

UNCITRAL Working Group III  
Comments from delegations on the Initial Draft on the Establishment of  
Advisory Centre

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## Comments submitted by Armenia

1. The Draft provision 1 stipulates that the Advisory Centre on International Investment Law (hereinafter referred to as “the Centre”) will provide the specified services to [developing] States as well as to small and medium-sized enterprises (SME). In this regard, it should be noted that the appropriateness of stipulating relevant competence with respect to SMEs was considered at the Commission as well, therefore we recommend to consider also the method of determining as to whom the preference is to be given in the case where both a State or an SME apply to the Commission in respect of the same issue. In particular, we think that in such cases it is more appropriate to give the preference to the State.
2. Point “d” of Draft provision 4 provides for a preference rule for the cases where two States, having been represented by the Centre earlier under another case, apply to the Centre in respect of the same issue, and the preference is given to a less developed State, whereas if both States have the same level of development — to the State represented by the Centre under less number of cases. Taking into consideration that the fact of having been represented by the Centre, on the part of applicant States, under the same number of cases is not theoretically excluded, we recommend to regulate the issue of giving preference also for the cases where, along with the specified circumstances, the applicant States are represented by the Centre under the same number of cases, by giving the preference to the State having applied initially.

## Comments submitted by Canada

This submission sets out the views of the government of Canada on the initial note prepared by the Secretariat on the Advisory Centre.

Canada takes note of interventions by various WGIII participants indicating that the management of ISDS cases creates a burden on States, in particular developing and least developed countries. We understand that many under-resourced Member States feel that they lack the human and financial resources to defend themselves adequately in ISDS proceedings and are seeking comprehensive assistance in case management, up to and including representation at arbitration hearings. The work of the Advisory Centre should therefore be aimed at providing support and coaching to Member State users throughout the case process with a view to building the long-term capacity of states to lead and manage ISDS cases.

Further to the initial informal survey done by the Secretariat, a follow-up information gathering exercise should be undertaken to identify more precisely the interest of potential users of the Advisory Centre based on the concrete options that have been developed specifically with respect to services and user fees/costing structure.

### **Scope (draft provision 1)**

Canada is of the view that only some services should be available to SMES, such as the access to databases, research tools, and workshop resources. Therefore, the scope provision should be adjusted to reflect the more limited services available to SMEs. While this could also be addressed in later provisions, this provision should be amended to avoid treating (or appearing to treat) potential SME beneficiaries on par with State Beneficiaries.

### **Services (draft provision 2)**

In Canada's view, an advisory centre should be responsive to the concerns shared by various WGIII participants and be focused on assisting states with ISDS cases and providing support during proceedings. While we recognize the importance of case-specific assistance, the work of the advisory centre should focus on extensive support for a Member-led litigation strategy instead of full representation. It is vitally important for Member States to be actively leading and managing the cases in which they are a respondent. Over-reliance on external counsel may act as a barrier to the development of the in-house government legal capacity needed to maintain an effective and coherent treaty practice and case-specific support should seek to complement and not fully replace governments' role in ISDS claims. The case-specific assistance provided to Member States should be provided with a view to building longer-term defence capacity within developing countries.

Procedural and strategic guidance that could be provided would include:

- Access to databases, research tools, and workshop resources;
- Provision of memos on particular legal issues;

- Support in the arbitrator selection process;
- Support on retaining and using experts for valuation and damages;
- Support on discovery, and gathering and managing documentary evidence.

To ensure the sustainability of the Centre and to ensure that initial challenges can be identified and addressed in a timely way, the Centre could begin with a more limited mandate and expand its role, as needed, in line with increased Member State demand and resource capacity. The financial and person-hour costs linked to many elements of the ISDS process are high. It is likely that there may be significant number of annual requests for assistance for the Centre and offering “extensive” support to all interested Member States will not likely be financially feasible.

According to what has been said above, Canada supports the UNCITRAL Secretariat’s draft provisions 2(c)(ii) and 2(e).

#### **Beneficiaries (draft provision 4)**

In Canada’s view, the services provided by the Advisory Centre should be of two types: assistance and support in organizing defence; and capacity building and sharing of best practices. The first range of services should be available only to developing and least-developed countries, with priority given to the latter. Capacity building to support should be available to all, including SMEs and developed countries.

#### **Possible legal structures and other topics**

An independent, impartial and non-political intergovernmental body (similar to the ACWL) would help ensure that the Advisory Centre remains depoliticized, to the extent possible, and that governance decisions are not linked overtly or tacitly to unrelated matters.

An independent management board consisting of members from both developed and developing Member States, operating in their individual capacity, should be established. Their work should be supported by a full-time professional staff to further ensure the independence of the organization.

#### **Virtual centre/Location or locations**

Canada notes that most investment counsel and tribunals are concentrated in a limited number of world cities and it might be beneficial for the Advisory Centre to be located close to these major centres.

The pandemic has shown that videoconferencing technology can be effective in fostering collaboration in spite of geographical constraints. Providing services virtually may be one way to promote maximum geographical reach for the Centre.

## **Cost and financing (draft provision 6)**

Ensuring the financial sustainability of the Centre should be a priority for the establishment of the Advisory Centre. In this respect, some important lessons can be drawn from the experience of the ACWL. The organization's initial plan for its financing was not sustainable over the long-term. Long-term donor commitments from Member States, coupled with a prudent investment strategy should be considered prerequisites to the establishment of the advisory centre.

Assuming it is established as an independent international organization providing services to its members, ideally all of the Advisory Centre's Member States (including users of the Centre's services) should make a financial commitment in line with their level of development to ensure their accountability to the process and promote the Centre's financial sustainability. A user fee system should also be contemplated to ensure that costs are equitably distributed among users.

A range of funding sources should be available and the fee structure should vary depending on the services provided.

Canada is grateful for the important and in-depth work done by the Secretariat to propose a budget model for advisory centre for dispute settlement on investment matters. In addition to the budget for representation services, it would be useful to consider the cost of other services, especially regarding capacity building.

## **Other Comments**

The relationship between the Advisory Centre and beneficiaries, including the existence of a solicitor client relationship in certain circumstances, should be specifically addressed. Further reflection is also necessary as to how this relationship would be consistent with any overarching guiding principle of the Advisory Centre (e.g. a requirement that the Advisory Centre be mindful of the objectives of ISDS reform and not contribute to further incoherence). In addition, further thought should be given to developing working procedures to avoid conflicts and address governing issues as between the Advisory Centre, the governing board, members and/or donors and contributors. Assuming contributions or donations from the public and private organizations are accepted, such procedures would be particularly important to ensure that the Advisory Centre's role and its services remain in keeping with the reform objectives.

## Comments by the Republic of Chile, Colombia and Mexico

The above-mentioned delegations express their appreciation to the UNCITRAL Secretariat for the preparation of the draft Working Paper and as requested, submit the following comments.

### **I. PURPOSE AND SCOPE - draft provision 1**

1. As a general comment, draft provision 1 is silent on the *purpose* of the Advisory Centre (“AC”). We consider that it is essential to agree on what the purpose of setting up an AC would be, to properly address the scope of the services (draft provision 1(a)); how the AC shall render its services (draft provision 1(b)); and what the AC comprises (draft provision 1(c)). Once there is agreement on what is that the AC seeks to achieve, there can be a discussion about what services the AC should provide, how those services should be rendered and by whom. For example, does the AC seek to reduce costs defenses for States? Does it seek to provide legal training on the rights and obligations of States under international investment law or on ISDS defense?
2. Regarding draft provision 1(a) which refers to the beneficiaries of the AC, SMEs **should be excluded**, for the following reasons First, it is difficult to find a common definition of SME, as it may vary from jurisdiction to jurisdiction depending on the number of employees and size. As a matter of principle, in the view of Chile, Colombia and Mexico, the AC should be a tool to assist only *States* in the implementation and application of their investment policies vis-à-vis foreign investors, and in particular, giving legal assistance, support and capacity building to States in ISDS defense and regarding the resolution of potential investor-state disputes. The AC should not be used as a tool for increased litigation from investors. Also, the inclusion of SMEs would increase the risk of conflicts of interest and raise issues of prioritization of resources.

### **II. SERVICES TO BE PROVIDED – draft provision 2**

3. As a general comment, from our perspective the AC should commence with a narrower scope of services and gradually expand its scope, provided there is an identified consensus for a need for broader services.
4. We consider that in its first stages, the AC’s main focus should be on providing legal assistance in organizing the defense, advisory services and capacity building/sharing of best practices (i.e. like the services listed in draft provision 2 (c) (ii), 2(d) and (e)). In any event, if an AC were established, during its first stages it should offer capacity building and legal and policy advisory services, with a view to expanding into pre-dispute and dispute avoidance services, should this be considered appropriate (i.e, services like those listed in draft provision 2(a) and option 2 of draft provision 2(b)).

**COMMENTS BY THE REPUBLIC OF CHILE, COLOMBIA AND MEXICO, ON  
THE DRAFT ESTABLISHMENT OF AN ADVISORY CENTRE**

However, we consider representation services should not be included in the services to be provided by the AC.

5. We consider that serving as a mediation centre should be excluded (i.e. exclude option 1 of draft provision 2(b) “serving as mediation centre”), as it would not be an efficient use of resources, given the existence of several mediation centres.
6. We also consider that the AC should not include the provision of representation services in mediation (i.e. exclude option 3 of draft provision 2(b): representing or assisting State beneficiaries in mediation” and draft provision 2(c)(i): “representation of State beneficiaries before any international forum and under any procedural rules...”).

**III. ADDITIONAL SERVICES – draft provision 3**

7. Draft provision 3, as is, is drafted in too broad terms, without giving any guidance as to the type of services to which the AC could expand. In the assumption that the AC commences providing policy advisory and capacity building services, we consider that any provision concerning any potential “additional services”, such as draft provision 3, should predict the direction that the AC may take.

**IV. BENEFICIARIES – draft provision 4**

8. As indicated in our comments regarding on the purpose and scope of the AC (draft provision 1), we consider that SMEs should be excluded from the beneficiaries of the AC, as their inclusion may lead to more investor-state litigation and may result in additional difficulties for the functioning of the Center. It should be taken into account that the Center will be financed by States, in this sense, services should be provided only to States. By focusing on assisting States in the implementation of investment policies and in treaty interpretation, the AC also may serve to strengthen the protections offered to investors, including SMEs.
9. The need for a specific type of service will depend on the experience, resources, and political circumstances of a specific State beneficiary. There are different degrees of experience and resources among States, including among developing states and among least developed states. We consider that, as a matter of principle, the AC should focus on servicing those states who objectively have a more urgent need, like least developed States, without prejudice that capacity building on dispute prevention and managing of negotiations and cooling-off periods could be offered to all beneficiary States who may require such services.

**COMMENTS BY THE REPUBLIC OF CHILE, COLOMBIA AND MEXICO, ON  
THE DRAFT ESTABLISHMENT OF AN ADVISORY CENTRE**

10. Concerning the institutional setting of the AC (para. 61 of WP), we consider that the AC could take advantage from existing structures and be attached to an international organization. However, we consider that the AC should not be part of or associated to a standing multilateral court. The adjudicative functions of such body are incompatible with those of a center that seeks to advise States in the development of treaty negotiation policies, treaty interpretation, and in dispute prevention. We see several risks of associating the functions of the AC to permanent court. The AC, if any, should remain independent from the influence of an adjudicative body, who has the potential to pass judgments on the implementation of the policies developed by States in their treaties.

**V. MEMBERSHIP – draft provision 5**

11. We consider that membership to the AC should remain available to States or regional economic integration organizations. With regard to private donors, due attention shall be given to ensure that their participation does not raise conflicts of interests, and that if they are accepted, that they not be contingent on particular projects or earmarked.

