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11th Annual Forum of Developing Country Investment Negotiators

February 7-9, 2018
Nairobi, Kenya

MEETING REPORT

The Changing World of Investment Negotiations: From bilateral protection to…?

EXECUTIVE SUMMARY

The 11th Annual Forum of Developing Country Investment Negotiators (the Forum) was held in Nairobi, Kenya, from February 7 to 9, 2018. It was co-organized by the Kenya Investment Authority (KenInvest), the International Institute for Sustainable Development (IISD) and the South Centre. Building upon the successes of previous Forums, the event gathered 141 participants representing 65 developing country governments, 11 regional and international organizations and invited academics.

Under the theme of "The Changing World of Investment Negotiations: From Bilateral Protection to…?" participants discussed the design of investment treaties and reform of investor–state dispute settlement (ISDS) from the perspective of sustainable development. Participants reviewed trends and developments in international investment policy-making at the global, regional and national levels, focusing on the scope and breadth of investment negotiations and on both substantive and procedural aspects of the investment regime. Also on the agenda were discussions on challenges, opportunities and strategic options for developing countries to engage with one voice to shape the agenda for investment regime reform in a way that contributes to their economic and social development.

Participants noted with regret the fragmentation of the current reform processes that has led to substantive and procedural issues related to investment being discussed separately. However, participants also stressed the need to capitalize on reform opportunities and to address current problems (particularly with respect to ISDS), safeguarding policy space today to allow substantive issues to be addressed in the future. They considered that developing countries should prepare for and engage in all ongoing reform discussions at every level, with common positions based on a positive agenda, even if they disagree with the choice of forum or approaches for the negotiations.

Regarding the desirable characteristics of a forum for negotiations to reform the investment regime, participants considered that the ideal forum should accommodate different national and regional approaches, emphasize consensus building, reflect values shared by developing countries, pursue sustainable development goals and provide for decision-making processes that are balanced and fair to developing countries.

While participants assessed the advantages and disadvantages of various forums, approaches and ongoing efforts toward investment regime reform at bilateral, regional and multilateral levels, the discussions focused on the process for ISDS reform at the United Nations Commission on International Trade Law (UNCITRAL) and the push to launch "structured discussions" on investment facilitation at the World Trade Organization (WTO).

Some participants shared the view that the WTO could be a good forum for negotiations on investment, given that it could provide a voice to developing countries. However, some others disagreed, recalling the WTO's trade focus and its unconvincing track record in integrating issues of sustainable development. With respect to investment facilitation discussions at the WTO, some participants raised concerns about the content and scope of "facilitation of investment" and its link to sustainable development, while some others said that discussion of the issue is a positive thing, regardless of divergence in positions.

Participants agreed and emphasized that developing countries should take an active role in the UNCITRAL process for ISDS reform, to ensure that the outcomes of the process respect their interests and address their challenges and needs. They also recognized that, in parallel, developing countries should work toward comprehensive solutions for the long term and to think about future generations of investment treaties and dispute settlement mechanisms.

Finally, participants discussed how to change the culture of negotiations on investment and on reform of the investment regime toward *normative solidarity*. This would entail achieving a common position among developing countries on principles that should govern the international investment regime, while taking into account national and regional specificities. Among the ideas shared by participants, several may be highlighted:

- Developing countries should first seek to better understand what is being discussed, then find common positions based on their national development goals and finally actively engage in multiple forums based on such positions. Investment for sustainable development and the balancing of rights and obligations between investors and states, among other substantive issues, should be among the common positions to be adopted by developing countries.

- Communication of developing country governments with all stakeholders affected by foreign investment, in particular the local population, is critical to gaining political will and support at national level. Communication with capital-exporting countries and foreign investors is also highly important.

- All departments within a national government must have a coherent approach to strengthen national institutional positions on various investment-related issues.

- At regional and global levels, governments should continue to share best practices on institutional design for negotiations and how to build stronger negotiating positions.

- Awareness of investment issues should be raised and strong political will to address them should be built at the highest level. To complement the Annual Forum of Developing Country Investment *Negotiators*, a Forum of Developing Country Investment *Policy-Makers* could be created for those purposes.

INTRODUCTION

The 11th Annual Forum of Developing Country Investment Negotiators (the Forum) was held in Nairobi, Kenya, from February 7 to 9, 2018. It was co-organized by the Kenya Investment Authority (KenInvest), the International Institute for Sustainable Development (IISD) and the South Centre. Building upon the successes of previous Forums, this year's event gathered 141 participants representing 65 developing country governments, and 11 regional and international organizations.

Under the theme "The Changing World of Investment Negotiations: From Bilateral Protection to…?" participants grappled with the question of redesigning the substantive and procedural aspects of investment treaties and investor–state dispute settlement (ISDS) to enhance sustainable development outcomes. Participants also explored a range of strategic options for developing countries to build *normative solidarity*, creating a coherent but differentiated voice with which to shape the reform agenda in a way that contributes to economic and social development.

The agenda of the Forum can be found on the IISD website: http://www.iisd.org/event/11th-annual-forum-developing-country-investment-negotiators.

Day 1: Wednesday, February 7, 2018

OPENING CEREMONY

The Forum was jointly opened by **Mr. Chris Kiptoo** (Principal Secretary, State Department of Trade, Ministry of Industry, Trade and Co-operatives, Kenya), **H.E. Davaasuren Damdinsuren**, (State Secretary, Ministry of Foreign Affairs, Mongolia), **Ms. Nathalie Bernasconi** (Group Director, Economic Law and Policy [ELP] Program, IISD) and **Mr. Vicente Yu** (Deputy Executive Director, South Centre). **Mr. Moses Ikiara** (Managing Director, KenInvest, Kenya) facilitated the opening ceremony.

Welcoming participants on behalf of the Kenyan government, **Principal Secretary Chris Kiptoo** highlighted the growing number of costly investment arbitrations faced by developing countries, including Kenya. He emphasized that treaty texts should carefully balance all interests and not undermine domestic laws. He then stressed the importance of developing country engagement in international processes, such as at the United Nations Commission on International Trade Law (UNCITRAL) and the United Nations Conference on Trade and Development (UNCTAD). **H.E. Davaasuren Damdinsuren** exemplified Mr. Kiptoo's point on costly arbitration by referring to a current case against Mongolia in which the investor claimed compensation equating to 60 per cent of the national education budget. He also stressed the need to reform the investment regime.

SESSION 1: THE SCOPE OF THE 11TH ANNUAL FORUM: NEW PIECES TO A NEW PUZZLE

The first session of the Forum discussed recent developments and future directions in international investment negotiations. The session was facilitated by **Ms. Roslyn Ng'eno** (Policy Advocacy Manager, KenInvest, Kenya).

Invited to provide an overview of trends in investment treaty policy-making, **Ms. Nathalie Bernasconi** (IISD) started with the national level, observing that developing countries were adopting three broad approaches with respect to their existing stock of old bilateral investment treaties (BITs). Some are seeking to renegotiate them, some are terminating them, while others are keeping them with the hope that they will not give rise to arbitrations. At the regional level, Ms. Bernasconi sees Africa as a laboratory for innovative approaches, including model treaties (for example, the Southern African Development Community [SADC] Model BIT template and the Pan African Investment Code [PAIC]) and strong rules (Common Market for Eastern and Southern Africa [COMESA] Common Investment Area [CCIA] Agreement). She encouraged developing countries to use best practices from other developing regions when building their own regional approach. At the multilateral level, Ms. Bernasconi noted that "structured discussions" were in the making, and pointed to discussions around multilateral rules for investment facilitation at the WTO and a process to reform ISDS at UNCITRAL. These developments were particularly important to understand, including the risks and opportunities for developing countries, she concluded.

Ms. Opeyemi Abebe (Trade Adviser, Trade Competitiveness Section, Commonwealth Secretariat) analyzed the trend of including investment chapters in regional and megaregional trade or economic agreements. She clarified the difference between regional (at one regional integration organization level) and megaregional agreements (between distinct regions often from different continents) and noted that megaregional agreements create new challenges for developing countries. While partners within a region are trying to achieve a common objective, this level of cohesion is usually missing in megaregional deals between partners with diverse

levels of economic development. She went on to identify two main risks of this trend for developing countries. First, these agreements usually include more onerous burdens than developing countries would have at the WTO, but sometimes without the special and differential treatment component. This was the case in the recent Australia–New Zealand–Pacific Islands regional agreement. Second, trade negotiators use the investment chapter as a bargaining chip for market access, driven by a perception that all foreign direct investment (FDI) is desirable. She questioned whether megaregional agreements include the level of safeguards developing countries need, as compared to BITs. On the “Friends of Investment Facilitation for Development” at the WTO, she noted that the word “development” is included, but recalled that the Doha round, aimed at discussing development issues, has not yet been concluded. Finally, she encouraged developing countries to engage at all levels to advance the agenda for sustainable development.

Mr. Carlos Correa (Special Advisor on Trade and Intellectual Property, South Centre) examined the future direction of multilateral negotiations on investment. He explained that, at the beginning of investment law regime design, the main focus was to regulate FDI, to ensure that it would perform certain functions in the economy. Then the aim became to promote and liberalize FDI, shifting away from regulation. Finally, it turned into FDI protection, leading to a substantial increase in the number of BITs. Mr. Correa stated that the latest development is granting pre-establishment rights and facilitating investments and proposed several key questions for developing countries on investment facilitation discussions at the multilateral level. First, would an agreement on facilitation of investment replace or supplement BITs? Second, is investment facilitation really a trade issue, and if so what is the nature of the linkage between trade and investment? Third, is the WTO the right forum for negotiating investment facilitation, and is a plurilateral agreement viable under the WTO? Hoping that all these issues would be discussed during the Forum, he drew attention to the preliminary challenge of reaching a multilateral consensus mandate to negotiate on investment at the WTO.

During a second round of questions, panellists had the opportunity to discuss more specifically the ISDS reform at UNCITRAL.

Ms. Bernasconi pointed out that reforming substantive obligations and dispute settlement mechanisms should go hand in hand. On the one hand, even with new, well-drafted substantive rules, investment arbitration risks persist as long as those rules are associated with the traditional arbitration system. On the other hand, a well-reformed arbitration system could not come to completely satisfactory solutions if it is still interpreting the older-style, broad and unbalanced rules, said Ms. Bernasconi. In that context, she questioned the implications of this dynamic for the reform process at UNCITRAL, where ISDS reform alone is being negotiated. She encouraged developing countries to think about how the UNCITRAL process could be reconciled with future substantive reforms, and how they can make this happen.

