



United Nations
Economic Commission for Africa

**Building Africa's Negotiating Capacity for Improved
Terms of Engagement with the Rest of the World: Concept
Note**

**3rd Annual Workshop on International Economic Negotiations
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Building Africa's Negotiating Capacity for Improved Terms of Engagement with the Rest of the World:

Annual Workshop on International Economic Negotiations

I. BACKGROUND

Africa is changing, as is the rest of the world. This change manifests itself in various forms, including improved and sustained growth despite the continuing state of low commodity prices, better and improving governance, and improved macroeconomic conditions. However, change is not always positive, as can be seen from rising inequalities within and among nations, increasing outflow of illicit financial resources, climate change and several other environmental challenges and related conflicts. While most of these challenges are shared by all humanity, many have disproportionate adverse effects on Africa in particular.

The terms on which Africa engages with the rest of the world play a direct role on the impact of these opportunities and challenges for Africa. Indeed, Africa's economic engagement with the rest of the world effectively determines its future prosperity. In order to continue to succeed, Africa will need – among others – to produce and export those goods in which it has the comparative advantage and import those for which it lacks such advantage. To produce the goods and services needed on the international market, and to supply them on competitive and beneficial terms, Africa needs to attract foreign investment of the type and magnitude that can make a meaningful and sustainable difference to the continent. This will require a qualitative shift away from the traditional natural resources-centred, exploitative, dig-up-and-export model of foreign investment to one that is people-centred, diversified and integrated with the rest of the economy, provides employment opportunities to local communities, and serves as a foundation for sustainable and broad-based development. To achieve this, the domestic political economy environment in a country, the quality of its governance institutions and its overall regulatory framework are critical.

Equally critical, however, is the existence of an enabling international environment within which to compete and succeed, and the capacity of its negotiators to influence the terms on which that competition takes place, the rules of the game so to speak. The areas of engagement are many and varied – bilateral and multilateral treaties for the promotion and protection of

foreign investment (investment negotiations), international tax treaties for the avoidance of double taxation and double-non-taxation of corporate profits (tax negotiations), international and regional trade liberalisation (trade negotiations), and contracts for the exploration and development of extractive resources (contract negotiations) being the prominent examples.

II. OBJECTIVES

As its Capacity Development Strategy makes clear, UNECA's overarching focus is to promote policies and programmes that strengthen the process of African economic integration by "assisting member States in the development of common positions towards international negotiations as well as in enhancing the skills of African negotiators to get optimal deals for their countries and region from bilateral and international negotiations". In the same context, the March 2015 Report of the High Level Panel on Illicit Financial Flows from Africa notes how the natural resources sector is prone to the generation of illicit financial outflows by means including "secret and poorly negotiated contracts". It was in appreciation of this reality that, in May 2015, the Capacity Development Division of UNECA launched the annual policy dialogue on natural resources contract negotiations. Likewise, the African Ministers of Finance declared, at their 2 June 2003 meeting on Aid, Trade, Debt, IMF and HIV/AIDs, that there was a need to establish a legal technical assistance facility to help Heavily Indebted Poor Countries ("HIPC") in Africa to address the problems of creditor litigation – which ultimately led to the establishment of the African Legal Support Facility.

African ministers have consistently called upon continental institutions to provide capacity building assistance in the field of negotiations, and the series of negotiation workshops in this project responds to these calls by focusing on "how" member states can best protect their national interests from being undermined through international agreements/contracts. The workshops aim to consolidate the outcomes further by creating regular opportunities for lead national negotiators from all African countries to convene and exchange experiences, explore options and strategies for possible coordination of positions, and listen to and interact with globally leading thinkers and practitioners in the field of economic negotiations in general and the four specific sectors in particular. In this way, these workshops aim to contribute towards filling perceived gaps in the skills and capacity of African governments and institutions to negotiate international agreements that best serve national and continental interests in four major issue areas:

