulatory space of host countries. The CFIA is based on three pillars: a) risk mitigation framework for the treatment of investors and their investments; b) institutional governance; and c) agendas for cooperation and investment facilitation.
37. In the first pillar, the CFIA provides a set of measures that reduce the investor's exposure to risk and establish a framework for the treatment of investors and their investments. It establishes guarantees of non-discrimination (national treatment and most favored nation treatment), transparency clauses, specific conditions for cases of direct expropriation, compensation in case of conflicts and guarantees for international transfers.
38. In the second pillar, the CFIA proposes the establishment of focal points or "ombudsmen" in each Party and the creation of a Joint Committee. These elements can be considered the institutional core of the Agreement, as they contribute to the fulfilment of the commitments made and to strengthen the dialogue between the Parties with regard to investments and appropriate assistance to investors.
39. The Joint Committee, composed of government representatives of both Parties, is in charge of monitoring the implementation of the Agreement, the sharing of information regarding investment opportunities, bilateral investment cooperation and facilitation initiatives and, above all, joint action to prevent disputes and amicable settlement of any issues related to bilateral investment.
40. The Focal Point's role is to act as a facilitator of the relationship between the investors and the host country government, both in terms of dialogue with the relevant authorities and by providing government support, with the ultimate goal of improving the business environment to attract and maintain investments. In Brazil, the CAMEX, an inter-ministerial body linked to the Presidency, will act as the Ombudsman.
41. In its third pillar, the CFIA provides for the establishment of investment facilitation and cooperation agendas in areas that may improve the investment environment. Such agendas may vary depending on the possibilities and challenges of the bilateral investment relationship. The agendas make the CFIA a dynamic tool that facilitates the gradual evolution of specific commitments between the Parties.
42. The Agreement also encourages high standards of social, environmental and corporate responsibility on the part of investors and their investments. By encouraging the adoption of a high degree of socially responsible business practices, the CFIA contributes to promote quality investments and to enhance the benefits to sustainable development of the local communities and the host State.
43. Also, while a traditional BIT is primarily focused on ISDS rules, the Brazilian proposal focuses on dispute prevention mechanisms based on bilateral dialogue through the Focal Points and the Joint Committee, responsible for the preliminary examination of specific issues brought by the parties. If a dispute leads to arbitration proceedings, the procedure will take place in a State-State format, much like the dispute settlement system of the World Trade Organization.
44. The CFIA is an innovative alternative to traditional investment agreements, seeking to overcome the limitations and litigious approach of the latter by fostering a more dynamic, constructive and long-term interaction between the Parties. The model also recognizes the essential role of governments in encouraging a favourable environment for investment that meets both the needs of the private sector as well as the development priorities of host countries.
45. As for the negotiating process, given the horizontal and multidisciplinary nature of investment and the goal of promoting the quickest route to consensus between the Parties, the Brazilian government believes it is important and desirable to establish a dialogue on the draft proposal involving all the relevant government agencies that have authority over the issue.