While recognizing the importance of combining substantive and procedural reforms, **Ms. Abebe** took the view that ISDS negotiations at UNCITRAL affords developing countries an opportunity to reform a crucial issue and that any reform initiative is a good start and should be seized upon. All the processes together—at UNCITRAL, UNCTAD, national and regional levels—would result in a better situation for developing countries than existing ISDS, Ms. Abebe suggested.

During the plenary discussion, some participants warned against ongoing bilateral negotiations based on old-style models. It was proposed to move from bilateral protection to "normative solidarity," with participants stressing the need for developing countries to actively engage to reach a coherent position in every forum on all the issues, including ISDS. Some participants expressed concern that many developing countries' investment codes provide protection to foreign investors that is broader than some modern BITs and so called for greater coherence at the national level. Others saw a total review of ISDS as the only way to address all the current problems within the system, calling for a common position among developing countries regarding reforms at bilateral and multilateral levels, including the current UNCITRAL process.

Ms. Roslyn Ng'eno concluded the session by calling for coherence and one voice in developing country positions in all investment negotiations processes.

SESSION 2: RECENT DEVELOPMENTS IN INTERNATIONAL INVESTMENT LAW AND POLICY-MAKING

Session 2, moderated by **H.E Davaasuren Damdinsuren** (Mongolia), looked at recent developments in the area of international investment policy-making, reform and dispute settlement, with an emphasis on the specific focal issues of the Forum.

Invited to provide an update on regional investment negotiations in Latin America, **Mr. José Henrique Vieira Martins** (General Coordinator for Trade and Investment Policy, Secretariat for International Affairs, Ministry of Finance, Brazil) described the main features of the Intra-Southern Common Market (MERCOSUR) Protocol on Cooperation and Facilitation of Investment (the MERCOSUR Investment Protocol), adopted in April 2017. Largely based on Brazil's Cooperation and Facilitation Investment Agreement (CFIA) model, the MERCOSUR Investment Protocol focuses on business environment improvements and establishes an ombudsman in each of the member states and a joint committee to prevent disputes and to develop a joint agenda on investment cooperation. The protocol also provides some investor guarantees, such as direct expropriation and transfers of funds, he noted, and innovatively includes an extensive clause on Corporate Social Responsibility (CSR). Regarding the Union of South American Nations (UNASUR), he explained that negotiations have been

underway for almost ten years for the creation of an alternative centre for settling investment disputes. Contrasting with the International Centre for Settlement of Investment Disputes (ICSID), the centre is likely to have innovative rules regarding arbitrator selection and state–state arbitration, and will also play an advisory role for regional policy-makers. He then clarified that Brazil, although not involved in the Pacific Alliance, has signed CFIAs with all of its members. This demonstrates, according to Mr. Martins, the shared views among Pacific Alliance countries on some important aspects such as investment facilitation. He finally emphasized the importance of having productive discussions on investment facilitation.

Ms. Elisabeth Tuerk (Chief, International Investment Agreements Section, Division on Investment and Enterprise, UNCTAD) presented global trends on investment policy-making based on the 2016 UNCTAD World Investment Report and International Investment Agreements (IIA) databases. She explained that these statistics show an important positive trend in terms of the quality of recent treaties. Further, for the first time the number of BITs terminated in 2017 (50) is higher than the number of new BITs or treaties with investment provisions (TIPs) concluded. Ms. Tuerk also noticed the growing number of TIPs, even if 80 per cent of all existing IIAs are still BITs. However, and as part of the UNCTAD IIA reform Phase 2, she pointed out the need to address the stock of existing old-style treaties: 95 per cent of BITs (that is, 2,500 treaties) were concluded before 2010. She also presented a comparative analysis between old and recent treaties, showing that new treaties are generally better from a sustainable development perspective, but not perfect. Ms. Tuerk called on developing countries to assess what negotiations at regional and multilateral levels mean for their existing stock. For example, can the reform process at UNCITRAL address the deficiencies of ISDS in the existing stock of BITs? Will a multilateral approach replace existing BITs, or will it just add an additional layer of complexity? In that regard, she recalled that the 10 options for modernizing old-generation treaties from the UNCTAD Investment Policy Framework for Sustainable Development (IPFSD) offer useful tools for developing countries. In closing, Ms. Tuerk raised a question that echoed the Forum theme: From treaties that bite to…?

Mr. Martin Kohout (Associate Economic Affairs Officer, Investment Policy Section, United Nations Economic Commission for Africa [UNECA]) provided an update on negotiations of the African Continental Free Trade Agreement (AfCFTA) and the PAIC, both African Union (AU) initiatives. He explained that the CFTA will become the world's largest free trade area after the WTO in terms of the number of participating countries. During the AU Heads of State Summit in January 2018, AU member states agreed to sign the CFTA Agreement and Phase 1 Protocols on March 21, 2018 in Kigali. While the Phase 1 negotiation involved trade in goods, trade in services and dispute resolution, Phase 2 will cover investment, intellectual property and competition, and should start just after Phase 1. Regarding the PAIC, Mr. Kohout explained that it was adopted by the Specialized Technical Committee (STC) on Finance, Monetary Affairs, Economic Planning and Integration of the African Union in October 2017 as a non-binding guiding policy instrument. The STC also requested the AUC to share the draft with other relevant Committees. In terms of the interaction between the two instruments, he

noted the potential for convergence between the CFTA and PAIC. Following this update, he highlighted that intra-African trade and investment agreements should promote structural transformation and create a wider economic space and investment opportunities for all investors. Stressing the need for consistency and a regulatory environment conducive to sustainable development, he called for the CFTA investment chapter to safeguard policy space, enhance predictability and level the playing field.

Panellists were then given the opportunity to exchange their views on the different trends at regional and global level.

Mr. Martins described three main differences between Brazil's CFIA model (on which the MERCOSUR Investment Protocol is based) and traditional BITs: the Brazilian and MERCOSUR approaches focus on investment facilitation, provide for state–state arbitration only and exclude portfolio investments. In comparison to the MERCOSUR approach and most of Brazil's CFIAs, Mr. Martins stated that the CFTA is a more comprehensive agreement including investment provisions. He also noted similarities in the three approaches discussed in the panel (CFIA/MERCOSUR, CFTA and PAIC): the focus on safeguarding policy space, creating predictability and levelling the playing field. Mr. Martins also noted that the PAIC, as a non-binding instrument, promotes new views regarding investment policy-making that are similar to those reflected in some binding Latin American instruments.

Mr. Kohout noted that Africa has become a place of innovation, which provides options for policy-makers to shape the agenda. Several agreements or model treaties at continental (PAIC), regional (COMESA, EAC and SADC) or bilateral level (for example, the Morocco–Nigeria BIT) are seen as modern instruments, as highlighted by UNCTAD recent survey on the quality of IIAs. Describing some commonalities between the PAIC and the Morocco–Nigeria BIT, Mr. Kohout noted that they each explicitly recognize sustainable development objectives in the preamble, protect the right to regulate, use a narrow definition of investment, contain provisions on investor obligations, CSR and human rights and the PAIC also allows for state counterclaims against the investor in the case of an alleged treaty breach. Mr. Kohout shared the view that they illustrate a shift in investment treaty-making in the continent.

Ms. Tuerk emphasized the importance for developing countries to design the treaties that work for them. To that purpose, she recalled that the UNCTAD 2015 Roadmap for IIA Reform recommends five issues for consideration: (1) preserving the right to regulate, (2) improving dispute settlement (not necessarily ISDS), (3) ensuring responsible investment, (4) facilitating investment and (5) addressing systemic complexity. Therefore, Ms. Tuerk considered that it is less about where to draw inspiration, but more specifically what treaties promote sustainable development and how to deal with old treaty stock.

Mr. Martins seconded Ms. Tuerk's point that each country or region should look for a model that suits them. Taking the example of Brazil and discussions at WTO on investment

facilitation, he considered that discussions at a multilateral level could be positive and may help gain the support of more countries or organizations, such the Organisation for Economic Co-operation and Development (OECD) and UNCTAD. **Ms. Tuerk** agreed that it is important to discuss how to effectively facilitate investments. However, she clarified that UNCTAD does not have a position on whether this is a topic that should be discussed at the WTO and is therefore not a "friend" of the Friends of Investment Facilitation for Development (FIFD) group. For **Mr. Kohout**, the important thing is that regional models and modern BITs send the signal of shared commitments, understanding and will.

During the plenary discussions, some participants stressed the importance of designing concrete steps for reform at the national and regional levels and called for more sharing of experiences on dealing with the old stock of BITs. Asked whether the PAIC would form the basis for investment chapter negotiations in the CFTA, **Mr. Kohout** responded that this could be considered as an option. To the question of whether Brazil has concluded a CFIA with a developed country, **Mr. Martins** responded they have not yet had success; he noted that, although Brazil is willing to be flexible, it will walk away if the parties are unable to reach a minimal consensus. Some participants questioned the roles of development policies in investment treaty negotiations in Africa and expressed concern about the ability of countries to develop a common vision despite different economic realities and constraints. Some participants also questioned the ability of Least Developed Countries (LDCs) to adopt a similar approach to countries as Brazil, India or South Africa, even within regional integration organizations.

SESSION 3: DRILLING DOWN ON THE SUBSTANTIVE SCOPE OF AGREEMENTS

Mr. Moses Ikiara (Kenya) moderated Session 3, aimed at looking at the ongoing development of the content of investment treaties and their relationship to trade agreements and regional economic agreements. The discussion opened with India and Nigeria being invited to share the most innovative substantive provisions in their recent BITs or models.

