



**United Nations Commission on
International Trade Law
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Settlement Reform)
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Possible reform of investor-State dispute settlement (ISDS)

Draft provisions on the establishment of an advisory centre on international investment law

Note by the Secretariat

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I. Introduction

1. From its thirty-fourth to thirty-seventh sessions, the Working Group undertook work on the possible reform of ISDS based on the mandate given to it by the Commission at its fiftieth session in 2017.¹ During those sessions, the Working Group identified and discussed concerns regarding ISDS and considered that reform was desirable in light of the identified concerns.
2. At its thirty-eighth session in October 2019, the Working Group expressed general support for further considering the establishment of an advisory centre and requested the Secretariat to continue undertaking preparatory work (A/CN.9/1004*, paras. 28 and 40–49). At its thirty-ninth session in October 2020, while discussing other reform elements, the Working Group provided further instructions relevant to the preparatory work and requested the Secretariat to prepare draft provisions (A/CN.9/1044, paras. 26 and 39).
3. At its forty-third session in September 2022, the Working Group discussed the establishment of an advisory centre on international investment law based on documents A/CN.9/WG.III/WP.212 and A/CN.9/WG.III/WP.212/Add.1. The Working Group reiterated its support for the establishment of an advisory centre (A/CN.9/1124, para. 44). Deliberations focused on draft provisions 5 to 9 in document A/CN.9/WG.III/WP.212, as services to be provided and the beneficiaries would have an impact on the structure and financing an advisory centre (A/CN.9/1124, paras. 42 to 65). The Secretariat was requested to prepare a revised set of draft provisions based on the deliberations.
4. Accordingly, this Note contains revised draft provisions on the establishment of the advisory centre on international investment law (hereinafter, the “Advisory Centre” or “Centre”) to assist the Working Group in its consideration of the reform element. It should be read together with document A/CN.9/WG.III/WP.212/Add.1 and its annex, which provides sample budget figures of the Centre.
5. As is the case for other documents provided to the Working Group, this Note does not seek to express a view on the reform element, which is a matter for the Working Group to consider.

II. Draft provisions

A. Establishment, objective and general principles

6. The Working Group may wish to consider draft provisions 1 to 3, which respectively address the establishment, objective and general principles of the Centre.

Draft provision 1 – Establishment

The Advisory Centre on International Investment Law (“Advisory Centre”) is hereby established.

Draft provision 2 – Objective

The objective of the Advisory Centre is to provide technical assistance and capacity-building with regard to international investment law and investor-State dispute settlement (ISDS) and provide legal support and advice with regard to ISDS proceedings, including representation services.

¹ *Official Records of the General Assembly, Seventy-second Session, Supplement No. 17 (A/72/17)*, paras. 263 and 264. The deliberations and decisions of the Working Group at the thirty-fourth to thirty-seventh sessions are set out in documents A/CN.9/930/Rev.1 and its addendum, A/CN.9/935, A/CN.9/964, and A/CN.9/970, respectively.

Draft provision 3 – General principles

1. *The Advisory Centre shall operate in an effective and sustainable manner.*
2. *The Advisory Centre shall be independent and free from external influence.*
3. *The Advisory Centre shall cooperate closely with international organizations with a view to furthering the objectives of the Advisory Centre.*

7. Draft provision 1 provides the legal basis for establishing the Advisory Centre. Draft provision 2 defines in a generic manner the objective of the Centre, indicating that the scope of its activities would relate to international investment law and investor-State dispute settlement (ISDS). This is based on a suggestion that the Working Group should be ambitious with regard to the mandate of the Centre, while being mindful of the practical and financial implications (A/CN.9/1124, para. 44).

8. Considering that draft provision 2 aims to capture the key functions and services to be provided by the Centre, the Working Group may wish to first consider draft provisions 6 and 7, the conclusions of which can then be reflected in draft provision 2. For example, the phrase “ISDS” has been used in the draft provisions to broadly refer to all types of dispute resolution mechanisms to resolve disputes between an investor and a State (including investment mediation and State-to-State dispute settlement) regardless of whether the legal basis for the dispute is an investment treaty, domestic legislation or an investment contract (A/CN.9/1124, para. 54). Alternatively, the Working Group may wish to consider using the phrase “international investment dispute (IID)” as defined in the code of conduct for arbitrators (see article 1(a) and (b) in document A/CN.9/1148).

