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Treating Symptoms or Root Causes? The Draft Statute of an Advisory Centre on International Investment Dispute Resolution

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At its 57th Session, taking place in New York between 24 June and 12 July 2024, the United Nations Commission on International Trade Law ("UNCITRAL") will discuss the adoption "in principle" of the draft statute of an advisory centre on international investment dispute resolution. The text is the result of much deliberation in UNCITRAL Working Group III, which is mandated with developing reform of investor-state dispute settlement ("ISDS").

Unlike some of the other instruments discussed in the Working Group, the idea of an advisory centre enjoyed general support among delegations from the start (Working Group III, October 2019 Session Report, para. 28, and September 2022 Session Report, paras. 42-65). For resource-constrained developing countries, establishing such a centre promises a source of legal assistance in the complex and expensive task of defending against ISDS claims. For capital-exporting economies, it offers a means to ease some of developing countries' concerns about ISDS – and in this way, to shore up a dispute settlement system the perceived legitimacy of which is under growing pressure.

In practice, there are open questions as to whether an advisory centre can deliver on these demanding expectations. These questions hinge on the centre's mandate, its resourcing and its place within the wider ISDS reform process. The next few sections cover these issues in turn.

The Advisory Centre's Mandate

Participating in ISDS proceedings requires time and money. Studies have estimated the average cost of defending an ISDS claim at close to US$5 million, in addition to the cost of the arbitral tribunal itself. The high costs partly reflect the complex issues at stake and the specialist expertise needed. But they also stem from structural problems – and for this reason, Working Group delegates have voiced concerns about costs throughout the reform process (see, for example, October-November 2018 Session Report, paras. 109-133). Cost issues can drive major asymmetries in the disputing parties' abilities to advocate their positions, particularly in disputes between well-endowed multinationals pursuing cases and lower-income countries defending them.

The advisory centre is billed as a response to these concerns. Its mandate involves two pillars,

reflected in Articles 6 and 7 of the draft statute. Article 6 deals with general technical assistance and "capacity building", such as advice on dispute prevention, trainings, seminars, exchange of experience and serving as a repository of information. Article 7 governs the centre's provision of "legal support and advice with regard to an international investment dispute proceeding". Legal support in specific proceedings was the key ask of developing countries, which often find themselves at the receiving end of ISDS claims. It is also the main gap in the existing system, as other organisations assisting governments on investment treaty law (such as United Nations Trade & Development) do not offer support in ISDS disputes.

In relation to Article 7, the draft statute envisages wide-ranging services: from providing a preliminary case assessment to assisting in arbitrator selection, supporting the preparation of pleadings and representing states in the proceedings. But it also clarifies that these services are "subject to the resources available" to the advisory centre (Article 7(2)). The Working Group did not take up early suggestions for prioritising Article 7 services over the more general training and sharing work (October 2023 Session Report, para. 63), instead situating the two pillars on the same plane. Both in law and in practice, resourcing will determine the centre's ability to perform its role, particularly with regards to legal support in investment disputes.

The Resourcing Question

The draft statute identifies three possible sources of financing: member contributions, service fees and donations (Article 8(1)). Reliance on donations raises several issues. One is that, as donor countries may also be major capital exporters, there is potential for conflicts of interest. These may be general, as capital exporters may favour legal interpretations at odds with the interests of developing country respondents; or more direct, if the claimant originates from a donor country. According to the draft statute, a donation is only possible if it "does not create any conflict of interest or otherwise impede [the centre's] independent operation" (Article 8(4)). But the text does not clarify the types of conflicts of interest covered or how their existence would be established and managed, thus leaving these matters to regulation by the advisory centre's bodies.

More fundamentally, the extent to which donations will materialise remains to be seen. The Working Group is discussing other reform instruments that would require resourcing, such as establishing a standing dispute settlement mechanism or appellate body. With public finances under strain, many governments may have to prioritise. And with Article 7 services explicitly conditioned on resource availability, it is unclear whether establishing the centre can make a systemic difference in ISDS, considering the large number of cases and high cost of proceedings.