Mr. Chanchal Chand Sarkar (Director of the International Investment Agreement Division, Ministry of Finance, India) recalled that his country has signed 84 BITs based on a 1993 model BIT. India faced a number of treaty-based claims from mid-2000 onwards, including the well-known *White Industries* case. There are now around 20 disputes claims at various stages pending against India and many of these are frivolous in nature. Considerable socioeconomic changes that have taken place since India's earlier model BIT of 1993, the experiences in disputes and the changes in the FDI regime led India to review its model BIT and developed a new comprehensive model. Mr. Sarkar then described some of the key features of India's model, including: (1) an enterprise-based definition of investment; (2) post-establishment protection only; (3) exclusion of tax matters and subsidies from treaty scope;

(4) exclusion of local government (village-level) decisions from the scope of measures covered by the BIT; (5) omission of the most-favoured-nation (MFN) treatment clause; (6) exclusion of the words "fair and equitable treatment" (FET) but retention of the spirit of this protection in a carefully limited way; (7) exhaustion of local remedies (limited to five years) before the investor can resort to ISDS; (8) investor obligations to balance the rights afforded to investors; (9) incorporation of procedural provisions on transparency, conflict of interest and qualification of arbitrators in the ISDS mechanism. Mr. Sarkar also highlighted the differences in trade and investment negotiations and how investment negotiations should not be subordinated by the former. In his view, it is essential to maintain a well-coordinated approach among countries as well as within a country amongst several government departments such as trade, investment and foreign affairs, among others.

Ms. Ajuma Patience Okala (Deputy Director and Legal Adviser of Nigerian Investment Promotion Commission, Nigeria) shared her own country's experience in revising and using its model BIT. She recalled that Nigeria's previous model BIT was geared toward investor protection, including broad and loosely worded provisions with no safeguards. She also noted that the government submitted to ISDS in its national investment law. Following oil spills and massive environmental degradation in the Niger delta and ISDS cases against Nigeria, the government started considering the *quality* and not just *quantity* of investment, Ms. Okala explained. Therefore, Nigeria conducted a review of its stock of BITs. She stated that it was arguable whether there was direct correlation between them and amount of FDI received. She also pointed out that there are other drivers of FDI into Nigeria. This finding led to a significant change in thinking and a review of Nigeria's model BIT to balance investor rights and obligations, reference the country's sustainable development goals and protect the right to regulate. The new model was adopted in 2016 and still has many investor protections, including free transfer of funds, MFN treatment, national treatment and expropriation—but in more careful, circumscribed language and with more safeguards. The model also includes obligations on CSR, labour, anti-corruption and human rights and establishes a joint commission. Based on a qualitative mapping of 21 out of its 29 old BITs, showing that many reform-oriented provisions are missing, Nigeria has plans to amend, renegotiate or terminate the BITs that fall short of the quality required.

Mr. Aaron Cosbey (Associate and Senior Economist, IISD) gave a presentation on BITs and their implications for industrial policy space, from the starting point that industrial policy tools can transform investments to make them positive for development. He explained that the current debate is not *whether* to use industrial policy but *how* to do it right. The paradox is that despite a change in attitudes to industrial policy from the Washington Consensus era, countries still conclude BITs that restrict their use of these tools (such as, for example, performance requirements [PRs] on local content, local management, balance of payments, joint ventures and R&D requirements). Mr. Cosbey noted that although many BITs do not limit industrial policy space, a significant number do. He recognized that industrial policy is notoriously hard to get right, and there are more failures than successes, but given their

importance for sustainable development, their use should not be prohibited. He went on to consider what IIAs should do in relation to industrial policy and in particular PRs, canvassing the options of: (1) saying nothing (falling back on the limited prohibition of some PRs in the WTO Agreement on Trade-Related Investment Measures [TRIMs]), as most BITs do; (2) carving out certain PRs; (3) prohibiting PRs but grandfathering existing ones; (4) prohibiting PRs but excluding them from ISDS; (5) limiting the use of industrial policy based on what we know works (for example, using sunset clauses to phase out support after a certain time). Mr. Cosbey concluded that it is not clear that BITs increase FDI, but that, even if they did, there would be no reason to restrict developing countries' use of the industrial policy tools needed to help ensure sustainable development.

Mr. Vicente Yu (South Centre) gave a presentation on the investment facilitation discussion at multiple forums and the rising stakes of those discussions. He first noted that initiatives on investment facilitation discussions have been raised at different multilateral forums (for example, Asia–Pacific Economic Cooperation [APEC], MERCOSUR, UNCTAD) and at country level (Brazil and South Africa, for example). Mr. Yu then reflected on the key questions of investment facilitation discussions at the WTO, including how to structure such discussions, whether it is necessary to have investment facilitation obligations at the WTO level and what should be the content of any multilateral obligations. He emphasized that developing countries should carefully consider the type of carve-outs and safeguards they will need to protect their policy space if discussions give way to negotiations. He encouraged participants to reflect on these questions, starting with a clear sense of what the government wants to do on a national level. Then the issue of the scope of substantive multilateral obligations of investment facilitation can be viewed from the perspective of how to integrate national objectives with regional, continental and international objectives, Mr. Yu concluded.

Mr. Ikiara gave the opportunity to Mr. Sarkar and Ms. Okala to reflect on their countries' experiences negotiating based on their new models.

Ms. Okala shared that Nigeria has signed BITs based on its new model with Morocco and Singapore. Nigeria is currently negotiating with other countries, some of which proposed a very "old-school" BIT with pre-establishment rights and a prohibition on the use of PRs. Ms. Okala explained Nigeria's position was that its model BIT was beneficial to responsible investors as well as to host states. Nigerian negotiators also explained to their partners that the Nigerian Parliament would not be able to ratify new agreements based on old-style BITs given the current policy direction of the government.

Mr. Sarkar explained that the Union Cabinet of India had given the mandate to terminate India's old BITs when the initial duration expired. Since then, India is actively engaged in negotiations with these countries. Mr. Sarkar said that India has negotiated using its model BIT as a base text (not "take it or leave it") with both developing and developed countries. In

all cases, India has retained the provisions on exhaustion of remedies, strike-out of frivolous claims under ISDS.

Regarding the question about which high-risk elements of IIAs should be avoided at all costs, **Mr. Cosbey** and **Mr. Yu** agreed that FET is highly problematic, as it is raised in the vast majority of disputes and can greatly impact regulatory flexibility. **Mr. Sarkar** noted that MFN and pre-establishment rights, if included, should not be subject to ISDS, and that the definition of investor is key to limit the possibility of multiple proceedings.

Turning the discussion to negotiating forums, **Mr. Ikiara** noted that the risk of a "race to the bottom" is high where countries are in competition for FDI and questioned whether it would be preferable to restrict investment negotiations to regional rather than bilateral forums. **Ms. Okala** responded that each has its own merits and challenges and one should not necessarily replace the other.

During the plenary discussions, participants with experience in revising their model BIT and renegotiating or terminating BITs echoed the comments of India and Nigeria. Participants shared instances in negotiations with developed countries seeking provisions requiring a country to seek permission of foreign investors to change its laws, as well as the onerous preparation of positive or negative lists related to pre-establishment rights for developing countries. Participants agreed that many developing countries still see BITs as being a symbol of friendship until they get "bitten" by ISDS cases. One participant pointed out that being a first mover in respect of BIT reform is very challenging. Others shared the experience of developed countries refusing renegotiations and trying to convince the developing country partners that all FDI would leave if their BITs are terminated. Ultimately, participants shared positive experiences of BIT reform, though highlighting that it can be difficult to withstand international pressure. Participants emphasized the need to focus first on national laws, industrial policy space and development objectives as starting points to meet the country's own needs depending on its level of development and the importance of safeguarding sovereignty and the right to regulate. In doing so, participants agreed that high-level political will is essential.

BREAK-OUT SESSION 1: WHAT SCOPE SHOULD THERE BE TO INVESTMENT NEGOTIATIONS?

The session was facilitated by **Ms. H. Suzy Nikièma** (International Law Advisor and Regional Coordinator [Africa] for the ELP Program, IISD). Participants were invited to discuss in groups and develop the scope of the main substantive issues in future investment treaties and investment chapters in free trade agreements (FTAs), depending on the geographic scope considered (megaregional FTAs, regional FTAs, BITs among developing countries, BITs among countries with different levels of development).

For that purpose, they were invited to consider various elements, including: substantive obligations on investment liberalization; investment protection obligations; investor obligations and responsibilities; home state obligations; exceptions, carve-outs or waivers; safeguards for the right to regulate; and investment facilitation.

On **investment liberalization**, participants agreed that it was preferable to either not grant pre-establishment rights in investment treaties, or to include them, subject to exclusions from ISDS and of sensitive sectors (using a positive-list approach).

Regarding **investment protection obligations**, some groups agreed to include provisions such as national treatment, MFN treatment, FET and free transfer of funds, but in a more circumscribed way than in old-style BITs. Others proposed excluding controversial provisions such as indirect expropriation and FET.

The need to preserve the **host state's right to regulate** was emphasized by all groups, with some calling for specific exceptions and exclusions (not only a general exception clause). Including **obligations of investors**, including CSR, was also a converging point among the groups.

Some groups proposed the inclusion of **investment facilitation** aimed at simplifying administrative procedures investors have to go through, lowering costs of doing business and improving regulatory transparency.

Groups also supported **home state obligations** to share information on investment opportunities, the **exclusion of taxation issues** from the treaty scope and **obligations to respect national laws** related to human rights, environmental protection and anti-corruption.

SESSION 4: SUBSTANTIVE SCOPE AND NEGOTIATING CHALLENGES: EXPERIENCE SHARING

This session was moderated by **Ms. Amira Klaï** (Director, Investment and International Cooperation, Ministry of Development, Tunisia). Panellists were invited to share their experiences and challenges in response to the issues discussed during the group Break-out Session 1: What scope should there be to investment negotiations?

Ms. Erika Ramananarivo (Director of PPP Promotion, Ministry of Finance and Budget, Madagascar) shared her experience in negotiations between Madagascar and a developed country partner five years ago. The partner country sought pre-establishment rights when Madagascar's stock of BITs included post-establishment rights only. She noted that the

negotiation was based on the partner country's model, as Madagascar did not have a model, putting Madagascar in a weaker negotiation position. She also noted that the mining sector is critical for Madagascar, and that currently two developed countries are seeking to conclude old-style BITs with the country. Madagascar is currently developing a model BIT and revising the mining code. Ms. Ramananarivo explained that the right to regulate has been a key issue for Madagascar and has led to the breakdown of negotiations with some countries.

