

Submission to the UNCITRAL Working Group III (ISDS Reform) by the Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH and the Regional Cooperation Council (RCC)

Comments on the Proposal for the Establishment of the Advisory Centre on International Investment Law

1. Context and background

On behalf of the international development organizations operating in the region of the Western Balkans, the Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH¹ and the Regional Cooperation Council (RCC) (Western Balkans Partner Organizations)² commend and support the continued work of the UNCITRAL WGIII on the establishment of the Advisory Centre on International Investment Law. The Partner Organizations have been working in the region for decades to strengthen the legal framework for economic development, particularly with regards to trade and investment policies, and international dispute resolution.

The purpose and objectives of our work are closely aligned with the stated objectives of the Advisory Centre,³ i.e. building the capacities of economies (particularly least developed and developing ones) through technical assistance and capacity development related to international investment law and dispute resolution. Furthermore, the Partner Organizations share the view that such services should be provided in a manner which is “effective, affordable, accessible and financially sustainable” as laid out in the principles of the Advisory Centre.⁴

To this end, our organizations and projects have conducted a series of studies, mapping reports and risk assessments, developed regional standards for treaty negotiation and model dispute resolution clauses, conducted extensive substantive and practical capacity development programs, and developed unique materials to support such efforts. In addition, the Partner Organizations continuously engage the competent institutions in regional and international exchange of experiences and best practices for the reform of investment policies and ISDS.

Some prominent examples of our previous regional initiatives and activities are outlined below.

Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH

Over the past five years, and through two projects,⁵ GIZ has collaborated closely with the key institutions in the Western Balkans and its Partner Organizations to strengthen the legal

¹ For GIZ, this submission is made by the „Legal Reform for Economic Development in the Western Balkans“ project.

² Disclaimer: The comments, suggestions and views expressed in this submission are provided in support of the efforts of the WGIII for the establishment of the Advisory Centre. They are contributed by individuals working on specific projects and portfolios in the Western Balkans on behalf of their respective organizations, and thus do not represent the views or positions of their organizations or commissioning parties. Therefore, they should not be interpreted as an endorsement or commitment of any kind, nor should it prejudice any future positions on this matter. Finally, the partner organizations do not speak on behalf of the governments of the Western Balkans, and the views expressed in this submission are not meant to reflect any positions of any specific government or the region itself.

³ Draft Statute of the Advisory Centre, Article 2.

⁴ *Ibid.* Article 3.

⁵ “Open Regional Fund South-East Europe Legal Reform” and „Legal Reform for Economic Development in the Western Balkans.”

framework for ISDS reform and to develop capacities of the governments for the prevention, mitigation and management of investment disputes. With the support of distinguished regional and international experts, these efforts have resulted in the following milestones:⁶

- Reports and analysis: Mapping report of the legal and institutional framework for ISDS in the Western Balkans; *6 National Risk Assessment Reports for ISDS* arising from Covid-19 measures; Model ISDS clause for investment treaties; *6 National Communication Roadmaps for Dispute Prevention*; *6 National Strategic Proposals for ISDS Mediation*; Model ISDS clause for investment treaties
- Capacity development resources: A Lexicon for ISDS Terminology; Standardized Training Handbook for Investment Law and ISDS (with practical exercises)
- Capacity development events and activities: Regional Training of Trainers for Investment Law and ISDS; Economy-wide Trainings on Investment Law and ISDS; Treaty Negotiation Simulation (in collaboration with the Czech Ministry of Finance, the RCC and WB); Forthcoming ISDS mediation training and mediation simulation
- Ongoing regional and international exchange: A series of online workshops with: government representatives from Canada, Croatia, Spain, Slovakia, and others; international organizations including UNCTAD and ICSID; as well as experts from academia and practice.

Regional Cooperation Council (RCC)

The RCC is the leading regional organization facilitating the implementation of actions aimed at creating a common regional market in the Western Balkans. The regional investment area is one of the top four priorities on the common regional market agenda. Some of the activities RCC has implemented on the investment policy front involve the following:

- The RCC led the process of creating regional standards for IIAs, which have been agreed upon by all Western Balkan economies. These standards have proved very beneficial for these economies, aiding them in the formulation of model clauses and facilitating BIT negotiations with third parties.
- The RCC conducted a comprehensive mapping of ISDS structures in the Western Balkan economies to enhance investment security and predictability. Additionally, it has provided support to these economies in their process of developing Standard Operating Procedures (SOP) for ISDS.
- The RCC has organized numerous capacity-building workshops for key stakeholders in the Western Balkan economies. These workshops involved topics such as best practices and techniques for negotiating investment treaties, key substantive claims in ISDS, significance of treaty silence in ISDS and related subjects. Each workshop included practical, hands-on exercises to reinforce the learning experience.

