

Bridging the Gap Between Environmental Objectives and International Investment Law: The Implications of UNCITRAL's Investor-State Dispute Settlement Reform Draft Provision on Procedural and Cross-Cutting Issues (article 12)

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Abstract:

Balancing economic growth with environmental development is of increasing importance as the global focus on sustainable development continues to grow. The need for an international legal framework that can align investment inflows with a state's regulatory autonomy to enforce environmental conservation measures has become apparent. Traditional plurilateral agreements have often prioritized stability and predictability, which can repress states' regulatory flexibility capacities and hinder their ability to adapt and innovate in response to unforeseen emerging environmental challenges.

UNCITRAL Working Group III responded to these shortcomings in the Investor-State Dispute Settlement (ISDS) mechanism by publishing a new draft on 'Procedural and Cross-Cutting Issues' in July 2023. Draft provision 12(1) includes a standard right to regulate, similar to those found in more recent international investment agreements (IIAs). However, draft provisions 12(2) and 12(3) are far more novel, and specifically encapsulate measures aligning with the Paris Agreement and Articles 3 and 4 of the United Nations Framework Convention on Climate Change (UNFCCC). Draft provision 12(3) explicitly states that no claims can be submitted under ISDS if the alleged breach is due to a State action to safeguard public health, safety, environment, or cultural diversity, or to comply with climate change agreements or related UN principles.

The provisions will undergo further discussion during UNCITRAL Working Group III's next session in October 2023. If adopted, the proposed regulation could help reconcile international investments with the sovereign rights of states to regulate and implement environmental protection measures, without the fear that it may lead to costly and protracted ISDS cases.

This article considers how UNCITRAL's Draft Provision 12(3) could serve as a solution to the current limitations of IIAs in accommodating to green transition, including the insufficient protection of public interest measures and a lack of focus on climate change policy safeguards. The aim of this article is to explore the potential alignment of treaty safeguards for investment protection with environmental regulations. The article focuses on an analysis of the UNCITRAL draft provisions in relation to existing IIAs as a point of reference. Additionally, the article will also address potential implications of a harmonized legal framework for plurilateral and bilateral agreements, such as enhancing predictability in the investment environment, more efficient dispute resolution, and promoting climate action by aligning investment agreements with global climate objectives.