46. In Brazil, the technical team in charge of CFIA negotiations is composed of representatives of the Ministry of Foreign Affairs, Ministry of Industry, External Trade and Services, Ministry of Finance, CAMEX, Central Bank and the Office of the Attorney-General, without prejudice to the participation of other Government institutions.
47. To date, Brazil has signed CFIAAs with Angola, Chile, Colombia, Malawi, Mexico, Mozambique and Peru the representative of Brazil concluded.
48. **Mr. Chanchal Sarkar, Director of National Investment and Infrastructure Fund, Department of Economic Affairs (India)**
49. Mr. Sarkar gave a presentation on the Indian investment treaty model. As a background, he pointed out that in 1991 the Government of India had initiated the exercise of entering into BITs as part of the Economic Reforms Programme, essentially to attract FDI and additionally to create a stable legal regime for addressing claims of foreign investors. Till date, India has signed BITs with 83 countries. These reciprocal agreements have been negotiated on the basis of the Model Text adopted in 1993, and amended in 2003. The 1993 Model BIT contained provisions that were susceptible to broad and ambiguous interpretations by arbitral tribunals and that do not adequately take into account the socio-economic conditions in India and the broad objectives of governmental policy. Since 2009, the Government began receiving a number of dispute notices from foreign investors, based on these treaties.
50. The aforesaid developments led the Government to start an exercise seeking to understand and identify the legal and policy challenges emanating from existing BITs. As part of this exercise, the Government completed the review of the earlier Model BIT and came out with a revised version, which has been approved by the Committee of Secretaries on 16th July 2015 and approved by the Cabinet on 16th December, 2015.
51. The Indian BIT regime is based on a fundamental premise that while it is important to have investment treaties to provide a normative institutional framework to foreign investors in order to enforce their rights and claims, it is also important to ensure that BITs do not impede on policy space or impede the Government's power to regulate foreign investments for legitimate public purposes. Furthermore, as stated above, the main objectives behind India's review of its Model BIT are to address issues related to overly broad interpretations of certain provisions by arbitral tribunals and to adequately reflect and take into account India's socio-economic policy realities. Accordingly, the Model BIT attempts a delicate balancing act between the competing interests of investors to protect their investments and obligations of the investors as well as the Host State's right to regulate.
52. The goals behind the Model BIT may be summarized as follows: (i) The objective of the Model BIT is to provide appropriate protections for foreign investors in India, in light of the relevant international precedents and practices, while appropriately preserving the regulatory powers of the Government. The fundamental premise on which the Indian Model BIT is based is that treaties are to be an additional layer of protection for foreign investors, while well-drafted commercial contracts between investors and the State or private agencies being the primary source of protection. The intention behind the text is to ensure that only the "hard cases", i.e., those involving genuine and gross violations of investor rights or manifestly arbitrary treatment by the State, are adjudicated before international arbitral tribunals, whereas other cases are settled before domestic courts.
53. (ii) The Model BIT also recognises the fundamental principle of exhaustion of local remedies. It is expected that investors will give precedence to the Indian domestic court system rather than invoke BITs for settling all types of disputes. Towards this end, further steps to reform domestic laws and court systems in order to ensure efficient access to justice by foreign investors are also expected in the near future, with a view to complement the objectives of the Model BIT.
54. (iii) The scope of investment treaties is a key concern reflected in the Model BIT. Traditionally, the fundamental premise for investment treaties is to protect FDI, i.e. investments which are long term in nature. The classical definition of FDI as per the OECD benchmark refers to the objective of establishing a lasting interest by a resident enterprise. Current treaties do not reflect this approach; as a result, all kinds of indirect and minority shareholders are protected under BITs. The new model seeks to align the international investment agreement regime with the FDI regime by taking into account the fundamental premise of FDI, which is that it is long term in nature. Keeping in view this objective, "investment" has been defined in the new Model BIT as an enterprise and reflects the objective of establishing a lasting interest by an investor.
55. (iv) The Model also recognizes the need to change the asymmetry in the current BIT system, under which investors are provided protections and procedural avenues irrespective of their conduct. From an Indian

perspective, investment treaties are not just instruments of investor protection, but also a valid tool to promote sustainable development goals, transparency in corporate dealings and to prevent unethical business practices. The new Indian Model BIT text has adopted a substantive approach to promoting these legitimate policy goals by including a chapter on investor obligations and requiring investors to comply with host state legislation before commencing dispute settlement under the treaty.

