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The Road to Abuja Newsletter

**Coherence in International Investment Governance:
Crafting a holistic approach to investments
that work for sustainable development**

United Nations (UN) Processes

UNCITRAL Working Group III on Investor-State Dispute Settlement Reform (ISDS)

What Is It?

The United Nations Commission on International Trade Law (UNCITRAL), specifically under Working Group III (WGIII) negotiations, [formally began](#) in 2017 with the aim of developing multilaterally agreed reforms for ISDS. Ultimately, it is a member state-driven process with evolving issues being put and kept on the agenda through the persistence of a few key states. So far, the UNCITRAL WGIII process is by no means perfect. Criticisms include the narrowness of its mandate—which focuses on procedural issues to the exclusion of substantive ones—and a low ambition level. Ten formal negotiations sessions have been held since 2018, not counting several informal and consultative meetings.

What's at Stake?

States will need to look ahead to what the future of the international investment regime could look like. The final, multilaterally agreed outcomes from the UNCITRAL process will need to be sufficiently ambitious that they lay the groundwork for states in their priority areas; hence, negotiators need to signal that they are open to innovative reforms, rather than agreeing on the lowest common denominator just for the sake of consensus.

To get the most out of the UNCITRAL WGIII process, participating regularly, making written submissions, making concrete proposals, and taking the floor will be critical for developing countries. In this regard—and in light of resource constraints facing negotiators—participating

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in competing forums, coordination, and coalitions (especially in a virtual context) is important to develop common positions that ensure particular priorities and interests are taken into account.

Developing countries may also choose to prioritize reforms in areas that would have the greatest impact, such as damages, third-party funding, dispute avoidance, or exhaustion of domestic remedies, among others. With [damages](#), there is room for innovative reforms that could get to the heart of one of the biggest problems with ISDS—the huge size of arbitral awards. Likewise, [third-party funding](#) is closely linked to large awards, as they inevitably make the financing of investment arbitration lucrative for various actors.

What's New?

In September 2021, the Secretariat circulated its [third draft Code of Conduct](#) for investment adjudicators and suggested [means for its implementation and enforcement](#). This was discussed at UNCITRAL in November. IISD has produced [an analysis](#) to assist negotiators. One of the most important issues at stake is arbitrators' double-hatting. It will be important to have a clear approach to restrict this very problematic practice. Consultative meetings in December covered remaining provisions for the Code of Conduct, financing aspects of a multilateral investment tribunal, a multilateral instrument on ISDS reform, and shareholders' claims for reflective loss. [A paper](#) on the latter topic was just published by David Gaukrodger, OECD, and was submitted to UNCITRAL WGIII.

The UN Binding Treaty on Business and Human Rights

What Is It?

The Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises (OEIGWG)—per the mandate of the UN Human Rights Council Resolution 26/9—must develop an international legally binding instrument to regulate the activities of transnational corporations and other business enterprises with respect to human rights. Their discussions aim to create greater accountability for human rights abuses by foreign investors and redress for affected communities, including in the domestic courts of home and host states.

What's at Stake?

The prospective instrument could be a first binding instrument at the international level addressing human rights abuses resulting from transnational business activities. While many states participating in the binding treaty negotiation agree that key elements of the relationship between business and human rights need to be addressed—including business accountability for human rights abuses and access to remedies by victims of human rights abuses—there are also serious disagreements about the scope and content of such a treaty. To ensure coherence in investment policy-making at the continental, regional, and national levels as well as between investment law and other international obligations, it will be important for developing countries to follow this process and actively participate in it.

What's New?

From October 25 to 29, OEIGWG held its [seventh session](#) to develop such an instrument. Annex II of the [draft summary report](#) of the session contains the concrete textual proposals made by states during the session. Delegates to the negotiations have been heavily debating issues such as whether the binding instrument should only apply to transnational corporations or also cover domestic business conduct, whether the instrument should impose any international obligations directly on corporations, and whether due diligence obligations should be limited to parent companies or be extended to the entire supply chain.

The UN Convention on the Right to Development

What Is It?

The UN Convention on the Right to Development is a multilateral framework currently being negotiated by the UN General Assembly Human Rights Council and drafted by a tasked drafting committee. It stems from the 1986 [UN Declaration on the Right to Development](#), which establishes development as a right and puts people at the centre of the development process.

