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Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its forty-sixth session (Vienna, 9–13 October 2023)

Contents

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I. Introduction

1. At its fiftieth session in 2017, the Commission entrusted Working Group III with a broad mandate to work on the possible reform of investor-State dispute settlement (ISDS). From its thirty-fourth to thirty-seventh session, the Working Group identified and discussed concerns regarding ISDS and considered that reform was desirable in light of the identified concerns.[1] From its thirty-eighth to forty-fifth session, the Working Group considered concrete solutions for ISDS reform.[2]

2. At its fifty-sixth session in 2023, the Commission adopted the UNCITRAL Model Provisions on Mediation for International Investment Disputes, the UNCITRAL Guidelines on Mediation for International Investment Disputes and the UNCITRAL Code of Conduct for Arbitrators in International Investment Dispute Resolution with accompanying commentary.[3] The Commission also adopted the UNCITRAL Code of Conduct for Judges in International Investment Dispute Resolution with accompanying commentary in principle.[4]

3. At that session, the Commission expressed its satisfaction with the progress made by the Working Group. The Commission requested the Working Group to continue its work in an effective manner and encouraged it to present the draft text on an advisory centre on international investment law and a guidance text on means to prevent and mitigate disputes for its consideration in 2024.[5]

II. Organization of the session

4. The Working Group, which was composed of all States members of the Commission, held its forty-sixth session from 9 to 13 October 2023 at the Vienna International Centre.

5. The session was attended by the following States members of the Working Group: Afghanistan, Algeria, Argentina, Armenia, Australia, Austria, Belarus, Belgium, Brazil, Bulgaria, Canada, Chile, China, Colombia, Côte d'Ivoire, Croatia, Czechia, Democratic Republic of the Congo, Dominican Republic, Ecuador, Finland, France, Germany, Ghana, Greece, Honduras, India, Indonesia, Iran (Islamic Republic of), Iraq, Israel, Italy, Japan, Kenya, Kuwait, Malawi, Malaysia, Mexico, Morocco, Nigeria, Panama, Peru, Poland, Republic of Korea, Russian Federation, Saudi Arabia, Singapore, Spain, Switzerland, Thailand, Türkiye, Uganda, Ukraine, United Kingdom of Great Britain and Northern Ireland, United States of America, Venezuela (Bolivarian Republic of) and Viet Nam.

6. The session was attended by observers from the following States: Bahrain, Costa Rica, Egypt, El Salvador, Eswatini, Guatemala, Jamaica, Jordan, Lebanon, Libya, Lithuania, Madagascar, Malta, Myanmar, Netherlands (Kingdom of the), Pakistan, Paraguay, Philippines, Portugal, Romania, Sierra Leone, Slovakia, Sri Lanka, Sweden, Tunisia, Uruguay and Uzbekistan.

7. The session was also attended by observers from the European Union.

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[1] The deliberations and decisions of the Working Group at its thirty-fourth to thirty-seventh session are set out in documents A/CN.9/930/Rev.1; A/CN.9/930/Rev.1/Add.1; A/CN.9/935; A/CN.9/964; and A/CN.9/970, respectively.

[2] The deliberations and decisions of the Working Group at its thirty-eighth to forty-fifth session are set out in documents A/CN.9/1004*; A/CN.9/1004/Add.1; A/CN.9/1044; A/CN.9/1050; A/CN.9/1054; A/CN.9/1086; A/CN.9/1092; A/CN.9/1124; A/CN.9/1130 and A/CN.9/1131.

[3] *Official Records of the General Assembly, Seventy-eighth session, Supplement No. 17* (A/78/17), paras. 35, 40 and 90. The texts adopted by the Commission are available at https://uncitral.un.org/en/texts/isds.

[4] Ibid., para. 90.

[5] Ibid., paras. 151, 152 and 155.

8. The session was also attended by observers from the following international organizations:

(a) *United Nations System*: International Centre for Settlement of Investment Disputes (ICSID) and United Nations Conference on Trade and Development (UNCTAD);

(b) *Intergovernmental organizations*: Andean Community (CAN), Asian-African Legal Consultative Organization (AALCO), Association of Southeast Asian Nations (ASEAN), Commonwealth Secretariat, Cooperation Council for the Arab States of the Gulf (GCC), Energy Charter Secretariat, Organisation for Economic Co-operation and Development (OECD), Permanent Court of Arbitration (PCA) and South Centre;

(c) *Invited non-governmental organizations*: Academic Forum, Académie Africaine de la Pratique du Droit International (AAPDI), African Association of International Law (AAIL), All India Bar Association (AIBA), American Arbitration Association – International Centre for Dispute Resolution (AAA/ICDR), American Bar Association (ABA), American Society of International Law (ASIL), ArbitralWomen, Asian Academy of International Law (AAIL), Association for the Promotion of Arbitration in Africa (APAA), Belgian Centre for Arbitration and Mediation (CEPANI), British Institute of International and Comparative Law (BIICL), Cairo Regional Centre for International Commercial Arbitration (CRCICA), Center for International Investment and Commercial Arbitration (CIICA), Centre of Excellence for International Courts (iCourts), Centre for International Law, National University of Singapore (CIL), Chartered Institute of Arbitrators (CIArb), China Council for the Promotion of International Trade (CCPIT), China International Economic and Trade Arbitration Commission (CIETAC), Columbia Centre on Sustainable Investment (CCSI), Comisión Interamericana de Arbitraje Comercial (CIAC-IACAC), Corporate Counsel International Arbitration Group (CCIAG), European Federation for Investment Law and Arbitration (EFILA), European Law Institute (ELI), Forum for International Conciliation and Arbitration (FICA), Geneva Center for International Dispute Settlement (CIDS), Institute for Transnational Arbitration at the Center for American and International Law (CAIL/ITA), Institute of International Law (IIL), Inter-American Bar Association (IABA), International Arbitration Institute (IAI), International and Comparative Law Research Center (ICLRC), International Bar Association (IBA), International Council for Commercial Arbitration (ICCA), International Institute for Environment and Development (IIED), International Institute for Sustainable Development (IISD), International Law Association (ILA), International Law Institute (ILI), Islamic Chamber of Commerce, Industry and Agriculture (ICCIA), Max Plank Institute for Comparative Public Law and International Law (MPIL), Milan Chamber of Arbitration. New York City Bar Association (NYCBAR), New York International Arbitration Center (NYIAC), New York State Bar Association (NYSBA), Regional Centre for International Commercial Arbitration Lagos (RCICAL), Stockholm Chamber of Commerce Arbitration Institute (SCC Arbitration Institute), Swiss Arbitration Association (ASA), Tehran Chamber of Commerce, Industries, Mines and Agriculture (TCCIMA), United States Council for International Business (USCIB) and Vienna International Arbitration Centre (VIAC).