⁶ All of the documents and training materials listed below are available in English and the local languages of the Western Balkans and could be made available to members of the Advisory Centre as part of its resources and capacity development materials.

Through these activities in the Western Balkans, the partner Organizations have sought to keep the region in lock step with the international best practices in the reform of investment policies and ISDS, while also tailoring the relevant reform solutions for the regional context and each individual economy. In doing so, we have recognized the need for continuous technical assistance, capacity development and awareness raising related to investment law and investment disputes, which makes the Advisory Centre an interesting reform option with possible long-term benefits.

With this background, the Partner Organizations are submitting these comments to the proposed Draft Statute of the Advisory Centre (Draft Statute), for further consideration by the WG III. Since the Draft Statute foresees close collaboration with international organizations, including in its general principles, the Partner Organizations remain open for collaboration in the development of the proposal, as well as the work of the Advisory Centre upon its establishment.⁷ The comments will only relate to the general framework and the services to be provided by the Advisory Centre, which is relevant to the experiences of the Partner Organizations in the Western Balkans.⁸

2. Comments and suggestions on the general framework of the Advisory Centre

2.1. Coordination of the Activities between the Advisory Centre and International Organizations

- The services envisioned under Article 6 of the Draft Statute cover activities which are already conducted around the world by a number of international (development) organizations and institutions.⁹ In order to ensure the effective use of the Advisory Centre's resources and to avoid overlap in substance and implementation, it will be important to establish a steady coordination and exchange between the Advisory Centre and the relevant organizations. Such collaboration and coordination could have a multiplying¹⁰ effect and ensure the sustainability of the various forms of technical assistance already provided by the international organizations, and feed into the services provided by the Advisory Centre.
- One way to accomplish good coordination would be to maintain a joint calendar which would continuously provide up-to-date information about planned activities and events organized by the partner institutions and the Advisory Centre. A consolidated calendar could be periodically provided to the users of the Centre as part of the general program.
- The WGIII may consider distinguishing between organizations which may formally become supporting partners of the Advisory Centre and others, where the former would be in closer coordination with the Advisory Centre. This coordination could include regular exchanges on respective activities and workload, regional presence and user needs.¹¹

⁷ *Ibid.*

⁸ For greater certainty, the Partner Organizations will continue to follow the deliberations on the legal assistance and support of the Advisory Centre services, but do not wish to make any input at this stage. This should not be interpreted as an endorsement or opposition to the inclusion of such services, nor does it in any way prejudice any future position or work of the Partner Organizations in this area.

⁹ Some examples include the World Bank, GIZ, RCC, UNCTAD, OECD, the Geneva Institute, etc.

¹⁰ Draft Statute of an Advisory Centre, Article 3.3 and Article 6.3.

¹¹ Suggestions for specific forms of collaboration in capacity development and technical assistance are outlined in section 3 below.

2.2. Target beneficiaries of the Advisory Centre

- The Advisory Centre is primarily dedicated to supporting economies in matters related to investment law and ISDS. While it is clear that the specific institutions and agencies competent for ISDS may differ in different economies, it is also a factor to be considered in the planning of the capacities and resources of the Centre. Namely, in complex government structures and federal political entities, the competence for investment protection may be allocated to several federal units and their respective ministries, even if the central government institutions may be in charge of representing the government in ISDS proceedings.¹² This may have different implications for the Centre services offered under Articles 6 and 7 of the Draft Statute.
- Therefore, it will be important to plan the range of possible target beneficiaries and accommodate potentially larger groups of stakeholders from some Members.¹³ One way to prevent a possible backlog of requested services is to establish regional offices of the Advisory Centre that could provide services in specific areas. The regional centres could be supported by the Partner Organizations or others to provide various technical assistance and capacity development services. If the Advisory Centre is equipped with a robust online platform, it could offer broad services online, including live or asynchronous trainings and practical exercises. All of these options would have financial implications, to be further considered by the WGIII and the future Members of the Advisory Centre.

