

## UNCITRAL Commission, 58<sup>th</sup> Session, Vienna

### U.S. Comments to A/CN.9/1218

**Date of Submission:** July 11, 2025

The United States thanks the Armenian delegation for its excellent hospitality during the second operationalization meeting. The United States also extends its thanks to both the Armenian delegation and the Secretariat for their hard work preparing A/CN.9/1218 (“Summary of the second meeting on the operationalization of the Advisory Centre on International Investment Dispute Resolution”).

The United States delegation has prepared the comments below following its review of the summary document. These comments are presented for the Commission’s consideration alongside A/CN.9/1218, so that the issues raised therein can be studied by all UNCITRAL Member States and, as appropriate, reflected in the Commission’s report of its fifty-eighth session. The United States understands that the summary of the second operationalization meeting will not be subject to a formal adoption process by either Working Group III or the Commission and that the text of the summary will therefore not be tabled for revision or debate during the upcoming Commission session. Several of the below comments are nonetheless framed as line edits to the summary document for clarity and ease of communication.

#### **Section II: Establishing the Advisory Centre within the UN system**

- pp. 3-4, ¶¶ 9, 14 – Operationalization meeting participants agreed that the establishment of the Advisory Centre on International Investment Dispute Resolution (the “Advisory Centre” or “ACIIDR”) should not have any impact on the resources of the United Nations, meaning both financial and other resources (e.g., time). However, the summary document refers in several places only to the “budget” of the United Nations. The report of the Commission’s fifty-eighth session should clarify that where the summary document discusses the Advisory Centre not impinging on the United Nations “budget,” it should be understood as referring to “resources” more broadly, including both money and time.
- p. 3, ¶ 10 – Paragraph 10 of the summary could be read to imply that all participants in the second operationalization meeting were agreed that the Advisory Centre might at a later stage seek to become a specialized agency. However, certain participants expressed concern or uncertainty about the desirability of that two-step approach. Therefore, paragraph 10 would more accurately capture participants’ discussion on this point if revised as follows: “It was stressed that this would offer greater flexibility and autonomy and allow for a more expeditious establishment. Views were expressed that establishing the Centre as a related organization of the United Nations would leave open the possibility for the Centre to become a specialized agency at a later stage, though it was questioned whether a two-step process of starting the Centre as a related organization with the goal that it would ultimately become a specialized agency was feasible in terms of both efficiency and budgetary constraints.”

- p. 4, ¶ 12 – Paragraph 12 discusses the possibility that work could be undertaken immediately to begin preparing a relationship agreement, but does not account for concerns expressed that operationalization work should not impinge on the time or financial resources of the United Nations or the Secretariat. That consideration is directly relevant to the third recommendation in Section VIII of the summary, and could be accounted for in paragraph 12 by editing the first sentence of that paragraph as follows: “It was said that work could begin to prepare a relationship agreement with the United Nations **pending available resources**, . . .”

#### Section IV: Budget samples of the Advisory Centre

- p. 6, ¶ 24 – As drafted, the last sentence in paragraph 24 implies that participants during the operationalization meeting widely felt that the most important factor in establishing the Advisory Centre and determining its allocation of services was to retain flexibility. However, participants also expressed the view that the Advisory Centre needed to have a stable foundation to ensure its long-term success. The final sentence in paragraph 24 would more accurately capture that nuance if revised as follows: “Overall, it was widely felt that the Centre should **begin on solid footing while retaining** flexibility to adjust its services based on available resources and evolving circumstances and that the Centre could expand its services as demand for services and accompanying budget increased.”
- p. 6, ¶ 26 – The United States understood that the Secretariat proposed increasing the contingency fee incorporated into the anticipated budget from 5% to 15%, but the text in paragraph 26 suggests that the entire budget would be increased by 15%. Assuming the U.S. understanding of the Secretariat’s proposal is accurate, the third sentence would be more accurate if revised to read: “To account for such costs, it was widely felt that the **contingency fee incorporated into the** anticipated budget should be increased **by from 5 per cent to 15 per cent**.”
- p. 6, ¶ 28 – In keeping with the comment above, the United States understood the compromise proposal reflected in paragraph 28 slightly differently than how it has been characterized in the summary document. A more accurate summary based on the U.S. understanding would be as follows: “In light of the above, ~~it was agreed that~~ the **Chair proposed that a notional figure of US\$ 4.5 million plus a 15% contingency fee could be used as a working assumption** ~~for future discussions would be an~~ of the Centre’s annual operational costs ~~of US\$ 4.5 million~~ for the initial years of ~~its~~ operation ~~of the Centre~~.” The U.S. delegation also proposes that the report of the Commission’s fifty-eighth session should clarify that the US\$ 4.5 million figure is not determinative and would be used solely to facilitate further operationalization-related discussions.