9. The Working Group elected the following officers:

Chairperson: Mr. Shane Spelliscy (Canada)

Rapporteur: Ms. Natalie Yu-Lin Morris-Sharma (Singapore)

10. The Working Group had before it the following documents: annotated provisional agenda (A/CN.9/WG.III/WP.229), draft provisions on the establishment of an advisory centre on international investment law (A/CN.9/WG.III/WP.230), draft provisions on procedural and cross-cutting issues (A/CN.9/WG.III/WP.231) and annotations to the draft provisions on procedural and cross-cutting issues

(A/CN.9/WG.III/WP.232). In addition, a document setting out the possible budget of an advisory centre (A/CN.9/WG.III/WP.212/Add.1) and a compilation of international investment agreement provisions and arbitration rules related to procedural and cross-cutting issues were made available to the Working Group for reference purposes.

11. The Working Group adopted the following agenda:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Possible reform of investor-State dispute settlement (ISDS).
5. Other business.
6. Adoption of the report.

12. As to the scheduling of the session, it was agreed that the discussions during the first three days would begin with the draft provisions on the establishment of an advisory centre on international investment law, which would be followed by the discussions on the draft provisions on procedural and cross-cutting issues and annotations thereto.

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

A. General remarks

13. At the outset, it was recalled that the Working Group had considered the establishment of an advisory centre on international investment law (the "Advisory Centre" or the "Centre") at its thirty-eighth session in October 2019 and forty-third session in September 2022, whereby support had been expressed for its establishment (see A/CN.9/1044 and A/CN.9/1124, respectively). It was also recalled that in accordance with the workplan agreed by the Working Group at its resumed fortieth session in May 2021 (see annex of A/CN.9/1054), the establishment of the Advisory Centre was scheduled to be presented to the Commission at its next session in 2024.

14. In that context, the Working Group engaged in a discussion on what it would aim to present to the Commission and what it would recommend as a course of action. A number of options were presented including the possibility of the Commission to: (i) adopt the draft provisions on the establishment of the Advisory Centre as a model text for use by States and organizations that wished to set up an Advisory Centre; (ii) adopt the draft provisions in principle subject to the completion of work on a multilateral instrument on ISDS reform (MIIR) to deliver the ISDS reforms in a comprehensive manner; or (iii) proceed with the establishment of the Advisory Centre without necessarily awaiting the conclusion of a MIIR (see A/CN.9/WG.III/WP.230, para. 45).

15. While views diverged on the possible approaches, the general support for the establishment of the Advisory Centre was reiterated, particularly in order to address the urgent needs of developing States in obtaining assistance with regard to investment disputes.

16. During the discussions, it was suggested that the Advisory Centre should be established as an intergovernmental body and that effort should be made by the Working Group to prepare a statute establishing such an institution. It was also suggested that the Centre should be established as an independent organization separate from any existing organization and that its establishment should not be linked with other reform elements, in particular a standing mechanism. It was said

that it was premature to decide on the way of establishment, which should be based on the progress made on other reform elements. It was stated that there might be benefit in establishing the Centre under the auspices of an existing body (for example, the United Nations) and that linkage with other reform elements would need to be carefully assessed, as both had resource implications. It was also mentioned that while the key provisions on the establishment would need to be agreed upon by the Commission, some level of discretion should be provided to the Members of the Centre (and its governance structure) and that its eventual establishment would need to be based on further negotiations among potential donors as well as beneficiaries (especially with regard to the financing aspects). The accessibility of the Centre and its services, its independence, impartiality and the need to avoid external influence or conflicts of interest, geographical diversity in terms of the Centre's presence as well as its staff members, and its effective and sustainable financial operation, were all mentioned as important elements to be ensured in the design of the Centre.

17. In summary, it was widely felt that the Advisory Centre should be established as an intergovernmental body, which would require the preparation of an international instrument to which States and regional economic integration organizations (REIOs) could become parties to. On that basis, the Working Group agreed to proceed with the preparation of the draft provisions establishing the Centre. It was suggested that the draft provisions could eventually form a protocol or an annex to the MIIR avoiding the need to prepare a separate treaty. However, it was said that the operation of the MIIR was not yet clear, in particular whether a State that has not joined the MIIR could join its protocol or annex without joining the MIIR. It was agreed that States and REIOs should be given flexibility in becoming a party to such protocol or annex. It was further agreed that the establishment of the Centre should be independent from other ISDS reform elements contained in the MIIR.

18. The Working Group further agreed to recommend to the Commission that the draft provisions should be adopted in principle, which would allow for adjustments. It was further anticipated that once the draft provisions were adopted in principle by the Commission, efforts would need to be made the Working Group and the secretariat to operationalize the Advisory Centre by addressing relevant issues that arise in its implementation.

19. With that understanding, the Working Group proceeded to consider the draft provisions on the establishment of an Advisory Centre as contained in document A/CN.9/WG.III/WP.230.

B. Establishment, objectives and general principles (A/CN.9/WG.III/WP.230, paras. 6–10)

20. The Working Group considered draft provisions 1 to 3, which respectively addressed the establishment, objectives and general principles of the Advisory Centre.

Draft provision 1 – Establishment

21. Regarding draft provision 1, it was suggested that the name of the Advisory Centre should be descriptive of its functions and therefore contain a reference to investor-State dispute settlement (ISDS). While a suggestion was made that the draft provision should be placed in square brackets as it would need to be adjusted if established under the auspices of an existing institution, it was generally felt that adoption of the draft provisions "in principle" would allow for them to be tailored in such circumstances.

Draft provision 2 – Objectives

22. While some support was expressed for the current text of draft provision 2, a number of suggestions were made.

23. One was to provide a more generic description of the Advisory Centre's objectives, which would ensure that it had a broad mandate that could also evolve over time depending on developments in the field and the needs of the beneficiaries. On the other hand, it was suggested that the draft provision could highlight the priorities of the Centre and what its main focus should be without necessarily limiting the scope of services. Yet another suggestion was to have the Centre focus on capacity-building efforts and not case-specific services, such as representational services.

24. Another suggestion was to make an explicit reference to draft provisions 6 and 7 in draft provision 2 or to highlight them as the two pillars of the Advisory Centre's functions. In response, it was said that draft provision 2 might not be necessary as it simply referred to the services mentioned in draft provisions 6 and 7 and that the objectives of the Centre might be better placed in a preamble. Another view was that the Centre's objectives should encompass legal advisory services prior to the formal initiation of ISDS proceedings.

25. A further suggestion was that draft provision 2 should expressly indicate States and REIOs as beneficiaries. In response, it was explained that draft provision 3 made it clear that only States and REIOs could become Members of the Advisory Centre and thus benefit from its services, while draft provisions 6(3) and 7(3) provided flexibility to provide services to non-Members in limited circumstances.

26. Diverging views were expressed on whether the Advisory Centre should provide assistance with regard to State-to-State dispute settlement (SSDS) and whether such services should be expressly mentioned in, or excluded from the scope of, draft provision 2. While it was said that the mandate of the Working Group did not extend to preparing specific rules on SSDS, it was questioned whether SSDS would fall under the mandate of the Working Group. In connection, the meanings of the term "investor-State dispute settlement" and the term "international investment dispute (IID)" as used in the UNCITRAL Code of Conduct for Arbitrators in International Investment Dispute Resolution were discussed.