2.3. Access to the Services of the Advisory Centre

- While the Advisory Centre is intended for and should be primarily available to governments (Members or non-members according to its rules), there may be benefits of allowing private entities (especially micro, small and medium-sized enterprises “MSMEs”) to use some of the resources under Article 6. Namely, investors and governments tend to interact from adversarial silos even before the initiation of arbitral proceedings. Therefore, the cooling off-period is often wasted due to miscommunication, as both parties already prepare legal strategies for the arbitration. Investors, much like governments, are mostly not aware of the options for dispute prevention and amicable settlement that may be available in a specific case.
- However, if the Advisory Centre would allow investors to access some of its services under Article 6, there may be a number of possible benefits for both investors and governments (contributing to the objectives of the Centre). For example, if the Advisory Centre acts as a repository for information and legal instruments related to investment law and ISDS, investors could access information about the legal framework in their host economy, as well as the institutions involved in various stages of investment disputes.
- Furthermore, the investors could learn about dispute prevention and mitigation procedures generally, and the institutional framework for dispute prevention and mitigation in their

¹² For example, in Bosnia and Herzegovina, the State Attorney's Office is in charge of representing Bosnia and Herzegovina in ISDS, regardless of whether the dispute arose due to measures from the central or entity institutions. Nevertheless, the entity institutions, including those of the 10 cantons in the Federation of Bosnia and Herzegovina, would need capacity development and technical assistance on investment law and ISDS, to be able to assess the risks of possible disputes and avoid measures which could breach investment treaties. Such trainings and workshops would have to cover hundreds of persons from different levels of government.

¹³ For the purposes of this submission, the term „Member“ should be understood in the context of its definition in the Draft Statute of the Advisory Centre.

respective host economy, in case of a dispute. In parallel, the Advisory Centre could provide governments a legal assessment of specific investment claims and help determine the adequate dispute resolution mechanism, including mediation. This may improve the odds of the effective use of the cooling-off period and narrow the information gap between governments and investors. Such opportunities may be limited if the investors engage immediately with their legal counsel or third-party funders.

- While some economies have raised justified concerns about sharing such resources with investors as providing support for their potential investment claims, any such risks could be overcome with the proper eligibility criteria and requirements (which will be developed by the Governing Committee), as well as the safeguards against conflicts of interest.

2.4. Financing of the Advisory Centre

- Although the Draft Statute foresees that the amounts of membership contributions for Members will account for their level of economic development, there are other factors that should be considered in this respect. Since least developed and developing economies are in most need of capacity development, technical and legal assistance, it will be important to ensure that financial burdens do not restrict or prevent them from taking advantage of the benefits of the Centre. One way to mitigate the burden on such economies is to consider phased or extended timeframes for payments.
- It is particularly important to clarify the criteria under which the Governing Board may limit the access to the Advisory Centre services to Members in default of their annual contribution (Draft provision 8.3), and the parameters of such limitations.
- Developing economies may have difficulties justifying or getting budget approval for membership in the Advisory Centre, especially in a period where they are not facing any investment disputes or are in the closing stages of a pending case. This is even more so given that most governments already have budget lines set aside for legal defense which are easier to access. There will also be little incentive to pay for membership and service fees for technical assistance and capacity development which the economies already get free of charge from international organizations. Therefore, the WGIII should consider an incentive scheme for the Advisory Centre to attract meaningful participation and membership.
- One option would be to provide general materials and programs for capacity development free of charge to Members, and charge a fee for on-demand, tailored technical assistance and training. Any non-members that are eligible for the use of the Centre's services would be charged for both types of assistance.

3. Comments and suggestions on the technical assistance and capacity building services of the Advisory Centre

The largest potential for collaboration between the Partner Organizations and the Advisory Centre lies in the services outlined in Article 6 of the Draft Statute. This particularly relates to the distribution of training materials and other resources developed by the Partner Organizations, as well as the collaboration on specific capacity development and technical assistance programs and providing experts with verified credentials and experience. Although the details and

framework of such collaboration will be determined in the future, the following sections will provide some suggestions in this context, for the consideration of the WGIII.