9. Draft provision 3 lists the principles that would guide the operation of the Centre (A/CN.9/1004*, para. 48). Paragraph 1 underlines the need for its operation to be efficient and viable in the long term, including by having a sustainable financing structure. Paragraph 2 emphasizes that the structure of the Centre should be independent from any existing or future organization and that the operation of the Centre should not be influenced by outside entities, both of which would ensure the legitimacy of its work and avoid any potential conflicts. For example, as draft provision 8(3) foresees voluntary contributions being made by donors, paragraph 2 would affirm that donors would not have an influence on the operation of the Centre (see para. 37 below).

10. Paragraph 3 requires the Centre to cooperate closely with international organizations, which reflects the views in the Working Group that the services to be provided by the Centre should not overlap with activities of other international 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) (A/CN.9/1124, para. 56).² The paragraph, however, does not intend to limit the Centre from cooperating with regional organizations or non-governmental organizations that provide similar services.

B. Membership and structure

11. The Working Group may wish to consider draft provisions 4 and 5, which respectively address the membership and governing structure of the Centre.

² For a list of activities, see A/CN.9/WG.III/WP.212, footnote 7.

Draft provision 4 – Membership

1. *Any State or regional economic integration organization may become a member of the Advisory Centre by [methods to be established].*
2. *Each Member is entitled to the services of the Centre in accordance with the regulations adopted by the Governing Board.*

12. Draft provision 4 establishes the Advisory Centre as an intergovernmental body, of which any State or regional economic integration organization (REIO) can become a member. However, if established within another organization, the membership may be limited to those that are members of that organization (for example, membership of the Advisory Centre on WTO Law (ACWL) is limited to members of the WTO and any State or separate custom territory in process of acceding to the WTO). The means to become a member of the Advisory Centre would largely depend on the structure of the Centre as well as the final form of the draft provisions (for example, if prepared as a convention or a protocol to a convention, States and REIOs would need to ratify or accede to it to become a member).

13. Membership in the Advisory Centre entails rights and obligations. Paragraph 2 provides that Members of the Centre are entitled to its services outlined in draft provisions 6 and 7, while paragraph 3 of both provisions foresees the possibility that the Centre may provide services also to non-Members. Draft provision 8(1) and (2) provide that Members shall make an annual contribution to the budget of the Centre and pay fees for the services rendered by the Centre.

14. Paragraph 2 further provides that the types and extent of services that Members would be entitled to would be detailed in the regulations of the Advisory Centre adopted by the Governing Board (see draft provision 5(3)(c)). This gives the flexibility to the Governing Board to determine how best to make use of the resources available to the Centre taking into account the composition or the membership of the Advisory Centre (see paras. 32–33 below).

Draft provision 5 – Structure

1. *The Advisory Centre shall consist of a Governing Board and a Secretariat headed by an Executive Director.*
2. *The Governing Board shall be composed of representatives of the Members of the Advisory Centre and meet at least once a year.*
3. *The Governing Board shall carry out the following functions:*
 - (a) *Evaluate and monitor the performance of the Advisory Centre;*
 - (b) *Appoint and elect the Executive Director for a term of [...] years;*
 - (c) *Adopt and revise regulations on the operation of the Advisory Centre as well as rules of procedure;*
 - (d) *Adopt the annual budget of the Advisory Centre including the amount of contribution to be made by each Member of the Advisory Centre; and*
 - (e) *Adopt the fee structure for services provided by the Advisory Centre.*
4. *The Governing Board shall take decisions by consensus and in accordance with the rules of procedure referred to in paragraph 3(c).*
5. *The Executive Director shall report to the Governing Board and shall:*
 - (a) *Manage the day-to-day operation of the Advisory Centre;*
 - (b) *Employ and manage the staff members of the Secretariat in accordance with the staff regulations adopted by the Governing Board; and*
 - (c) *Represent the Advisory Centre.*

15. There are many ways to structure the organization of an intergovernmental body and draft provision 5 provides for one example with a simple two-tier structure.³

16. Paragraph 2 foresees a Governing Board consisting of all Members of the Advisory Centre, which would meet at least once a year. The Governing Board would be supported by a Secretariat, which would be headed by an Executive Director and staffed with full-time professional individuals. The Executive Director would be appointed by the Governing Board and responsible for the day-to-day activities of the Advisory Centre (see draft provision 5(3)(b)).