27. One view was that SSDS should not fall within the mandate of the Advisory Centre as the Centre should focus on disputes between an investor and a State, the costs of which were part of the original impetus for the establishment of the Centre. In support, it was stated that providing assistance with regard to SSDS (in addition to ISDS) would put a heavy burden on the Centre and might result in tension and potentially conflicts of interest, particularly if the Centre were to provide assistance to States parties to the same SSDS. It was further said that SSDS did not raise the same level of concerns about costs as ISDS did. Accordingly, support was expressed for referring to the resolution of an IID or ensuring a narrow understanding of the term ISDS, both with the aim of excluding SSDS.

28. Another view was that SSDS was being used to resolve investment disputes and that other alternatives to ISDS might be developed in the future. Accordingly, it was suggested that the draft provision should not be restrictive and unduly limit the services to be provided, particularly if the Advisory Centre would have the capacity to provide such services. It was also said that the experience of the Advisory Centre on WTO Law (ACWL) showed that providing assistance with regard to SSDS did not pose problems regarding conflicts of interest. Reference was also made to article 2(1) of the UNCITRAL Code of Conduct for Arbitrators in International Investment Dispute Resolution, which allowed States to apply the Code in SSDS.

29. As to the legal bases of disputes which the Advisory Centre could provide assistance on, it was said that the Centre could provide assistance regardless of whether the basis was an investment treaty, domestic legislation or an investment

contract. It was, however, suggested that priority should be given to disputes arising from investment treaties.

30. Different views were expressed on whether the Advisory Centre should provide services with regard to investment mediation and prevention of investment disputes.

Draft provision 3 – General principles

31. It was generally felt that draft provision 3 should be drafted in a more precise and clearer manner, if retained. A number of drafting suggestions were made.

32. One was to introduce a chapeau that the principles outlined in the draft provision aimed to "further the objectives of the Advisory Centre".

33. With regard to paragraph 1, it was suggested to refer to the financing structure of the Centre being sustainable, to emphasize accessibility, and to highlight that the services of the Centre should be affordable to least developed countries (LDCs) and developing countries. It was said that paragraph 1 could read as follows: "The Advisory Centre shall operate in a manner that is effective, affordable, accessible and financially sustainable."

34. With respect to paragraph 2, it was suggested that the meaning of "independence" and "external influence" could be clarified. It was said that the Centre should carry out its functions independently and impartially, irrespective of its sources of funding. It was clarified that the notion of impartiality was not mentioned in draft provision 3 as the Centre would in fact be partial towards Members in providing certain services. In that context, it was said that paragraph 2 could read as follows: "The Advisory Centre shall be independent and free from undue influence, including from donors."

35. With regards to paragraph 3, the need to avoid overlap with activities of other organizations and the need to coordinate such activities were underlined. It was stated that paragraph 3 should not be too prescriptive but rather emphasize cooperation, also with regional organizations. It was thus said that paragraph 3 could read as follows: "The Advisory Centre shall cooperate closely with international and regional organizations and coordinate, as appropriate, its activities to ensure the best use of its resources."

36. It was suggested that confidentiality of information should also be addressed as a general principle. While it was generally felt that the Advisory Centre should have the duty to ensure that confidential information obtained during the rendering of its services remained confidential, views were also expressed that that would relate more to the administrative operation of the Centre.

37. It was suggested that an additional paragraph should be included in draft provision 3 to highlight that the Advisory Centre aimed to provide assistance to LDCs and developing countries. It was mentioned that providing such a general principle could assist the Centre in obtaining official development assistance funds. While support was expressed for that approach, questions were also raised on the means of classification (including by whom and based on what criteria).

38. Another suggestion was to indicate that the Advisory Centre should aim to avoid conflicts of interests in its operation. Yet another suggestion was that the need for the Centre to treat all the Members equally should be included as a general principle.

C. Membership and structure (A/CN.9/WG.III/WP.230, paras. 11–20)

39. The Working Group considered draft provisions 4 and 5, which respectively addressed the membership and governance structure of the Advisory Centre.

Draft provision 4 – Membership

40. Based on the understanding that the Centre would be established as an intergovernmental body, it was widely felt that only States and REIOs should be allowed membership. In that context, it was stated that it should not be too burdensome for LDCs to become a Member.

41. While noting the value of the Centre cooperating with organizations or institutions in providing its services, it was generally felt that there might not be much merit to grant observer status to such organizations or institutions. It was stated that non-State bodies, including micro-, small- and medium-sized enterprises (MSMEs) could benefit from the services of the Centre. However, it was also stated that they should not be permitted to do so, because the Centre should provide services only to States.

42. With regard to the suggestion that the square-bracketed text in paragraph 1 could be further elaborated, it was also said that it would be premature to indicate the methods considering that the relationship between the MIIR and the draft provisions (as a possible protocol to the MIIR) were yet to be determined. In this regard, it was observed that these matters could be developed in tandem with the MIIR.

43. With respect to a suggestion to delete paragraph 2 as it merely signalled the rights and obligations of the Members provided for in other draft provisions, it was generally felt that there was merit in emphasizing that membership in the Centre entailed certain rights and obligations that were provided for in draft provisions 6 to 8 as well as in the regulations to be adopted by the Governing Board. It was said that it needed to be clear for States and REIOs that there were benefits and duties of becoming a Member. After discussion, it was stated that paragraph 2 could read as follows: “Each Member is entitled to the services of the Centre and has the obligations as set out in these draft provisions and the regulations adopted by the Governing Board.”

44. Acknowledging the need to categorize the Members into different groups with regard to (i) the services to be rendered; (ii) priority to be given in obtaining the services; (iii) financial contributions to be made; and (iv) fees to be charged for services rendered, it was suggested that draft provision 4 should indicate which category or classification a State or an REIO would fall under. It was further said that such classification should be set forth in the instrument establishing the Advisory Centre so as to inform potential Members of their rights and obligations. It was also said that while it would not be prudent to leave the classification to the Governing Board or the Executive Director, it should be possible to make any necessary adjustments once the Centre is operationalized. Another view was that the instrument establishing the Centre could provide guidance on the classification, with the Governing Board determining the categorization and leaving it to the Executive Director to apply in concrete cases.

45. Diverging views were expressed on how States and REIOs could be categorized. Reference was made to criteria and methodologies used by different organizations, but it was noted that these were in a different context or for different purposes. It was also explained that while the United Nations maintained a list of LDCs, it did not maintain an official list of developing and developed countries. In that context, doubts were expressed with regard to the need for categorization. However, it was said that it would be useful to develop a set of criteria for the purposes of the Centre, drawing inspiration from existing classifications and possibly including additional criteria (for example, experience with regard to ISDS proceedings). It was mentioned that States should have the right to choose the category to which they would belong. It was also said that an objective means for classification would be more appropriate. The Working Group decided to consider this issue further in the context of draft provisions 7 and 8.