H.E. Davaasuren Damdinsuren (Mongolia) gave an overview of his country's current stock of trade and investment agreements. He explained that the terminated treaties did not deliver the expected benefits for Mongolia, but instead imposed great financial risks and impacts for the country's ability to achieve sustainable development. H.E. Damdinsuren noted that Mongolia has created a working group to reform the investment regime generally, draft a new model BIT and build the capacity of its technical staff with support from IISD and UNCTAD. Mongolia is also considering amendment, termination and renegotiation as possible options for reforming its stock of old treaties. H.E. Damdinsuren explained that Mongolia is considering the issues of investor obligations and how to adapt its BITs to its domestic situation. It has also established a council to help resolve investor grievances before they become disputes. He concluded by noting that the Sustainable Development Goals (SDGs) make investment policies more challenging than ever for developing countries and that FDI is needed for climate change mitigation, health, education, energy, infrastructure and productive sectors.

Mr. Samuel Trujillo (Attorney, Directorate of Foreign Investment and Services, Ministry of Trade, Colombia) noted that Colombia is currently renegotiating a BIT with Spain and, as a member of the Pacific Alliance, is negotiating treaties with Australia, Canada, New Zealand and Singapore. He explained that Colombia's approach to liberalization is not to include trade issues in BITs but to negotiate investment chapters in FTAs. Mr. Trujillo noted that Colombia has tried using BITs as a pathway to FTAs with two countries without success. In other situations, an FTA can be undesirable from a trade-policy perspective while a BIT may be acceptable. Regarding the relationship between investment and trade in FTAs, he explained that per a strictly legal hierarchy, trade prevails over investment (for example, investment chapters in treaties state that, if there is any inconsistency, trade provisions prevail) but the reality is more complex. Mr. Trujillo suggested that integrating trade goals in investment instruments does not necessarily mean expanding the scope of investment treaties, but to the contrary refining their scope. As an example, after setting out a basic typology of investments (FDI that seeks natural resources, FDI that seeks consumer markets and FDI that is directed toward efficiency and establishing global value chains), Mr. Trujillo explained that, from a trade policy perspective, the latter is the most sought after by developing countries. This explains the preference for an enterprise-based definition of investment by some countries like India or Brazil, which is an essence a reduction in the scope of investment agreements inspired by legitimate trade goals. Mr. Trujillo considered that MFN, particularly the inadequate application of this standard by many tribunals, is another barrier to including

trade-related disciplines in BITs. As an example of an area where investment agreements have imported traditionally trade-related provisions, Mr. Trujillo mentioned a frequent commitment in newer BITs establishing that investment should not be promoted through the reduction of environmental and labour standards. Even though in trade agreements this commitment follows principles of a free market more than a genuine concern for environmental or labour standards (i.e. preventing artificial competitiveness of developing countries due to lower environmental and labour costs), in investment instruments this commitment has greater depth due to its relationship with the right to regulate and the protection of legitimate public policy objectives. For example, he noted also that there are proposals, including Colombia's new model BIT, that seek to expand the denial of benefits provision to take into account investor behaviour, beyond the traditional elements of control and substantial business activities, which in the case of Colombia's new model BIT involves environmental damage and labour laws violations as issues limiting an investors access to ISDS.

To prompt debate in the plenary, **Ms. Klaï** questioned the need for a model and the feasibility of using such model during a real negotiation.

Participants noted that, unlike in the area of trade, there is no "World Investment Organization," and therefore a model is needed as a guide for developing countries. Otherwise, they would be left with the model of developed countries, which would not be in their favour. A model can help determine and discipline the policy of the government so it is not determined by different negotiators on a case-by-case basis. Participants also noted that continental or regional agreements (like the PAIC and the SADC model BIT) can help guide countries without a model. Reacting to participants' comments, **Ms. Ramananarivo** agreed on the importance of a model in providing a "legal anchor" to guide negotiators on what to include or exclude in negotiations. As such, Madagascar's current reform project includes developing a model and negotiation strategy. She posited that the negotiating strategy should also differ whether the negotiation is North–North or South–South. **Mr. Trujillo** gave an example of the benefits of a model in respect of the transfer of funds provision. He said that the scope of the prudential carve-out should be a standard red-line provision checked by the country's central bank, prudential regulator and ministry of finance and that it should not be negotiable. He went on to explain that a model BIT should not limit flexibility if it is used correctly, because the team should know which aspects of the model are red lines, such as the example provided, and which can be more flexible.

Ms. Klaï closed the session by clarifying that Tunisia has also developed a model BIT and echoed panellists' and participants' experience regarding the usefulness of a model.

Day 2: Thursday, February 8, 2018

SESSION 5: DRILLING DOWN ON THE BREADTH OF AGREEMENTS: TRADE IN INVESTMENT AGREEMENTS AND INVESTMENT IN TRADE AND ECONOMIC PARTNERSHIP AGREEMENTS

Ms. H. Suzy Nikièma (IISD) moderated the session, which elaborated on the growing development of the negotiation of trade provisions in investment agreements and investment provisions in broader trade and economic partnership agreements.

The moderator invited **Mr. Jonathan Bonnitcha** (Lecturer in Law, University of New South Wales and Associate, ELP, IISD) to share the main findings of his recently co-authored book ("The Political Economy of the Investment Treaty Regime") and his recently published IISD study ("Assessing the Impacts of Investment Treaties: Overview of the evidence"). Mr. Bonnitcha said that over 50 studies investigate the impact of BITs on FDI flows. While results are very sensitive to the methodology used, most studies indicate that there is no or minimal impact of BITs on FDI. He noted that it is often very difficult to isolate the impacts of BITs from those of broader economic and political reforms. Mr. Bonnitcha queried whether the BIT–FDI nexus is the right question to be asked, as it is a measure of quantity, rather than quality of investment. He posited that BITs encourage the riskiest form of FDI, because they act as a form of insurance policy. BITs are more likely to attract FDI that is sensitive to regulatory change because the investment has a high impact on local communities, environment etc., and as such BITs may change the *structure* of existing FDI rather than attracting new investment. Mr. Bonnitcha recalled that, regarding regulatory chill impact, some say BITs improve government decision making (in order to comply with their BIT commitments). While the evidence shows there are no widespread, regular effects of BITs on government decision making, there are major isolated impacts. He called on participants to share their experience of how BITs influence government processes. Mr. Bonnitcha noted two other key impacts of BITs: the shift in bargaining power between governments and investors and the system costs they entail (money and hours spent negotiating, dealing with arbitration, etc.). Developing country governments with limited capacities and resources must consider the opportunity costs of BITs.

Before responding to the moderator's question of where the demand for substantive investment issues to be addressed at the WTO comes from and why, **Professor Makane Moïse Mbengue** (Associate Professor of International Law, Faculty of Law, University of Geneva) contextualized the debate on the nexus between investment and the multilateral trade system. He noted that this relationship is not new, recalling the 1947 (but never ratified) Havana Charter for the International Trade Organization, which included investment rules,

and the consensus in 2004 after the WTO Cancun Ministerial Conference to not expand investment beyond the TRIMs Agreement and the General Agreement on Trade in Services (GATS). He emphasized that what *is* new is the question of whether there should be multilateral and binding rules on investment at WTO level. As to *why*, Professor Mbengue noted two recent developments that could have some influence. First, the Trade in Services Division of the WTO Secretariat was renamed as the Trade in Services *and Investment* Division, indicating the Secretariat's intention to cover investment issues. In addition, since 2017, a new group of countries called Friends of Investment Facilitation of Development (FIFD) has been pushing for investment negotiations at the WTO. FIFD members are mostly developing countries and LDCs, who only want WTO negotiations on facilitation of cross-border investment, not on investment protection or ISDS. They believe that a multilateral approach is best because it would reduce regulatory uncertainty by bringing clear and consistent rules and would enhance stability by anchoring domestic policies and rules to international commitments.

Professor Mbengue identified three risks for developing countries on negotiating investment facilitation at the WTO. First, a "sociological risk": trade negotiators do not necessarily know investment issues and vice versa. Professor Mbengue advised countries wanting to engage with these negotiations to ensure that their trade negotiators coordinate with their investment negotiators. Second, more disciplines and pressures will be imposed on developing countries, and investment facilitation commitments could lead to a new generation of rights for investors, in the form of a "right" to investment facilitation. Third, if investment facilitation is made subject to the WTO dispute settlement mechanism, countries could be subject to one more forum for investment-related disputes.

Called upon to explain the difference between WTO dispute settlement and ISDS, **Ms. Opeyemi Temitope Abebe** (Commonwealth Secretariat) noted that at the WTO there is only state–state dispute resolution whereas ISDS involves investors and states. She emphasized that the interests of states and the interests of investors are very different. Further, the remedies available at the WTO versus under ISDS are very different: at the WTO, claimants are limited to seeking a reversal of the offending measure or retaliation or withdrawal of benefits, whereas under ISDS investors can claim monetary awards. Ms. Abebe noted that this has very different implications for the state, for instance when 60 per cent of a country's annual health budget is awarded to an investor under ISDS. She also noted the difference between the two systems in terms of the right to appeal, which is very limited under ISDS, while at the WTO there is a dedicated appellate body. Notably, the structure of the two systems is also very different. The WTO the dispute settlement board has a pool of adjudicators paid by WTO system, whereas under ISDS arbitrators can be selected from anywhere, and the parties pay their own arbitrators; therefore, by design, they cannot be neutral. Ms. Abebe shared the view that opening the door to conversations about investment facilitation at the WTO is very risky for developing countries, as the agenda could quickly expand well beyond investment facilitation to liberalization and protection.

Ms. Abebe was then asked to explain the impact, in terms of the dispute resolution mechanism, of BIT provisions recalling the parties' WTO commitments on investment. She considered that an investor could indeed use ISDS to challenge a country for failing to comply with its WTO TRIMs commitments, giving arbitrators the freedom to interpret WTO rules. Given how arbitrators have interpreted BITs, Ms. Abebe expressed concern that this would hugely broaden the scope of commitments from what was originally intended. She noted that the PR provisions in the recent regional economic agreement between Australia, New Zealand and Pacific Island nations incorporates TRIMs commitments and that, although in this instance there is no recourse to ISDS for these provisions, other treaties may allow such recourse.

