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Comments on ‘Draft statute of an Advisory Centre’ - Note by the Secretariat, UNCITRAL Document A/CN.9/WG.III/WP.236

1. This document sets out the position of UNCTAD’s Division on Investment and Enterprise on the draft statute of an Advisory Centre as contained in UNCITRAL Document A/CN.9/WG.III/WP.236 - Note by the Secretariat. It focuses in particular on the Centre’s mandate and its proposed activities. UNCTAD’s comments aim to allow the proposed Advisory Centre to effectively use its limited resources to address real gaps in existing services, avoid duplication of work, improve access to justice and add value for resource-constrained governments.
2. Below, UNCTAD outlines its mandate with respect to the international investment regime and offers a brief description of its activities in this area. Subsequently, the document sets out a number of concerns relating to the proposed scope of activities in the current draft statute of the proposed Advisory Centre.

UNCTAD’s mandate and work related to the IIA regime

3. The mandate for UNCTAD’s work programme on IIAs derives from the Accra Accord,¹ the Doha Mandate,² and the Nairobi Maafikiano. In addition, the Addis Ababa Action Agenda and The Bridgetown Covenant call on UNCTAD to continue its existing programme of meetings and consultations with member States on investment agreements,³ and its work on the reform of the international investment regime and to work towards coherence in its modernization process.⁴
4. UNCTAD’s work is based on three pillars of activities: research and policy analysis, international consensus building, and technical assistance and advisory services. Its work covers the general dissemination of information and best practices as well as country and region-specific, tailor-made technical assistance and policy advice with a focus on sustainable development. UNCTAD provides its services in a universal and inclusive manner with a deep understanding of developing countries’ needs and concerns related to IIAs.

¹ UNCTAD, Accra Accord, UNCTAD 12th Session, Ghana 20–25 April 2008, para 151.

² UNCTAD, Doha Mandate, UNCTAD 13th Session, , UNCTAD/ISS/2012/1, para 65(k).

³ UN, Addis Ababa Action Agenda, 13–16 July 2015, para 91.

⁴ The Bridgetown Covenant: From inequality and vulnerability to prosperity for all, 3-7 October 2021, para 127 (o). https://unctad.org/system/files/official-document/td541add2_en.pdf

5. UNCTAD furnishes technical assistance in the form of country- and region-specific policy advice, including the sharing of best practices on treaty drafting, IIA reform actions, and the development of model IIAs. This is done on the basis of, for example, its [Investment Policy Framework for Sustainable Development](#), its [Reform Package for the International Investment Regime](#), and the [IIA Reform Accelerator](#). This general reform-oriented policy advice is supplemented by country-specific support and technical assistance delivered through over 50 comprehensive IIA reviews and model BIT reviews since 2012 as well as over 100 capacity building events and follow-up support for investment treaty negotiators and other government officials.
6. UNCTAD's technical assistance is complemented by its intergovernmental consensus-building meetings on IIAs, which bring together developed and developing countries as well as the private sector, civil society and academia. The UNCTAD biennial World Investment Forum (WIF), the annual IIA conference, regular regional workshops, and the recently established multi-stakeholder platform for investment treaty reform create inclusive, universal venues for the exchange of information and sharing of best practices among a wide range of stakeholders.
7. Informing its technical assistance and consensus-building activities are data collection, database maintenance and research activities. UNCTAD maintains comprehensive databases on international investment agreements, treaty-based investor State disputes (ISDS) and domestic investment laws. It regularly publishes reports on trends in IIAs and ISDS, IIA reform issues and international investment law developments. [UNCTAD's Investment Policy Hub](#) provides free-of-charge access to databases, research materials, toolboxes and policy analysis for users worldwide.

The proposed mandate of the Advisory Centre and its scope of work

8. The Advisory Centre was initially proposed during the 36th session of Working Group III under the heading of "concerns pertaining to cost and duration of ISDS cases".⁵ It was stated that the Centre could "assist States faced with difficulties in ISDS proceedings particularly with regard to cost".⁶ As recounted by the UNCITRAL Secretariat, the proposals to establish an Advisory Centre "were made in relation to the concerns regarding the cost and duration of ISDS, and in light of the consideration that the cost of ISDS creates a burden on States, in particular developing and least developed countries."⁷ Such concerns, thus, originally related to emerging or existing disputes rather than wider issues of international investment law and international investment policy.

⁵ UNCITRAL, Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-sixth session (Vienna, 29 October–2 November 2018), 6 November 2018, A/CN.9/964, Section 4(D).

⁶ *Ibid*, para 119.

⁷ UNCITRAL, Possible reform of investor-State dispute settlement (ISDS) - Advisory Centre - Note by the Secretariat, 25 July 2019, A/CN.9/WG.III/WP.168, para 4.

9. The current draft proposes that the Advisory Centre’s activities focus on “training, support and assistance” on international investment law and/or dispute resolution.⁸ This is significantly wider than required to address the initially identified problem relating to the costs of dispute settlement proceedings. Consequently, leaving the proposed Centre’s scope of work unrefined, raises at least two principal questions, set out below.
10. First, the Centre’s limited resources risk being spent on activities that do not directly address the core issues identified by delegates, namely the high cost of legal representation, in particular for developing and least developed countries.
11. Second, the proposed Centre’s limited resources should be carefully used while avoiding duplication of services. This has been repeatedly expressed throughout the negotiations. The draft statute implicitly recognizes this in Draft Article 3(3), which requires the Advisory Centre to cooperate and coordinate closely with relevant international and regional organizations. Moreover, the UNCITRAL Secretariat’s commentary on that draft provision explicitly states that “services to be provided by the Centre should not overlap with activities of [...] organizations such as the United Nations Conference on Trade and Development (UNCTAD), the World Bank and the Organisation for Economic Co-operation and Development (OECD).”⁹
12. If adequately refined, the Advisory Centre’s proposed mandate and services could complement UNCTAD’s IIA-related activities listed above. UNCTAD’s technical assistance does not relate to legal support for emerging or existing disputes. Additionally, UNCTAD does not provide legal opinions on specific measures and their compatibility with IIAs. UNCTAD’s assistance is limited to policy analysis and policy advice as well as technical assistance on investment policymaking, IIA drafting, dispute settlement and alternative dispute resolution.
13. The outcomes negotiated in Working Group III are meant to improve the current state of affairs related to ISDS. The Advisory Centre’s activities should, thus, aim to solve a clearly identified problem, i.e. the cost associated with investment dispute settlement. The current draft provisions propose a mix of concrete legal assistance (Article 7), addressing this problem, and wider related activities (Article 6). In particular, Article 6 could potentially duplicate existing services offered by UNCTAD and other organizations.
14. Therefore, by narrowing and focusing on dispute settlement and legal representation, the proposed Advisory Centre can make a valuable contribution to complement existing services and assist States, particularly resource-constrained States, to navigate the current dispute settlement landscape. It would offer services in addition to those covered by the technical assistance, policy work and advisory activities of UNCTAD and other institutions.

⁸ UNCITRAL, Possible reform of investor-State dispute settlement (ISDS) - Draft statute of an advisory centre - Note by the Secretariat, 27 November 2023, A/CN.9/WG.III/WP.236, Draft Article 2(1).

⁹ Ibid, para 13.

UNCTAD stands ready to provide further clarifications to delegates on any of the matters raised above, including detailed suggestions for how current draft language could be adapted to avoid the duplication of services.