**VI. LOCATION – draft provision 6**

12. We consider that it is too premature to state a view on a specific location of the AC. But, as a matter of principle, cost-effectiveness and regional representation should be considered when determining this matter. In terms of regional representation, consideration should be given to a seat located in a least developed State or in a developing State. This may increase awareness of the existence of the AC and its services in the region where the State is located and facilitate access to beneficiaries and could facilitate the training purposes of the AC for young generations.

**VII. COST AND FINANCING – Annex 1 of WP**

13. Funding of the AC should consider the limited resources of developing States and least developed States. Solutions seeking to exclude any financial burden of developing and least developed States should be envisaged.



## Comments submitted by Costa Rica

### Costa Rica's comments to the Note by the Secretariat regarding the Advisory Centre (A/CN.9/WG.III/WP.)

Following the endeavours undertaken by the Working Group III, the Republic of Costa Rica hereby submits its comments to the Note by the Secretariat regarding the Advisory Centre (A/CN.9/WG.III/WP.).

Costa Rica appreciates the efforts of the Secretariat in providing the Working Group with valuable information as a starting point for the discussions of the Working Group. Moreover, Costa Rica would like to provide some general comments for further consideration on topics that have caught our attention, without prejudice to any additional comments that may be submitted during this discussion.

Subject	Costa Rica's comments
<i>Scope</i>	<p>Costa Rica has some concerns regarding the scope of the Centre (as set out in Draft provision 1). The scope includes a wide range of services that could be provided by the Centre, as well as several beneficiaries of these services. For example, the services vary from pre-dispute services, to training and policy advise, and defense services. Due to the multiple responsibilities derived from these services and considering that staff size will be conservative at the beginning, perhaps it would be beneficial to establish priorities regarding services offered. In this same interest, Costa Rica suggests that the beneficiaries of these services should be limited to States.</p> <p>Our very positive experience with the Advisory Centre on WTO Law ("ACWL") leads Costa Rica to suggest that the Working Group could consider a more limited scope. Thus, the Centre could direct its efforts and available resources to concrete actions regarding the defense of States that may have a disadvantage within the system solely due to costs.</p>
<i>Structure of the Centre</i>	<p>Regarding the Centre structure, Costa Rica agrees with the notion that the internal organization should match the services offered. We suggest that the management structure should be as simple as possible to avoid complex bureaucracy.</p>
<i>Funding</i>	<p>We understand that one of the intentions of creating the Centre would be to avoid external influence, including donors. Therefore, careful consideration is required on this specific topic. We agree that the Centre should be sustainable. To do so, a possible solution is to request a one-time entry contribution, similar to what is required by Article 6.2 of the Agreement establishing the Advisory Centre on WTO Law. Creating such a fund could help the Centre at its early stage. Costa Rica also considers that a competitive fee for its services could be necessary.</p> <p>In recent discussions, some Delegations have suggested that the beneficiaries could also provide payment in kind and second a government official to equip the Centre with additional</p>

Subject	Costa Rica's comments
	staff. We share the view that a more flexible concept of payment could become a possibility for LDCs to access the services of the Centre, as well as an opportunity for training and capacity building.

# Comments submitted by European Union and its MS

## **Comments on Specific Draft provisions**

### **I. Initial draft on the establishment of an advisory centre**

The EU and its Member States thank the UNCITRAL Secretariat for the work done in bringing forward the conclusions of Working Group III and in particular for the production of this draft Note and its addendum. The EU and its Member States politely make the following comments to the draft.

As a preliminary comment, the EU and its Member States recall that, while championing the establishment of an Advisory Centre on International Investment Law, they envisage that such establishment constitute an integral part of a broader reform of investor-State dispute settlement (ISDS) encompassing the creation of a permanent structure for the resolution of investment disputes composed by tenured adjudicators appointed by States and randomly allocated to cases (i.e. a Multilateral Investment Court, as referred to in past interventions and submissions of the EU and its Member States, notably A/CN.9/WG.III/WP.159 and its Addendum 1 of 24 January 2019)<sup>1</sup>.

The EU and its Member States submit that such permanent institution is key to the creation of an Advisory Centre, and that discussions on the setting up of both institutions should be held in parallel. The close relationship between the two bodies is explained by the fact that a Multilateral Investment Court will result in a rationalisation of costs per dispute, given its ability to inter alia create consistent case-law, fix strict procedural deadlines and rapidly dismiss unmeritorious claims. The creation, as part of the same structural reform efforts, of an Advisory Centre that is able to work together (albeit observing the necessary independence and impartiality guarantees) with said permanent structure will assist beneficiary States in their litigation processes which will already be systemically less costly and lengthy, thanks to the broader structural reform.

### **A. Draft Provision 1**

#### ***Draft provision 1 - Scope***

*a. The Centre shall provide the services listed in [draft provision 2] below (“the Services”) in matters relating to international investment law and investor-state dispute settlement (ISDS) proceedings (the “Services”) to [developing] States, in particular to the least developed among them (the “State Beneficiaries”) [and small and medium-size enterprises (SMEs)] (the “SMEs Beneficiaries”) ([collectively] the “Beneficiaries”).*

*b. The Centre shall render the Services:*

*(i) In a sustainable, accessible and competitive manner;*

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<sup>1</sup> The submission of the European Union is available at A/CN.9/WG.III/WP.159 - E - A/CN.9/WG.III/WP.159 -Desktop (undocs.org). Its addendum is available at A/CN.9/WG.III/WP.159/Add.1 - E - A/CN.9/WG.III/WP.159/Add.1 -Desktop (undocs.org).

*(ii) In compliance with high technical and professional standards and with applicable statutes, internal regulations and rules;*

*(iii) Free from any external influence, including from donors and in the best interest of the Beneficiaries; and*

*(iv); (...)*

*c. The Centre shall comprise:*

*(i) An Assistance Mechanism, to provide the Services; and*

*(ii) A Forum, for Beneficiaries to discuss, share information, engage in training, and potentially develop guidelines or best-practice documents in relation to any of the areas covered by the Services, building upon available resources.*

### **Comments:**

The EU and its Member States note that it may be desirable and good treaty practice that the first provision in this Treaty provides for the establishment of an Advisory Centre, to be then followed by a provision that defines its scope. This is assuming that the Advisory Centre has not been established by a different document, for example a Convention setting up a permanent institutional structure for the resolution of investment disputes.

As for the definition of beneficiaries, the EU and its Member States note the inclusion of the qualifier “[developing]” in square brackets in draft provision 1(a). While it is unclear to the EU and its Member States what the square brackets imply, it is the view of the EU and its Member States that, as detailed in the relevant section below, only developing - as opposed to developed - States be able to benefit from the Assistance Mechanism.

Also, with respect to the definition of beneficiaries, the EU and its Member States find the reference to “SMEs” at risk of being overly restrictive. In light of the fact that there is no single definition of an SME across legal systems, the EU and its Member States would suggest that broader wording be added, to the effect of covering vulnerable investors more generally, including SMEs and individual investors.

The EU and its Member States agree with the overarching principles as proposed in draft provision 1(b), which should remain in such provision generally formulated. The idea that the Centre is to operate without incurring overlaps with the work conducted by other entities, such as to maximise the use of resources, should in view of the EU and its Member States also be added.

## **B. Draft Provision 2**

### **C. Services**

10. The Working Group may wish to note that the list of possible services that an advisory centre could render includes: (i) pre-dispute and dispute avoidance services; (ii) mediation and other alternative dispute resolution (ADR) services; (iii) assistance in organizing the defence and support during

dispute settlement proceedings; (iv) legal and policy advisory services; and (v) capacity-building and a platform for sharing of best practices. The scope of the services of an advisory centre will be dependent on, and interrelated with, available funding – the more money is available on a sustainable basis, the more services can be provided.

### **Comments:**

Regarding the tasks of the Advisory Centre, as a preliminary comment the EU and its Member States would suggest that a certain degree of flexibility be embedded to draft provision 2, listing the tasks of the Advisory Centre, in order to allow for the governing body to modify such list as appropriate over time. This type of flexibility should be incorporated, wherever necessary, into the instrument, to allow the Centre to adapt to developments. The EU and its Member States note that this may already be achieved by the addition of the proposed draft provision 3 subject to the comments included below.

#### ***Draft provision 2(a)***

*2. The Centre shall provide the following Services:*

- a) Pre-dispute and dispute avoidance Services, which include assisting the State Beneficiaries to:*
  - (i) Set up conflict management systems, including early dispute prevention policies and alert procedures;*
  - (ii) Establish a lead agency responsible for centralizing ISDS matters and protecting the interests of the State Beneficiaries; and*
  - (iii) Address specific questions in the management of disputes with foreign investors].*

#### ***Draft provision 2(b)***

*[2. The Centre shall provide the following services:]*

- b) Alternative dispute resolution, by:*
  - [Option 1: Serving as a mediation centre.]*
  - [Option 2: Providing advice to the [State] Beneficiaries including on the selection of the most appropriate dispute resolution method, and other advisory services in relation to ADR in ISDS.]*
  - [Option 3: Representing or assisting State Beneficiaries in a mediation procedure.]*

### **Comments:**

In view of the EU and its Member States, a combination of the 2nd and 3rd option outlined above would appear to cover the broadest scope of possible services while safeguarding the advisory nature of the Advisory Centre, and accordingly be preferable to any of those option taken individually. This could

be achieved through a broad empowerment allowing the Centre to decide on a case-by-case basis and according to the individual circumstances of the case (e.g. funds available, complexity etc) the extent of its involvement in a given ADR case, including the prima facie assessment of a case and whether mediation or another method of ADR might be a suitable option therefor (option 2) and/or the representation in a mediation or other ADR procedure (option 3).

In view of the EU and its Member States, option 1 would not be suitable to the extent that allowing the Advisory Centre to act as a mediation forum where mediation procedures would be administered would change the advisory nature of the Centre and give rise to potential conflicts of interest.

***Draft provision 2(c)***

*[2. The Centre shall provide the following services:]*

*c) Assistance to State Beneficiaries in investor-State dispute settlement proceedings, which includes:*

*(i) Representation of State beneficiaries before any international forum and under any procedural rules, including jointly with the defence team the State Beneficiary where so requested by such Beneficiary;*

*(ii) Assistance and support in organizing the defence, including for:*

- The preparation of the defence of investment disputes;*
- The early assessment of the risks associated with a given claim, so as to permit identification of the strategy and course of action to adopt;*
- The determination of the financial implications and earmarking of a budget for the defence of a case;*
- The selection and appointment of arbitrators/adjudicators;*
- The preparation of written statements, and documentary evidence; and*
- Technical support on substantial and procedural conduct of ISDS.*

**Comments on General remarks:**

The EU and its Member States support that the Centre provides assistance during litigation, as that was the demand formulated by a large majority of developing countries.

**Comments on Representations services:**

While in principle not opposed to the possibility that the Centre provides representation services in the context of litigation, the EU and its Member States are of the view that that should always be conducted in parallel with a significant involvement of the beneficiary State. That will have a (even if small)

minimising impact on the resources needed but more importantly will secure that the State retains a certain ownership of the litigation strategy and process.

The EU and its Member States refer to their initial comment recalling that the establishment of an Advisory Centre is to be conceived as part of a larger reform establishing a permanent institution for the resolution of disputes. As the EU and its Member States have explained, the rationale of this reform option closely relates to the fact that traditional ISDS does not meet the standards deemed necessary for the resolution of disputes where issues of public policy are at stake (such as transparency, perceived independence and legitimacy). Accordingly, the EU and its Member States consider that such Centre is to only represent States in disputes that satisfy those minimum standards. For those reasons, the EU and its Member States submit that the proposed language allowing the Centre to represent beneficiary States “before any international forum and under any procedural rules” may have to be revised.