Mr. Martin Kohout (UNECA) presented the findings of a forthcoming UNECA study on the links between BITs and Double Taxation Treaties (DTTs). He started by explaining that DTTs eliminate or minimize instances of double taxation whereby the same income is taxed in the home and host economies. Like BITs, they contain non-discrimination provisions and usually a mutual agreement procedure between tax authorities for dispute resolution. Mr. Kohout highlighted some of the DTT risks that are different to BITs, noting that they can facilitate tax avoidance and curtail a government's taxation rights, often allowing them to lower or abolish taxation but not to impose new forms of taxation that are not provided for in the national legislation. Mr. Kohout then outlined some of the ways in which BITs and DTTs can interact negatively, overlap and contradict each other. He noted particularly the case of investor/investment definitions, MFN, FET and expropriation. On the issue of the mutual agreement procedure and ISDS, he pointed out that investors may use both procedures at the same time, which in turn could potentially reach different or incoherent conclusions. In concluding, Mr. Kohout highlighted the UNECA report's recommendations that developing countries need to clearly articulate their national investment policy and then review all DTTs and BITs through this policy. They need to align the agencies responsible for BITs and DTTs, focus on greater regional integration, build stronger domestic institutions and be more active in global discussions.

During the plenary discussions, participants addressed questions to the panellists. On how the national investment policy could assist with overlap and interaction between DTTs and BITs, **Mr. Kohout** responded that the investment policy—of which BITs and DTTs should be part—should follow from a national development plan. This policy should determine how BITs and DTTs fit together and could consider, for instance, removing taxation from BITs altogether or creating a hierarchy in the case of inconsistency.

On the issue of investment facilitation at the WTO, participants noted that the scope of investment facilitation is not clearly defined and therefore questioned how countries can consider taking on obligations on investment facilitation. It was noted that the joint statement issued at the 2017 WTO ministerial conference in Buenos Aires is not a ministerial statement

and that a legal basis to discuss investment facilitation at the WTO is missing. In response to this point, **Professor Mbengue** explained that many decisions at WTO level are based on practice and not on law, so this issue is not definitive. He considered that the discussion should not be about the legal basis but instead about whether there is consensus on the issue of investment facilitation at the WTO. Participants raised concerns that investment facilitation, while an important topic, is not benign, highlighting the fact that issues such as predictability, prompt publication and transparency have been the subject of WTO disputes. There was a concern that investment facilitation could be a gateway to more horizontal obligations that touch on the right to regulate. **Professor Mbengue** agreed that the definition of investment facilitation needs to be clarified and that developing countries need to insist that facilitation be for responsible investment and sustainable development only. Then he encouraged countries opposed to investment facilitation at WTO to put their arguments and concerns on the table. **Ms. Abebe** recalled that countries may facilitate investment through domestic law.

Mr. Bonnitcha was asked to clarify his point on BITs encouraging riskier forms of investment and what empirical evidence exists to support this. He explained that data problems make this a difficult question, but that in general BITs seem to be most relevant to FDI in sectors such as mining while irrelevant to high-tech manufacturing and global value chains. He was then asked to share his views on the future of BITs, given the lack of evidence in favour of them increasing FDI. Mr. Bonnitcha responded that BITs are just *one* part of the investment governance framework and not an especially important part. He predicted a shift toward national law and investment policies, with BITs becoming very limited in scope to issues like direct expropriation, or becoming more balanced and including investor obligations.

BREAK-OUT SESSION 2: WHAT IS THE OPTIMAL BREADTH OF NEGOTIATIONS FOR DEVELOPING COUNTRIES AND WHY?

The session was facilitated by **Mr. Martin Dietrich Brauch** (Associate and International Law Advisor, ELP Program, IISD). Participants were invited to discuss in small groups and design the optimal option for negotiating investment treaties and trade agreements. They were asked to consider three scenarios: (1) negotiating investment issues in free trade agreements only, (2) negotiating investment issues in investment treaties only, and free trade agreements separately, (3) negotiating only as a regional group with another state in the context of regional integration organization.

Regarding **Scenario 1** (investment in FTAs only), participants identified **advantages** such as a more integrated approach between trade and investment issues, avoiding overlapping agreements; an efficient allocation of human and financial resources in negotiations; and more chances to agree on state–state arbitration only (no ISDS), as common in trade agreements.

They also identified **risks**: investment issues may be diluted into trade issues; investment is more likely to be liberalized in the spread of trade liberalization; investment may be negotiated by trade experts without relevant special knowledge; investment may be leveraged to obtain trade concessions, to the detriment of policy space; there could be a spillover of standards that are common to trade and investment, such as MFN, leading to inconsistency and difficulty of interpretation; and the amendment or termination of investment chapters is more challenging in the context of a broader agreement.

Regarding **Scenario 2** (investment in BITs only), the following **advantages** were identified: negotiations are simpler and faster with specialized experts, meaning time gains and cost savings; the scope of the treaty can be better defined; substantive obligations can be individually considered and carefully drafted in the sole context of investment; the balance between investor and state obligations can be better achieved; and the contentious ideological issues related to trade and investment can be avoided. The **risks** related to this option include overlap and inconsistency between a country's stock of BITs and FTAs and the multiplication of various dispute settlement mechanisms, leading to higher exposure of host states to investment disputes.

As related to **Scenario 3** (regional approach only), participants identified the following advantages: collective bargaining reduces the political pressure on individual countries; more technical resources in negotiations; a common interest and understanding of standards at regional level; the possibility of addressing regional needs; and the opportunity to strengthen regional integration process. In term of **risks**, participants mentioned: the lack of consensus at regional level; the failure to integrate nations' specific contexts and realities; the temptation to agree to the lowest common denominator; and the length of the negotiation process.

SESSION 6: THE BREADTH OF NEGOTIATIONS: EXPERIENCE SHARING

This session was moderated by **Ms. Aminata Traoré** (Permanent Secretary, Private Sector High Council, Ministry of Investment Promotion and Private Sector, Mali). Panellists were invited to share their experience and challenges in response to the issues discussed during Break-out Session 2: What is the optimal breadth of negotiations for developing countries and why? Panellists started with an overview of their negotiation policies for BITs and FTAs.

Mr. Parvez Rifat (Director General, Board of Investment, Pakistan) explained that since 2003, Pakistan's policy has been to not enter into BIT negotiations. The Pakistani Investment Policy requires a model BIT to be developed for consideration by the various stakeholders. Once this is concluded, negotiations may recommence.

Mr. Ariel Martins (Head of the Investment Treaty Negotiation Unit, Ministry of Foreign Affairs and Worship, Argentina) shared that Argentina is currently negotiating new BITs in new contexts, including new investment chapters in FTAs and commercial agreements. For instance, with Chile and Mexico, Argentina took the opportunity to develop investment chapters to replace their 1990s BITs. He noted that MERCOSUR is also negotiating FTAs with the European Union and the European Free Trade Association (EFTA), but these parties did not agree to use this process to renegotiate old BITs.

Mr. Djamal Abdelli (Deputy Director, General Directorate of Foreign Economic and Financial Relations, Ministry of Finance, Algeria) shared that at the moment Algeria is only negotiating BITs and does not negotiate investment chapters in FTAs. He noted that Algeria has 42 ratified BITs, including many first-generation treaties signed in the 1990s. In about 2005 there were a number of disputes initiated against Algeria. This led to a review of the investment treaty strategy. Since 2009 only one agreement has been signed, with a country at the same level of development as Algeria. However, Mr. Abdelli noted that Algeria is currently being strongly requested by some developed countries to sign BITs.

Panellists were then invited to share experiences their countries have had in negotiating FTAs or economic partnership agreements (EPAs) including investment chapters and the challenges of such negotiations.

Mr. Martins considered that the challenges depend on whether negotiations are with a developing or developed country. He noted that Argentina has received proposals for new generation BITs with some positive elements (for example, investor obligations) and some more challenging elements (for example, investment liberalization and PR prohibitions).

Mr. Rifat shared information regarding Pakistan's stock of FTAs with investment chapters. He noted that it was not challenging to include investment in these FTAs because Pakistan already had BITs with those countries. Pakistan is currently negotiating FTAs with two countries. One of them wants to include an investment chapter, but Pakistan cannot agree to this until the BIT template is revised. Mr. Rifat noted that Pakistan currently has separate investment and trade policies but is working on an integrated policy and wants to conclude FTAs with countries with which it already has BITs.

Mr. Djamel noted that Algeria has signed and ratified an FTA with the European Union which does not include an investment chapter. If it did, it would provide an opportunity to deal with multiplicity and inconsistency of BITs signed with EU member states.

On how to ensure consistency between BIT and FTA obligations with the same country, **Mr. Martins** said that in Argentina's case, the old BITs were replaced by new investment chapters in FTAs with Chile and Mexico, so there was no risk of conflict. Regarding the MERCOSUR–

European Union negotiations, there was no issue of coherence or consistency, because the old BITs will remain in force and the investment chapter in the new FTA will be very limited.

Panellists were asked whether their countries had negotiated on other issues along with investment—such as services and public procurement. **Mr. Abdelli** noted that Algeria strives to exclude public procurement contracts from BITs, because such contracts are not considered investments under Algerian law and because the country has been exposed to investment arbitration cases based on first-generation BITs that included public procurement in the definition of investment. **Mr. Martins** agreed that coherence between services and investment chapters could be an issue, and Argentina's approach has been to split the market access of services and the protection given to "mode 3" (commercial presence) investments to each be governed by their respective chapters. He noted that Argentina has been requested to afford to investors protections greater than those under the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), but that Argentina could not accept this, as the investment chapter could not give greater protection than what was protected at the WTO level, especially when including ISDS. He also highlighted the importance of providing for general exceptions and ensuring the consistency of procedural provisions, such as those regarding the conduct and impartiality of arbitrators.

During the plenary discussions, participants noted that, on the issue of maintaining consistency between investment and services provisions within FTAs, it is important that the agreement set a hierarchy of interpretation in case of conflict. Participants discussed the link between trade and investment, noting that the two should be handled separately because they have different impacts on development. Participants noticed there is no clear practice as to whether investment and trade should be negotiated together or separately. **Mr. Martins** responded to this point, agreeing that there is indeed overlap and confusion about what is trade and what is investment. He argued that when investment is defined as an enterprise, the scope of BITs does not cross over into areas of trade. He also noted that whether or not to include liberalization commitments is a decision for an individual state and that developing countries should carefully consider the trade-offs. He considered that pre-establishment rights should only be given in exchange for market access for goods or some other valuable consideration.

SESSION 7: DRILLING DOWN ON THE SPECIAL CASE OF DISPUTE SETTLEMENT: LOCAL, REGIONAL AND MULTILATERAL DESIGNS

The session discussed ongoing developments of investor–state-based dispute settlement mechanisms and was moderated by **Mr. Daniel Uribe** (Visiting Researcher, Global Governance for Development Programme, South Centre). He invited the panellists to share their views on various options for the reform of ISDS at national, regional and global level.

