



# Special Rapporteur on human rights and the environment

Distr.: General  
10 July 2023

Original: English

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## Annex 3: Brief summary of ISDS reform efforts

### **Supplementary information to the report of the Special Rapporteur, David R. Boyd, on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment to the General Assembly**

The following information is supplementary to the report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment to the General Assembly. It is available on the website of the Office of the High Commissioner for Human Rights

<https://www.ohchr.org/en/special-procedures/sr-environment/annual-thematic-reports>

## Annex 3: Brief summary of ISDS reform efforts

### A. Modernization of the ECT

Since 2017, parties to the ECT have attempted to modernize the treaty, negotiating an Agreement in Principle that: defines key terms including “fair and equitable treatment” and “indirect expropriation”; clarifies States’ right to regulate;<sup>1</sup> allows States to exclude investment protection for fossil fuels beginning ten years after the new provisions enter into force (the mid-2030s at the earliest); and confirms that investment protection may be denied where States have implemented measures to protect human rights.<sup>2</sup>

These proposed amendments are widely viewed as inadequate in the face of the planetary environmental crisis and egregious inequality.<sup>3</sup> A growing number of European States including Belgium, Denmark, France, Germany, Luxembourg, the Netherlands, Poland, Slovenia and Spain have withdrawn from the ECT or announced plans to do so, citing its incompatibility with ambitious climate and environmental action.<sup>4</sup> The European Parliament passed a resolution calling for EU States to engineer a coordinated exit from the treaty because the proposed changes would not align the ECT with the Paris Agreement.<sup>5</sup> In November 2022, Parties to the treaty deferred a decision on ECT modernization, reflecting the growing opposition to incremental reforms.

### B. Amended ICSID Rules

In 2021, the ICSID Rules were amended for the fourth time, in an effort to increase transparency and public participation.<sup>6</sup> The amendments increase the likelihood that case materials, awards and decisions will be published, and provide guidance to tribunals about permitting amicus curiae submissions. However, parties can still block publication by refusing to provide consent, tribunals can still reject amicus briefs, and there are no other mechanisms for public participation, even by impacted communities.<sup>7</sup> These modest changes fail to address the fundamental flaws of IIAs.

### C. UNCITRAL Reforms

The UNCITRAL Rules on Transparency were introduced in 2013, providing for the timely publication of documents filed in ISDS cases, including information about parties, hearings, decisions and awards, but subject to an exception for confidential business information.<sup>8</sup> Although theoretically useful, the practical impact of these rules is limited because they only apply to arbitration claims initiated under investment treaties concluded on or after April 1, 2014, which excludes the vast majority of investment treaties. The Mauritius Convention on

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<sup>1</sup> Energy Charter Secretariat, *Finalization of the negotiations on the Modernisation of the Energy Charter Treaty* (Brussels, 24 June 2022), available online: <<https://www.energycharter.org/fileadmin/DocumentsMedia/CCDECS/2022/CCDEC202210.pdf>>

<sup>2</sup> ECT Agreement in Principle at page 5.

<sup>3</sup> Columbia Centre on Sustainable Investment, “The Energy Charter Treaty: Assessing Amendment, Withdrawal, and Termination” (2022) *CCSI*, available online <[https://ccsi.columbia.edu/content/climate-change#!#cu\\_accordion\\_item-4991](https://ccsi.columbia.edu/content/climate-change#!#cu_accordion_item-4991)>.

<sup>4</sup> EC, *European Parliament resolution of 24 November 2022 on the outcome of the modernisation of the Energy Charter Treaty*, 2022/2934(RSP). Nikolaus J. Kurmayer, “Activists rejoice as Berlin announces exit from controversial energy charter treaty” (13 November 2022), *Euractiv*, available online: <<https://www.euractiv.com/section/energy/news/activists-rejoice-as-berlin-announces-exit-from-controversial-energy-treaty/>>. See also Submission from Germany.

<sup>5</sup> EC, *European Parliament resolution of 24 November 2022 on the outcome of the modernisation of the Energy Charter Treaty*, 2022/2934(RSP) at paras 5 and 20.

<sup>6</sup> International Centre for Settlement of Investment Disputes, “ICSID Rules and Regulations Amendment” (1 July 2022) *ICSID*, available online: <<https://icsid.worldbank.org/resources/rules-amendments>>.

<sup>7</sup> ICSID Convention, Regulation, and Rules (2022) at Rule 63 and 64.

<sup>8</sup> UNCITRAL Rules on Transparency (2013), Articles 2 and 3.

Transparency (which entered into force in 2017) extends the application of the UNCITRAL Rules on Transparency to investment treaties concluded before 2014.<sup>9</sup> However, only nine states have ratified the Mauritius Convention, including Australia, Benin, Bolivia, Cameroon, Canada, the Gambia, Iraq, Mauritius, and Switzerland.<sup>10</sup>

In 2017, UNCITRAL established Working Group III, a group of experts given a broad mandate to work on procedural reforms of ISDS.<sup>11</sup> In 2023, Working Group III released draft guidelines for mediation as well as a draft code of conduct for arbitrators that would partially address concerns about revolving doors and double hatting.<sup>12</sup> Again, these procedural reforms do not overcome the fundamental flaws of the ISDS system.<sup>13</sup>