### **Comments on Assistance and support during ISDS proceedings:**

The EU and its Member States are not opposed to the Centre providing assistance and support services other than representation during litigation. Similarly, the EU and its Member States are not opposed to this Treaty including language on the specific tasks this might encompass, provided those are included in the form of open, non-exhaustive lists or, as previously noted, that some flexibility is retained.

Regarding the 4th bullet point of the proposed draft provision 2(c)(ii) (i.e. “The selection and appointment of arbitrators/adjudicators”), the EU and its Member States refer to their first general comment on the Advisory Centre being part of a broader reform encompassing the creation of a permanent institution. Under such EU and its Member States’ preferred reform approach, adjudicators would be randomly allocated to individual cases, hence reducing the scope of action of the Advisory Centre in assisting States in the selection and appointment of those adjudicators. That said, there may admittedly be instances where support from the Advisory Centre may be warranted in connection with such selection and appointment (e.g. in connection to possible conflicts of interest). In any event, the EU and its Member States suggest using exclusively the more generic term “adjudicators”, similar to what is currently under discussion for the draft code of conduct prepared by the Secretariats of ICSID and of UNCITRAL.

#### ***Draft provisions 2(d)***

*[2. The Centre shall provide the following services:]*

*d) Legal and policy advice on matters relating to international investment law, including assistance to State Beneficiaries for:*

*(i) The review of, and potential amendment to, their international investment instruments; and*

*(ii) Assessment of compliance with treaty obligations of measures or contemplated measures.*

### **Comments:**

The EU and its Member States agree that the Advisory Centre should be able to provide advisory services not directly linked to litigation proceedings.

#### **Draft provisions 2(e)**

*[2. The Centre shall provide the following services:]*

*e) Data collection services, as well as a forum for Beneficiaries to discuss, exchange information on, and develop best practices for matters relating to international investment law, and also capacity building and training activities, including regarding treaty negotiation and the interpretation of investment obligations, through appropriate means.*

### **Comments:**

The EU and its Member States agree on the importance that the Centre engages in capacity-building activities. In view of the EU and its Member States, additional reflection may be necessary to determine which services are to be provided in this sense, considering the principle that the Centre is not to duplicate work that is already being conducted by other entities. For example, the management of a database is something that the Centre may not necessarily need to be responsible for, considering the existing ones (e.g. UNCTAD's investment policy hub, UNCITRAL-managed and EU-co-funded Transparency Repository).

Moreover, the EU and its Member States submit that additional reflection may be needed on the architecture of the Forum. This issue closely relates to the membership of the Centre (and access to the governing structure) which should be circumscribed to beneficiary countries (having access to all services of the Centre) and donor countries/regional economic integration organisations (developed or developing, according to their level of development). This may constitute a more reduced scope of governments than those which could participate in the services of the Forum as described in draft provision 2(e), which could also extend to other countries/organisations not necessarily being members of the Centre. One idea could be to envisage a model of concentric circles, with a smaller one defining access to the assistance mechanism services including beneficiary countries only; a second one defining members of the governing bodies including beneficiary countries and donor countries/organisations; and a third and broader one providing a forum to discuss policy developments that would be open to other countries (and possibly other entities) that wish to be included.<sup>2</sup>

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<sup>2</sup> See Roberts and St John, <https://www.ejiltalk.org/uncitral-and-isds-reform-visualising-a-flexible-framework/>



### **C. Draft Provision 3**

#### ***Draft provision 3 – Additional Services***

*The Centre shall perform any other functions assigned to it by the governing body which is directly related to its purpose and in accordance with the obligations and functions of the Centre.*

#### **Comments:**

The EU and its Member States favour the inclusion of a provision empowering the governing body of the Advisory Centre to modify the list of functions thereof, thus ensuring that the list stays up-to-date and in line with the needs of the time. The EU and its Member States note however that the proposed language only foresees that such modification occurs by means of adding tasks to those already foreseen. The EU and its Member States submit that the governing body should be able to modify the list of functions more broadly, that is to say, by adding, but also by modifying or removing, functions.

#### **Comments on avoidance of duplication of services:**

The EU and its Member States attach a high degree of importance to ensuring that the Centre operates in an efficient manner, including by focusing its services on the needs of beneficiaries that are currently not met by other entities, while not overlapping with the work of those. For this reason, the EU and its Member States have proposed that this idea be captured as a governing principle of the Centre in its comments to draft provision 1(b) (Scope) above.

The EU and its Member States would also propose that the conclusions of studies compiling the range of services already being provided, and that therefore allow for a clear identification of the services that are still needed, continue to be integrated into the decision-making process in a clear and transparent manner.

### **D. Draft Provision 4**

#### ***Draft provision 4 - Beneficiaries of Services and order of priority***

*a). Services outlined in draft provisions [2, paragraphs [(a) to (e) and 3] are available to developing and least developed State Beneficiaries, whereas the Services outlined in draft provisions [2, paragraphs [--] and 3] are available to all Beneficiaries, subject to the specification by the governing body.*

*b) In the event that two or more State Beneficiaries require the Services of the Centre and the capacity of it to provide such Services is insufficient, the following rules shall apply, unless otherwise provided by*

*the [governing body]: priority shall be given to least-developed State Beneficiaries; if both State Beneficiaries are on the same economic level of development, priority shall be given to the State Beneficiary that has requested the Centre for the Services first.*

*c) If the State Beneficiary, even if it is a least developed State Beneficiary, which made the first request is already represented by the Centre in another case, the State Beneficiary not otherwise represented shall have priority to use the Service.*

*d) If both State Beneficiaries having requested the Services of the Centre are already represented by the Centre in other cases, the least developed State Beneficiary shall be entitled to use the Service. If the States have similar levels of development, the State, which is represented in fewer cases shall have priority.*

#### **Comments on draft provision 4(a):**

The EU and its Member States are of the view that the services of the Centre should be available to any developing and least-developed country government. The EU and its Member States also note that, in case of conflict or funding shortages, least-developed countries should have priority in benefiting from the services.

The EU and its Member States do not support that developed states benefit from the services of the Centre that are attributable to the Assistance Mechanism. That said, the EU would be in favour of considering ways for developed state governments to be involved in knowledge-sharing and the development of best-practices, subject to the considerations highlighted under paragraph 41 above in relation to the architecture and governance of the Forum and membership of the Centre.

In defining the scope of entities/individuals that are entitled to the assistance services of the Centre, the EU and its Member States favour an approach where only government officials can directly attend trainings and work directly with the Centre. It would then be for each state to determine who is a government official for this purpose and register its representatives.

#### **Comments on SMEs:**

The EU and its Member States recall here its comments above that the categories of investors benefiting from the services of the Centre should not be circumscribed to SMEs only, but capture also individual and vulnerable investors.

53. In addition, the Working Group may wish to note that possible conflict of interests might arise from the inclusion of SMEs as beneficiaries of the services of an advisory centre. This would depend largely on the nature and scope of the services that the centre would offer. For instance, if SMEs were to benefit from legal representation as States would do, this might give rise to situations where an investor would initiate a claim and be represented by the centre in a dispute, thus depriving the State against whom the claim is made of the same opportunity.

### **Comments:**

The EU and its Member States would be ready to explore options so that the bulk of advisory services be also available to duly defined non-state actors participating in investor-State dispute settlement, including small and vulnerable investors, proceedings, provided that the provision of such services via an Advisory Centre was devised as part of a broader institutional reform of ISDS as described above. The modalities and extent of such availability to non-State actors would have to be discussed in detail after more clarity was available on the manner how the establishment of an Advisory Centre was linked to the broader ISDS reform efforts.

54. The ACWL offers an interesting model regarding how to solve such potential conflict of interests. Usually, the ACWL represents the first country that requested its assistance. With respect to the other country, the ACWL maintains a curated list of lawyers and law firms who have agreed to represent ACWL Members and LDCs on the same terms as those provided by the centre, including with respect to fixed rates. However, such an approach would result in governments funding claims against themselves from foreign investors.

### **Comments:**

The EU and its Member States are conscious of the risk of conflicts of interest where certain categories of non-State actors, such as certain investors, in addition to States, are entitled to benefit from the Centre's services, in particular in terms of assistance in litigation. A possible avenue to address this problem would be to have the Centre curate a list of lawyers and law firms providing services in the same conditions as the Centre (along the lines of what the ACWL does) for SMEs to be referred to in cases of possible conflicts. Additional reflection may be needed to ensure the operational arrangements in investor-State disputes, while this option may be a relatively straightforward solution in cases of State-to-State disputes, which the EU submits the permanent structure should also be able to hear.

## **E. Possible models for the establishment of the centre**

### **Comments:**

As stated above, the EU and its Member States favour the creation and functioning of an Advisory Centre as part of the wider multilateral reform of ISDS whereby a permanent body would be set up for the adjudication of disputes. Institutionally, this would translate in the Centre being part of the same overall structure as the Court, with the necessary checks and balances to ensure that the advisory and adjudicatory functions be duly separated and conducted in full observance of all independence and impartiality requirements.

In other words, there would be institutional synergies despite the two institutions operating separately.

A body of decision-makers (general assembly-type) would make the highest policy decisions of the Centre. It would be composed of State governments (as well as regional organisations) making financial contributions to the Centre (see comment to paragraph 41 above). Especially if the Centre were to provide services to certain categories of investors, representatives of such stakeholders may also be somehow represented in the governing structure of the Centre, together with other categories of non-State actors. In that case, options would need to be explored in order to seclude possible conflicts of interest of entities other than governments, including for example the setting up of an advisory body that included a balanced representation of such other non-State actors and entities, including investor representatives but also others such as private organisations, practitioners, NGOs or academia. The diversity of backgrounds would add to the body while incorporating the necessary checks and balances to ensure that no undue influence be exerted on the decision-making body, made up of governments only.

The EU and its Member States recall once again that, if as per their preferred reform option the Advisory Centre were to be tied to a broader institutional framework (i.e. incorporating also a permanent body to hear disputes), it could be envisaged that the governance structure also be tied to it. Variations of this schema could be thought of, together with ways to contain conflicts of interest which may be less likely to arise in a self-standing Centre.

## **F. Draft Provision 5**

### ***Draft provision 5 - Membership***

*The Centre shall remain open to membership by [States – regional economic integration organizations – private donors] in accordance with the provisions of this Agreement.*

### **Comments:**

The EU and its Member States recall the comments made to the previous section, which are also relevant in terms on membership of the Advisory Centre. In a nutshell, the EU and its Member States submit that membership should be reserved to governments and regional economic integration organisations contributing financially to the Centre, while options could be explored to effectively capture and take into account the views of non-governments beneficiaries and possibly other types of non-state actors and entities (NGOs, academia, etc). This structure is without prejudice to the comment under paragraph 41 above on a possible model of broader concentric circles to involve also non-contributing countries to exchange best practices, which may or may not be an intrinsic part of the Advisory Centre.

67. On a different note, the internal organization and the staffing of the advisory centre has also a bearing on its independence and impartiality.

Questions such as whether staff would be permanent, composed of consultants or member-government secondees (or a combination) and the manner in which the centre may work with external service providers would need careful consideration. Any misalignment of perspective and interest between a support provider and the beneficiary might create difficulties in the operation of the centre. The Working Group may also wish to note that an advisory centre would need to have a diverse staff, including a diversity of expertise and experience, as well as diversity in legal, social, and governmental backgrounds. The staff requires sufficient expertise to ensure that it can deliver the highest quality services, and sufficient experience to independently render the full range of required services, including assistance and defence in ISDS cases.