#### Section V: Financing of the Advisory Centre

- p. 6, ¶ 29 – Paragraph 29 inaccurately reports that discussions were based on the assumption that membership dues should cover “almost” the entirety of the Advisory Centre’s budget during the initial years of operation. In fact, the working assumption (as

understood by the U.S. participant) was that membership dues should cover all of the Centre's budget during its initial years of operation.

- p. 7, ¶ 31 – Paragraph 31 would more precisely and accurately capture the discussions during the second operationalization meeting if it expressly noted that participants widely felt that entry into force of the Statute should be premised on membership dues covering 100% of the Advisory Centre's budget. As currently drafted, the first sentence of paragraph 31 makes no reference to entry into force.
- p. 7, ¶ 32 – By suggesting that it is “given” that the Advisory Centre will seek to become a related organization, the summary improperly assumes the outcome of the Commission discussions as to the structuring of the ACIHDR within the UN system. See also the U.S. comments below to Section VIII (“Recommendations to the Commission”).

## **Section VI: Thresholds for entry into force**

- p. 9, ¶ 43 – The second sentence of paragraph 43—related to voluntary contributions—does not fully reflect the meeting participants' specific discussions on entry into force. The Commission report should therefore clarify that, during the operationalization meeting, it was suggested that a third condition should be established for the Statute to enter into force based on the amount of money voluntarily contributed as a donation following signature but prior to entry into force. The Commission report might also reflect that (1) in support of that proposal, it was said that the interim secretariat would require money on hand in order to operationalize the Advisory Centre and that any money donated voluntarily could be counted against any annual contributions later owed by the donor following entry into force; but (2) concern was expressed that voluntary contributions would not be sufficiently reliable to constitute a workable condition for entry into force.

## **Section VII: Classification of the Members of the Advisory Centre**

- pp. 9-10, ¶¶ 45, 51 – Participants in the operationalization meetings have discussed delineating between the procedure that would be used to determine annual contributions and the classification for determining priority for services. However, the language in paragraphs 45 and 51 can be read as conflating those two procedures (see, e.g., the inclusion of “as well as applicable fees” in the first sentence of paragraph 45, the final sentence of paragraph 45, and chausette (v) at the end of paragraph 51). Considering that potentially confusing language, the U.S. delegation proposes that the Commission report clearly explain the distinction between funding and prioritization and how those issues have been separately treated by the operationalization meeting participants.
- p. 9, ¶ 46 – Paragraph 46 could have been drafted more precisely to clarify not just that a category of Members should correspond to the official list of LDCs, but that the category of LDCs would be the highest-priority category of Members (i.e., the category of Members that should receive priority for services above all others).