56. (v) Attempts have been made to strike a balance between the costs and benefits of investor-state dispute settlement (ISDS). After extensive deliberations within the Government and with other stakeholders, the model BIT retains the investor state dispute settlement system. However, it has also introduced detailed rules on various elements, including compulsory negotiations, prevention of conflict of interest for arbitrators, transparency, interpretation and review to safeguard the interest of State parties to ensure no exposure to undue liability.
57. (vi) Another change has been in the form and structure of the agreement itself. Until now, Indian IIAs adopted a minimalistic approach with typical 10-12 pages containing vague provisions, which left too much interpretative authority in the hands of the arbitral tribunals. Provisions in the new Model BIT, are fairly detailed, especially in regard to substantive protections and dispute settlement.
58. Some of the main features and provisions of the Indian Model BIT: The revised Indian model includes a number of innovative provisions that aim at maintaining investor's rights while preserving the right of the State to regulate in public interest. These provisions include, among others: (a) A post-establishment model of investment protection; (b) A careful definition of the scope of the treaty and exclusion of sensitive public policy issues from the scope – such as taxation, government procurement and public services; and (c) Exclusion of 'fair and equitable treatment' or 'most favoured nation treatment' provisions. However, the new Model BIT provides for the obligation to afford due process and the protection against manifestly abusive treatment or targeted discrimination on manifestly unjust grounds or denial of justice in any judicial or administrative proceedings.
59. The Indian Model BIT is based on a realistic approach. Reforming the international investment agreement regime is a gradual process, which must be done step by step taking each treaty and action into account. The Model is merely a first macro level step in the overhaul of the entire system.
60. The new Model reflects the international investment policy of the Government and is expected to become the basis of all BIT negotiations involving India in the future. Mr. Sarkar expressed hope that the Model BIT would become a template document worldwide for integrating sustainable development concerns in the investment treaty system and will motivate other States to reform their investment treaty regimes.
61. Mr. Sarkar concluded by proposing that the latest reforms in its BIT model, could create, in the view of the Indian government, a more stable investment regime and minimize the misuse of the ISDS mechanism.
62. **Mr. Noorman Effendi, Deputy Director for Trade, Industry, Investment, and IPR, Ministry of Foreign Affairs (Indonesia)**
63. Mr. Effendi shared some of Indonesia's views and experiences emerging from the review process of bilateral investment treaties (BITs) and international investment agreements (IIAs) in accordance with Indonesia's national interests and current policy objectives.
64. Since Indonesia started its BITs' review in 2013, the government has examined 64 BITs as well as 5 investment chapters under various free trade agreements. The review seeks to evaluate the current IIAs and its impact on Indonesian national economy. To date, Indonesia decided to discontinue 20 out of 64 BITs. This process will continue to develop gradually with careful consideration.
65. Indonesia gave special attention to the ISDS clause. Indonesia faced the highest number of ISDS cases among ASEAN member states. The decision to undertake the review was particularly encouraged by a billion-dollar lawsuit by the UK-listed Churchill Mining and a frivolous claim arising from a bail-out following the collapse of a private bank (Rafat Ali Rizvi v. Indonesia).
66. In his presentation, Mr. Effendi pointed out that most of these cases arose from toxic elements of the IIAs regime. For example, in the case of Rafat Ali Rizvi against Indonesia, the investor did not comply with the provision of Indonesian law with respect to admission of his investment. The dispute included questioning whether the investment made by Rafat Ali was "granted admission in accordance with Indonesia's Foreign

Capital Investment 1967 or any law amending or replacing it”. Legally, it is very much related to the scope and definition of the investment, one of the toxic elements for review within the IIA regime. That is why the IIAs’ reform seeks to clarify the definition of covered investments and to avoid vague and too broad definitions. Indonesia stressed that only direct investments that were granted admission in a process administered by the national investment agency (BKPM) and under a special legal form of foreign investment company are entitled to the protection of the BIT.