### **Comments:**

The EU and its Member States agree that the composition and staffing of the Centre will be central to the practical operation of its roles and functions. The EU and its Member States submit that those are issues that will be better addressed once additional clarity is available on the tasks to be realistically allocated to the Centre and that a certain discretion be given to the director of the centre to organise itself.

## **G. Draft Provision 6**

### ***Draft provision 6 - Location***

*a. The Centre shall be based in [...].*

*b. The Centre shall seek to ensure adequate global coverage, whether through virtual and, as feasible, physical presence regionally.*

### **Comments:**

In order to avoid that the location of the Centre be unduly politicised with its associated risks for the progress of discussions and multilateral ISDS reform, the EU and its Member States propose that this question be left out of the Advisory Centre's statutes, and that it be deferred to the Centre's governing structure, in light of the relevant circumstances, while more substantive discussions on the establishment of the Centre move forward. Such approach would also allow for decisions on possible regional branches to be made in a more informed fashion.

The EU and its Member States would therefore suggest that the language in draft provision 6(a) reads along the lines of "The Centre's location shall be determined by the Centre's governing structure in accordance with the procedures to that end established".

## **II. Cost and financing**

### **A. Assessment of workload of the advisory centre and costs**

### **Comments:**

The EU and its Member States value the conclusions reached in the context of the Study and appreciate the importance of said document in informing the discussions relative to the costs and funding of an Advisory Centre.

That said, the EU and its Member States submit that it is premature to discuss the funding in such specific terms, including in specific amounts, given the many question marks that remain unanswered at this stage. While some of those question marks can already be anticipated at this point, such as obligations of the Centre concerning the need to handle contributions in a transparent manner and to periodically undergo audits and comply with reporting obligations, or can be reasonably expected to be clarified in the context of discussions that Working Group III is bound to hold in the near future, the EU and its Member States argue in favour of empowering the governing body of the Advisory Centre to decide on other issues of importance that may be difficult to elucidate in the context of Working Group III sessions.

Additionally, the EU and its Member States recall their internal mandate to work towards the creation of a system to support developing and least-developed countries operate in the investment dispute settlement regime as part of the multilateral broader structural reform of investor-State dispute resolution. As Advisory Centre discussions become more specific, the EU and its Member States expect that discussions on other aspects of structural reform will also become more detailed, thus allowing for the progressive materialisation of the reform efforts, to the benefit of all States, including those that advocate for the creation of an Advisory Centre.

For those reasons, the EU and its Member States take good note of the Study and reserve their position on how the conclusions set out therein may specifically relate to the establishment of an Advisory Centre.

## **B. Ways of financing these costs**

### **Comments:**

Without prejudice to the previous comment, the EU and its Member States preliminarily agree that fees for beneficiary States differentiate between their respective levels of development.

## **C. Financial structure**

### ***Draft provision 6 - Financial structure of the Centre***

- 1. A trust fund shall be established to enable the sustainable operation of the Centre (the "Trust Fund").*
- 2. The Trust Fund shall receive contributions from all the Members taking into account their level of economic development and as decided by the [governing body of the Centre]. [Least developed Countries are exempted from paying a contribution.] It may also receive contributions or donations from public and private organizations and sponsors.*

*3. The Centre shall charge fees for the legal services in accordance with the schedule of fees set out in Annex on Fees to this Agreement. The fee for State Beneficiaries shall be set taking into account their level of economic development and decided by the [governing body of the Centre]. Least developed Countries are not exempted from paying a fee for [Services], [for Services except those related to information-sharing, training, and capacity building] [for legal representation].*

*4. The annual budget of the Centre shall be from the resources of the Trust Fund, as well as from the fees it charges for its services in accordance with the rates established by the [governing body].*

*5. The Centre shall have an external auditor.*

### **Comments:**

Without prejudice to the previous comments, the EU and its Member States agree that some or a combination of the mechanisms above may be explored as possible sources of income to ensure the functioning of the Advisory Centre.

## **D. Sustainability**

### **Comments:**

The EU and its Member States acknowledge the potential tensions and concerns that may arise in the context of donors funding the Advisory Centre. The EU and its Member States recall in this sense their comments to paragraph 63 of the draft working paper on a general assembly-type of governing body formed essentially by states, in combination with a formula (that remains to be explored) allowing other interested actors to participate in the decision-making processes of the Centre while secluding potential conflicts of interest.

## Comments submitted by Indonesia

### Introduction

1. This paper aims to present Indonesia's perspective and constructive comment on one of reform options being discussed in the Working Group III (ISDS Reforms) which is the establishment of an advisory center on international investment law ("advisory center" or "center").
2. This paper presented to the Working Group III is based on the initial draft on the establishment of an advisory center, including its addendum prepared by the Secretariat of UNCITRAL as contained in document number: A/CN.9/WG.III/WP.
3. In general, Indonesia is of the view that the advisory center should be designed to have a characteristic that is compatible with the factual situation and facts happening in the ISDS system. It should also give its primary focus on providing assistance to the developing and least developed countries in dealing with the ISDS system.
4. This paper does not prejudice the position that the Government of Indonesia would take in the deliberation on the establishment of the advisory center.

### General Remarks

5. While it might be true that Advisory Centre on WTO Law (ACWL) could provide a valuable model for the establishment of the Advisory Centre, it is necessary once again to draw the attention of the Working Group III that the regime of WTO Law is different from investment law.
6. In the context of WTO law, one of the legal remedies provided is to request the losing party to bring its measure/s into conformity with the relevant agreements. The compensation mechanism might be triggered when the losing party could not implement the ruling in a period of time, but it is temporary and voluntary in nature. Meanwhile, in the context of the investment law, the investor-state dispute settlement (ISDS) mechanism is applied. The investors are allowed to ask for compensation, and states are obliged to pay for compensation if they lose in a proceeding.
7. In addition, in WTO law, the dispute settlement system is based on a single multilateral agreement that has a permanent litigation body with permanent procedural rules. However, in the realm of investment law, the ISDS mechanism is based on various treaties (either regional or bilateral). The procedural rule is varied from one treaty to another.
8. It is worth noting that ACWL is seated in the same place as the headquarter of WTO in Geneva, Switzerland. Thus, it might incur lower cost of travelling for its staffs.
9. Based on comparison above, the ISDS mechanism is arguably unpredicted, more complex and directly impacts states financially than the dispute settlement system in the WTO. Hence, Indonesia believes that the advisory center should be designed to have its own characteristic that is compatible with conditions of ISDS system.



## Scope

10. As the advisory center, in performing its services, might receive information that is treated as confidential, Indonesia proposes to add one more principle in the draft provision 1 (b) of the initial draft that is to maintain confidentiality of information that it receives in performing its services.

## Services, Staffing and Financing

11. Indonesia is of the view that the list of services rendered by the advisory center as contained in the initial draft are too broad and might be counterproductive. As an example, if the advisory center is designed to function as a mediation institute, there will be a chance where it could comprise itself with the other function to provide defense services, especially when it deals with the same countries. As a result, the advisory center may not be able to fully serve its primary purpose to assist developing and least developed countries in the ISDS proceedings. Hence, in order to reap the full benefit of advisory center, it might be better to limit its function as effective as possible.
12. In term of staffing, there are two scenarios being proposed that are scenario A (15 lawyers) and B (8 lawyers). It can be assumed that the advisory will be a relatively small organization. Therefore, by limiting its functions as effectively as possible, it could help to avoid the heavy workload of the advisory center. Furthermore, this limitation will allow the advisory center to provide dedicated personnel that are able to provide full support to countries in every stage of ISDS proceedings which might take several years.
13. Regarding financing, Indonesia suggests the advisory center to have its main services among services mentioned in the initial draft. These main services will be financed through membership fees and fees paid by users of the advisory center's main services. The other services (apart from main service mentioned above) which can be considered as additional services could be financed from voluntary contribution by States and private donors and development assistance agencies or organizations. Over time, with more voluntary contribution, the advisory center could provide more additional services.

## Beneficiaries

14. The initial draft proposes small and medium enterprises (SMEs) as a possible beneficiary of the advisory center. In this matter, Indonesia is of the view that this proposal might defeat the very purpose of establishing the advisory center in the first place as it could open the possibility of creating a situation where countries are funding claims against themselves.
15. Considering SMEs as beneficiary could create complexity as there is no agreed definition of SMEs. Furthermore, the valuation and capability to invest in foreign countries might differ substantially from Indonesian SMEs to other countries' SMEs.

## Seat

16. Indonesia wishes to convey its view that the consideration of the seat of the advisory center is one of the most critical issues in this deliberation. This issue might implicate the budget of the advisory center as its lawyers might have to travel frequently in delivering its services especially its defense service as they will be needed to attend the hearings in person.

## Closing

17. The idea of establishing the advisory center is intended mainly to assist developing and least developed countries. Therefore, it is suggested that WG III of UNCITRAL could consider designing an advisory center that can fulfill such intention.
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## Comments submitted by Panama

The Republic of Panama (“Panama”) expresses its gratitude to the Secretariat of UNCITRAL for preparing the draft Note on the establishment of an advisory centre and its addendum, for comments by Working Group III delegates.

Panama wishes to make *three* general comments (I) before turning to the draft provisions under discussion by Working Group III (II).

### **I. General Comments**

*First*, the initiative of establishing an Advisory Centre on International Investment Law (“ACIIL” or the Centre) is welcome. As it was mentioned during the thirty-eight session of the Working Group, the establishment of an advisory centre could, *inter alia*, enhance transparency in ISDS, address concerns regarding the cost of ISDS proceedings, and contribute to access to justice and equality of arms (A/CN.9/1004, p. 28).

*Second*, while the Advisory Centre on WTO Law (“ACWL”) could provide a useful model, the structure of the ACIIL should be consistent with the ISDS regime and its reform options currently under consideration by Working Group III.

*Third*, the implementation of an advisory centre shall be flexible enough to be able to evolve over time, particularly with respect to its structure and the scope of services to be provided by the Centre. In any event, the ACIIL shall provide its services in an independent manner, free from undue political and financial influence. To this end, the ACIIL should be funded by various sources that could ensure its independence as well as its sustainability.

### **II. Comments on Specific Draft provisions**

#### **A. Draft Provision 1**

##### ***Draft provision 1 - Scope***

*a. The Centre shall provide the services listed in [draft provision 2] below (“the Services”) in matters relating to international investment law and investor-state dispute settlement (ISDS) proceedings (the “Services”) to [developing] States, in particular to the least developed among them (the “State Beneficiaries”) [and small and medium-size enterprises (SMEs)] (the “SMEs Beneficiaries”) ([collectively] the “Beneficiaries”).*

*b. The Centre shall render the Services:*

- (i) In a sustainable, accessible and competitive manner;*
- (ii) In compliance with high technical and professional standards and with applicable statutes, internal regulations and rules;*
- (iii) Free from any external influence, including from donors and in the best interest of the Beneficiaries; and*
- (iv); (...)*

*c. The Centre shall comprise:*

- (i) An Assistance Mechanism, to provide the Services; and*
- (ii) A Forum, for Beneficiaries to discuss, share information, engage in training, and potentially develop guidelines or best-practice documents in relation to any of the areas covered by the Services, building upon available resources.*

### **Comments:**

More clarity is needed regarding the scope of services of the Centre. Pursuant to the “Note on the costs and financing of an Advisory Centre on International Investment Law”, the Centre shall only handle cases based on international treaties and not on investment contracts or national laws.<sup>1</sup> However, the term investor-state dispute settlement (“ISDS”) used in the draft provision implies that the ACIIL could provide services on any type of international investment dispute, not only dispute arising pursuant to the investment promotion and protection provisions in an international treaty (IID). In this sense, it would be useful to include a list of Definitions for purposes of the multilateral instrument establishing the Centre.