1. Investment

African countries recognise the crucial role of foreign investment for their national development. Unlocking their potential requires capital, technology and knowhow that are often unavailable to them from domestic sources. To attract foreign investment to their shores, they not only attempt to create a conducive business environment domestically but also undertake binding promises, in treaties and contracts, enforceable before a court of law or some equivalent tribunal. In that spirit, African countries have concluded hundreds of bilateral investment treaties (BITs), largely but not exclusively with developed countries. According to a recent survey carried out by the UNECA, there are about 2,750 BITs in the world today, over 850 of which involve an African country. [See UNECA 2016]. A vast majority of these African BITs are with developed countries, often based on model investment treaties prepared by the latter countries. In such circumstances, it is only natural that the country that prepares the draft or the model treaty (1) does so in a manner that best protects and promotes its national interests, and (2) dictates the terms of the negotiations that follow. Unsurprisingly, the final text of the treaties signed by most African countries with their developed counterparts are hardly distinguishable from the models on which they are based. The adverse impact of these one-sided treaties is revealed to these countries only much later, when they are brought before international arbitration tribunals to answer a case. According to the above UNECA survey, as of the end of 2015, African countries have been involved in 111 investment disputes so far, in all cases appearing as respondents. These disputes and other developments have made African countries realise that the BITs they may have signed in the past without much thinking, often as a gesture of good will and in the name of sending the right signal to potential foreign investors, can impose serious constraints on the exercise of their regulatory sovereignty domestically and with potentially enormous financial consequences for breach of legal commitments. As a result of these developments, several African countries have started exploring different options, ranging from comprehensive reviews and in some cases termination of BITs (e.g. South Africa and Morocco), to the use of RECs to develop regionally-harmonised model investment treaties for use in future BIT negotiations (e.g. the EAC and SADC) and a new initiative to develop a Pan African Investment Code (PAIC) at the continental level. Negotiators are increasingly confident that they will meet the AU Assembly deadline to conclude negotiations over the agreement establishing the Continental Free Trade Area (CFTA) by December 2017; negotiations on the CFTA investment chapter are expected

to commence in the new year. African government officials involved in the development of investment policies and the negotiation of investment treaties need to have a comprehensive understanding of the substantive and procedural obligations contained in these treaties and appreciate the fast-changing policy landscape in the area. The annual economic negotiation workshops in this area are thus intended to bring together technical experts in the field with investment policy makers and negotiators operating at national/government levels and at the level of sub-regions/RECs and the AUC.

2. Taxation and Financial Instruments

To the extent economic transactions cross borders, whether in the form of foreign investments or the provision of services abroad, there is room for two or more tax jurisdictions to assert their authority over one and the same taxable income. If this leads to double or multiple taxation of the same income, its effect on international business could be catastrophic – no businessperson would engage in cross-border transactions, and society would suffer as a result. The need for some internationally agreed mechanism to remove this impediment and enable international business transactions to take place thus becomes apparent. This is where the so-called double taxation treaties (DTTs) come into the picture. DTTs are binding international law instruments negotiated, typically, between two states in a bilateral setting with a view to avoiding double taxation, but also to minimize or prevent tax avoidance and tax evasion practices. Moreover, as soon as the risk of double taxation is taken care of through DTTs or similar arrangements between countries, companies and other taxpayers immediately see the potential benefits from shifting taxable income from high-tax jurisdictions to low-tax jurisdictions through acts of base erosion and profit shifting (BEPS), the most potent instrument being the use of transfer pricing arrangements in the form of transactions within a firm or between related firms. That is why tax planning and forum/jurisdiction shopping play a major role in the business strategy of virtually every multinational corporation (MNC). International negotiations on tax matters therefore revolve around the distribution of tax revenues, mainly from MNCs, between the capital exporting or home states (where MNCs typically come from) and capital importing host countries where the taxable activity or income is likely to be located. African countries routinely lose billions of dollars through aggressive tax avoidance and illegal tax evasion practices every year by MNCs. But, it is also becoming clear that MNCs are not alone in this; African oligarchs are also busy plundering their own people. While this might be partly explained by the lack of capacity in national law enforcement institutions, their job is

made significantly harder by the nature of international tax treaties that are almost inevitably skewed against their interests. These annual economic negotiation workshops in this area are thus intended to bring together technical experts in the field with relevant public officials drawn primarily from national government ministries and RECs involved in the development of national tax policies and international tax negotiations.

3. Trade

Africa has been at the centre of multilateral and regional trade liberalisation movements from the early days. At the multilateral level, nearly all sub-Saharan African countries that are members of the WTO today became GATT contracting parties automatically upon attaining independence. The only exceptions from today's WTO members are South Africa, which was a founding member of GATT from 1948, and Cape Verde, DR Congo, Liberia and Seychelles, which acceded to the WTO after 1995. At the regional level, too, Africa has been actively experimenting with different forms of preferential arrangements that began with the Southern African Customs Union (SACU), which is known as the oldest customs union in the world (first established in 1910), and continuing into the ongoing negotiations to establish the Continental Free Trade Area (CFTA). Once again, trade liberalisation is not an end in itself; countries engage in this highly demanding exercise in order to realise the presumed gains from trade. Whether those gains are actually realised for the benefit of a particular country depends, at least in part, on the pace and depth of liberalisation and its sectoral coverage. That is why trade negotiations at different levels have become an almost permanent occupation for government officials in trade ministries. Moreover, and despite their best efforts, African countries have had little influence on the terms, depth and direction of international trade. To cite just a few examples, labour-intensive products in which African countries would have the natural comparative advantage, such as agriculture and textiles, have been excluded from the multilateral trading system for most of its lifetime; in cases where tariffs have been reduced or even eliminated for some of these products, Africa's agricultural products are often excluded from the lucrative markets of developed countries through highly complex and ever-changing and ever-rising product safety standards; the tariff structures in many countries are designed in such a way as to reward the exportation of raw materials and discourage the exportation of those same products in semi-finished or processed forms; etc. The only way to change this scenario is for Africa to speak with one voice at the negotiation forums, such as those taking place under the auspices of the World Trade Organisation (WTO), where the rules of the game