A comparison with the Advisory Centre on WTO Law ("ACWL") offers insights on resourcing and the centre's potential for impact. The ACWL provided a model for the Working Group's discussions from the start (Working Group III, October 2019 Session Report, para. 37, and January 2024 Session Report, paras. 43 and 85). It has supplied assistance in 20% of all WTO disputes since 2002 and, according to a report by the Columbia Center on Sustainable Investment (the "CCSI report"), it is widely credited "with substantially supporting access to the WTO's dispute resolution mechanisms by developing countries and [Least Developed Countries]" (p. 50).

As the two advisory centres would perform broadly similar roles in assisting developing countries in international economic law disputes, it seems natural for the Working Group to build on this

experience. Yet important differences are at play. Unlike ISDS, WTO disputes are between states. In trade disputes, states can act as claimants or respondents; while treaty-based ISDS is a one-way street, where only foreign investors bring claims against states. This means that, in a dispute settlement context, states can defend themselves and aim not to lose, rather than proactively advancing their own rights or interests. Significantly, the number and cost of proceedings differ. The CCSI report noted that the annual WTO caseload is smaller than the ISDS one and that defending an ISDS case typically requires many more billable hours than a WTO dispute (p. 89). To have a comparable impact, the advisory centre would likely need substantially more resourcing than the ACWL.

The Advisory Centre in Context

Whether the centre can help address concerns about ISDS will also depend on its place within the wider ISDS reform process. Although commonly discussed as a reform initiative, establishing an advisory centre does not change ISDS rules or address the factors that drive the high cost of proceedings. Rather, it offers support for dealing with the manifestations of this problem.

The Working Group recognised this, at least implicitly. Even when discussing specific concerns about cost, it noted the interrelatedness of issues – so that addressing these concerns may involve wide-ranging responses such as "statute of limitation on investor claims, early dismissal mechanism for frivolous or unmeritorious claims, limitations on standing, and narrowing the causes of actions that investors could bring a claim [sic]" (October-November 2018 Session Report, para. 118). In other words, subsidised legal support would be a significant step forward for those developing countries able to use the centre's services; but tackling the deeper problem the advisory centre responds to requires reforming the underlying system.

The Working Group is yet to address key concerns about ISDS, such as: the exceptionally broad approach on allowing shareholder claims, which can multiply proceedings (October-November 2018 Session Report, paras. 43 and 50); third-party funding of ISDS claims, which raises concerns about transparency and perverse incentives (October 2019 Session Report, paras. 17-25); the asymmetric nature of ISDS, with arrangements limiting scope for states to make counterclaims and excluding third parties from proceedings (ibid, paras. 31-35; September 2022 Session Report, para. 103); and methods for calculating damages, which can lead arbitral tribunals to award extremely large amounts, compounding concerns about "regulatory chill" (ibid, paras. 89-100).

In a broad sense, these issues can affect the overall costs states must bear as a result of ISDS – directly, through more claims and higher damages, and indirectly, because streamlining damage assessment methods might reduce the cost and duration of proceedings, or because lifting barriers on counterclaims might discourage some claims or at least allow the parties to debate related issues in the same proceeding, rather than in separate, uncoordinated lawsuits. Without complementary reforms that effectively address these issues, an advisory centre may reduce the costs of defending claims for some states but is unlikely to have a systemic impact on the number of claims, their likelihood of success or the amounts awarded.

Conclusion

Addressing the concerns the advisory centre's mandate responds to will require not only thinking through issues of resourcing but also advancing reforms that can tackle the deeper problems. As well as monitoring the Commission's upcoming discussions of the advisory centre, then, it will be worth following the Working Group session in September, when several key reform themes will be on the agenda under the rubric of the Draft Provisions on Procedural and Cross-Cutting Issues. In a joint submission to the Working Group, CCSI, the International Institute for Environment and Development, the International Institute for Sustainable Development and the South Centre argued that, while the temptation to focus on the "easier" themes will be strong, the Working Group should prioritise the most consequential issues and devote adequate time to finding effective responses.

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