Regarding Draft provision 1(b)(ii), it is unclear what is meant to be included as “applicable statutes, internal regulations and rules”.

More generally, Panama believes the ACIIL shall operate in an independent manner. Accordingly, Panama agrees with other commentators that have expressed the need for the ACIIL to be financed from different sources that do not make it dependent on renewal of voluntary contributions.<sup>2</sup>

### **B. Draft Provision 2**

#### ***Draft provision 2(b)***

*[2. The Centre shall provide the following services:]*

*a) Alternative dispute resolution, by:*

*[Option 1: Serving as a mediation centre.]*

*[Option 2: Providing advice to the [State] Beneficiaries including on the selection of the most appropriate dispute resolution method, and other advisory services in relation to ADR in ISDS.]*

*[Option 3: Representing or assisting State Beneficiaries in a mediation procedure.]*

### **Comments:**

Panama agrees with the scope of Options 2 and 3 but not with Option 1. The ACIIL should remain an assistant mechanism, able to provide advice, legal representation and assistance to State Beneficiaries in ADR, including mediation procedures. Serving as a mediation centre may conflict with its advisory and representation role.

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<sup>1</sup> Nicolas Angelet, Ndanga Kamau, Benjamin Remy, Karl P. Sauvant, Carlos José Valderrama, and Don Wallace, *Note on the costs and financing of an Advisory Centre on International Investment Law* (18 July 2020), ¶23, available at: [https://uncitral.un.org/sites/uncitral.un.org/files/aciil\\_note\\_on\\_costs\\_financing\\_24\\_august\\_2020\\_final\\_update.d.pdf](https://uncitral.un.org/sites/uncitral.un.org/files/aciil_note_on_costs_financing_24_august_2020_final_update.d.pdf).

<sup>2</sup> *Id.*, ¶61.

### ***Draft provisions 2(d)***

*[2. The Centre shall provide the following services:]*

*d) Legal and policy advice on matters relating to international investment law, including assistance to State Beneficiaries for:*

- (i) The review of, and potential amendment to, their international investment instruments; and*
- (ii) Assessment of compliance with treaty obligations of measures or contemplated measures.*

### **Comments:**

Panama is concerned about the influence that the ACIIL could have on policy matters of State Beneficiaries. It therefore proposes to limit Centre's advice to legal matters relating to international investment law.

### **C. Draft Provision 4**

#### ***Draft provision 4 - Beneficiaries of Services and order of priority***

- a). Services outlined in draft provisions [2, paragraphs [(a) to (e) and 3] are available to developing and least developed State Beneficiaries, whereas the Services outlined in draft provisions [2, paragraphs [--] and 3] are available to all Beneficiaries, subject to the specification by the governing body.*
- b) In the event that two or more State Beneficiaries require the Services of the Centre and the capacity of it to provide such Services is insufficient, the following rules shall apply, unless otherwise provided by the [governing body]: priority shall be given to least-developed State Beneficiaries; if both State Beneficiaries are on the same economic level of development, priority shall be given to the State Beneficiary that has requested the Centre for the Services first.*
- c) If the State Beneficiary, even if it is a least developed State Beneficiary, which made the first request is already represented by the Centre in another case, the State Beneficiary not otherwise represented shall have priority to use the Service.*
- d) If both State Beneficiaries having requested the Services of the Centre are already represented by the Centre in other cases, the least developed State Beneficiary shall be entitled to use the Service. If the States have similar levels of development, the State, which is represented in fewer cases shall have priority.*

### **Comments:**

Panama is from the view that the *Assistant mechanism* (comprising assistance and representation services) shall be reserved for least developed countries and developing countries, whereas the *Forum* services (comprising access to data collections, exchange of

information and sharing of best practices) could be open to all beneficiaries, including developed countries and micro, small and medium size enterprises (“MSMEs”).

In principle, Panama agrees with establishing a priority order among Beneficiaries, in accordance with their economic level of development, and on a “first come, first served” basis. However, a distinction need to be made depending on the type of the service requested. Furthermore, possible conflict of interests should also be taken into consideration when accepting to represent a State Beneficiary in an ISDS proceeding.

#### **D. Draft Provision [7]**

##### ***Draft provision [7] - Financial structure of the Centre***

- 1. A trust fund shall be established to enable the sustainable operation of the Centre (the “Trust Fund”).*
- 2. The Trust Fund shall receive contributions from all the Members taking into account their level of economic development and as decided by the [governing body of the Centre]. [Least developed Countries are exempted from paying a contribution.] It may also receive contributions or donations from public and private organizations and sponsors.*
- 3. The Centre shall charge fees for the legal services in accordance with the schedule of fees set out in Annex on Fees to this Agreement. The fee for State Beneficiaries shall be set taking into account their level of economic development and decided by the [governing body of the Centre]. Least developed Countries are not exempted from paying a fee for [Services], [for Services except those related to information-sharing, training, and capacity building] [for legal representation].*
- 4. The annual budget of the Centre shall be from the resources of the Trust Fund, as well as from the fees it charges for its services in accordance with the rates established by the [governing body].*
- 5. The Centre shall have an external auditor.*

#### **Comments:**

The ACIIL should be established as an independent intergovernmental organization. Thus, any governing body shall act independently from UNCITRAL and any other economic and/or political influence.

In order to ensure the sustainability of the Centre, a multiplicity of financial sources should be considered, including but not limited to one-time membership fee, voluntary contributions from Beneficiaries and private donors, fees for services to be charged to beneficiaries in accordance with their level of economic development.

Both, contributions and fees for services shall take into account States’ level of economic development. However, general exceptions from initial contributions may have a negative impact in the budget of the Centre, particularly at its inception. That being said, Panama is not opposed to exempting least developed countries from certain services such as those related to information-sharing, training and capacity building.

## Comments submitted by the Republic of Korea

The Republic of Korea (“Korea”) sincerely appreciates the United Nations Commission on International Trade Law (UNCITRAL) Secretariat for the preparation of the Draft Provisions on the Advisory Centre (“Centre”). Korea, in line with many delegations, supports the establishment of the Centre focused on the investor-State dispute settlement. Reflecting our response to the survey on the Centre previously conducted by the Secretariat, and to further contribute to the Working Group’s discussion, Korea hereby provides in this submission additional views on the overall framework of the Centre and on each draft provision.

### **A. General comment on the Draft Provisions**

Korea would first like to offer a general observation on the Draft Provisions. Korea recalls from the thirty-eighth session of the Working Group that preparatory work on the establishment of the Centre was discussed to be undertaken to address concerns identified regarding the current ISDS regime, which include the cost of ISDS proceeding, correctness and consistency of decisions, access to justice, and even transparency.<sup>1</sup> In addition, a point was made during the Working Group discussion that the structure of the Centre and the scope of its services should be outlined in light of how the Centre would interact with the ISDS regime and its reform efforts.<sup>2</sup> However, these concerns do not seem to be adequately reflected in the current Draft Provisions. Therefore, Korea is of the view that the Working Group should once again be reminded of the above as we devote our collective efforts into further work on the Draft Provisions.

In addition, a comprehensive review of various issues would be necessary before deciding the specific details of the Centre. Such a review could include consideration of (i) the nature and scope of the services; (ii) the sustainability of and the funding for the services; (iii) the management and operation system; and (iv) the location and structure of the facilities, the level of systemization, and the mandate of the Centre. It would be equally essential to avoid duplicating any of the existing work of related service providers and strive to find the means to use the resources and funding of the Centre as effectively as possible.

### **B. Provision 1: Scope**

Korea understands that draft Provision 1 is aimed at setting forth the purpose of the Centre, the scope of its activities, and relevant principles.<sup>3</sup> Once the scope of services listed in draft Provision 2 is more elaborated, the corresponding phrase in draft Provision 1(a) should be revisited to ensure it reflects the details of the scope of the Centre articulated in the final text.

In line with the Secretariat’s explanation, draft Provision 1(b) sets forth certain principles that the Centre should comply with when carrying out its activities. However, Korea is of the

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<sup>1</sup> Initial draft on the establishment of an advisory centre, para. 4.

<sup>2</sup> *Ibid.*, para. 6.

<sup>3</sup> A/CN.9/1004, para. 7.

view that it may be more appropriate to have some of the aspirational terms in this provision—*e.g.*, sustainable—included in a preamble, if and once created, laying out the general principles applicable to the entire set of provisions as a best endeavors or efforts clause. Further, the meaning of the term “competitive” is not so clear and, as such, the term may be replaced with a different term, such as “feasible” or “practical”.

In addition to the overall structure of draft Provision 1(b), Korea suggests that clarity be added with respect to specific principles as the current text appears to be unclear. To avoid any unnecessary confusion in this respect, Korea invites the Working Group’s further discussion on how to best articulate the text in draft Provision 1(b) as the guiding principles of the Centre.

### **C. Provisions 2 and 3 (Services)**

#### ***a) Provision 2(a): Pre-dispute and dispute avoidance services***

In terms of the establishment of conflict management systems, Korea agrees on the need to have such a system in place, which may include schemes for early dispute prevention and alert procedures for mitigating a dispute or preventing it from escalating into an adversarial proceeding.

With regards to draft Provision 2(a)(ii), Korea supports the idea of having the Centre assist with the establishment or designation of a lead agency which would ensure proper attention to potential disputes, provide adequate responses to problems with foreign investors, and defend the interests of the beneficiary at each stage.<sup>4</sup> Also, Korea agrees that the Centre may act as a platform that collects and shares best practices and information in the area of pre-dispute, dispute, and dispute avoidance services.<sup>5</sup>

#### ***b) Provision 2(b): Mediation and other alternative dispute resolution (ADR) services***

Korea echoes the need to mitigate disputes or prevent disputes from escalating into an official proceeding, such as arbitration. Nevertheless, as previously expressed, entrusting the Centre with ADR services is of less importance to Korea considering the existing several ADR service providers and facilities available for use, the purpose of the establishment of the Centre, and its limited resources. There may be some room for the Centre playing a part, for example, by providing some advice pertaining to ADR in deciding whether a mediation or negotiation would be a proper route for the settlement of a dispute and what steps may be required.

To further elaborate on the Centre’s potential function in relation to ADR, Korea is of the view that the Centre’s advisory service may include, but not limited to, (i) assessment of the strength and weaknesses of a case on a *prima facie* basis; (ii) evaluation of whether an ADR (*i.e.*, mediation) would be a proper recourse worth consideration; and (iii) assistance with the preparation for ADR proceedings.

In addition, Korea views that the Centre may be able to provide representation services and

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<sup>4</sup> Initial draft on the establishment of an advisory centre, para. 13.

<sup>5</sup> *Ibid.*, para. 14.



assistance in mediation proceedings and, should this be the case, that function may be inserted into draft Provision 2(c). Separately, the Centre may also function as a platform for sharing relevant information and experience as described in draft Provision 1(c)(ii) on mediation.

***c) Provision 2(c): Representation and assistance services in ISDS***

When taking into consideration of the absence of assistance services in ISDS defence for under-resourced States under the current regime, Korea is of the view that the Centre should mainly provide representation and assistance services in ISDS. It would be necessary to streamline the process for deciding which service to provide to which beneficiary on what basis.