Draft provision 5 – Structure

46. With regard to the structure of the Advisory Centre, there was support for a simple two-tier structure consisting of a Governing Board and a secretariat headed by the Executive Director. It was, however, suggested that the possibility of introducing a managerial body or a committee composed of a limited number of representatives to effectively take decisions regarding the operation of the Centre and to monitor the activities of the secretariat could be desirable for an efficient structure. Suggestions were further made to adjust the nomenclature of the "Governing Board" and the "Executive Director" to better reflect their functions and context.

47. It was widely felt that paragraph 2 should be clarified to indicate that each Member would appoint one representative to the Governing Board. In response to a question on how the Governing Board would operate (for example, the election and the term of the chairperson of the Board, bureau members, when and where to hold the annual meetings, quorum and how to call for an extraordinary session), it was said that those issues would generally be addressed in the rules of procedure to be adopted by it. In that context, questions were raised on whether certain aspects would need to be spelled out in draft provision 5.

48. In the same vein, views diverged on the level of discretion to be provided to the Governing Board in adopting or revising relevant regulations and rules of procedure. It was said that certain aspects (for example, voting rules in the absence of consensus and the criteria for contributions and fees) would need to be explicitly set out in the draft provisions.

49. With regard to paragraph 3, it was suggested to add a new subparagraph, which would allow the Governing Board to perform any other function in accordance with the draft provisions. It was explained that the subparagraph would provide for the necessary flexibility and allow the Governing Board to adapt to changing circumstances or unforeseen needs. It was suggested that the Governing Board should adopt long-term and short-term strategies and goals.

50. With regard to the decision-taking rule in paragraph 4, it was suggested that the Governing Board should be required to make efforts to reach decisions by consensus, while providing for a default rule in case consensus could not be obtained (for example, by a qualified majority). It was said that such a rule would avoid situations of deadlock and allow decisions to be taken in a timely manner. On the other hand, it was stated that certain issues should require consensus, while administrative issues could be subject to a simple majority rule. In that context, the need to provide the basic rules on voting (for example, each Member having one vote, the quorum required to take decisions and the qualified majority threshold for taking decisions in the absence of consensus) was mentioned.

51. With respect to paragraph 5, it was noted that the relationship between the Governing Board, the Executive Director and the secretariat could be further clarified, including the reporting mechanism and the authority of the Governing Board to dismiss the Executive Director. It was also stated that the role of the secretariat in providing the services of the Advisory Centre and the discretion afforded to the Executive Director to take certain decisions should be clearly set out in paragraph 5. Similarly, it was said that the representative role of the Executive Director should be made clearer. It was further suggested that there should be gender balance and geographical representation among staff members of the secretariat, who should also represent different legal traditions as well as LDCs and developing countries. It was also suggested that the Executive Director should report on voluntary contributions in a transparent and accessible manner to avoid any potential conflict of interest. Lastly, it was said that the Centre's regulations should include rules to address conflict-of-interest situations.

D. Functions and services (A/CN.9/WG.III/WP.230, paras. 21–33)

Draft provision 6 – Technical assistance and capacity-building activities

52. It was observed that technical assistance and capacity-building activities mentioned in draft provision 6 would constitute one of the two key pillars of the Centre's activities, which should be open to all Members and be generic in nature (in comparison with the activities under draft provisions 7, which would be more case-specific and upon the request of a Member). In that context, it was questioned whether draft provision 6 would cover a situation where a Member sought legal advice on a measure that it might take.

53. With regard to paragraph 1, general support was expressed for the Centre not merely coordinating but also directly providing and facilitating technical assistance and capacity-building activities.

54. With regard to paragraph 2, suggestions were made to:

- Delete the reference to "conflict management" in subparagraph (a);
- Delete the phrase starting with the words "including but not limited to" in subparagraph (b), as paragraph 2 provided an indicative list and delete references to "State-to-State dispute settlement";
- Exclude services relating to investment promotion policies and treaty interpretation; and
- Indicate that the Centre could function as a repository for international investment law and ISDS-related resources.

55. With regard to subparagraph 2(c), there was broad support that the Centre should function as a forum for the exchange of information and sharing of best practices. It was suggested that the forum of exchange might be better placed under the MIIR than in the Centre, to ensure broader participation and to avoid duplication.

56. With regard to paragraph 3, some doubts were expressed about whether non-Members should be able to take part in the activities of the Advisory Centre. In that context, it was clarified that institutions or individuals that provide the services in draft provisions 6 and 7 should generally be able to take part.

57. However, it was stated that the participation of non-Members as beneficiaries of the services needed to be further examined. It was also stated that the circumstances that would justify the participation of non-Members as beneficiaries would differ depending on whether that non-Member was a State or a non-State entity.

58. Views particularly diverged on whether MSMEs and possibly other investors could benefit from the services in draft provision 6, as that could have resource implications and might eventually lead to claims being brought against a Member. It was stated that MSMEs benefitting from the Centre could result in conflicts of interest. It was also said that providing access to justice would not justify MSMEs benefiting from the Centre as they could obtain support from elsewhere, including third-party funding. In that context, one view was that MSMEs could be beneficiaries of the Centre only if third-party funding was to be completely prohibited in ISDS. The definition and types of MSMEs to be granted services were questioned, as they could differ depending on the jurisdiction. In that context, it was suggested that paragraph 3 should be revised to limit the participation to non-Member States or REIOs.

59. On the other hand, it was stated that technical assistance and capacity-building to MSMEs were important means for providing access to justice and could prevent disputes, and therefore, should fall under the functions of the Centre. In support, it was said that providing support for MSMEs could also attract financial contributions to the Centre and allow it to develop a balanced approach reflecting

the views of both respondent States and claimant investors. It was also said that the participation of MSMEs in some of the activities of the Centre, such as capacity-building activities, could be beneficial to its home State as well as the host State, because such capacity-building could help to the prevent and avoid disputes. It was suggested that draft provision 6 should make explicit reference to MSMEs and that the Working Group could develop criteria to determine under which circumstances MSMEs would be able to benefit from the Centre's activities, for the Working Group's further consideration.

60. It was generally felt that the ultimate authority to determine whether non-Members should be allowed to benefit from the activities of the Centre should lie with the Governing Board (which would at least establish the specific criteria for such participation and review any decisions made) and not the Executive Director, although discretion might be delegated to the Executive Director in certain limited instances.

61. It was said that a non-exhaustive list of criteria to determine non-Member participation could be developed which might differ depending on whether the non-Member seeking to participate was a State or REIO. In that context, a suggestion was made to delete the word "particularly" in draft provision 6(3). It was suggested that the non-Member participation "being beneficial to the Members" and "contributing to the objectives of the Centre" as well as the resources available to the Centre could be useful criteria to consider. It was however suggested that clarity should be provided on the meaning of "being beneficial". It was also mentioned that non-Members should be charged fees for the services, preferably at a higher rate than that charged to the Members.