While the declaration signalled an important step, implementation has remained a challenge. In 2016, the Human Rights Council tasked the Special Rapporteur with contributing practical guidance for realizing this goal at local, national, regional, and international levels. In 2018, the Human Rights Council voted by majority to adopt Resolution 39/9 to develop “a draft legally binding instrument on the right to development.” In 2020, they published [a draft Convention on the Right to Development](#), building on existing international legal instruments. The new multilateral framework will aim to make it a binding human right, with both developed and developing countries being held to compliance standards. The process is open to all UN member states.

What's at Stake?

A binding treaty on the right to development would be very important for developing countries, given its close linkage to the reform of international investment agreements (IIAs). The treaty could make it more compelling for countries to interpret IIAs to align with the treaty.

However, there is currently minimal participation by developing countries in this process, possibly due to competing demands and resource constraints facing negotiators. Furthermore, some developed countries are critical of the process, with a few even boycotting meetings to indicate their unwillingness to engage. It is important for developing countries to coordinate and speak with one voice on issues of priority.

What's New?

Two meetings have been held—one in May 2021 and the other in late November 2021—where member states participating in the process were invited to submit comments on the current [draft text](#). The next meeting and review by the drafting committee will happen in March 2022, with countries giving further submissions on the text in May 2022.

Multilateral Processes

The Joint Statement Initiative on Investment Facilitation

What Is It?

After its launch by a group of World Trade Organization (WTO) members on the sidelines of the WTO's 11th Ministerial Conference in 2017, the Joint Statement Initiative (JSI) on investment facilitation (IF) has developed an increasingly high profile among policy-makers, academics, and international organizations. When it was issued, signatories agreed to begin “structured discussions” to identify and develop “the elements of a framework for facilitating foreign direct investments.” In 2020, participating WTO members moved into negotiating mode to reach an outcome at the WTO's 12th Ministerial Conference (MC12). The outcome of these negotiations would entail binding commitments relating to the domestic “behind-the-border” measures that could affect countries' national administrative laws and procedures. To date, [over 110 WTO members](#) have signed onto the JSI.

What's at Stake?

To date, it is not clear what IF means and how it should be incorporated in a multilateral binding agreement, leaving it open for interpretation by various actors with differing interests.

The IF agreement currently under negotiation centres on the publication and consultation requirements of investment-related measures. It also includes requirements on streamlining and accelerating authorization and permitting processes, which could be challenging for governments to implement.

The exact scope of the agreement is still unclear, leaving many uncertainties around the potential interaction of this agreement with other international investment rules, including existing IIAs. Although participants originally explicitly stated that they wished to exclude market access, ISDS, and investment protection from the scope of the agreement, questions remain over whether the final outcome from this negotiation could inadvertently implicate these areas. Still under discussion is also whether and how the agreement could contribute to achieving development objectives.

What's New?

Since September 2020, participating WTO members intensified work with a view to presenting some type of “concrete outcome” at MC12. This included having an “as clean as possible text” based on a revised version of the “Easter Text,” as well as a ministerial statement setting the end of 2022 as a target date to conclude the negotiations. They also agreed on a schedule of meetings for the first half of 2022. According to this schedule, participants will hold eight 2-day negotiating meetings between January and July 2022, starting on January 26–27, 2022. Despite the postponement of MC12, signatories met on November 30 at the level of Heads of Delegation to take stock of the negotiations and reiterate their commitment to continue negotiations based on the schedule above.

The Energy Charter Treaty Modernization and Expansion

What Is It?

The Energy Charter Treaty (ECT) is a multilateral treaty regulating investment and trade in the energy sector. It currently applies to [56 contracting parties](#). The ECT contains investment protection rules and allows for ISDS. It grants extensive privileges to energy investors and their investments, including those in fossil fuels, and has given rise to the highest number of investor–state arbitrations under any treaty—137 known arbitration cases to date. Recognizing the need for reform, ECT signatories started negotiating a modernization of the treaty in 2020. Eight negotiation rounds have been held since then in the midst of increased civil-society opposition to the agreement.

What's at Stake?

The ECT has long been criticized for putting at risk states' efforts to transition to net-zero economies and reform their energy sectors. Due to the treaty's broadly defined investment provisions, it exposes states to ISDS claims and potential liability to pay excessive damages. However, whether the result of the modernization process of the ECT will support ambitious climate action is far from certain, given the pushback by some member states. The new ECT is at risk of inheriting the ills of its predecessor.