17. Paragraph 3 allows the Governing Board to take key decisions on matters relating to the operation of the Centre. The Governing Board would have oversight over the operation of the Advisory Centre and as listed in paragraph 3, it would adopt relevant regulations including staff regulations, the budget as well as the fee structure of the Centre. The Working Group may wish to consider additional functions to be carried out, or decisions to be taken, by the Governing Board.

18. For example, regulations to be adopted by the Governing Board could: (i) further clarify the scope of services of the Centre and their beneficiaries as described in draft provisions 6 and 7; (ii) provide rules on prioritization to be followed by the Executive Director under draft provision 7(5) (see paras. 32–33 below); and (iii) set forth the procedure for receiving voluntary contributions under draft provision 8(3). Regulations may also need to address conflicts of interest that might arise in the operation, for example, when the Centre provides representations services and when it receives contributions from private donors. Such regulations should aim to preserve the integrity of the Centre.

19. While paragraph 4 provides as a general rule that decisions are to be taken by consensus, the Governing Board should adopt rules of procedure, which would allow decisions to be taken in case consensus cannot be achieved, for example, by a vote or other means. This would ensure that the operation of the Advisory Centre is not interrupted due to an objection, for example, by a sole Member or a small number of Members.

20. The staffing of the Secretariat would have a bearing on the independence of the Advisory Centre, which should be borne in mind when the Governing Board adopts staff regulations. Staff members should possess sufficient expertise and experience to deliver a wide range of high-quality services. Issues such as the contracts to be provided to staff members including benefits and entitlements could be addressed in staff regulations. Such regulation should aim at achieving geographical diversity and gender balance among staff members, as well as diversity of expertise and experience (including in the government or public sector), as well as diversity in legal and social backgrounds. Paragraph 5 provides that the Executive Director would be accountable to the Governing Board and represent the Centre externally. Engagement of external consultants or service providers including law firms⁴ and programmes for government secondees could be addressed in a separate regulation.

³ In contrast, the ACWL has a three-tier structure composed of the General Assembly, the Management Board and the Executive Director. The Management Board is responsible for taking decisions necessary to ensure the efficient and effective operation, including the appointment of the Executive Director. The six members of the Management Board are selected on the basis of their personal qualifications in the field of WTO law or international trade relations and development, with three nominated by the developing country members, two by the developed country members and one by the least developed countries (A/CN.9/WG.III/WP.212, footnote 4). Considering that the composition of the Advisory Centre, including the number of its Members, is not yet known, draft provision 5 suggests a simpler structure.

⁴ See also document A/CN.9/WG.III/WP.212, footnote 6.

C. Functions and services

1. Technical assistance and capacity-building activities

21. The Working Group may wish to consider draft provision 6, which addresses technical assistance and capacity-building activities to be provided by the Centre.

Draft provision 6 – Technical assistance and capacity-building activities

1. The Advisory Centre shall provide technical assistance to its Members and engage in capacity-building activities with regard to international investment law and on issues pertaining to ISDS.

2. For this purpose, the Advisory Centre shall:

(a) Advise on issues pertaining to dispute prevention and conflict management;

(b) Provide training with regard to possible means of resolving disputes including but not limited to arbitration, mediation and State-to-State dispute settlement;

(c) Function as a forum for the exchange of information and sharing of best practices; and

(d) Perform any other functions assigned to it by the Governing Board.

3. The Executive Director may allow a non-Member to take part in the activities mentioned in paragraphs 1 and 2, particularly when such participation is determined to be beneficial to the Members.

22. Paragraph 1 provides that technical assistance would be provided to the Members of the Advisory Centre and that the scope of capacity-building activities would relate broadly to issues of international investment law and ISDS.

23. Paragraph 2 lists examples of activities to be conducted by the Centre, including functioning as a forum for Members to exchange information and share best practices. The paragraph further provides that the Governing Board could assign additional functions as it determines appropriate.