62. In summary, the Secretariat was requested to revise draft provision 6 in light of the discussions and as follows:

- Clarify that the Centre could coordinate and cooperate with non-Members to provide the services;
- Indicate the beneficiaries of the services in clear fashion;
- If non-Members were to be granted access to the services, develop possible criteria for the Governing Board to use, differentiating between situations where the non-Member is a State and where it is not;
- Include ways to incentivize membership, including a fee structure that would be favourable to Members; and
- Address the possible conflicts of interest that could arise when non-Members receive services.

Draft provision 7 – Assistance with regard to ISDS proceedings

63. While a suggestion was made that the services in draft provision 7 should not be provided by the Advisory Centre, it was generally felt that assistance with regard to ISDS proceedings should be one of the key functions of the Centre. While different views were expressed on whether the services referred to in draft provision 7 should be given priority over those referred to in draft provision 6, it was generally felt that the services mentioned in both provisions were important and should form the two pillars of the Centre's operation. In that context, a phased approach was suggested, where the Governing Board would decide whether and how to implement the services in draft provision 7 based on the Centre's available resources.

64. With regard to paragraph 1, it was said that the Centre should aim to provide its services to the broadest membership possible. It was widely felt that all Members should be entitled to request the services of the Centre, even though they might not necessarily be granted the services based on the rules of prioritization to be agreed upon. It was further said that paragraphs 1 and 2 should be revised to allow Members to request legal support and advice prior to the formal initiation of an

ISDS proceeding. As to the scope of paragraph 1, one view was that it should be limited to a proceeding between a foreign investor and a State, while another view was that it should be expanded to refer also to SSDS.

65. A number of suggestions were made with regard to the services listed in paragraph 2.

66. It was suggested that the Centre should focus on providing assistance at the early stages of the proceedings. On the contrary, it was also said that the Centre should aim to provide services throughout the proceedings to ensure consistency and to effectively reduce the burden of Members. Recognizing that there would be different cost implications for the different services listed, questions were raised on the extent to which the Centre would be expected to provide assistance (for example, with regard to the enforcement of an award) and whether Members were expected to pay fees for all types of services or whether some services would not require additional payment beyond the membership fee.

67. It was suggested that the Centre should take into account geographical and gender diversity in providing the services in subparagraph 2(b) and that services could also be provided with regard to investment mediation and the challenge of an arbitrator.

68. Views diverged on whether the Centre should provide representation services as outlined in subparagraph 2(d). One view was that it should be the core service, considering that one of the key objectives of establishing the Centre was to reduce the burden of developing countries in obtaining representation. Another view was that, while noting the importance of such services, having the Centre first focus on other services listed in paragraph 2, which were less resource-intensive, would allow the Centre to provide services to a broader membership and would allow Members to build capacity to represent themselves. It was suggested that one possible approach would be to defer the decision to the Governing Board.

69. It was stated that subparagraph 2(e) would need to be clarified, particularly with regard to whether the Centre would be allowed to engage external legal counsel in providing its services, as this had cost implications and could lead to conflicts of interest. It was generally felt that the Centre, at least in its initial phases, should focus on facilitating the Member’s hiring of legal counsel by managing a list of law firms, which might provide services on a pro bono basis or at a reduced rate and that it should not hire counsel on behalf of the Members.

70. It was said that subparagraph 2(f) should be revised to be clear that the allowance being given to the Governing Board to assign additional functions, for example, as the Centre expands, must pertain to the objectives of the Centre.

71. It was observed that the services mentioned in draft provision 7 should be available only to Members and, therefore, it was suggested that paragraph 3 should be deleted (as well as the reference to “non-Member” in paragraph 6). It was stated that if services were to be provided to non-Members, it should be limited to non-Member “States” and even in that case, representation services should generally not be available to those States. On the other hand, it was said that MSMEs should also have access to the services in draft provision 7 subject to rules to be determined by the Governing Board.

72. There was general support for prioritizing LDCs followed by developing countries, when the resources of the Centre did not allow it to meet all requests. In that context, the need to have a clear categorization among the potential Members was reiterated (see paras. 44–45 above).

73. In summary, the Secretariat was requested to revise draft provision 7 in light of the discussions and as follows:

- Provide alternative language on whether SSDS would be covered in the Centre’s services;

- Clarify the services listed in paragraph 2, possibly suggesting ways to prioritize among the services or to phase-in services, while retaining representation services on the list for further consideration;
- Revise paragraph 3 so that the possibility of non-Member States or REIOs benefiting from services would not be ruled out and clarifying the "exceptional circumstances" (for example, when the non-Member States was in the process of becoming a Member), so as to allow the Working Group to consider it in conjunction with draft provision 6(3); and
- Revise paragraph 5 so that the Governing Board would provide guidance to the Executive Director on how to implement the prioritization among the services and how to categorise Members' access to services.

E. Financing (A/CN.9/WG.III/WP.230, paras. 34–38)

Draft provision 8 – Financing

74. Considering the possible difficulty faced by some governments in committing to annual contributions, it was mentioned that paragraph 1 could refer to initial one-time contributions by Members. On the other hand, it was emphasized that annual contributions would provide a more predictable and stable source of funding for the Centre.

75. It was generally felt that the budget of the Advisory Centre should be mainly funded by the annual contributions and the fees for services, as stipulated in the first sentence of paragraph 3. Additionally, it was widely felt that a minimum threshold should be met (for example, minimum number of Members or/and minimal financial resources) before the Centre could be set up and begin operation. In that context, it was suggested that the sample budget figures in document A/CN.9/WG.III/WP.212/Add.1 could be updated. It was further suggested that the establishment of trust funds could be anticipated for receiving contributions and managing the overall budget of the Centre.

76. It was stated that the expected annual contribution of each Member should be pre-determined so as to allow States and REIOs to understand the nature and extent of the financial obligations of becoming a Member of the Centre. It was suggested that the scale of contribution should reflect the different level of economic development among the potential Members and be based on objective criteria, which could be further adjusted by the Governing Board. However, it was also suggested that the scale of contribution could be established by the Governing Board on the basis of pre-determined criteria.

77. It was mentioned that fees to be charged by the Centre could possibly become the main source of funding once the Centre's operation expanded and stabilized. Similar to the annual contribution, it was said that the fee schedule for the services and for the respective categories of Members and possibly non-Members should be predetermined (with non-Members being charged sufficiently higher fees to incentivize membership). However, it was also suggested that the fee schedule should be established by the Governing Board on the basis of predetermined criteria.

78. While it was felt that voluntary contributions by Governments, international organizations, private entities or individuals would secure the viability of the Centre, caution was also expressed. It was felt that clear rules on the acceptance of such contributions (for example, whether they could be earmarked for specific purposes) should be developed to ensure the independence of the Centre and the transparency of its financial operation.