- p. 9, ¶ 48 – To fully and accurately reflect the U.S. participant’s intervention on classification on members of the Advisory Centre, the Commission report should reflect that the alternative view expressed during the second operationalization meeting was that none of the existing classifications fully reflected either the objectives of the Advisory Centre or global economic realities.
- pp. 9-10, ¶ 49 – Paragraph 49 does not reflect the view expressed during the second operationalization meeting that the final indicative list should be included in the text of the Statute in order to ensure predictability and transparency in determining priority. Given the importance of that viewpoint, the U.S. delegation proposes that it be reflected in the Commission report.
- p. 10, ¶ 52 – The U.S. participant’s recollection is that the Secretariat was asked during the second operationalization meeting to prepare a paper presenting a choice between a decoupled approach and a three-grouping approach, but not to assume how lines would be drawn for purpose of the three-grouping approach. If that recollection is correct, paragraph 52 would be more accurate if modified as follows: “After discussion, the secretariat was requested to prepare two ~~set of lists~~ **options** for further consideration. One ~~list option~~ **would reflect a ‘decoupled’ approach with contain** LDCs in one category **and with** all other Members in another category. Another ~~list option~~ **would propose a bespoke three-category approach for categorizing countries specifically for the Advisory Centre contain LDCs in the first category, LLDCs, SIDS as well as low income and middle income developing countries in the former “UNCTAD Data Hub in the second category (excluding LDCs contained in the first category), and the remaining Members in the third category. The secretariat was further requested to consider ways of** ~~classifying Members solely for the purposes of the governance structure of the Centre, which could be based on the two set of lists mentioned above or based on other criteria (for instance, regional groups and levels of contribution).~~”

## **Section VIII: Recommendations to the Commission**

- pp. 11–12, ¶ 53 – The United States views A/CN.9/1218 as an inappropriate vehicle for inviting the Commission to take decisions based on the operationalization process. Because A/CN.9/1218 has not been vetted with or formally considered by the Working Group, it should be understood only as a description of the discussions that occurred during the second operationalization meeting from the perspective of a single participating State. And as the comments throughout this paper indicate, aspects of that summary do not, in the U.S. delegation’s view, fully and accurately reflect the outcomes of that meeting. The United States also opposes the implication in paragraph 53 that the participants in the second operationalization meeting collectively agreed to invite the Commission to take decisions based on all eight of the recommendations set out in that summary document. On the contrary, the U.S. delegation maintains its position that the Commission should not take any interim decisions on substantive issues related to the operationalization process while that process remains ongoing (see also, U.S. comments to paragraph 56, 57, and 58). The U.S. delegation therefore proposes that the Commission report should include language that makes the following clarifications as to

paragraph 53: “~~At the end of the~~Based on the views expressed by participants in the Meeting, the Commission ~~was invited to~~ may wish to consider taking the following decisions relating to the operationalization of the Advisory Centre at its fifty-eighth session.”

- pp. 11–12, ¶¶ 56, 57, 58 – As noted above, the U.S. delegation maintains its view that the Commission should not take any interim decisions on substantive issues related to the operationalization process while that process remains ongoing. Three of the recommendations in the summary paper—in paragraphs 56, 57, and 58—could be read to invite such an interim decision. To that end, and in keeping with other comments included elsewhere in this paper, the U.S. delegation proposes that the Commission report should include language clarifying paragraphs 56, 57, and 58 as follows:
  - “Third, the Commission may wish to ~~consider expressing its desire~~ recognize that it was widely felt by the participants in the second operationalization meeting that the Advisory Centre should aim to become a related organization of the United Nations and request, ~~pending available resources~~, that work be undertaken by the interim secretariat of the Advisory Centre on the terms of a possible relationship agreement based on existing agreements concluded between the United Nations and related organizations.”
  - “Fourth, the Commission may wish to ~~confirm~~ recognize that it was widely felt by the participants in the second operationalization meeting that ~~it would the Commission should~~ take a holistic approach when determining the location of the Advisory Centre, taking into account the following factors: (i) support from the host State/Government; (ii) stable environment; (iii) accessibility and affordability; (iv) geographic distribution; (v) attractiveness to a qualified workforce; and (vi) cooperation and coordination.”
  - “Fifth, the Commission may wish to recognize that it was widely felt by the participants in the second operationalization meeting that its secretariat should function as the interim secretariat of the Advisory Centre and to request its secretariat to seek possible means for it to function as the interim secretariat of the Advisory Centre ~~once~~ if the Statute is finalized and adopted by the General Assembly. This should be sought without any ~~budget resource~~ implications on the United Nations and not to the detriment of the provision of services to the Commission as a whole (see paras. 14–15 above).”