24. In light of the views expressed that the functions of the Advisory Centre should not overlap with those of other international organizations (A/CN.9/1124, para. 56), the Working Group may wish to consider whether the scope of the activities mentioned in paragraphs 1 and 2 should be narrower or certain activities explicitly excluded (for example, to clarify that the Centre would not provide technical assistance on investment promotion policies or negotiation of investment treaties). Another approach would be to encourage the Centre to cooperate closely with those organizations that provide for such services by concluding partnership agreements and have the Governing Board monitor the activities to avoid duplication of work (see draft provision 2(3) and para. 10 above).

25. It is quite rare for an intergovernmental body to provide services to non-Members, particularly when Members are required to make an annual contribution. Accordingly, draft provisions 2, 6 and 8 indicate that the main beneficiaries of the services of the Centre would be its Member States. However, considering that the activities covered under draft provision 6 would benefit from non-Member participation (particularly with regard to the forum function in subpara. 2(c)), paragraph 3 foresees that the Executive Director may allow a non-Member to take part in the activities of the Centre. This would allow States with limited financial resources to pay the dues as well as micro, small and medium-sized enterprises (MSMEs) to possibly benefit from the services provided by the Centre (A/CN.9/1124, para. 64). The Working Group may wish to consider whether other criteria for allowing non-Member participation should be outlined in paragraph 3.⁵

⁵ For example, MSMEs that have a legitimate claim with a chance of success and yet unable to financially afford the legal claim, having regard to size, origin, and other relevant criteria.

2. Assistance with regard to ISDS proceedings

26. The Working Group may wish to consider draft provision 7, which addresses the assistance to be provided by the Centre with regard to ISDS proceedings.

Draft provision 7 – Assistance with regard to ISDS proceedings

1. Upon the request by a Member, the Advisory Centre may provide legal support and advice with regard to ISDS proceedings, which may include representation services.

2. For this purpose, the Advisory Centre may:

(a) Provide a preliminary assessment of the case, including the appropriate means to resolve the dispute;

(b) Assist in the selection of mediators, arbitrators or other types of adjudicators as well as experts;

(c) Support the preparation of statements, pleadings and evidence as well as with regard other aspects of the proceedings;

(d) Represent the Member in an ISDS proceeding as well as a hearing, including jointly with a team of that Member;

(e) Engage with external legal counsel to provide the above-mentioned services; and

(f) Perform any other functions assigned to it by the Governing Board.

3. In exceptional circumstances, the Executive Director may allow a non-Member to submit a request for assistance. If such request is granted, the services referred to in paragraphs 1 and 2 may be provided to that non-Member.

4. The provision of the above-mentioned services is subject to the resources available to the Advisory Centre.

5. When the Advisory Centre is not in a position to meet all requests for assistance under this draft provision, the Executive Director shall determine the recipient(s) of services, giving priority to Members within the following categories: (i) least developed countries (LDCs); and (ii) developing countries. The Executive Director shall also take into account, among others, the order in which the requests were made and whether the Member is receiving any such assistance or has received assistance in the past.

6. Based on an annual report by the Executive Director, the Governing Board shall adopt a regulation on the allocation of support, which shall include a categorization of Members and any non-Member that may request assistance.

27. Whereas draft provision 6 provides for services to be delivered by the Advisory Centre relating broadly to issues of international investment law and ISDS, draft provision 7 focuses on legal support and advice with regard to ISDS proceedings. Paragraph 1 of draft provision 7 clarifies that such services would be provided upon the request by a Member, while paragraph 3 provides discretion to the Executive Director to extend such services to non-Members upon request and in exceptional circumstances (see para. 25 above).

28. The Working Group may wish to consider whether the reference to “ISDS proceedings” in draft provision 7 is appropriate (see para. 8 above). Otherwise, it may wish to specify the types of dispute resolution proceedings for which the Centre would provide legal support (for example, arbitral proceedings involving treaty-based claims raised by a foreign investor) or exclude certain proceedings (for example, those involving domestic investors, [A/CN.9/1124](#), para. 54).