With respect to the scope of assistance for ISDS defence, considering the likely limit in the Centre's resources, Korea suggests that it be set narrowly. Rather than providing a broad range of primary litigation-related services throughout the entire proceedings, such as serving generally as a legal counsel, the Centre's assistance should focus on providing assistance in organizing the defence and during the proceedings by providing (i) assistance with discrete or time-sensitive issues upon request such as initial legal memos analyzing claims, (ii) quick due diligence on investor claimants, (iii) support with procurement of counsel, or (iv) support with identifying potential adjudicators or experts.

The Centre should be capable of providing assistance in selecting arbitrators, sharing of best practices related to procedural issues, and providing necessary legal services in the early stage of proceedings. Preferably, the Centre may also be tasked with providing legal representation up until the preliminary consultation stage.

When the dispute proceeds to a substantive stage, such as those that require strategy planning, risk assessment, evidence collection, or representation at hearings, the Centre may recommend retraining an outside legal counsel and, possibly, provide any necessary information in the selection of the counsel. Korea's view is that engaging the Centre in full defence may not be practical nor efficient. The main defence work should be conducted and organized by the respondent government and/or its outside legal counsel. The concept of "early coaching" may as well describe the role of the Centre.

Meanwhile, as it may be impossible for the Centre to assist all State beneficiaries in ISDS defence, it may be worth considering establishing an outside support or cooperation network, such as a group of independent attorneys who are able to cooperate with the Centre, modeling after the Advisory Centre on WTO Law ("ACWL").

With regards to draft Provision 2(c)(ii), the clause "The preparation of the defence of investment disputes" technically covers the items in its following clauses and therefore can be omitted. Alternatively, the chapeau may be modified to include the preparation of the defence to ultimately read "Assistance and support in preparing for or organizing the defence, including for:"

***d) Provision 2(d): Legal and policy advisory services***

Legal and policy advisory services regarding international investment law and investment

treaties are already provided by various institutions such as the UNCTAD, the OECD, and the World Bank. Therefore, if the Centre is to perform legal and policy advisory services, the Centre should preferably provide services that are not duplicative of the services provided by other institutions.

Another point for consideration would be whether to restrict the scope of such legal and policy advisory services of the Centre as stipulated in draft Provision 2(d)(i) to avoid overwhelming the Centre with excessive types of services compared to its limited capacity and resources.

***e) Provision 2(e): Capacity building and sharing of best practices***

Korea acknowledges the importance of capacity building of developing countries and least developed countries (“LDCs”) in ISDS defence work. Again, it would be important to avoid duplication of services already provided by existing institutions and instead identify specific services not available yet.

With regards to draft Provision 2(e), Korea finds that the current draft provision sets forth various functions in a single provision. To ensure clarity, Korea suggests that the functions be provided in separate sub-provisions according to their nature: for instance, different sets of services can be listed in relation to capacity building and sharing best practices.

**D. Provision 3: Additional Services**

Korea agrees on the need to preserve some flexibility as to the type of services provided to the beneficiaries. However, as this is also interrelated with the issues of funding and resources of the Centre, it may be useful to draft this provision in an open-ended manner and periodically review and assess the scope of services provided by the Centre starting from some period after the date of its establishment or enforcement.

**E. Provision 4: Beneficiaries of Services and order of priority**

As a general remark, Korea notes that the beneficiaries of each type of services should be identified after the scope of services is determined. At this stage of discussion, Korea suggests the beneficiaries include all States. This will incentivize not only developing countries and LDCs but also developed countries to become a member of the Centre. This may potentially lead to a better financing of the Centre. Also, as stipulated in draft provision 2(e), the Centre is to provide data collection services, as well as a forum for the beneficiaries to have discussions, exchange information, and share best practices, among others, meaning that developed countries can also benefit from the services provided by the Centre, even if they are not prioritized in receiving certain services, *i.e.*, assistance with ISDS defence. To facilitate efficient management and use of resources of the Centre, the Working Group may consider specifying the beneficiaries for certain services or defining the priority of beneficiaries to be provided with a particular service.

With regards to whether small and medium sized enterprises (“SMEs”) should be included in the scope of beneficiaries, Korea is of the view that inclusion of the SMEs is of less priority than that of States, considering (i) the limited resources of the Centre and (ii) the difficulty of

defining SMEs due to the absence of a global benchmark.

In terms of the draft provisions themselves, Korea notes that some provisions refer to “State beneficiaries” (*i.e.*, draft Provision 2.a)), while some other provisions refer to “beneficiaries” (*i.e.*, draft Provision 2.e)). Once the Working Group fixes the scope of beneficiaries or particularizes the beneficiaries for each service of the Centre, the draft provisions should be revised accordingly. The Working Group may otherwise consider having a separate provision delineating the beneficiaries of each service, as currently shown in draft Provision 4. In any cases, Korea is of the view that the beneficiaries of all or parts of the services should be clearly and properly stipulated.

## **F. Possible legal structures and other topics**

### ***a) Possible model(s) for the establishment of the Centre***

The institutional setting of the Centre, especially whether the Centre would be a legally independent international entity or attached to an existing international entity,<sup>6</sup> would depend on how the Working Group interprets the central values of “independence and impartiality of the [C]entre”.<sup>7</sup> When the Working Group reaches a consensus on establishing an independent body, it would be ideal to establish the Centre as an entity similar to the ACWL, a model which would help ensure independence and impartiality of the Centre.

On a separate note, Korea is of the view that the UNCITRAL Regional Centre for Asia and the Pacific (RCAP) may be contemplated as a platform for the establishment of the Centre. The RCAP could be expanded to carry out the function of the Centre, considering its existing physical facilities and the scope of roles.

### ***b) Membership and internal structure***

Membership is an issue that must be discussed along with the issue of funding, but as a starting point, granting membership to all signatory States to the Centre and funders could be considered. If the Centre is to be an independent intergovernmental body, the functions to be fulfilled by the members of the Centre<sup>8</sup> could be modeled after the ACWL, in which the General Assembly consists of representatives of the members of the ACWL and the LDCs entitled to the services of the ACWL and acts as the highest decision-making body. As the General Assembly can independently decide on the specific roles of the members and adopt the necessary rules to regulate potential conflicts of interest, among others,<sup>9</sup> the Centre may be able to function in the same or a similar manner.

### ***c) Location***

In deciding the location of the Centre, the Working Group must first determine whether the Centre should be established as a single Centre that provides centralized services or whether

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<sup>6</sup> Initial draft on the establishment of an advisory centre, para. 61.

<sup>7</sup> A/CN.9/1004, para. 37.

<sup>8</sup> Initial draft on the establishment of an advisory centre, para 66

<sup>9</sup> *Ibid.*, para. 66.

there should be several regional offices located in different parts of the world to provide services tailored to those regions.<sup>10</sup>

There are several pros and cons in both scenarios. If a single Centre is established, consistency could be ensured in the types and quality of its services. Effective management of the database will also be possible. However, it may be difficult to provide services to all beneficiary States due to limited resources, and management of the tasks may become too cumbersome or complex.

On the other hand, if there are several offices located in different regions of the world, it would be possible to provide region- or State-specific services, and the overall management of services would be more efficient compared to having a single Centre. However, there may be inconsistency in the types and quality of their services as the circumstances may vary by the location of each office.

In consideration of the above and the likely limited resources and funding of the Centre, Korea finds that it would be most effective to establish a single Centre and to have a department within the Centre responsible for providing region-specific services to overcome the difficulties described above.

## **G. Funding**

Financing is a crucial aspect in conceptualizing the Centre. Korea finds that financing by members and/or fees charged for services, individually or in combination, would be most practical and effective and, therefore, should be prioritized in further consideration of the establishment of an advisory Centre. Korea is in support of the sliding scale approach<sup>11</sup> which considers each signatory State's level of economic development and the service(s) they use.

In the initial stage, it would be the members that mainly finance the Centre and, as the Centre commences its operation and its experience accumulates, the Centre may then be able to require a service fee of the beneficiaries. Funding of the Centre in the long term should not be limited to a one-time membership fee, and it would be idealistic to have the Centre ultimately operate mainly on its revenue from service charges. It is evident that more services can be provided if a larger budget is available in a sustainable manner. In this regard, multiple sources of funding may be required to achieve the objective of the Centre, *e.g.*, year-round voluntary contributions, private donors, and fees paid by ISDS users. As the funding issue shall be discussed along with membership and overall management structure of the Centre, Korea will proceed to conduct additional review on this issue as the working group's discussion progresses.

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<sup>10</sup> *Ibid.*, paras. 69-70.

<sup>11</sup> *Ibid.*, para. 10.

## Comments submitted by Switzerland

### **I. GENERAL COMMENTS**

Switzerland would like to thank the UNCITRAL Secretariat for its work on the Draft Working Paper on the Establishment of an Advisory Centre and its Addendum. It underlines the main questions to be discussed with respect to the establishment of an Advisory Centre for Working Group III to further advance work on this reform option.

In Switzerland's view, the Draft Working paper and the Addendum provide a very good basis on which to build. Switzerland would like to comment it as follows.

### **II. COMMENTS ON SPECIFIC ISSUES**

#### **1. Purpose of the Centre, Scope**

With respect to the scope of the Advisory Centre it must be taken into account that several issues are interconnected. The scope of the services will depend on the available funds. It would therefore be possible to expand the scope of services gradually taking into account the available funds. The same applies to the determination of beneficiaries. As long as the function of the Advisory Centre is limited to an assistance mechanism for ISDS proceedings, the circle of beneficiaries could be limited to least developed countries (LDCs). Once it becomes a forum for sharing information and experience, the circle of countries could be extended.

We reserve the right to provide additional comments at a later stage regarding the draft provision 1 on scope. Further work on this draft provision will only be possible once the discussion on services and beneficiaries are more advanced.

#### **2. Services**

As regards services to be rendered by an Advisory Centre, Switzerland would like to underline that particular attention should be paid to avoid duplication for services currently available or being developed.

##### ***2.1. Pre-dispute and dispute-avoidance services***

We are of the view that dispute prevention should be covered, notably the setting up of conflict management systems.

Regarding draft provision 2 (a), we would suggest not to include point (iii). In our view the Advisory Centre should focus on helping to develop conflict management systems and not interfere with the management of specific conflicts between foreign investors and host countries at the national level.

## ***2.2. Mediation and other alternative dispute resolution (ADR) services***

As regards draft provision 2 (b), option 2, that is to say advisory services in relation to ADR, seems the most appropriate one.

Taking into consideration the existing structures regarding mediation and ADR, we are of the opinion that the Advisory Centre should not serve as a mediation institution (option 1). As already emphasized, duplications should be avoided wherever possible.

Furthermore the scope of the services is interrelated with the available funding. In this respect we would depend on available funds whether services could be extended to option 3 (representing or assisting States in a mediation procedure) at a later stage.

## ***2.3. Representation and assistance services in ISDS***

The Advisory Centre should provide assistance and support in ISDS defence, including in the early stages of defence. When doing so, the Advisory Centre should work in partnership with the State Beneficiary, e.g. by working together with the State's officials to prepare written statements, etc. This would allow the Advisory Centre to combine its assistance in ISDS with capacity building. In that regard, the Advisory Centre should not provide full representation but rather accompany the country concerned thereby helping to build capacities in view of possible other future proceedings.

In view of the above, we suggest to amend draft provision 2 (c) (i) to reflect this necessary partnership between the Advisory Centre and the State Beneficiary.

## ***2.4. Legal and policy advisory services***

When outlining the contours of an Advisory Centre, we need to ensure that the services provided would not be duplicative of existing resources. In this respect we are of the opinion that the Advisory Centre should not provide policy advisory services in relation with the drafting, review and/or amendment of international investment instruments as other institutions (e.g. UNCTAD) already provide such services.