Ms. Nathalie Bernasconi (IISD) started with an overview and update on discussions on ISDS reform at global level, noting that there is a broad consensus on the need for reform. She highlighted that ISDS: (1) contributes to the loss of policy space; (2) circumvents domestic judicial systems; (3) provides rights to only one group of actors (foreign investors); (4) grants greater rights to foreign investors than domestic investors; and (5) is perceived as opaque, unpredictable and lacking independence. Countries have taken various actions in response, namely: (1) reverting to domestic dispute settlement (South Africa); (2) allowing for state–state dispute settlement only (Brazil); (3) requiring specific consent to submit to ISDS; (4) including ISDS only after exhaustion of remedies (India); (5) introducing a treaty-specific Investment Court System (European Union). Ms. Bernasconi then focused on the multilateral investor–state dispute court proposed by the European Union, noting that it is not a comprehensive reform, as it combines new and old elements. The proposed court would include a roster of arbitrators (rather than party-appointed ones), an appellate review process and certain ethical standards, particularly relating to "double-hatting." However, she emphasized that it would still be an ISDS mechanism in which only foreign investors could initiate claims and that without the requirement to exhaust local remedies. Turning to the current UNCITRAL process on ISDS reform, she recalled that the mission of the UNCITRAL Working Group is to identify concerns regarding ISDS, consider whether reform is desirable and, if so, develop recommended solutions. For these rules to be game-changers, developing countries will have to actively engage in discussions, try to influence the UNCITRAL process and put new options on the table.

Mr. Luis Guillermo Vélez (General Director, National Agency for the Legal Defense of the State, Colombia) concurred with criticisms of ISDS and shared the view that ISDS does not have the fundamental elements for a fair adjudication system: it is not fair, fast or predictable. He explained that the original error of ISDS was to be modelled on the international commercial arbitration model, with commercial lawyers as arbitrators. As such, states gave commercial arbitrators the responsibility of working with unfamiliar tools (treaties and customary international law, as opposed to the detailed contracts with which they were used to working), and on an unfamiliar philosophical basis (broader public interest objectives, as opposed to profit maximization for private disputing parties). Emphasizing the conflict of interest issue, Mr. Vélez shared that, between 1972 and 2011, 37 investment arbitrators based in four cities have sat on 50 per cent of known cases and are all "quadruple-hatters" (arbitrator, counsel of a disputing party, counsel of a third-party funder and expert). He also raised the issue of lack of predictability and rules to prevent frivolous claims. Finally, Mr. Vélez concurred that multilateral reform is necessary but slow and that developing countries are already facing negative ISDS consequences. Therefore, he called for small changes in the short term that can already have marginally important results.

Mr. Mustaqeem De Gama (Counsellor, Department of Trade and Industry, Permanent Mission of South Africa in Geneva, South Africa) agreed that the commercial arbitration model

is a foreign animal when it comes to state relations. He explained that South Africa decided to use domestic law as the primary law applicable to any relationship, recalling that state practice is a primary source in Article 38 of the Statute of the International Court of Justice (ICJ). He criticized the fact that secondary sources of international laws have been prioritized, including the writings of scholars and tribunal decisions. As to South Africa's rationale for submitting international investment disputes to domestic judges, he explained the advantages of domestic legal remedies and their sequencing, compared to compensation as the primary international remedy of arbitration. South Africa terminated many of its BITs in 2010, which, as Mr. De Gama explained, allowed the country to start addressing its international legal obligations and enact domestic legislation in replacement. The Investment Act now prevents consent to international arbitration, making it crucial to empower South African courts and implement a system of dispute prevention. The Act gives authorities and the investor an opportunity to settle disputes amicably and allows for state–state arbitration under certain conditions. In conclusion, Mr. De Gama shared that a focus on domestic remedies, targeted interventions, trade policy and industrial policy helped South Africa move away from the investment treaties system and curb ISDS cases.

Mr. Joel Yaméogo (Head of Industry Division, West African Economic and Monetary Union [UEMOA] Commission) explained that UEMOA is currently negotiating a regional investment code and is grappling with the issues of investment incentives and the legal status of the code. He noted that these difficulties stem from the different levels of economic development, geography (coastal versus landlocked) and language of UEMOA member states. In terms of disputes settlement, the draft code refers to the UEMOA Court of Justice, as regional regulation supersedes national laws. Although international arbitration is included, it is not the preferred option, he said.

Opening the discussion to the plenary, **Mr. Uribe** asked about the opportunities and challenges that the UNCITRAL process presents for developing and emerging economies. While several participants agreed with the criticisms of ISDS, some noted the challenge of following the South African model in developing countries where the judiciary is not always independent, and that resources and efforts are needed to improve domestic courts. **Mr. Vélez** and **Mr. De Gama** pointed out that ISDS is a problem even for developed countries, where the judiciary is assumed to be independent and efficient. Participants also shared the view that international arbitration should be the last recourse, after domestic and regional courts. **Mr. Yaméogo** expressed the view that countries can start by reducing ISDS risks, without necessarily moving away from it.

Coming back to the UNCITRAL process, **Ms. Bernasconi** stressed that it should both address the immediate dispute risks in the short term, but also rethink investment dispute settlement more broadly in the long term. A new investment dispute settlement mechanism should take into consideration all interests, including those of local communities and other affected stakeholders, and go beyond adversarial type of dispute settlement, such as ISDS.

Rather it should ensure access to remedies to a broader group of stakeholders, and provide for more solution-oriented processes. Also on the UNCITRAL process, **Mr. Vélez** shared a map showing countries defending the status quo with reforms limited to the bilateral level (Chile, China, Japan, Mexico, Russia and the United States), those pushing for a multilateral investment court (Australia, Canada and the European Union) and a third group of developing countries wanting to quickly address the most prominent problems in the system (Argentina, Brazil, Colombia, Ecuador, Egypt, India, Pakistan and South Africa). He encouraged the developing countries represented at the Forum who are UNCITRAL members to prepare for and engage in the next session in April and invited them to join the latter group.

BREAK-OUT SESSION 3: WHAT ARE THE APPROPRIATE ROLES FOR DIFFERENT DISPUTE SETTLEMENT OPTIONS?

The session was facilitated by **Mr. Joe Zhang** (Law Advisor, ELP Program, IISD). First, participants discussed in small groups the pros and cons, from a government perspective, of three international dispute settlement mechanisms: investor–state arbitration, investor–state court, and state–state dispute settlement. Second, participants were asked to design a broader investment dispute settlement mechanism. They considered issues and options including: judges vs. arbitrators; adjudication vs. mediation; ombudsmen; institutional structures; standing (who are the disputing parties); and length of proceeding.

Regarding **investor–state arbitration**, participants noted that the pros include: ensuring enforceability of Parties' commitments; promoting good governance in host states; enhancing investors' confidence; and insuring investors against their risks. Participants also mentioned, among other aspects, the following cons of investor–state arbitration: it is primarily designed for private contractual disputes; it limits states' policy space; its lack of an appeals mechanism, among other issues, leads to unpredictability and inconsistent awards; it is a one-way system (only investors can bring claims); it is too costly and time consuming; it lacks transparency; it poses the risks of conflicts of interests and arbitrators' multiple hatting; it raises issues concerning arbitrator impartiality and quality; and it fails to provide a mechanism to avoid frivolous claims.

Regarding an **international investor–state court**, participants indicated pros such as the following: predictability; transparency; appeals mechanism; reduced bias in the appointment of judges; and developing country judges in the roster. In turn, participants also mentioned cons, including the following: enforcement of judgements may pose difficulties; good lawyers may not be willing to make themselves available as judges and lose other professional opportunities; the court would allow investors to avoid domestic courts; and investors would not be involved in the choice of judges in the roster. Different groups had diverging views on

the issues of costs and duration of proceedings: while some groups perceived the court to be a faster and less costly alternative, others perceived it as potentially slower and more expensive.

Participants indicated several pros of the **state–state dispute settlement** option: it is more transparent and flexible, less expensive and not driven by profit maximization; it is likely to respect state sovereignty; it is more conducive to an amicable resolution, as states have similar interest in investment regulation; monetary compensation is not the only remedy available; it may eliminate the problem of frivolous claims. Among the cons of this option, participants mentioned: less powerful countries may be under the pressure of powerful ones; states bear the costs of arbitration for investors; selection of investor's cases by home state could be challenging; proceedings may affect diplomatic relations; political considerations may affect the procedure; proceedings may be time consuming; and the option may not lead to a change in ISDS jurisprudence.

As related to **the design of a broader dispute settlement mechanism**, participants agreed that the ideal mechanism should focus first on prevention (through ombudsmen, for example) and amicable settlement processes (through mediation, for example); then require the exhaustion of local remedies. If provided, international arbitration should be a last resort and include an appeal mechanism.

SESSION 8: THE DESIGN OF DISPUTE SETTLEMENT: EXPERIENCE SHARING

The session was moderated by **Ms. Elyjean Portoza** (Attorney, Board of Investments, Philippines). Panellists were invited to share their experiences and challenges in response to the question discussed during Break-out Session 3: What are the appropriate roles for different dispute settlement options?

Mr. Chanchal Chand Sarkar (India) noted that certain issues are excluded from the scope in India's new model BIT, such as taxation. The new model also provides for more transparency in ISDS, deals with conflicts of interest and refers to International Bar Association (IBA) standards. Finally, he recalled that the Indian model requires the exhaustion of local remedies for five years before recourse to arbitration.

Ms. Therenna Reeves (Chief Legal Counsel, Legal Department, National Investment Commission, Liberia) explained that Liberia has not been negotiating BITs: first, because the country is focused on maintaining flexibility for development in the wake of a civil war that lasted over 14 years and second because BIT commitments conflict with Liberian laws. However, she pointed out that the country submits to ISDS in most of its investment contracts. She concluded that Liberia is concerned with the issues around ISDS and is working on its current laws to provide alternatives and solutions.

Mr. Ernesto Rossell (Deputy Attorney General of Defense and Legal Representation, Attorney General's Office, Bolivia) recalled Bolivia's reform approach. After the 2006 election, the new government introduced a plural economic model, nationalized hydrocarbons companies, and denounced all of Bolivia's BITs and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention). Mr. Rossell highlighted that Bolivia has successfully closed 13 investment arbitration cases (including negotiated settlements), while five are pending. He explained that the nationalizations and denunciation of BITs did not produce the predicted negative effects on economic growth, but improved Bolivia's ability to attract investments. He concluded with a message of hope for participants: the beginning of reform was very hard for Bolivia, but the country now has a new model BIT to provide legal security and economic stability.