A few years ago, the ECT Secretariat started a program to convince more countries—especially from Africa and the Association of Southeast Asian Nations (ASEAN) region—to sign the treaty. The ECT Secretariat's expansion efforts have targeted Ministry of Energy officials who are less aware of the risks flowing from the treaty's investment provisions. It is therefore critical that all relevant audiences coordinate and engage on developments in their country. The outreach efforts of the Secretariat are currently on hold.

What's New?

In the last two negotiation rounds, negotiators mostly focused on the definition of the “economic activities” that would be covered by a modernized ECT. To address the chilling effect on states' climate action, the European Union (EU) had suggested in March to disapply the treaty from future fossil fuel investments and to gradually phase out coverage of existing fossil fuel investments. However, this proposal did not reach consensus, and the ECT signatories are now discussing more flexible approaches. Furthermore, the ISDS provision itself remains outside the remit of the modernization group. Meanwhile, EU member states—including Poland, Greece, Spain, and France—have asked the EU Commission to consider a coordinated withdrawal and stated that they would withdraw unilaterally should such a coordinated withdrawal fail.

OECD/G20 Inclusive Framework on Global Minimum Tax Reform

What Is It?

On October 8, 2021, 136 countries [agreed to a statement on a two-pillar solution](#) to address the tax challenges arising from the digitalization of the economy. The statement was an important step for the global initiative to [address the tax challenges arising from a digitalized economy](#), led by the OECD since 2018. Pillar one creates a new taxing right for businesses selling goods and services digitally in countries where their users or consumers are physically located. Pillar two ensures that all global profits of multinational companies are taxed at a minimum effective tax rate of 15%. This global minimum tax of 15% is most likely to impact countries dependent on foreign investments, and the reform could have two outcomes: 1) eliminate tax competition from tax havens and conduit countries; 2) reduce tax competition between developing countries.

What's at Stake?

Pillar two will require many states, both within and outside of the Inclusive Framework, to review their domestic tax policies. For instance, a country may choose to increase its corporate tax rate or remove tax incentives in light of the new global minimum tax. This would, for example, include the overhaul of long-term and broad tax holidays granted to large foreign investors.

While tax incentives in the law can be undone unilaterally by amendment of the legislation, some are subject to stabilization provisions in law or contracts. These clauses could make it difficult for governments to adapt their tax policy to the new reality of a global minimum tax without the risk of being sued in international arbitration. Few developed countries offer stabilization in their domestic law or investment contracts. Therefore, the stabilization issue is primarily a problem for developing and emerging economies—the most vulnerable to tax competition. It also affects developing countries that have not signed up to the statement but have stabilized preferential tax arrangements for multinational companies headquartered in countries that have signed up.

Developing countries should stay engaged in this process to [find a solution to address stabilized tax incentives](#) that could prevent developing countries from aligning their tax policy with a global minimum tax and foregoing vital tax revenues as a result.

What's New?

The Inclusive Framework is working on model legislation, a multilateral convention, and a multilateral instrument for the implementation of the two-pillar solution through 2022, for implementation in 2023. The model legislation is intended to give effect to the income inclusion rule and the undertaxed payment rule. It will be supplemented by a commentary that explains the purpose and operation of the rules, as well as the need for a switch-over rule in certain treaties.

Regional Processes

The AfCFTA Investment Protocol

What Is It?

The African Continental Free Trade Area (AfCFTA)—arguably the widest-reaching trade area globally—officially began trading under Phase I of the accord on January 1, 2021. This is an agreement that will be watched closely, given its scope, size, and potential development impacts, along with what it means for existing regional communities in Africa and trading ties with partners outside the region. Phase I protocols of the AfCFTA were adopted in early 2018, while negotiations on Phase II are currently ongoing. These encompass negotiations on an investment protocol as well as protocols on competition and intellectual property rights. Further, Phase III will involve negotiations for an e-commerce protocol.

What's at Stake?

There are currently over 2,800 IIAs globally, with African states being part of 860 of them. This “spaghetti bowl” of agreements has created a fragmented and complex international investment governance landscape, which has led to various reform processes at the global, regional, and bilateral levels.

The negotiation of the AfCFTA Investment Protocol is happening in this reform-oriented landscape and could generate extraordinary momentum for member states of the African Union. The future protocol, once finalized, would promote sustainable intra-African investments, while consolidating a decade of reform and innovations within the continent and bringing more coherence to the member states’ bilateral and regional IIAs network. It will also reflect common African positions on modern provisions in investment treaties and influence other negotiations and processes outside the region.

What's New?

The AfCFTA Committee on Investment held a meeting from December 13 to 16, 2021, to discuss the Zero Draft of the Investment Protocol.