67. The tribunal accepted Indonesia’s opinion and stated in the award that the claimant’s investment was not granted admission in accordance with the “Foreign Capital Investment Law of Indonesia” as required by the BIT, and therefore did not fall within the scope of the treaty.
68. The current imbalance of the IIAs’ regime and ISDS makes States vulnerable to legal action and potentially liable for huge compensations. It limits the exercise of States’ sovereign rights. It clearly diminishes policy space, which is essential for governments to engineer the advancement of public interest. In contrast, investors are granted with wide ranging of rights without clear obligations.
69. In practice under the existing IIAs’ regime, many host States already give their consent to investors bringing any dispute to international arbitration without requiring further consent from the host States (i.e. ‘automatic consent’). Such “automatic consent” should be modified, and a requirement for prior consent should be included in every investment agreement. Indonesia considers introducing such separate consent requirement before an investor could bring a dispute to any international arbitration. By including such prior consent requirement, any foreign investor who intends to sue the state under ICSID (International Centre for Settlement of Investment Disputes), UNCITRAL or any other arbitration rules would be required to first obtain the consent of the host State.
70. Mr. Effendi considered this proposition as a fair adjustment, whereby investors may bring the case to international arbitration if the investor and Host State have expressed their consent to settle the case through the arbitration. Thus, a special agreement to settle a dispute through international arbitration would be required on a case-by-case basis.
71. Article 25 of ICSID Convention provides several conditions for a dispute to be settled before the ICSID forum, including “a written consent” to settle the dispute before the ICSID forum. In legal terms, the Convention requires “consent in writing to submit to the Centre”. But Article 25 does not further elaborate the specific form of written consent. Mr. Effendi argued that it is up to the governments to develop such “written consent” while adequately protecting their interests before the arbitration proceedings in every investment agreement they enter into.
72. Such an approach would be expected to cut down the number of ISDS claims through international arbitration. It will also promote settlement of cases through the domestic courts or alternative dispute resolution mechanisms. This approach could include exhaustion of all available local and legal remedies prior to invoking international arbitration. Formulating a sound foreign investment policy requires protecting national interests and policy space within an open global investment climate. Host States should be able to develop better regulations and investment cooperation agreements that thoroughly cover all the issues of legal aspect of the investment such as provisions with respect to deliverable investments, events of default, termination clauses, compensation and remedies, governing law and choice of dispute resolution venue, among other aspects, including by reforming the broken IIAs’ system.
73. Mr. Effendi concluded by stressing that the paramount objective of this process is to develop an approach to investment agreements that eliminate the current “toxic elements” of the IIAs’ regime and develop an acceptable dispute settlement model.

## **V. Interactive discussion**

74. During the interactive discussion, participants raised three important issues.

- a. The first is the potential trade-off between host country policy space and providing certainty to investors. One participant asked if "policy space", which all the presentations emphasized, could mean that investors are vulnerable to changes in policy approaches of their host countries.
  - b. The second issue was about the reaction of "stakeholders", particularly investors and their own governments, to the reform efforts.
  - c. The third issue concerned the continuing evolution of the IIA system, as reflected in multiple ongoing negotiations, such as on the Regional Comprehensive Economic Partnership (RCEP) in the Asia Pacific region. Having proposed their own alternative models for providing investor protections, developing countries involved in these negotiations have to contend with traditional approaches to investment protection rules proposed by some other countries in these negotiations
75. In responding to the issues raised, Minister Rob Davies Minister took the view that the trade-off between policy space and investor certainty could be an artificial construct since many genuine investors base their decisions on the prospect of actively participating in a domestic development program, whose design and implementation depends in turn on the existence of policy space. Minister Davies cited the recent large investments South Africa garnered in its automobile sector development program even after it had withdrawn from old-model investor protection agreements. Director Parola of Brazil emphasized that investment promotion can be more effective than the traditional investor protection approach. This involves host State's responsibilities to facilitate the legitimate business activities of foreign investors.
  76. On the question of "stakeholders" reactions, some speakers noted the immense resistance from OECD member States and their diplomatic delegations to the process of innovation and reforms being introduced by developing countries. Speakers emphasized the importance of undertaking the reform process with extensive consultation and transparency - as had been done in the country cases presented in the side event. Such an approach is essential in order to avoid adverse real effects on investment outcomes, which are different from the threats and fear mongering that have accompanied developing country efforts to reform the system. Developing countries also have responsibilities towards their indigenous private sector whose interests and long-term development are often hurt by traditional investor protection models.
  77. Improved coordination and cooperation among developing countries, including convergence over basic principles on investor protection is timely, especially given that developing countries continue to engage in negotiations in foras where traditional investor protection approaches are proposed.