79. It was suggested that the budget and the expenditure of the Centre should also be subject to internal and external audits, which could address ethical concerns and maintain the Centre's integrity.

80. In summary, the Secretariat was requested to revise draft provision 8 in light of the discussions and to provide some more specificity on the sources of funding. The Secretariat was also requested to prepare a schedule of contributions to be made by potential Members based on existing categorizations and relevant criteria as well as a schedule of fees to be paid by Members and non-Members for services. Considering the limited time till the next session and the indicative nature of the schedules, the Working Group agreed that the schedules could be prepared as informal documents for consideration by the Working Group at its session in January 2024. The Secretariat was further asked to update the sample budget figures in document A/CN.9/WG.III/WP.212/Add.1.

F. Legal status and liability (A/CN.9/WG.III/WP.230, paras. 39–42)

Draft provision 9 – Legal status and liability

81. Based on the assumption that the Advisory Centre would be established as an intergovernmental organization, it was generally felt that the Centre should have legal personality, which would allow it to effectively manage its operations (for example, by procuring services, signing contracts and acquiring property). It was said that this should be regardless of whether the Centre would be established under the United Nations or any other international organization.

82. It was also felt that the Centre, the Executive Director and the staff members of the secretariat should be granted some form of functional immunity related to the Centre's status as an intergovernmental organization (immunity from legal process with respect to acts performed by them in the exercise of their functions). It was, however, said that functional immunity should not be understood to mean that staff members would not be accountable to the Centre, its Members and the Executive Director, which should be clearly set out in the staff regulations or a separate code applicable to staff members.

83. On how to grant such immunity, reference was made to the possible conclusion of a host country agreement with the State where the Centre would be headquartered. It was suggested that the statute establishing the Centre could include provisions on functional immunities, as the Centre and its staff members might be providing services not only at headquarters but within the jurisdiction of other Members. It was also mentioned that if the Centre were to be established under the auspices of the United Nations, reference could be made to the treaties and rules that applied to United Nations staff.

84. On the location, it was suggested that the Advisory Centre should generally be accessible to the beneficiaries, which could be further ensured through regional presence, subject to available resources.

G. Way forward

85. Based on the above deliberations, the Secretariat was requested to revise the draft provisions on the establishment of the Advisory Centre for its consideration at its next session.

IV. Draft provisions on procedural and cross-cutting issues

A. General remarks

86. The Working Group recalled that at its forty-third session in September 2022, it considered draft provisions on procedural reform on the basis of document A/CN.9/WG.III/WP.219, which addressed the procedural issues that the Working Group had identified during the first phase of its mandate. The Working Group also

recalled that it had considered so-called “cross-cutting” issues (see A/CN.9/1124, paras. 89–104) and identified additional issues as requiring further work.

87. Noting that the procedural and cross-cutting issues had been outlined in a comprehensive manner in the form of draft provisions (A/CN.9/WG.III/WP.231 and A/CN.9/WG.III/WP.232), the Working Group engaged in a preliminary discussion on how to make progress with those provisions (referred to below as the “Draft Provisions”). It was generally felt that procedural reform was a crucial pillar of the ISDS reform that could potentially tackle the concerns identified by the Working Group at the first phase of its work.

88. It was observed that the mandate given to the Working Group by the Commission was a broad one to tackle the possible reform of ISDS and that the Draft Provisions sought to address the cross-cutting issues that had been identified, particularly those reflecting the concerns of developing countries. Nevertheless, concerns were expressed that some of the issues addressed in the Draft Provisions did not fall within the mandate of the Working Group, which was to focus on procedural aspects of ISDS reform. It was said that the Working Group should be cautious not to extend its work to limit consent of States embodied in IIAs or to substantive obligations therein. In particular, doubts were expressed about draft provision 4 on SSDS (as it was viewed that SSDS does not fall within the mandate of the Working Group) as well as draft provision 9 on denial of benefits and draft provision 12 on right to regulate. Accordingly, it was suggested that those provisions either be deleted or placed within square brackets.

89. It was said that the Draft Provisions could lead to the harmonization of the rules governing ISDS and the modernization of old-generation IIAs. On the other hand, a doubt was expressed that the preparation of the Draft Provisions might lead to further fragmentation if only adopted by a limited number of States and might result in legal uncertainty if they were to be applied in conjunction with existing treaty provisions as well as applicable arbitration rules.

90. Reference was made to the ICSID Rules Amendment process, which had taken a number of years and it was stated that the results of that process could serve as a reference for the Working Group with regard to those Draft Provisions for which there was overlap with the ICSID Arbitration Rules. However, it was mentioned that as not all States were ICSID members, there would be benefit in deliberating the relevant provisions in the Working Group and further developing the rules agreed in the ICSID Amendment Process to reflect the concerns identified by the Working Group (for example, on third-party funding).

91. It was generally felt that Draft Provisions should be prepared to apply to disputes arising from IIAs, investment contracts and domestic legislation. Views diverged on whether the Draft Provisions should be prepared to apply generally to all forms of investment dispute settlement or rather prepared in the context of investment arbitration, which could later be adjusted for use in a standing mechanism.

92. Different views were expressed on the possible form of the Draft Provisions. One view was that they could be prepared as model provisions for States to incorporate in their IIAs based on their specific needs and interests or for dispute resolution institutions to incorporate in their procedural rules. It was said that that the so-called “suite approach” would allow for flexibility, although their application to existing IIAs might be minimal.

93. Another view was that they could be prepared as provisions for the MIIR, some constituting core provisions of the MIIR (which States would not be able to opt-out of) and some placed in a protocol, which States could choose whether or not to sign on to. It was said that this approach would allow for the Draft Provisions to be applied to existing IIAs without the need to amend those treaties individually and to be applied to future IIAs by reference. However, it was said that the inclusion of

the Draft Provisions in the MIIR or any other treaty would make it difficult to amend those provisions at a later stage.

94. Yet another view was that some of the Draft Provisions could be prepared as a supplement to the UNCITRAL Arbitration Rules (UARs) to apply only in the context of investment arbitration. It was said that such rules could be annexed to the UARs or be presented as a standalone set of rules to be incorporated into the UARs, similar to the UNCITRAL Rules on Transparency in Treaty-based Investor Arbitration. It was said that such an approach would allow for the updating of the UARs, although the eventual application of the rules in disputes would depend, in some cases, on the claimant investor's choice of rules. It was cautioned that such work should not have any adverse effect on the use of the UARs to resolve non-investment disputes. It was also noted that at least some of the Draft Provisions could form the procedural rules of a standing mechanism.

95. It was observed that the possible form or the placement of the Draft Provisions would differ depending on the respective provision and a wide range of suggestions were made (for example, that those in section II.B could be prepared as a supplement to the UARs or as procedural rules of a standing mechanism). It was also said that some of the issues would be better formulated as guidance texts rather than as rules. Accordingly, it was agreed to consider the question of form as the Working Group considered the content of each provision.