The panellists were invited to share their experiences of using their models during negotiations, especially regarding ISDS provisions. **Mr. Sarkar** noted the challenge of agreeing on the exhaustion of local remedies in BITs with developed countries. **Ms. Reeves** noted that it is important for Liberia to require the application of Liberian law even when the arbitration takes place in a different country. **Mr. Rossel** found that Latin America countries are likely to find solutions together, as they are facing similar problems. He called for the establishment of arbitration forums that can represent the interests of the states and also protect investors.

During the plenary discussion, **Mr. Sarkar** was asked by several participants to clarify how the exhaustion of local remedies requirement works in practice. On survival clauses in old BITs, he explained that India is trying to replace or negotiate these provisions during the course of negotiations, and where the initial validity period is not over in older BITs, joint interpretive statements are issued to be adopted jointly by the treaty partners.

Day 3: Friday, February 9, 2018

SESSION 9: BRINGING IT ALL TOGETHER: WHAT SHOULD THE LANDSCAPE OF INVESTMENT NEGOTIATIONS BE?

The session centred on putting the pieces of the puzzle together to determine the next steps and was moderated by **Ms. Champika Malalgoda** (Executive Director, Research and Policy Advocacy Department, Board of Investment, Sri Lanka). She began by asking panellists whether substance and dispute settlement could be separated in negotiations and whether ISDS reform could proceed on its own.

Mr. Howard Mann (Associate and Senior International Law Advisor, ELP Program, IISD) considered that the optimal situation is to negotiate content and institutional mechanisms together. Any viable international legal regime is supported by a proper institutional mechanism and implementation structure, offering support for developing country members (lacking in the current investment treaty regime). Mr. Mann emphasized that developing countries need to reflect on both the optimal situation and the reality; and the reality is that the discussion has started on dispute settlement. As the UNCITRAL process will decide whether to have negotiations on dispute settlement and what the conditions for this should be, Mr. Mann encouraged developing countries to take an active role in this process. He clarified that the "third group" mentioned by Mr. Vélez is thinking through not just how dispute settlement should work in terms of instruments we have *now*, but also what we *want* to have. Therefore, he stressed the need to keep policy space today that will allow the integration of what is needed in the future, for example, for investor obligations to be enforceable. Mr. Mann also urged developing countries to be careful and avoid falling into the trap of thinking that tinkering around the edges of dispute settlement is sufficient. He considered that a much clearer articulation of the content of the next generation of treaties is important to ensure any reform to the dispute settlement process is fit for this new generation.

Invited to discuss the role of principles and declarations like the South–South, G7 and G20 in shaping the scope of negotiations, **Professor Mbengue** (University of Geneva) noted that non-binding principles represent "soft law" but can be more powerful than hard law, as illustrated in the context of global environmental protection and climate change, and should not be underestimated. He noted that principles and declarations often reflect strong consensus, compared with fragmented and inconsistent agreements, giving more bargaining power to developing country negotiators. Professor Mbengue also considered that declarations and principles contribute to *normative solidarity* and can help fill the gap for countries that do not have model agreements. He went on to explain that a major strength of principles is giving a voice to developing countries, which mostly have been rules takers or consumers for a long time. Principles and declarations can show that developing countries have their own voice, for instance in what he called "Africanization" of investment law, led by regional and continental processes. Having said this, Professor Mbengue warned against the trap of "uniformization," noting that the "cut and paste" approach is common in the BIT space. Declarations and principles should take into account local context, as well as enjoying mutual inspiration and cross fertilization, he concluded.

On the importance of choosing the right forum for discussions on substantive and procedural reforms, **Mr. De Gama** (South Africa) stressed the need to decide where and how reform should take place. However, he noted that substance cannot be divorced from procedure because they both feed into the future developing countries are trying to construct. Concurring with Professor Mbengue, Mr. De Gama emphasized that *normative solidarity* should bind agendas, taking into account different levels of development and regional context and allowing for normative solidarity but also differentiation.

On the same issue, **Mr. Mann** explained the importance of understanding the full range of negotiations and discussions currently underway at various different levels. This includes the multilateral negotiation at United Nations (UN) level regarding business and human rights, UNCTAD's work on sustainable investment, the investment facilitation discussions at the WTO, the dispute settlement issues discussed at UNCITRAL, the review of arbitration rules at ICSID, the review of the Energy Charter Treaty, the new regional and continental models or treaties in Africa (for example, COMESA, PAIC, and SADC) and investment negotiations in the Association of Southeast Asian Nations (ASEAN). Mr. Mann asked how to apply normative solidarity in the context of these different processes, and how to bring them together. He argued that there are definitely organizations that *should not* be the forum for that objective. Mr. Mann considered that the WTO is a trade organization first and that trade and investment are not two sides of the same coin. Developing countries need to keep these issues separate and distinct and not trade one for another. Mr. Mann put forward the view that the UN climate change negotiations present a convincing model in developing the appropriate platform. In terms of criteria for selecting the best forum, he proposed to look for a forum which will be holistic, emphasize consensus building between different regional approaches and link investment and sustainable development.

Professor Mbengue shared his own criteria for determining the appropriate negotiating forum, being a forum (1) pursuing sustainable development objectives, (2) with a decision-making process that is more balanced and fair to developing countries and (3) where the values shared by developing countries are reflected. Professor Mbengue emphasized the importance of strengthening the networks of developing country investment negotiators for more consolidated and proactive negotiating positions.

Mr. De Gama highlighted the need for developing countries to reengage and be present at every level of the debate regardless of the forum, as developing countries have lacked a voice for too long. He encouraged developing countries to set a positive agenda about what they *do* want, not just what they *do not* want. Developing countries should engage, even if they disagree (as they do on investment facilitation at the WTO), he concluded.

During the plenary discussion, participants queried whether departing from the WTO would build some incoherence into the approach of dealing with investment, given the TRIMs Agreement and the investment facilitation discussions. **Mr. Mann** explained that, although it is popular to speak of "trade-led development," it is the investment that is made to *enable* the trade and *how* that investment is structured and operated that determines whether development is sustainable, inclusive and equitable. He argued that what is needed is a forum with more focus on investment, especially sustainable investment, and a clearer sense of mission. He noted finally that the WTO has never been able to be the home of investment over many years, which means that it is not the right place for investment. **Professor Mbengue** noted that the WTO has shown clear limits on how it is able to integrate issues of sustainable

development. Even though the Marrakesh agreement refers to this, whenever there is a conflict between economic and non-economic values, the former prevails. He argued that if investment is brought in to the WTO, the same dynamic would hold, to the detriment of sustainable development objectives. Professor Mbengue went on to say that, given that the Doha round is now 15 years old, even if investment facilitation is put on the table, there is no chance that there will be a negotiated outcome. **Mr. De Gama** stated that investment at WTO is not even the key issue. The position of many developing countries is that they could agree to negotiate investment in the WTO if all other Doha round promises are kept.

Some participants shared the view that the WTO could be a good place for investment discussions, because many countries may see it as one of the only forums where they have voice and influence because of its consensus process. They also raised the concern of creating a new forum without the guarantee that it will succeed. **Mr. Mann** noted that the success of a new forum would depend on the coherence of its founding principles. Explaining further why the WTO is not the right forum, Mr. Mann stated that a new forum has more opportunity to set operating principles of *normative solidarity* and a strong sustainable development agenda. **Mr. De Gama** said that he is open to being convinced that investment, in its full complexity, is an issue that could be appropriately implemented at the WTO level, rather than being most effectively handled at the level of national development policy. He reminded participants that new institutions bring new problems, and it may be better to make existing institutions more effective and appropriate for the sustainable development narrative. According to him, any WTO level discussion on investment needs to be a *full* discussion, and not a discussion on selected topics. Mr. De Gama agreed that trade and investment coincide but are separate, and that the nexus and relationship between the two need to be well understood.

During a second round of plenary discussions, participants questioned which forum can be entrusted to do both dispute settlement reform and substantive reform. **Mr. Mann** responded that there currently are multiple forums with discussions on different aspects of content, with different perspectives and participants, but that dispute settlement reform should not be addressed alone just because this is the lowest common denominator. He called for a growing harmonization of vision at the regional level as is currently building in Africa. Participants asked how to foster normative solidarity and cooperation in a context of treaty negotiations often driven by unbridled competition, mistrust and pressure from developed countries. **Mr. De Gama** replied that the pie is big enough for everyone and that competitive cooperation is what comparative advantage is about. He shared the view that, once African countries diversify production, they will be able to trade and compete cooperatively. Participants also noted that small, landlocked countries find it difficult to be heard and understood at the multilateral and regional levels. **Professor Mbengue** agreed that the lack of differentiation among developing countries is at the heart of the problem as it is not a homogenous group. He emphasized that negotiators must come to the table with a clear mandate and objective in order to be effectively heard.

BREAK-OUT SESSION 4: WHAT SHOULD BE THE PRIORITIES OF DEVELOPING COUNTRY INVESTMENT NEGOTIATIONS?

The session was facilitated by **Mr. Martin Dietrich Brauch** (Associate and International Law Advisor, ELP Program, IISD). Participants were invited to discuss and adopt three top priorities for investment negotiations from a developing country perspective at each of three levels: (1) bilateral investment negotiations, (2) regional investment negotiations, (3) multilateral negotiation at forums such as UNCITRAL, UNCTAD and the WTO.

At the bilateral level, participants considered that states should prioritize, among others: attracting sustainable investments in line with national development policies; building legal frameworks providing balanced rights and obligations for states and investors; creating mechanisms for preventing investment disputes; negotiating BITs with strategic partners only; and designing BIT templates adapted to the economic level of their partners (less, equal or more developed partners).

At regional level, participants proposed that states prioritize: identifying common interests and ensuring that different levels of development of members states are considered; strengthening economic integration and cooperating on regional infrastructures to facilitate investment; protecting the right to regulate and policy space for performance requirements; harmonizing investment promotion packages to avoid competition and overlap; focusing on regional dispute settlement mechanisms; and balancing rights and obligations between states and investors.