are set. But, such potential mega-regional arrangements as the Transatlantic Trade and Investment Partnership (TTIP) and even the Trans-Pacific Partnership (TPP), though the US has withdrawn from it, threaten to further undermine the ability of African countries to exert the little influence they may have in such multilateral forums as the WTO. This is likely to further marginalise Africa in international economic rule- and policy-making. Africa's ongoing efforts to establish the CFTA and the African Common Market are part of the answer to this challenge. The annual economic negotiation workshops in this area are thus intended to bring together technical experts in the field with relevant public officials drawn primarily from national government ministries and RECs involved in international trade negotiations.

4. Natural resources contracts

Africa is endowed with abundant natural resources, but often lacks the technology, knowhow and capital to convert those resource endowments into tradable or consumer-ready products, making the involvement of foreign corporations inevitable. The terms on which these foreign corporations come and operate in Africa's natural resources sectors have to be negotiated between each African host state and a foreign corporation. If we take the oil and gas sector as an example, the negotiations will typically take place between the national oil and/or gas company or, in its absence, the relevant government ministry, on the one hand, and the foreign corporation on the other. Likewise, in the area of minerals, where the equivalent of the national oil or gas company is often missing, the negotiations are likely to take place between the relevant ministry and the foreign corporation. In all cases, the terms of engagement will depend to a significant degree on the negotiation skills of those who represent the government. The result so far is not encouraging. Most resource-rich African countries that actually produce and export significant volumes of natural resources-based products remain poor, sometimes poorer than their natural resource-poor neighbours; they are also much more likely to suffer political conflict and serious environmental damage than fellow resource-poor African countries. Indeed, natural resource contracts – and inadequate monitoring, follow up and enforcement on the part of relevant government institutions – are responsible for a significant proportion of the over 50 billion USD that Africa suffers in illicit financial outflows (UNECA IFF Report 2015). The annual economic negotiation workshops in this area are thus intended to bring together technical experts in the field with relevant public officials drawn primarily from national government ministries and national oil/gas companies in charge of contract negotiations and contract administration.

5. Gender Issues as a Cross-Cutting Challenge in International Economic Negotiations

The unequal power relations between men and women in political, economic and social institutions often lead to gender-based inequalities in ownership and control of wealth and unequal access to trade and investment opportunities. If the structure of international economic agreements considered in this series of workshops has a disproportionate adverse impact on African countries in general, their impacts within Africa are also likely to be disproportionately more detrimental to women than to men. That is why we believe the gender-dimension of international economic negotiations and the impact of the resulting agreements need to be addressed explicitly and systematically integrated into all our discussions in these workshops. A key question that needs to permeate all discussions in these workshops should thus be as to how we can mainstream gender issues in the negotiation of international agreements, starting from identifying and addressing issues of particular concern to women in each issue area all the way to ensuring that women are represented on equal basis at key decision-making positions within government. To this end, all resource persons are expected to actively and consciously incorporate the gender dimension of all issues in all the activities during the workshops.

III. ACTIVITIES

1. Annual Workshop

This is the third edition of an annual series of workshops that brings together government officials responsible for the negotiation of the various international agreements in the areas discussed above, with resource persons drawn from senior government practitioners, academia, and other experts.

2. Target Participants

Considering the range and complexity of issues that will be covered in these workshops, the manner in which these issues are traditionally assigned to different government departments, and taking into account logistical challenges in organising such workshops, we will invite one

negotiator per country from each ECA member state in such a way that there will be a broadly even split of negotiators amongst the four subject areas targeting the lead negotiators in each of those areas. While this ensures continental coverage, we also aim to ensure issue coverage in each of the member states through yearly rotations of the specific target ministries/departments from which the negotiators will be drawn from each member state. Accordingly, this session will also have:

- One participant per member state, selected in such a way as to ensure:
 - even distribution of national representatives amongst the four subject areas in any particular session, and
 - annual rotation of national negotiators between the different subject areas so that, by the end of the fourth session, all leading national negotiators on each subject area and in each country will have participated in these events;
- One participant from each of the RECs; and
- Two participants from the AUC.