#### D. Proposed legally binding instrument on transnational corporations and human rights

In 2014, the Human Rights Council established the Open-Ended Intergovernmental Working Group on transnational corporations and other business enterprises with respect to human rights (OEIGWG), with a mandate to establish a legally binding instrument to regulate the activities of transnational corporations.<sup>14</sup> The latest draft, *which was considered at the OEIGWG's eighth session in 2022*, would require all existing IIAs to be interpreted and implemented in a manner consistent with all relevant human rights instruments.<sup>15</sup> It would also require any new IIAs to be compatible with international human rights obligations.<sup>16</sup> This draft instrument could play a vital role in fostering harmonization between international human rights law and international investment law, clarifying the importance of human rights and environmental due diligence.<sup>17</sup> Unfortunately, there is still considerable opposition to this proposed instrument, uncertainty regarding its ultimate provisions, no time frame for its completion, and no guarantee regarding how many States will ratify it.

#### E. OECD initiative

In 2021, the OECD launched a work programme on the future of investment treaties. The OECD acknowledges that poorly designed treaties impede progress towards sustainable development, and that improvements are needed to meet today's myriad challenges, including "the over-riding importance of confronting the climate crisis."<sup>18</sup> There are two tracks to the OECD work programme. As described by the European Union, "The first Track focuses on future investment treaties, in particular on their alignment with the Paris Agreement, whilst the second Track focuses on how substantive provisions in older investment treaties could potentially be updated. The updating of outdated substantive provisions in older-generation investment treaties could provide additional safeguards

<sup>9</sup> *Convention on Transparency in Treaty-based Investor-State Arbitration*, 10 December 2014, UNTS 3208 (entered into force 18 October 2017).

<sup>10</sup> See [https://treaties.un.org/Pages/showDetails.aspx?objid=080000028040a108&clang=\\_en](https://treaties.un.org/Pages/showDetails.aspx?objid=080000028040a108&clang=_en).

<sup>11</sup> See the following site: [https://uncitral.un.org/en/working\\_groups/3/investor-state](https://uncitral.un.org/en/working_groups/3/investor-state).

<sup>12</sup> A/CN.9/1148.

<sup>13</sup> Lea Di Salvatore and Ladan Mehranvar, 2023, *Unlocking Expectations: UNCITRAL Working Group III Finalized its First Drafts - Does it Deliver?* <https://ccsi.columbia.edu/news/unlocking-expectations-uncitral-working-group-iii-finalized-its-first-drafts-does-it-deliver> See also Lisa Sachs et al, "The UNCITRAL Working Group III Work Plan: Locking in a Broken System?" (4 May 2021), *Columbia Center on Sustainable Investment*, available online: <<https://ccsi.columbia.edu/news/uncitral-working-group-iii-work-plan-locking-broken-system>>.

<sup>14</sup> See <https://www.ohchr.org/en/hr-bodies/hrc/wg-trans-corp/igwg-on-tnc>.

<sup>15</sup> See the draft instrument here: <https://www.ohchr.org/sites/default/files/LBI3rdDRAFT.pdf> at 14.5(a).

<sup>16</sup> *Ibid* at 14.5(b).

<sup>17</sup> See David R. Boyd and Stephanie Keene, *Policy Brief No. 3: Essential elements of effective and equitable human rights and environmental due diligence legislation*, (Geneva: United Nations Human Rights Special Procedures 2022) at page 28.

<sup>18</sup> <https://www.oecd.org/investment/investment-policy/investment-treaties.htm>

towards ISDS cases which may arise from States regulating to achieve legitimate public policy objectives.”<sup>19</sup>

## F. Proposed Multilateral Investment Courts

In 2015, the European Commission proposed a multilateral investment court—comprised of a first instance tribunal, an appeal tribunal and independent, qualified and tenured judges—that would act as a permanent body to decide disputes. The proposed court would replace the ad hoc tribunal structure of the ISDS system, enable third parties to intervene in proceedings, and would be open to any State in the world.<sup>20</sup> To date, however, progress towards the creation of the proposed court is limited.<sup>21</sup>

Canada and the EU are making progress in establishing an international investment court pursuant to the EU-Canada Comprehensive Economic and Trade Agreement (CETA). Detailed rules and procedures for the proposed court have been agreed upon but will not be implemented until all 27 EU Member States have ratified CETA. Similar investment court provisions are also found in the EU-Vietnam Investment Partnership Agreement and the EU-Singapore Investment Protection Agreement.

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<sup>19</sup> Submission from the European Union.

<sup>20</sup> European Commission, “Multilateral Investment Court project” (2022), *European Commission*, available online: <[https://policy.trade.ec.europa.eu/enforcement-and-protection/multilateral-investment-court-project\\_en](https://policy.trade.ec.europa.eu/enforcement-and-protection/multilateral-investment-court-project_en)>. Council of the European Union, *Negotiating Directives for a Convention Establishing a Multilateral Court for the Settlement of Investment Disputes* (Brussels, 1 March 2018), 12981/17, available online: <<https://data.consilium.europa.eu/doc/document/ST-12981-2017-ADD-1-DCL-1/en/pdf>> at para 1.

<sup>21</sup> European Commission, “Multilateral Investment Court project” (2022), *European Commission*, available online: <[https://policy.trade.ec.europa.eu/enforcement-and-protection/multilateral-investment-court-project\\_en](https://policy.trade.ec.europa.eu/enforcement-and-protection/multilateral-investment-court-project_en)>.