96. During the deliberations, it was said that informal means of work could be utilized to further the work on the Draft Provisions, including in the form of drafting groups or intersessional meetings. However, it was reiterated that participation in informal meetings posed challenges for some delegations in terms of cost and language and that decisions should only be taken in the formal setting.

97. The Working Group also engaged in a discussion on how to sequence its work and the priorities to be given. Diverging views were expressed. One view was to begin work on draft provision 23, as damages in ISDS posed significant concerns for developing countries. Another view was that work should focus on the Draft Provisions addressing the conduct of the proceedings, which had been advanced by the Working Group and were more likely to obtain consensus. Yet another view was that the draft provisions on the limitation of claims, such as those on denial of benefits, shareholder claims, counterclaims and the right to regulate deserved more attention, although a further view noted that those topics as well as damages were outside the scope of the Working Group mandate, because they addressed substantive obligations and policy choices.

98. After discussion, it was determined that the Working Group would first consider draft provision 23 on damages to be followed by the draft provisions in section II.A. It was further agreed that the draft provisions in section II.B as well as draft provisions 24 and 25 could be addressed afterwards.

B. Damages

99. The Working Group considered draft provision 23 on the assessment of damages and compensation. It was noted that the issues relating to the calculation of damages and compensation posed significant concerns, often resulting in questions about the legitimacy of the current ISDS system, considering the extent to which high amounts of damages were capable of undermining a State's economy and its ability to afford public goods and services for its nationals. It was said that the excessive amount of damages awarded by arbitral tribunals in certain cases, which were perceived to have been based on speculations, were particularly concerning as well as the perceived inconsistency among decisions on damages by arbitral tribunals, both of which needed to be addressed through work on the draft provision.

100. At the same time, a view was expressed that those concerns could be addressed through a standing mechanism and an appellate mechanism ensuring

consistency and imposing discipline in assessing and calculating damages. In response, it was stated that a standing mechanism would not necessarily resolve the concerns regarding the calculation of damages, which is often fact-based, whereas the preparation of a general rule on damages could have a wider impact on the ISDS system.

101. As to the calculation of damages, it was suggested that a prescriptive, legally binding rule should be prepared for inclusion in the MIIR. However, it was noted that any such rule, if included, should avoid departing from existing rules of customary international law. It was further said that developing rules on the calculation of damages for inclusion in a treaty could be difficult. It was also said that such a rule could limit policy choices available to States. Another suggestion was to prepare a model provision States could adapt in their agreements and which could guide the tribunals in their decision-making. Yet another suggestion was to prepare guidance texts (for example, on causation, calculation method, use of experts) which could usefully address the concerns raised with regard to damages without unduly impacting the substantive obligations in IIAs. That suggestion was made considering that the question of damages was in practice a fact-driven inquiry and the evidence and cases differed widely. It was also suggested that the text to be prepared should only focus on the procedural aspects of calculating damages, such as evidence. It was said that the different options were not mutually exclusive.

102. References were made to the "full reparation" standard as a generally recognized principle of customary international law with regard to the assessment of damages. It was generally felt that the standard should guide the work on this topic and that the draft provision developed should not contradict or amend that standard. Views were also expressed that the principles of fairness and equality among the parties should guide the work.

103. It was pointed out that some of the paragraphs in draft provision 23 were contrary to the "full reparation" standard. On the other hand, it was said that draft provision 23 adequately reflected the standard and how it should be applied. It was observed that incoherent approaches by tribunals in applying the standard and the divergence of calculation methods used by the tribunals, which had led to excessive amounts in damages in some cases, were at the core of the concern.

104. The Working Group had a preliminary discussion on draft provision 23.

105. With regard to paragraph 1, it was suggested that the possibility of the tribunal awarding monetary damages in combination with restitution of property should not be ruled out, while such an award should not result in double recovery. It was pointed out that courts were sometimes prohibited by domestic law from awarding monetary damages for acts by the State. On the other hand, it was mentioned that paragraph 1 could fill the gap in existing IIAs, which provided rules on damages only in the case of expropriation.

106. While it was widely felt that interest could be awarded by tribunals, views diverged on whether this should be limited to simple interest. One view was to prohibit compound interest, which often resulted in inflated and crippling amounts of damages. On the other hand, it was said that tribunals should be able to award compound interest on damages, if that would provide full reparation. In support, it was said that paragraph 2 should simply require that the interest be reasonable, which would need to be clarified, for example, by referring to commercial reasonableness.

107. While support was expressed for the current paragraph 3, views were expressed that damages should be limited to those caused by the breach. Accordingly, there was support for clarifying that the damages awarded were caused by the wrongful aspect of the State's measure and not by the measure in its entirety.

108. With regard to the list of elements in paragraph 3, there was general support for listing contributory fault, mitigation efforts and avoidance of potential double recovery. However, questions were posed on whether subparagraph (b) should refer

to “claimant” instead of “disputing parties”. It was suggested that subparagraph (c) would need to focus on limiting double recovery for the specific wrongful act and not for other types of compensation received by the claimant. In relation, a question was raised whether damages awarded but not yet collected should also be taken into account. Some doubts were expressed with regard to the need for subparagraph (d), considering that paragraph 1 addressed the restitution of property, and subparagraph (e). Doubts were also expressed about subparagraph (f), mainly that the standards listed therein were not recognized by all States and were generally non-binding. On the other hand, it was said that illegal activities of the investor should also be listed. In response, it was said that this was not necessary, as such an act of the investor would likely result in the tribunal denying jurisdiction or dismissing the claims on the merits without the need to consider damages or the respondent raising a defence to liability or a counterclaim.

109. There was general support for the first sentence of paragraph 4 as it introduced a clear threshold on the burden of proof and limited the awarding of damages that were inherently or unduly speculative. At the same time, it was expressed that while any assessment of damages must be based on the facts in the record, it should not go against the principle of full reparation. With regard to the second sentence, views diverged on whether it was appropriate to refer to calculation methods based on expected future cash flows. One view was that specific reference to calculation methods should be avoided and that it would be more appropriate to address those methods in more detail in a guidance text. Another view was that the general use of the discounted cash flow method posed concerns and that it might be useful to clarify the limited circumstances in which tribunals could use the method or when it would not be appropriate (for example, when the investment had not become operational yet or did not have any track record of profitability). Yet another view was that it was appropriate to include a reference to lost profits or future cash flows, as they could be determined based on factors that could be ascertained with adequate precision in some cases and thus were not always speculative.

110. While it was noted that paragraphs 5 and 6 provided useful guidance on the use of experts in assessing damages, it was questioned whether they were necessary in light of the existing rules in arbitration rules (see, for example, article 29 of the UARs). It was stated that the appointment of tribunal-appointed experts and the use of the tools in paragraph 6 should only be possible with the consent of the disputing parties.

111. With regard to paragraph 7, there was general support for a rule clarifying that punitive damages were not to be awarded.