What could be included in the services provided by the Advisory Centre is the advice regarding assessment of compliance with treaty obligations of measures or contemplated measures.

## ***2.5. Capacity-building and sharing of best practices***

For what concerns sharing of best practices, it appears useful to develop a forum where States could exchange information and develop best practices.

However, whether this could become a task of the Advisory Centre will depend on the available funds. The priority of the Advisory Centre should be the assistance of least developed countries (LDCs) in ISDS proceedings. In any case, capacity-building and training activities

should focus on ISDS and dispute prevention and should not include treaty negotiation. As already mentioned, duplication with the work of other institutions should be avoided.

If the Advisory Centre should also play a role in sharing information and experience, the circle of beneficiaries could be extended to all countries.

## ***2.6. Prioritization of services and flexibility***

Should a provision inspired by draft provision 3 be adopted, this provision should include a link to funding and resourcing issues.

## **3. Beneficiaries**

Regarding draft provision 4, we agree that services outlined in draft provision 2, paragraphs (a) to (d) could be limited to developing and least developed countries, with priority of access to services to LDCs. Regarding draft provision 2 paragraph (e), the provision should be divided into two distinct provisions as access to a forum and/or data collection services could be provided to all States while capacity-building and training activities could be limited to developing and least developed countries, again with priority of access to LDCs.

Furthermore access to the services of the Advisory Centre should not be extended to SMEs, which have access to other types of support, e.g. third-party funding.

## **4. Possible legal structures and other topics**

### ***4.1. Possible models for the establishment of the centre***

If the Advisory Centre is a legally independent intergovernmental body, the main advantage would be to avoid any external influence. However, it would be worth first exploring possible attachment to an existing or currently developed structure in order to benefit from synergies in view of ensuring the financial viability of the Advisory Centre.

### ***4.2. Membership and internal organization***

Membership should be limited to States and regional economic integration organizations and not extended to private donors. Private donors could nevertheless play a role in relation with the financing of the Advisory Centre.

### ***4.3. Virtual centre / Location or locations***

Draft provision 6 seems to be a good basis and could be later adapted depending notably on the discussion on financing.

## **5. Cost and financing**

The financial structure of the Advisory Centre on WTO Law (ACWL), which seems to have allowed the financial sustainability of this institution, should be considered as a model.

The financing of the Advisory Centre could be ensured by contributions by the country members (both developed and developing) and fees could be charged for the services, taking into account the level of development of the State Beneficiary.

As regards Draft provision 6, we suggest to envisage allowing LDCs to be exempted from paying a contribution as foreseen in the bracketed text of paragraph 2. However, LDCs could pay a fee (with lower rates) for services, except those related to training and capacity building.



## Comments submitted by Viet Nam

### **1. Introduction**

Based on the Initial draft on the establishment of an advisory centre published by the Secretariat, Viet Nam would like to provide comments on the options set out in the current draft. Our overall position is that the establishment of an advisory centre would greatly benefit respondent states. However, Viet Nam is still considering many of the issues related to the advisory centre. Therefore, Viet Nam has only provided preliminary comments of a general nature and reserves the right to submit additional comments on the topic.

Viet Nam also takes this opportunity to express its continued support of the ongoing ISDS reform process at Working Group III and thank the Secretariat for their tremendous work on the Initial draft.

### **2. Beneficiaries**

Viet Nam is of the view that the list of beneficiaries should not be extended to small and medium-sized enterprises (SMEs) to avoid conflicts of interest. Furthermore, the development of a general definition of "small and medium-sized enterprises" which must be approved by all member States can be a major obstacle, especially in light of the different economic conditions of the member States. In addition, SMEs have the right to take advantage of financial support from funders, therefore, their exclusion from the list of beneficiaries does not adversely affect their access to justice.

### **3. The scope of services provided by the centre**

Viet Nam believes that the advisory centre should determine the priority of the services provided to ensure the balance of budget and resources. In addition, as noted by the Secretariat in paragraph 59 of the Initial draft, the fact that the advisory centre simultaneously provides substantive guidance in both treaty formulation, interpretation, and legal defence arising from such treaty may create conflicts of interest and hinder the provision of impartial and unbiased services. The prioritization of services should also take into account a number of services that are currently available and provided by a variety of organizations. Taking all these factors into consideration, Viet Nam proposes the high priority for two services: (i) Representation and assistance services in ISDS in Draft provisions 2(c) and (ii) Capacity building and sharing of best practices in Draft provisions 2(e).

With respect to Draft provision 3, Viet Nam expresses concern about the extension to services which are not listed in the Draft. Viet Nam is of the view that the current definitions in Draft provision 2 specify a variety of services clearly. The expansion of services in Draft provision 3 would place an additional burden on other core services of the centre, and may create unnecessary debate on whether such services are "directly related" to the purpose and "in accordance with" the obligations and functions of the centre. In case it is necessary to include Draft provision 3, Viet Nam proposes to supplement the provision 3 with a principle that the centre shall perform other functions outside the scope of provision 2 only if the

resources are balanced, feasible and the performance does not adversely affect the core services of the centre.

#### **4. Membership**

With the view that the beneficiaries of the advisory centre are the States, Viet Nam believes that the centre shall remain open to membership by States and regional economic integration organizations.

## Comments submitted by CCIAG and USCIB

The Corporate Counsel International Arbitration Group (CCIAG)<sup>1</sup> and the United States Council for International Business (USCIB)<sup>2</sup> wholeheartedly support the establishment of an advisory centre for international investment law. We extend our appreciation to the UNCITRAL Secretariat for its considerable efforts drafting this initial text describing the potential scope, function, and financing of an advisory centre. An advisory centre will help address *all three* of the concerns that the working group has identified with respect to investor-state dispute settlement (ISDS):

- *Arbitrators*: An advisory centre could help ensure that all states have access to information to make good decisions on arbitrator selection and are prepared to mount (and defend) challenges to arbitrators.
- *Consistency and predictability*: Better arbitrator selection will lead to better arbitral decision-making. Also, an advisory centre could help states develop consistent positions on the interpretation of their investment agreements, which can lead to more consistent and predictable jurisprudence.
- *Cost and duration*: With a view to saving time and money, an advisory centre could share best practices on organizing the defense of claims, including internal coordination, instructing counsel, retaining expert witnesses, and managing document production.

In addition, an advisory centre will help prevent disputes from arising in the first place. In our experience, some states – particularly least developed states – are hampered by a lack of knowledge, experience, and institutional capacity to prevent disagreements or misunderstandings from developing into full-fledged investment disputes. An advisory centre will help fill the gap. For example, it could provide resources to help state officials understand the obligations that the state has undertaken in investment agreements, as well as create guidelines on dispute prevention. An advisory centre could also help channel some disputes that do arise to alternative dispute resolution, including mediation.

The bulk of an advisory centre's limited resources should go to dispute prevention and mitigation. Further, its services should primarily go to developing and least developed states.

However, an advisory centre should also provide select services to small- and medium-sized enterprises (SMEs), including advice regarding dispute prevention and mitigation, initiating mediation or arbitration, and instructing counsel. The rationale for providing services to SMEs is identical to the rationale for providing services to under-resourced states: to ensure a level playing field and access to justice. Also, providing services to SMEs will likewise help prevent disputes

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<sup>1</sup> The CCIAG is an association of corporate counsel from a broad variety of international companies focused on international arbitration and dispute resolution.

<sup>2</sup> USCIB is an association of international companies, law firms, and business associations from every sector of the economy, dedicated to promoting international trade and investment. As sole U.S. affiliate of the International Chamber of Commerce (ICC), the International Organization of Employers (IOE), and Business at OECD, USCIB presents informed business views and solutions to government leaders and policy makers worldwide.

from arising, including by deterring the filing of frivolous claims. Potential conflicts of interest can be managed, just as they are at law firms that advise both states and investors.

There are some services that an advisory centre should not provide to states or investors: above all, representation in ISDS cases. There are many concerns that states have already raised with respect to party representation, including the significant costs and staffing required, which could overwhelm the institution and prevent it from delivering other valuable services. We defer to states to weigh these resources questions.

We would focus on a single issue with respect to party representation: fairness. An advisory centre will be funded by government budgets, relying on taxpayer dollars. It is unfair for taxpaying investors to be required to subsidize the defense of their own claims. In our view, an advisory centre should remain neutral with respect to specific investment disputes. States, like investors, can obtain third-party funding to defray representation costs. Further, many law firms are eager to provide pro bono or heavily discounted representation to under-resourced states.

An advisory centre would be a historic achievement – a major structural reform – that would improve the system for the resolution of investment disputes for both states and investors. Thank you for the opportunity to comment on this initial draft text. We look forward to observing further discussions in the working group and exchanging views with states regarding this important initiative.



## Comments submitted by UNCTAD

1. This note responds to the call for comments on the *“Initial draft on the establishment of an advisory centre”*, contained in Document A/CN.9/WG.III/WP. The initial draft was prepared by the UNCITRAL Secretariat to facilitate the formal and intersessional discussions of Working Group III on Investor-State Dispute Settlement Reform. UNCTAD limits its comments to Section II.C of this document (paragraphs 10-47), dealing with the services to be provided by the proposed Advisory Centre. UNCTAD’s comments thereby respond to the need to gather information on existing services as voiced by delegations during earlier sessions of WGIII. The aim of providing this information is to allow the proposed Advisory Centre to effectively use its limited resources “to avoid overlaps and to address possible gaps.”<sup>1</sup>

2. Below, UNCTAD outlines its mandate with respect to the international investment regime and offers a brief description of its activities in this area. Subsequently, the document sets out UNCTAD’s understanding of the draft services that would be offered by the proposed Advisory Centre and how these relate to UNCTAD’s existing activities with a view to avoid overlaps and enhance synergies.

### **UNCTAD’s mandate and work related to the IIA regime:**

3. UNCTAD is the United Nation’s focal point for all matters related to International Investment Agreements (IIAs) and their development implications.

4. This mandate derives from the Accra Accord,<sup>2</sup> the Doha Mandate,<sup>3</sup> and the Nairobi Maafikiano, which reiterated the call for UNCTAD to continue its existing IIA work programme and to continue promoting a better understanding of issues related to IIAs and their development dimension.<sup>4</sup> In addition, the Addis Ababa Action Agenda calls on UNCTAD to continue its existing programme of meetings and consultations with member States on investment agreements.<sup>5</sup>

5. UNCTAD’s work is based on three pillars of activities: research and policy analysis, international consensus building, and technical assistance and advisory services. Its work

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<sup>1</sup> UNCITRAL, A\_CN.9\_1004, para 42.

<sup>2</sup> UNCTAD, Accra Accord, UNCTAD 12<sup>th</sup> Session, Ghana 20–25 April 2008, para 151.

<sup>3</sup> UNCTAD, Doha Mandate, UNCTAD 13<sup>th</sup> Session, , UNCTAD/ISS/2012/1, para 65(k).

<sup>4</sup> UNCTAD, Nairobi Maafikiano: From decision to action: Moving towards an inclusive and equitable global economic environment for trade and development, UNCTAD 14<sup>th</sup> Session, TD/519/Add.2, paras 38(l) and 55(hh) respectively.