29. The Working Group may wish to further consider whether the types of legal support and advice to be provided by the Centre as elaborated in paragraph 2 are

appropriate. Subparagraph (a) refers to an assessment of the dispute at hand and not general policy advice as to whether a measure or a potential one complies with the Member's obligations in an investment agreement (A/CN.9/1124, para. 58). Subparagraph (b) relates to assistance in identifying a suitable mediator or arbitrator and not that the Centre would act as an appointing authority.

30. The Working Group may wish to consider the extent to which the Centre should provide representation services (as mentioned in para. 1 and in subpara. 2(d)), which may be the most resource-intensive among the services to be provided. This is one of the reasons for providing discretion to the Centre on whether to provide such service which would depend on the resources available to it (para. 4) and for having the Governing Board assign other functions only when the resources are available (subpara. 2(f)). Subparagraph 2(d) further foresees that the services would be provided in close cooperation with the team of Government officials, which would ensure consistency with regard to the Member's approach in the ISDS proceeding, including the interpretation of its commitments. This could also enhance the capacity of the Members when dealing with other ISDS cases.

31. With regard to subparagraph 2(e), the Working Group may wish to consider whether it would be desirable for the Centre to engage with outside legal counsel to provide certain services. For example, the Centre could manage a list of law firms, which may be willing to provide its services to the Members on a pro bono basis or at a reduced rate.

32. As implied in paragraph 4, the Centre may not have the available resources to meet all requests for assistance and there may be a need to prioritize among its services or among the requesting Members and non-Members. Accordingly, it would be important to have clear rules on prioritization (A/CN.9/1124, para. 63), while giving some discretion to the Centre to make any determination based on all relevant circumstances. Paragraph 6 therefore foresees the Governing Board adopting a regulation, which would provide such rules on prioritization.

33. As noted, Members would have priority over non-Members (see paras. 25 and 27 above). Paragraph 5 further provides that least-developed countries (LDCs) and developing countries would be given priority (A/CN.9/1124, para. 47).⁶ It further states that the Executive Director should take into account a number of other factors in making the determination,⁷ including whether services had been provided to the requesting Member and the order in which the requests were made.⁸ In general, paragraphs 5 and 6 provide flexibility to the Executive Director and eventually the Governing Board to make the necessary adjustments to the rules on prioritization depending on the budget situation of the Centre and being reflective of the needs of different States (A/CN.9/1124, para. 63).

D. Financing

34. The Working Group may wish to consider draft provision 8, which addresses the budget structure of the Centre.

⁶ Countries facing financial, economic, political, or environmental challenges with limited experience in ISDS may be given priority. Priority may also be given to a category of States, for example, land-locked developing countries, small island developing countries, and countries in conflict and post-conflict situations.

⁷ These may include factors such as whether the requesting Member is a party to the dispute or a non-disputing party, the type of proceedings for which assistance is requested and the type of assistance requested.

⁸ For comparison, if two countries entitled to the ACWL's services seek advice in the same dispute, the ACWL applies the first-come-first-served rule. However, to avoid impinging the rights of the second country, the ACWL has created a roster of external counsel consisting of leading law firms and lawyers practising in WTO law, which could also assist countries that are denied direct assistance of the ACWL due to a conflict of interest.

Draft provision 8 – Financing

1. *Each Member shall make an annual contribution in accordance with the scale of contributions set by the Governing Board. If a Member is in default of its contributions, the Governing Board may decide to limit the rights of that Member under draft provision 4(2).*
2. *The Advisory Centre shall charge fees for its services in accordance with the schedule of fees set by the Governing Board.*
3. *The budget of the Advisory Centre shall be funded by the annual contribution of the Members, the fees for services rendered by the Advisory Centre and any voluntary contribution made by Governments, international organizations, private entities or individuals, in accordance with the regulations adopted by the Governing Board.*
4. *The budget and expenditure of the Advisory Centre shall be subject to an annual external audit in accordance with the regulations adopted by the Governing Board.*

35. Draft provision 8 lists the sources of the funding required for the establishment and operation of the Advisory Centre, which would be composed mainly of annual contribution by Members, fees charged and voluntary contributions. For example, the initial set-up cost may be borne by the Government hosting the Centre as a voluntary contribution.