At multilateral level, among the priorities highlighted were: undertaking a comprehensive reform of ISDS, including a multilateral mechanism with an appeals mechanism or regional approaches; developing guidance on investment treaty negotiations with a view to promoting sustainable development objectives; providing safeguards to protect developing country interests; developing new standards and approaches for investor obligations; and ensuring investment is not a part of WTO negotiations.

SESSION 10: THE BIG PICTURE: MAXIMIZING DEVELOPMENT BENEFITS FROM INVESTMENT NEGOTIATIONS

The session was moderated by **Mr. Joel Richards** (Technical Advisor, Investment and Private Sector, Caribbean Community [CARICOM] Secretariat). Panellists were invited to share their own experiences and challenges responding to the question discussed during

Break-out Session 4: What should be the priorities of developing country investment negotiations?

On the question of key elements of investment negotiations to enhance the sustainable development agenda of a country, **Mr. José Henrique Vieira Martins** (Brazil) recalled the lack of a clear correlation between BITs and FDI. As such, he noted that Brazil chooses to look for other ways to attract investment, including by generally improving the investment climate and maintaining space for sustainable development policy. Mr. Martins noted that it may be good practice to exclude commitments on indirect expropriation as it can be difficult and uncertain to effectively restrain arbitrator interpretation of this provision. He also spoke in favour of including provisions on CSR, labour, environment and exceptions specifically for health, environment and anti-corruption. He noted Brazil's bilateral and regional commitments on investment facilitation, such as the establishment of joint committees and ombudsmen to limit the adversarial approach expounded by traditional BITs.

Ms. Naa Lamle Orleans-Lindsay (Head of the Legal Department and Board Secretary, Ghana Investment Promotion Centre, Ghana) stated that investment treaty negotiators should understand their country's particular development goals and identify how the BIT will set out, protect and help to achieve those goals. She explained that the challenge for many countries is that goals are nebulous and subject to influence by institutional donors. Ms. Orleans-Lindsay emphasized the importance of a model to guide the country, set out its priorities and contain the key elements needed to protect the country's development goals. She also stressed the importance of a sticking to a master plan for BIT negotiations, instead of being passive and accepting offers to negotiate BITs, especially from countries that are not strategically relevant and key sources of FDI. Ms. Orleans-Lindsay explained the need to prepare and plan properly for negotiations. It is also important to have pre-negotiation meetings (exchange of models, identification of areas of convergence and divergence) to first decide whether it is worth starting negotiations at all. She warned about strategies she has experienced that are used by some countries during negotiations to put negotiators in a weaker position when they are hosted in their capital (for example, food and comfort deprivation, no access to Wi-Fi).

Mr. Hoang Xuan Hoa (Director of the Department of General Economic Affairs, Central Economic Commission [CEC] of the Communist Party of Vietnam, Vietnam) shared his country's challenges in FTA negotiations. He explained that FTAs open new opportunities for new investors and that Vietnam is negotiating bilateral, regional and megaregional agreements. According to Mr. Hoang, the main challenges with FTAs are overcoming limitations and weaknesses during the implementation of new commitments in economic, political and social affairs. He warned that due to competitive pressures to open markets, several economic sectors, enterprises and products of Vietnam will encounter more difficulties. At the same time, FTAs do not address several core issues for development such as limited access to skilled labour and human resources, limitations in health, education, access to credit, and science and technology. Therefore, Vietnam is looking toward other

solutions, including improving the national legal system, enhancing competitiveness and reforming the growth model to give priority to agricultural development. Mr. Hoang concluded by raising awareness about the negative impact of current FTAs.

Ms. Souphaphone Saignaleuth (Deputy Head of International Investment Cooperation Division, Investment Promotion Department, Lao PDR) shared that Lao PDR recently revised its investment promotion law to help attract responsible and sustainable investment. Ms. Saignaleuth explained that Lao PDR has a large stock of BITs (28) and investment chapters in FTAs, including ISDS. Lao PDR has been sued twice and is now revising its BIT model and learning from other countries' experience. She noted that Lao PDR has taken part in regional and multilateral investment negotiations including in the context of ASEAN. Lao PDR's model BIT is intended to bring a more consistent approach to negotiations and clarify the government's intention in entering into BITs, while the regional and multilateral approach presents an opportunity to promote harmonization. Ms. Saignaleuth noted that their 2013 BIT with Belarus lacks a lot of modern BIT innovations and suggested that policy-makers need to carefully consider the impacts of their choices on regulatory policy space.

Mr. Richards gave as an example the CARICOM negotiations with Canada for an investment chapter; Canada thought the CARICOM approach was too state-friendly and vice versa, and asked the panellists for their thoughts on how to reconcile this.

Ms. Orleans-Lindsay responded that the balance between state and investor rights is the biggest challenge. She shared Ghana's experience in having to continually restate their different level of development in negotiations: Ghana is only 60 years old and needs to be able to use industrial policy to protect its infant industries, but recognizes that it cannot just close the economy and must achieve a balance. Taking the example of current investment law reform in Ghana, Ms. Orleans-Lindsay explained how it is complicated to achieve this balance under various domestic pressures, including from different industry groups.

Invited to share how difficult it has been to implement their country's vision in the context of negotiations, **Ms. Saignaleuth** responded that, as an LDC, negotiations are very challenging for Lao PDR, especially in the ASEAN context as it has developed country members as well. She noted that Lao PDR's legal sector is still under development.

Mr. Hoang shared that Vietnam has a 2014 Investment Law and that the key question for Vietnam is to ensure that benefits are distributed equally between foreign investors, the interests of the state and public interests. The legal framework needs to be reformed to promote transparency and equity, but also to improve the business environment with stable macroeconomic conditions.

In term of negotiation success stories, **Ms. Orleans-Lindsay** replied that Ghana's best outcomes in negotiation arose from sound background research and due diligence. It was also

crucial that negotiators were able to explain in great detail *why* they wanted certain provisions, from an objective and not from an emotional perspective. **Ms. Saignaleuth** shared Lao PDR's experience in the negotiations for the 2012 ASEAN Comprehensive Investment Agreement. The agreement contains provisions to enhance ASEAN cooperation, promote liberalization and strengthen investment promotion and protection to attract FDI into the region. Lao PDR, as an LDC, got more time to implement these commitments**. Mr. Hoang** noted that Vietnam had similar experience in ASEAN negotiations. **Mr. Martins** shared the experience of negotiating with India, and the related discussions about the definition of investment using the *Salini* test. The MERCOSUR negotiations were another positive example for Mr. Martins, in which the parties agreed to state–state dispute settlement (using the already existing MERCOSUR Permanent Tribunal for Review) and to establishing a joint committee to support early and amicable resolution of disputes.

During the plenary discussions, participants shared their experiences on methods of exerting pressure and intimidation employed by their counterparts. Participants also acknowledged the courage of negotiators because of pressures that they go through and stressed the challenges for negotiators when they do not have the support of their superiors. **Ms. Orleans-Lindsay** agreed that it is very difficult to try to negotiate when it appears that a decision has already been made at a higher level. She stressed that negotiators have to lobby their superiors and get them to understand the risks. She advocated circulating written advice on BIT risks to cabinet, other ministries and agencies, making it harder to ignore. **Mr. Martins** agreed that internal coherence and understanding, especially at the top level, is very important. Participants noted that developing country negotiators can request several carve-outs and that the best way to approach this is to have a domestic regulatory framework in place to extract the desired development benefits, rather than trying have all requirements in the treaty.

Mr. Richards concluded the session by noting that not all developing country negotiators are as familiar with their own legal frameworks as they should be. CARICOM has started auditing laws which are relevant to trade and investment obligations to strengthen the negotiating positions of CARICOM member states.

TAKE-AWAYS AND NEXT STEPS

The session was facilitated by **Professor Mbengue** (University of Geneva). Noting that investment negotiators from developing countries are facing even greater challenges than they used to, he called for a change in culture of investment negotiations. Professor Mbengue invited the participants to share their views on a series of guiding questions:

- How do we define/formulate negotiating positions among developing countries?
- Can we do that in a multipolar environment? How should we react to this multipolar environment? Should we change the multipolar environment or adjust to it?
- How do we build *political* solidarity in order to achieve *normative* solidarity?
- How should countries engage in facilitating investment for sustainable development?

Participants shared the views that developing countries should first seek to better understand what is being discussed and find a common position based on their national development goals. Then they can have a clear plan to be present in multiple forums before taking any investment negotiation position. In that line, participants insisted on developing countries having common positions on substantive aspects, including investment for sustainable development and balancing rights and obligations.

It was also stressed that communication with all stakeholders, specifically the local population, is critical to gaining political will and support. Therefore, a bottom-up approach to build both political and normative solidarity is crucial. It was also noted that discussion with capital-exporting countries and foreign investors is important. Some participants proposed to first find ways to get out of BIT negotiations, rather than just adjusting to the multipolar environment, highlighting that the energy and time spent on BIT negotiations could be directed to other areas.

The need to have a coherent approach between all government departments to strengthen national institutional positions on various issues was also highlighted. It was proposed to restructure the international institutions that represent the South to be able to create political solidarity among developing countries. Regarding investment facilitation discussions at the WTO, some participants raised concerns about the content and scope of "facilitation of investment" and its link to sustainable development, while some others said that discussion of the issue is a positive thing, regardless of divergence in positions. A proposal was made to prepare a collaborative study between IISD, South Centre and the Commonwealth Secretariat on the pros and cons of investment facilitation discussions at the WTO.

Several participants proposed that governments share best practices on institutional design for investment negotiations and how to build stronger negotiating positions. The importance of creating a regional and global network for developing country investment negotiators was stressed several times.

Finally, all participants agreed that strong political will should be built at the highest level, as investment negotiators are not the policy-makers. In that light, the idea to create a forum of developing country investment policy-makers was brought in the discussion. This led to a proposal of organizing a half-day side event at the UNCTAD World Investment Forum with high-level representatives to raise awareness on current issues and reform discussions.

CLOSING CEREMONY

Ms. Nathalie Bernsaconi (IISD), **Mr. Carlos Correa** (South Centre), and **Dr. Moses Ikiara** (Kenya) formally closed the Forum by thanking the co-organizers and co-sponsors for their support, as well as the participants for their active engagement in the discussions throughout the three-day program. Participants were encouraged to continue the reflection on an alternative system to foster sustainable investment, as well as to engage in current discussions at various levels, and particularly in the upcoming UNCITRAL meeting on ISDS reform in April 2018.