<sup>5</sup> UN, Addis Ababa Action Agenda, 13–16 July 2015, para 91.

covers the general dissemination of information and best practices as well as country and region-specific, tailor-made technical assistance and policy advice with a focus on sustainable development. Specifically, UNCTAD provides the following services relating to the international investment regime:

- a. Policy advice and analysis of IIAs, including country-specific reviews of IIA networks and policy proposals for IIA reform, assistance in the development and reform of model BITs and inputs for the development of regional IIAs.
- b. Technical assistance and capacity building on investment policy making, including with regards to IIA obligations, IIA negotiations and IIA reform; the domestic implementation of IIAs, including with respect to dispute prevention policies and alternative dispute resolution.
- c. Provision of broad strategic orientation on developments in other fora such as the WTO Investment Facilitation negotiations, ISDS reform and regional investment policy developments (e.g., on the AfCFTA Investment Protocol).
- d. Intergovernmental consensus building, sharing of best practices, policy dialogue and knowledge sharing, including through its World Investment Forum, the Investment, Enterprise and Development Commission, and the annual IIA Conferences.
- e. The development of non-binding Guiding Principles for investment policymaking in cooperation with regional organizations (e.g., G20; D-8; ACP; OIC).
- f. Maintenance of comprehensive, user friendly and free-of-charge databases on IIAs, ISDS decisions, investment laws, and investment policy measures.

6. Through its work, UNCTAD has been at the forefront of efforts to reform the international investment regime and has provided backstopping to this process. UNCTAD's activities are provided with decades of experience and under the umbrella of the [Investment Policy Framework for Sustainable Development](#) (first launched in 2012 and updated in 2015), the [Reform Package for the International Investment Regime](#) (2018), and the recently launched [International Investment Agreements Reform Accelerator](#) (2020). UNCTAD provides its services in a universal and inclusive manner with a deep understanding of developing countries' IIA needs and concerns.

7. To date, over 75 countries and REIOs have benefited from UNCTAD's IIA reviews. In addition, UNCTAD has conducted [Investment Policy Reviews](#) for over 55 of its Members with a chapter dedicated to providing recommendations on the legal and policy framework of each country (figure 1). UNCTAD has also trained over 1,000 Government officials dealing with IIAs and ISDS through face-to-face and virtual workshops and conferences.

**Figure 1. Technical assistance provided by UNCTAD on IIAs at a glance (2012-2019)**



Source: UNCTAD, World Investment Report 2019.

### **The draft list of services provided by the proposed Advisory Centre:**

8. UNCTAD notes the desire to avoid that the proposed Advisory Centre duplicates existing services on international investment law, as expressed by UNCITRAL as well as the Members of WGIII.<sup>6</sup> It further notes the earlier preliminary outline of services provided by the UNCITRAL Secretariat and discussed by States during the 38<sup>th</sup> Session of WGIII.<sup>7</sup> UNCTAD welcomes the current work towards the concretization of services provided by the proposed Advisory Centre.

9. Some of the proposed services could complement UNCTAD's IIA-related activities listed in paragraph 5 above. UNCTAD does not provide technical legal advice on concrete (or emerging) disputes and specific proposed or actual measures by governments. UNCTAD's technical assistance does not relate to the avoidance of disputes with respect to particular government measures and UNCTAD does not provide legal opinions on specific measures and their compatibility with IIAs. Assistance in this respect is limited to general analysis, policy advice and technical assistance. Hence, UNCTAD sees no duplication in the proposed Advisory Centre undertaking representation of States in disputes and providing defence services. UNCTAD also does not provide assistance on specific and ongoing treaty negotiations between two governments.

10. *Draft provisions 2(a)* provides that the Centre shall assist States to “(i) Set up conflict management systems, including early dispute prevention policies and alert procedures; (ii) Establish a lead agency responsible for centralizing ISDS matters and protecting the interests of the State Beneficiaries; and (iii) Address specific questions in the management of disputes with foreign investors.”<sup>8</sup> Based on long-standing recommendations contained *inter alia* in the Investment Policy Framework for Sustainable Development and the Reform Package for the

<sup>6</sup> A\_CN.9\_1004, para 34; UNCITRAL, A/CN.9/WG.III/WP, para 42.

<sup>7</sup> WP.168\_E, paras 7-24; \_CN.9\_1004.

<sup>8</sup> UNCITRAL, A/CN.9/WG.III/WP, para 11.

International Investment Regime,<sup>9</sup> UNCTAD has been advocating the establishment of dispute prevention mechanisms and focused dispute management systems. UNCTAD offers advisory services and dedicated technical assistance on the implementation of these recommendations through, among others, country-specific Investment Policy Reviews, IIA reviews and training sessions for government officials on the implementation of IIAs, including with respect to dispute avoidance. Subparagraph (iii), relating to “*specific questions concerning the management of disputes*”, presumably, focusses on actual instances of (emerging) disputes. This could usefully supplement the services named under subparagraphs (i) and (ii) that UNCTAD already provides.

11. The explanatory comment to draft provision 2(a) notes the overlap with existing services in this area.<sup>10</sup> UNCTAD welcomes the recommendation that the Advisory Centre could “*act as a platform for sharing best practices and information*” instead of duplicating existing services and to use resources more efficiently.<sup>11</sup> Draft provision 2(a) could be limited to providing pre-dispute and dispute avoidance services with respect to actual (and emerging) disputes, as currently provided under subparagraph (iii), and otherwise to act as a platform for directing States to existing resources for established dispute prevention mechanisms.

12. *Draft provision 2(b)* appears relatively undefined and offers three different options for alternative dispute resolution services: (1) to act as a mediation centre; (2) to advise States in relation to ADR proceedings; and (3) to represent or assist States in ADR proceedings.<sup>12</sup> On the basis of the explanatory comment accompanying this provision, it appears all three options would directly be related to existing disputes. Any such assistance would complement the services provided by UNCTAD, including its policy advice and technical assistance on the inclusion of ADR provisions in IIAs.<sup>13</sup>

13. *Draft provision 2(c)* relates to actual disputes.<sup>14</sup> Given the comments by States in discussing the proposed Advisory Centre as well as the Columbia Center on Sustainable Investment (CCSI) scoping study and the Academic Forum on ISDS Concept Paper,<sup>15</sup> this provision would respond to an actual gap in the furnishing of services. As the proposed services relate to concrete disputes, they would complement existing assistance provided by UNCTAD, including general assistance and advice on ISDS outside of concrete arbitral proceedings.

14. *Draft provision 2(d)* provides for legal and policy advice on international investment law, including (i) the review and amendment of international investment instruments and (ii) the assessment of compliance with treaty obligations of measures or contemplated

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<sup>9</sup> IPFSD and Reform Package.

<sup>10</sup> UNCITRAL, A/CN.9/WG.III/WP, para 14.

<sup>11</sup> UNCITRAL, A/CN.9/WG.III/WP, para 14.

<sup>12</sup> UNCITRAL, A/CN.9/WG.III/WP, para 15.

<sup>13</sup> On basis of the Investment Policy Framework for Sustainable Development and the Reform Package for the International Investment Regime, UNCTAD advises countries on incorporating ADR mechanisms in their IIA reform efforts, for example, in its country-specific IIA reviews.

<sup>14</sup> UNCITRAL, A/CN.9/WG.III/WP, para 21.

<sup>15</sup> CCSI scoping study; K. Sauvart, ‘An Advisory Centre on International Investment Law: Key Features’ Academic Forum on ISDS Concept paper 2019/14, 10 September 2019.



measure.<sup>16</sup> In its current wording, subparagraph (i) duplicates existing services provided by UNCTAD and other international organizations. UNCTAD furnishes country and region-specific policy advice, including the sharing of best practices, on treaty drafting, IIA reform, and the development of model IIAs. This is done on the basis of, for example, its Investment Policy Framework for Sustainable Development and the recently launched IIA Reform Accelerator. This general policy advice is supplemented by country-specific support and technical assistance conducted in over 45 comprehensive IIA reviews conducted since 2012 as well as over 100 seminars for treaty negotiators and follow-up support. Moreover, UNCTAD regularly provides country-specific advice by reviewing model BITs, advising countries on the reform of their model BITs, and offering support in the development of model BITs. UNCTAD's technical assistance is complemented by its inclusive intergovernmental consensus-building meetings on IIAs bringing together developed and developing countries as well as the private sector, civil society and academia. Subparagraph (ii) proposes the preparation of legal opinions on (contemplated) measures and their compliance with treaty obligations. The two subparagraphs of draft provision 2(d) appear to entail different types of services, with subparagraph (i) duplicating UNCTAD's services and subparagraph (ii) usefully complementing the policy advice provided by UNCTAD.

15. *Draft provision 2(e)* concerns data collecting services and proposes for the Advisory Centre to act as a forum for matters relating to international investment law and capacity building activities. UNCTAD already maintains comprehensive databases on IIAs, ISDS and national investment laws that are up-to-date, user-friendly and free-of-charge. Data collection initiatives should therefore avoid duplication with these existing databases. The explanatory comment provides for trainee and secondment positions,<sup>17</sup> which would usefully complement existing services. Further, the explanatory comment again notes the role the proposed Advisory Centre could play in compiling, organizing and disseminating information relating to existing services rather than duplicating those offered by other institutions,<sup>18</sup> including UNCTAD. This role in directing the Advisory Centre's beneficiaries to existing services is welcomed by UNCTAD.

#### **Final remarks:**

16. The current draft provisions for the potential services of the Centre propose a mix of technical legal assistance and policy advice across draft Articles 2(a) to (e). UNCTAD provides country and region-specific policy and legal advice on all aspects of investment policy making, including its national and international dimensions. Many of the draft provisions covering policy advice, therefore, directly duplicate existing services, technical assistance, sharing of best practices and exchange of experiences offered by UNCTAD. In light of the Advisory Centre's limited resources, which will "inevitably define or limit the scope of services that could be provided",<sup>19</sup> it appears desirable to exclude existing services from the draft provisions and focus on those areas of services where the proposed Advisory Centre could fill a gap.

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<sup>16</sup> UNCITRAL, A/CN.9/WG.III/WP, para 34.

<sup>17</sup> UNCITRAL, A/CN.9/WG.III/WP, para 39.

<sup>18</sup> UNCITRAL, A/CN.9/WG.III/WP, para 40.

<sup>19</sup> A\_CN.9\_1004, para 32.

17. There appears to be a consensus that the proposed Advisory Centre would be modelled, in one form or another, after the ACWL. The CCSI scoping study finds that interviewees discussing the ACWL routinely noted that “key to its success is its focus on legal, and not policy, input.”<sup>20</sup> A clear focus on technical legal input as opposed to policy advice may also be desirable in light of the different expertise necessary to engage in such varying services, as noted by UNCITRAL on multiple occasions.<sup>21</sup> Equally, the Academic Forum on ISDS concept paper notes the offer of existing services, among others, provided by UNCTAD, and concludes that the Centre should focus on dispute-related services.<sup>22</sup>

18. Given the need to avoid the duplication of work,<sup>23</sup> consideration could be given for the Advisory Centre’s resources to be spent on value addition rather than replicating existing services. The services offered by the proposed Advisory Centre should complement the activities of UNCTAD and other institutions. The Centre could further act as a platform to disseminate information on existing services. This concrete focus on the representation of States in disputes and providing defense services could be directly reflected in draft provisions 2(a) to (e). The proposed Advisory Centre would thereby make a valuable contribution in enhancing the ability of States to benefit from and meet their obligations under IIAs.

19. UNCTAD stands ready to provide further information and/or clarification to delegates on any of the matters raised in this note.

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<sup>20</sup> CCSI scoping study, p. 87.

<sup>21</sup> UNCITRAL, WP.168\_E, para 20; UNCITRAL, A/CN.9/WG.III/WP, para 36.

<sup>22</sup> K. Sauvant, ‘An Advisory Centre on International Investment Law: Key Features’ Academic Forum on ISDS Concept paper 2019/14, 10 September 2019, p. 9.

<sup>23</sup> UNCITRAL, A/CN.9/WG.III/WP, para 42.