3.1. Technical assistance and capacity building

- The Advisory Centre could maintain a general training program scheduled in advance and available to all users, as well as the option for tailored, on-demand programs for specific Members. The Centre could have one larger training program offered annually to all Members, possibly implemented by region. The partner organizations could update the Centre annually on their scheduled activities, and the Centre could share such information with all the members.
- The capacity development programs could include in-person, remote and hybrid options, as well as pre-recorded trainings and practical exercises, which could be notified to all members periodically. Web-based trainings may be most efficient, particularly for matters that do not involve practical exercises.
- The capacity development programs should include theoretical and practical activities, including simulations of different proceedings.
- The Centre could be a forum for international and regional exchange among governments, but also with investors (particularly MSMEs) to bridge the communication and information gap and lower the levels of antagonism between these important stakeholders.
- In collaboration with partner organizations, the Centre could offer its Members participation in existing programs and events organized by the partner organizations in different regions.
- The Centre should develop a monitoring and evaluation framework to regularly assess the impact and effectiveness of the technical assistance and capacity-building programs. The framework should include key performance indicators and feedback mechanisms for participants.

3.2. Dispute prevention and alternative dispute resolution

- The Centre could assist governments in designing and setting up various dispute prevention mechanisms aligned with international best practices.
- The Centre could advise governments on adequate alternative dispute resolution mechanisms in the pre-dispute phase and encourage non-adversarial methods where adequate and possible.
- If approached by an investor, the Advisory Centre could put the investor in touch with the relevant institutions or mechanisms for dispute prevention and management in the respective economy.

3.3. Learning materials

- The capacity development materials developed by the partner organizations and the Centre should be made available free of charge for Members on an online platform that

could be accessed through a registered account. The platform could be made available to non-members in a restricted form and for a registration fee (monthly, annual, etc.)

- The platform could also serve as a repository of all relevant international instruments, or directly link to such existing platforms (for example, the UNCTAD's Investment Policy Hub) with instructions on their advanced search options.
- Partner organizations of the Centre can agree to hand over existing and future training materials to the Centre on a continuous basis (this includes material developed in the context of particular regions or economies, and in different languages).
- It will be important to ensure the broad availability and accessibility of the resources provided by the Advisory Centre. This particularly relates to the translation of the materials to as many languages as possible, but also ensuring simultaneous translations for in-person and online events. For this purpose, the WGIII may consider the appropriateness of using reliable translation AI for written and simultaneous translations, which would ensure inclusiveness, but also time and cost efficiency.
- Finally, to ensure that the Advisory Centre programs are in line with the needs and priorities of the users, there should be an established pipeline for collecting suggestions for training topics and issues which should be covered by the capacity development activities. This information can be collected directly from the Members, as well as from the partner organizations working in different regions.

3.4. Experts and trainers

- There should be a roster of experts, practitioners and international organizations who could conduct capacity development programs in the Advisory Centre, whether on demand, or as part of a general offering available to the users of the Centre. Any such person or entity would be vetted based on pre-determined eligibility criteria and would be available for engagement at the Centre, or willing to provide pro bono technical assistance or capacity building. The integrated experts working with certain international organizations, or those who have already conducted capacity development for government institutions in different regions could also be featured on the roster. The roster should include a balanced combination of persons with academic backgrounds, as well as experience practitioners to cover various dimensions of investment law and ISDS.
- To ensure that the Members get the best quality of services, some experts from the specialized roster (or a subgroup thereof) could only be available to Members. This will also ensure that least developed and developing economies, who will generally have priority treatment for the services of the Centre, are still able to benefit from high-quality assistance and training, even at times of high demand.
- Since experts at the Advisory Centre will have access to government officials, and the ability to collaborate with them closely, it will be an attractive opportunity for a wide number of individuals and organizations in legal practice. Therefore, it will be important to establish a clear vetting system and safeguards against conflicts of interest and unwanted advances and promotion to Members for possible future engagements outside of the Centre.
- The WGIII could consider developing a performance rating system where Members and other users can provide feedback on experts. The rating information could guide Members

and other users in selecting experts, promoting accountability, and fostering trust in the expertise provided by the Advisory Centre.

3.5. Online platform of the Advisory Centre

- The accessibility and efficiency of the services of the Centre would be greatly enhanced if it was supported by a robust online platform that could cover a number of its activities and services. It could primarily host the library of materials and documents that Centre collects as a repository, including the various training resources. It can also be a means for direct communication with Members and non-members, direct requests and updates about the regular capacity development activities. Therefore, an online platform could be a crucial feature to maximize the benefits of the Centre.
- For the services under Article 6, the online platform could host online trainings, workshops and other educational events, whether they are organized for a specific Member on demand, or an event meant for the general membership. In addition, the library could feature recorded training programs for asynchronous learning. For Article 7 services, the platform could be used to apply for legal advice or assistance, to schedule consultations, and hold online meetings between the experts and the relevant government institutions.