Gender balance:

- While the relevant national authorities take the ultimate decision on the selection of individual participants, we will encourage these authorities to pay special attention to the participation of women in the workshops.

IV. MODE OF WORK

1. Length of Event and Lead Experts

While the breadth and depth of issues envisaged for the event would easily fill up a whole week, it has been decided, again for practical and logistical reasons, that this be a three-and-half day event. The schedule is contained as an attachment to this concept note. The criterion for the selection of lead experts is also laid down below.

- **Day one:**

Two plenary sessions (morning and afternoon) focusing on generic and cross-cutting issues about the processes and dynamics of negotiations in general and key skills, strategies and techniques in particular.

- **Lead experts:** a team of two people composed of:
 - (1) an academic researcher specialised in the theory and practice of economic negotiations, and
 - (2) a seasoned practitioner with experience in different forms and levels of diplomatic and/or business negotiations and with proven facilitation skills and experience in providing/leading training programmes.
- **Day two:**
 - **Morning:** Four parallel sessions focusing on issues specific to each of the four subject areas, the rationale for these specialised agreements/contracts, the traditional drivers behind them, major interests and traditional sticking points in such negotiations, where negotiators need to pay special attention and why, and strategies to maximise achievement of their negotiation objectives in such difficult areas.
 - **Afternoon:** Four parallel sessions dedicated to close examination of two or three agreements/contracts by each subject matter group:
 - The agreements/contracts will be selected for the lessons negotiators can learn from them – e.g. good/bad/ugly agreements using protection of an African country’s interests as the main criterion; and
 - The discussions will be led mainly by the participants or their chosen leaders asking such questions as what the negotiators of the selected agreements got right (and why) and what they got wrong (and why), what lessons can be learnt from their experiences and how they would go about changing the terms of those agreements if they were given a chance to do so. The facilitators will monitor and follow up the discussion and provide assistance and guidance as necessary.
 - **Lead experts:** A team of two experts made up of a prominent academic specialist in the law/policy of the specific area and a specialist practitioner with experience as a negotiator/advisor/arbitrator/etc. in the area and proven facilitation skills and experience in providing/leading training programmes
- **Day three:**
 - **Morning and afternoon:** Four parallel sessions devoted to simulation exercises involving the negotiation of agreements/contracts in their respective subject areas.

- **Lead experts:** a team of two subject specialists on the specific area whose primary tasks include:
 - preparing the hypothetical scenarios, negotiating mandates/instructions and objectives, etc. for each team;
 - splitting the participants in two groups, each representing a negotiating party (country or company as the case may be) and dividing them between themselves so there will be one expert assisting each team;
 - instructing their respective teams on what they would need to do and how (e.g. select their chief negotiators, itemise and divide the detailed tasks involved in the negotiation process amongst themselves, develop their negotiating strategies and tactics, take stock, measure/assess progress and decide next steps, etc. and make sure they reach an agreement at the end of the allotted time).

- **Day four (morning only):**
 - Plenary: exchange of lessons and experiences with a focus on the bigger picture and asking such questions as:
 - What are the major areas of difficulty for Africa’s negotiators in the economic field?
 - What strategies can be followed to overcome those?
 - What can the different institutional stakeholders (RECs/AUC/ECA/AFDB/etc.) do to help overcome those difficulties?
 - What opportunities are there for African countries to get together and develop common negotiating objectives, develop common strategies and, where feasible and desirable, even speak in one voice in their negotiations with the world’s major powers/companies, etc.?
 - **Lead experts:** All experts who took part in the event over the preceding four days would come together in order to help articulate the answers to these questions and formulate the vision going forward.

V. EXPECTED OUTCOMES

The expected outcomes for this workshop will be:

1. Participants with better understanding of the dynamics in economic negotiations;
2. Participants with enhanced grasp of issues in their respective subject matter areas and improved negotiating skills, techniques and strategies;
3. More favourable outcomes for Africa from economic negotiations; and
4. Establishment of a pool of skilled economic negotiators for Africa.

VI. PARTNERSHIP

This project will be implemented in collaboration with RITD, IDEP, SROs and the African Union Commission.

VII. TIME FRAME

This third annual workshop is planned for 4 to 8 December 2017 in Accra, Ghana. For the lead-experts, a preliminary “faculty day” is planned for the afternoon of Monday, December 4th, 2017.

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