112. With regard to paragraph 8, views diverged. One view was to introduce a maximum amount of compensation to be awarded, on the basis of actual expenditures incurred. It was stated that this would be simpler to calculate and restrict the amount of damages calculated based on paragraph 4. Another view was to delete the paragraph because such an approach could, in some cases, run contrary to the standard of full reparation and might conflict with paragraph 4, which allowed the tribunal to award damages based on expected future cash flows.

113. With regard to paragraph 9, suggestions were made to introduce a threshold for determining the excessiveness of the claimed amount and to place it in draft provision 25.

Summary

114. After discussion, the Secretariat was requested to further develop a draft treaty provision that could address the gaps in existing IIAs by revising draft provision 23, and prepare guidelines for arbitral tribunals on the assessment and calculation of damages and compensation.

115. The Secretariat was further requested to revise draft provision 23 to be consistent with the general principle of full reparation and clarify that: (i) a tribunal

could award monetary damages and/or restitution of property; (ii) a tribunal could award reasonable interest; (iii) causation between the breach and the damage would be required; (iv) in assessing damages, a number of elements, including contributory fault, duty of mitigation efforts and avoidance of double recovery, needed to be taken into account; (v) damages should be based on clear rules on burden of proof requiring satisfactory evidence; and (vi) punitive damages should not be awarded. The Secretariat was further requested to consider placing the paragraphs on the use of experts and allocation of cost in the draft provisions on the conduct of the proceedings. It was suggested that the guidelines could further elaborate on, for example, calculation methods, means to avoid speculative damages, rules on causation as well as interest to be awarded.

C. Submission of a claim – conditions and limitations

Draft provisions 1 and 5

116. Considering that a number of IIAs already included provisions on amicable settlement, it was generally felt that there was not much merit in the Working Group developing a text similar to draft provision 1. It was, however, suggested that claimants should be required to seek (or, at least, initiate) amicable settlement prior to raising a claim and that draft provision 5, which provided for such a "cooling-off period", deserved further work to incorporate that preliminary step. Recalling its conclusions on the UNCITRAL Model Provisions on Mediation for International Investment Disputes, views were expressed that consultations and negotiation should not be mandatory.

117. After discussion, the Secretariat was requested to prepare a draft provision on a "cooling-off" period, including an option that would make such a period mandatory, taking into account modern treaty practice.

Draft provisions 2 to 4

118. While it was noted that some States utilized State-to-State dispute settlement to prevent and resolve investment disputes, it was generally felt that this was a policy choice to be left to individual States. It was further mentioned that the dispute settlement mechanism between States in existing IIAs mostly addressed the issues of treaty interpretation and was not designed to allow a State to raise a claim on behalf of an investor, which would be akin to diplomatic protection.

119. After discussion, the Working Group agreed to not develop a provision on State-to-State dispute settlement nor draft provisions 2 and 3, as they merely functioned as place holders.

Draft provision 6: Recourse to local remedies

120. Views diverged on whether claimants should be required to seek recourse to local remedies (a proceeding before a local court or competent authority) prior to raising a claim in investment arbitration.

121. One view was that claimants should be required to rely on local courts to resolve their claims. In support, it was said that investors should have confidence in the judicial system of the host State and were expected to utilize it first with arbitration being the last resort. It was also said that local courts were capable of effectively addressing the disputes and such proceedings could provide States the opportunity to address the concerns of investors while avoiding escalation of the dispute to an international forum.

122. As to the conditions under which claimants would be allowed to initiate arbitration, some stated that all local remedies should be exhausted, while others stated that claimants should be allowed to initiate arbitration upon the lapse of a period after initiating the local proceeding. It was said that the period of time should be sufficient to yield results at the local proceedings. However, concerns were

expressed about the additional cost and duration, particularly if local remedies were to be exhausted.

123. Another view was that while local remedies could provide an effective avenue for resolving disputes, making it mandatory would be contrary to the protection provided to foreign investors in the instrument of consent to arbitrate. It was said that this was a policy choice to be left to States, as reflected in article 26 of the ICSID Convention, and that inclusion of such a provision would contradict a number of existing IIAs. It was also pointed out that the efficiency and fairness of the local authorities differed, which made it difficult to suggest a harmonized approach. It was further suggested that the development of fork-in-the-road and no-U-turn provisions in addition to draft provision 7 on waivers could be a more suitable approach.

124. After discussion and considering the divergence in views, the Working Group requested the Secretariat to provide options for encouraging recourse to local remedies without necessarily requiring them and to do so in conjunction with other requirements for raising claims.

V. Other business

125. The Working Group heard an oral report from the representative of Singapore on the sixth intersessional meeting on ISDS reform, which took place on 7 and 8 September 2023 in Singapore. It was said that the intersessional meeting focused on the proposed standing multilateral mechanism and an appellate mechanism and that the summary report and the video recordings of the meeting would be made available in due course. The Working Group expressed its appreciation to the Government of Singapore for hosting the intersessional meeting and to the Secretariat for the support provided.

126. The Working Group heard proposals from the Governments of Belgium, China, Thailand and Republic of Korea to host intersessional meetings on the ISDS reform as follows.

Government	Location and dates (hybrid)	Proposed topics
Belgium	Brussels (7 March 2024)	ISDS reform elements and access to justice
China	Chengdu (first half of 2024)	Appellate mechanism and the MIIR
Thailand	Bangkok (second half of 2024)	Implementation of the Advisory Centre
Republic of Korea	Seoul (2024)	Procedural and cross-cutting issues

127. The Governments expressed flexibility with regard to the topics to be discussed as well as the exact dates, which would largely depend on the progress made by the Working Group on the different reform elements.

128. The Working Group expressed its gratitude to the Governments for their kind offer to host intersessional meetings in 2024. However, considering that the upcoming sessions were scheduled in January (Vienna), April (New York) and tentatively September and that the Commission was scheduled in late June to early July (New York), it was generally felt that intersessional meetings should be spread out to effectively achieve their purpose, reflecting the progress and agenda of the Working Group and the Commission. It was said that the limited resources available to delegates to participate in those meetings should be considered.

129. After discussion, the Working Group welcomed the proposal of the Government of Belgium to host an intersessional meeting in early March 2024 on

access to justice and relevant ISDS reform elements. As to the other proposals, the Secretariat was requested to consult with the proposing Governments to prepare a possible timetable for the Working Group's consideration.

130. With regard to the agenda of the forty-seventh session, the Working Group agreed to continue its deliberations on the establishment of the Advisory Centre and the guidelines on dispute prevention and mitigation. It was further agreed that the Working Group would continue its deliberations on the draft provisions on procedural and cross-cutting issues based on document A/CN.9/WG.III/WP.231 and A/CN.9/WG.III/WP.232 with the aim to provide the Secretariat with instructions on the remaining provisions in Section II.A. Delegates were requested to provide written comments on those and other provisions well in advance of the session to facilitate the deliberations during the session.

131. It was further anticipated that the forty-eighth session could be devoted to the topics of a standing mechanism and an appellate mechanism. The Working Group was also informed about the temporary staffing constraints in the Secretariat.