## V. Conclusions

78. In closing the discussion, the moderator encouraged participants to continue the dialogue within and beyond the UNCTAD XIV in the collective search for policy practical measures and recommendations for reforming investment policies and treaty regime, as an important dimension of South-South economic cooperation.

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## ANNEX I. Biography of speakers



### **H. E. Minister Rob Davies, Minister of Trade and Industry, South Africa**

Dr. Rob Davies is serving his second term as Minister of Trade and Industry, having been appointed to this portfolio in May 2014. During his first term from 2009-2014, he oversaw the development and implementation of annual three year rolling Industrial Policy Action Plans as well as steering South Africa's participation in important trade relations, including the Tripartite SADC-COMESA-EAC Free Trade Area, BRICS, Economic Partnership Agreement with EU, the US Africa Growth and Opportunity Act, and World trade Organisation Bali package. Between 2005 and 2008, he was Deputy Minister in the same Department. An ANC MP since 1994, Rob Davies served as Chairperson of the Portfolio Committees of Finance and Trade and Industry as well as the Constitutional Assembly Sub-Committee responsible for drafting Charter 13 (Finance).

Before entering Parliament, Rob Davies was Professor and co-Director of the Centre of Southern African Studies at the University of the Western Cape and before that Professor Auxiliar at the Centro de Estudos Africanos at Eduardo Mondlane University in Maputo, Mozambique. An anti-apartheid activist for many years, Rob Davies joined both the ANC and the SACP while in exile in Mozambique. He is currently a member of the Central Committee of the SACP and of the National Executive Committee of the ANC. Academically he holds an Honours degree in Economics from Rhodes University, a Masters in International Relations from the University of Southampton in the UK and a Doctorate in Political Studies from the University of Sussex.



### **Dr. Manuel Montes, South Centre**

Dr. Manuel Motes is Senior Advisor on Financing for Development at the South Centre. He was previously Chief of Development Strategies, United Nations Department of Economic and Social Affairs (UN-DESA) where he led the team that produced the World Economic and Social Survey (WESS), the annual UN analysis of development and international cooperation issues which began publication in 1947. Before that, he was also Chief of Policy Analysis and Development in the UN's Financing for Development Office. He was also the UNDP Regional Programme Coordinator, Asia Pacific Trade and Investment Initiative based at the Regional Centre in Colombo, Sri Lanka and the Programme Officer for International Economic Policy at the Ford Foundation in New York, 1999-2005.

Dr. Montes was a Senior Fellow and Coordinator for Economics Studies at the East-West Centre in Honolulu, 1989-1999; and Associate Professor of Economics at the University of The Philippines, 1981-1989. He has been a visiting scholar at the Institute for Developing Economies (IDE) in Tokyo, at the United Nations University/World Institute for Development Economics Research ( UNU/IWDER) in Helsinki, and at the Institute for Southeast Asian Studies (ISEAS). His recent publications have been in areas of macroeconomic policy, development strategy, income inequality, climate change financing and industrial policy. He holds a PhD in Economics from Stanford University. He held the Central Bank Money and Banking Chair at the University of the Philippines from 1984 to 1991.