36. The amount of contribution to be made by each Member and the fees to be charged for the services are to be fixed by the Governing Board. For that purpose, the Governing Board could take into account among others, the level of economic development of each Member ([A/CN.9/WG.III/WP.212/Add.1](#), paras. 17–35) and the need to ensure a sustainable operation of the Centre (see draft provision 3(1) and para. 9 above).

37. Likewise, the Governing Board would adopt regulations regarding voluntary contributions to be received by the Centre, with an aim to preserve the integrity and independence of the Centre. Imposing transparent and robust rules on private donations would help to safeguard the independence of the Centre.

38. The Working Group may also wish to consider a sample budget of the Advisory Centre as provided in the annex to document [A/CN.9/WG.III/WP.212/Add.1](#).

E. Legal status and liability

39. The Working Group may wish to consider draft provision 9, which addresses the legal status of the Centre.

Draft provision 9 – Legal status and liability

1. *The Advisory Centre shall have legal personality. It shall have the capacity to contract, to acquire and dispose of immovable and movable property and to institute legal proceedings.*
2. *The Advisory Centre shall be headquartered in [...] based on a host country agreement with [...], which shall accord to the Advisory Centre, its Executive Director and its staff members the status, privileges and immunities that the [...] accords to permanent diplomatic missions and their members or to international organizations and their staff.*
3. *The Advisory Centre, its Executive Director and its staff members shall not be liable to any person for any act or omissions in connection with the services provided by the Advisory Centre, except to the extent such limitation of liability is prohibited by applicable law.*

40. The Advisory Centre should have legal capacity to fully function and operate, as provided for in paragraph 1.

41. As to a suitable location for the Centre, the Working Group may wish to consider a number of relevant elements, including accessibility for the beneficiaries of the services and the overall efficiency in providing services, including remotely. The willingness of the host State to financially contribute to the establishment and operation of the Centre could also be a factor to consider. The setting up of regional offices can also be foreseen, which would broaden the scope of coverage but would require additional financial resources.

42. Paragraph 3 provides that the Advisory Centre, in particular the Executive Director and the staff members of the Secretariat, would not be liable for the services provided. This relates, in particular, to legal advice and representation services in ISDS proceeding as provided for in draft provision 7. Without such limitation, the Centre may need to obtain a professional insurance policy for its staff members, which may have an impact on the budget of the Centre.⁹

III. Way forward

43. According to the revised work plan agreed by the Working Group in May 2021 (annex of [A/CN.9/1054](#)), it is anticipated that the possible establishment of a multilateral advisory centre would be presented to the Commission at its session in 2024. It is further expected that reforms relating dispute prevention and mitigation, which was scheduled to be presented to the Commission in 2023, would be presented to the Commission in 2024. Accordingly, the Working Group may wish to decide how those reform elements would be deliberated during the following two sessions scheduled to take place in January (Vienna) and April (New York) 2024.

44. In this regard, the Working Group may wish to consider how to make progress on the Advisory Centre, mainly whether it should be presented and adopted as a stand-alone project or as a reform element to be incorporated in a multilateral instrument on ISDS reform, which would deliver comprehensive reforms.

45. The Working Group may wish to further consider what would be recommended to the Commission, which would determine how the draft provisions are eventually presented to it. One option would be the approach taken with regard to the draft provisions on mediation, where the Commission would be expected to adopt such provisions as a model text for use by States and organizations that wish to set up an advisory centre. Another option would be the approach taken with regard to the code of conduct for judges in international investment dispute resolution and recommend the adoption of the draft provisions in principle until the Commission finalizes its work on other related reform elements, including the multilateral instrument on ISDS reform. This would provide flexibility to adjust the draft provisions in light of such other reform elements. Lastly, it would be possible for the Working Group to recommend the establishment of the Advisory Centre on its own. If so, the Working Group may wish to consider how to implement this reform element (including possibly within the United Nations) and provide guidance on the work to be conducted by the Secretariat in preparation for such implementation.

⁹ International organizations, such as ICSID, the AWCL, the International Development Law Organization (IDLO) generally enjoy functional immunity. In private law practice, the use of professional liability insurance has no uniform approach and depends on domestic regulations on the legal professions where the law firm or practitioner is based. See Study conducted by the International Bar Association (2022), IBA International Principles on Professional Indemnity Insurance for the Legal Profession, p. 6.