**Mr. Alexandre Parola, Director of Economic Department, Ministry of Foreign Affairs, Brazil**

Brazilian career diplomat having served at the Permanent Mission of Brazil to the UN and other International Organizations in Geneva. He has also served with the Ministry of Defense in Brasilia and as the spokesperson for President Fernando Henrique Cardoso. He was a Visiting Research Associate at the Centre for Brazilian Studies of St Antony's College, Oxford University, in 2003. He also served the following positions:

- Division of Financial Policy and Development, assistant. 20/12/1988.
- Division of Trade Policy, assistant. 04/25/1990.
- Office of the Minister of State of Foreign Affairs, advisor. 07/17/1991.
- Office of the State Minister of Economy, Finance and Planning, advisor. 1992
- Undersecretary-General for Diplomatic Planning advisor. 10/02/1992.
- Embassy of Brazil in Washington, third and second secretary. 12/20/1993.
- Embassy of Brazil in Santiago, second secretary. 06/04/1997.
- Special Advisor of the Presidency, advisor. 07/19/1999.
- Office of the State Minister of Defense, advisor. 02/12/2004.
- Permanent Delegation of Brazil in Geneva, Counsellor and Minister Counsellor. 03/05/2006.
- Embassy of Brazil in London, Minister-Counsellor and Head of Chancery. 2011
- Director of the Economic Department of the Secretariat-General for Economic and Financial Affairs of the Ministry of Foreign Affairs. 24/08/2015.



**Mr. Chanchal Sarkar, Director of National Investment and Infrastructure Fund, Department of Economic Affairs, India.**

Mr. Sarkar has been working with the Government of India since 1999. Currently he is working as Director in the International Investment Agreement (IIA) Division, Department of Economic Affairs, Ministry of Finance, and is responsible for all bilateral investment agreements. Prior to his present assignment he has worked with the Department of Expenditure, Ministry of Finance and the Ministry of Commerce & Industry, Government of India and has handled bilateral and multilateral trade negotiations. Mr. Sarkar has written/published several Articles on Trade and related issues. Spoken in a number of national/international fora including the WTO, ISO, Codex among others. He has graduated from London School of Economics (LSE), London and holds an M.A and M. Phil in Economics from Jawaharlal Nehru University (JNU), New Delhi, India.



**Mr. Noorman Effendi, Deputy Director for Trade, Industry, Investment, and IPR, Ministry of Foreign Affairs, Indonesia.** He also served the following:

- 1998: Joined the Ministry of Foreign Affairs of the Republic of Indonesia.
- 2000-2004: Head of Economic III Section, Directorate of Intra-Regional Cooperation, Directorate General of Asia-Pacific and African Affairs, Ministry of Foreign Affairs.
- 2004-2007: Third Secretary, Embassy of the Republic of Indonesia to Thailand.
- 2007-2010: Head of Agriculture and Commodities Section, Directorate of Trade, Industry, Investment and IPRs, Directorate General of Multilateral, Ministry of Foreign Affairs of the Republic of Indonesia.
- 2010-2015: First Secretary, Embassy of the Republic of Indonesia to Japan 2015-now Deputy Director for Trade in Goods and Industrial Development, Directorate of Trade, Industry, Investment and IPRs, Directorate General of Multilateral, Ministry of Foreign Affairs of the Republic of Indonesia.

## ANNEX II. Photos of the side-event



From the right to the left: Dr. Rob. Davies, Minister of Trade and Industry of South Africa, keynote speaker; Mr. Noorman Effendi (Indonesia), Mr. Chanchal Sarka (India), Mr. Alexandre Parola (Brazil) and Dr. Manuel Montes (South Centre).



Government officials, academics and civil society representatives attending the South Centre-Permanent Mission of Indonesia to Geneva side event “Approaches by Developing Countries to Reforming Investment Rules; South-South Dialogue and Cooperation” at UNCTAD XIV in Nairobi.



Mr. Alexandre Parola, Director of the Economic Department, Ministry of Foreign Affairs, Brazil



Mr. Noorman Effendi, Deputy Director for Trade, Industry, Investment, and IPR, Ministry of Foreign Affairs, Indonesia



Participant intervention to Minister Rob. Davies



Professor making intervention to panellists