|  |  |  |
| --- | --- | --- |
| United Nations Commission on  International Trade Law  Working Group III (Investor-State Dispute Settlement Reform)  [xx] session  [Place, date] |  |  |
|  |  |  |

Possible reform of investor-State dispute settlement (ISDS)

Advisory Centre

Note by the Secretariat

Contents

[I. Introduction](#_Toc63421427)

[II. Establishment of an advisory centre](#_Toc63421428)

[A. Background information](#_Toc63421429)

B. Purpose of the centre…………………………………………………………………………………………...

[C. Services](#_Toc63421431)

[D. Beneficiaries](#_Toc63421432)

[E. Possible legal structures and other topics](#_Toc63421430)

I. Introduction

* + 1. At its thirty-fourth to thirty-seventh sessions, the Working Group undertook work on the possible reform of ISDS, based on the mandate given to it by the Commission at its fiftieth session, in 2017.[[1]](#footnote-2) At those sessions, the Working Group identified and discussed concerns regarding ISDS and considered that reform was desirable in light of the identified concerns. [[2]](#footnote-3)
    2. At its thirty-eighth session, the Working Group expressed general support for considering further the establishment of an advisory centre and requested the Secretariat to undertake further preparatory work ([A/CN.9/1004](about:blank), paras. 28 and 40-49). In addition, at its thirty-ninth session, while discussing other reform options, the Working Group provided further instructions relevant to such preparatory work (A/CN.9/1044, paras. 26, 39).
    3. Accordingly, this Note, including its addendum, aims at assisting the Working Group in the consideration of the establishment of an advisory centre on international investment law (“advisory centre” or “centre”). This document covers the structure of an advisory centre, the possible services and beneficiaries, and the addendum covers questions regarding cost and financing. Annexes contain summary tables on services and potential beneficiaries as well as a draft budget. As is the case for other documents provided to the Working Group, this Note was prepared with reference to a broad range of published information on the topic,[[3]](#footnote-4) and does not seek to express a view on the possible reform options, which is a matter for the Working Group to consider.

II. Establishment of an advisory centre

1. Background information
   * 1. At its thirty-eighth session, the Working Group expressed general support for undertaking preparatory work on the establishment of an advisory centre, which would address concerns identified, including with respect to the cost of ISDS proceeding, correctness and consistency of decisions as well as access to justice. It was also mentioned that an advisory centre could contribute to enhancing transparency in ISDS (A/CN.9/1004, para. 28).
     2. The Working Group provided guidance on how the preparatory work should be conducted ([A/CN.9/1004](about:blank), paras. 40-49) and requested the Secretariat to prepare draft provisions ([A/CN.9/1004](about:blank), para. 41). It was suggested that the Advisory Centre on WTO Law (“ACWL”) could provide a useful model as it was created to assist developing and least developed countries (LDCs) with the “legal capacity and to help them to understand fully their rights and obligations under WTO law”. Further, it is the only mechanism that provides a significant level of direct legal services in-house, by its own ACWL lawyers, including assistance in WTO dispute proceedings, legal advice on issues of WTO law, and training.
     3. It was pointed out in the Working Group that the structure of the advisory centre and the scope of its services should be considered in light of how the centre would interact with the ISDS regime and its reform efforts (A/CN.9/1004, para 37).

**B**. **Purpose of the Centre**

* + 1. The Working Group may wish to consider draft provision 1 on the purpose of the centre, its scope of activities and relevant principles, as follows:

***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***

* + 1. Draft provision 1(a) serves to define in a generic manner the services as well as the beneficiaries of the Centre, indicating that the focus of its activities relate to international investment law and ISDS. Draft provision 1(b) serves to define overarching principles as identified by the Working Group that the advisory centre should remain independent, impartial, non-political (A/CN.9/1004, para. 48), as well as reliable and sustainable (A/CN.9/1004, para. 47). Draft provision 1(c) suggests a possible internal structure with two pillars underlying that services would be rendered through an assistance mechanism, and that the centre would also serve as a forum, which activities could be further delineated.
    2. It may be noted that a number of interconnected issues follow from the principles identified in draft provision 1(b), such as (i) the nature and breadth of services offered, including the determination of beneficiaries to whom those services might be offered, all matters closely linked to the concerns that an advisory centre would address, and its objectives; (ii) the sustainability and funding of the services; (iii) the governance and institutional scheme of the centre; and (iv) the location, or locations, of an advisory centre, which would depend on a range of factors, including the form that such mechanism would take and the level of institutionalization, its mandate and roles, the identity and preferences of its beneficiaries and donors, its legal needs, and its budget.[[4]](#footnote-5) Furthermore, a key question concerns the means to establish independent governance mechanisms in light of the perceived or actual conflicts of interests that can arise in the relationships among beneficiaries, donors, support providers, governments, private- and government-owned investors and investments, and other stakeholders.

**C. Services**

* + 1. 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.

**1. Pre-dispute and dispute avoidance services**

* + 1. The Working Group may wish to consider draft provision 2(a) regarding pre-dispute and dispute avoidance services.

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

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

1. *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].*

***Comments***

* + 1. At its thirty-ninth session, the Working Group indicated that one focus of reform would be on the pre-dispute phase, so as to avoid that a dispute escalates into an adversarial proceeding. It was underlined that dispute prevention and mitigation measures contributed to create a stable and predictable climate for investment and played a significant role in both attracting and retaining investment (A/CN.9/1044, para 170).
    2. Draft provision 2(a) above provides that pre-dispute and dispute avoidance services could be geared towards assistance to State beneficiaries for (a) the set-up of conflict management systems, including early dispute prevention policies and alert procedures; (b) the establishment of a lead agency that 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; and (c) the management of conflicts between foreign investors and host country governments at the national level so that, if and when a conflict arises, this does not lead to international disputes but it is resolved locally.
    3. Addressing these issues would be important[[5]](#footnote-6), but also taking into account that duplication of the work with other organizations and individual service providers should be avoided when constructing the objectives and functions of the centre. [[6]](#footnote-7) In that light, as provided for draft provision 1(c)(ii), in addition to offering services covered under draft provision 2(a), the advisory centre might act as a platform for sharing best practices and information in this area, with the objective to also avoid overlaps.

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

* + 1. The Working Group may wish to consider draft provision 2(b), which is based on the understanding that disputes could be avoided or settled through negotiation or mediation, where parties to ISDS may benefit from advice and ADR services before the disputes escalate into formal proceedings such as arbitration. It contains three options.

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

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

1. *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***

* + 1. The Working Group may wish to consider whether an advisory centre might be established as a facility to offer alternative dispute resolution (ADR) services and support early settlement of disputes, in particular during the cooling-off period, which is foreseen in a majority of investment treaties. In addition, an advisory centre might play an important role with regards to risk assessment (A/CN.9/1004, para. 44), which could include an analysis of the case, its weaknesses and strengths, the choice of the appropriate dispute resolution method (and whether, for instance, it might be particularly suitable for mediation, and what might be the impediments related thereto), and an evaluation of the necessary resources to defend the case.
    2. In option 1, the centre would perform functions of a mediation institution by administering and facilitating mediation. Such services are however already partly and regionally available or are currently being developed. For example, in the area of energy disputes within the European Union and candidate States, the Energy Community Secretariat's Dispute Resolution and Negotiation Centre foresees such type of services. Likewise, the newly drafted ICSID mediation rules are open to any States, without the pre-requisite of being a Party to the ICSID Convention.
    3. In option 2, the centre would provide advisory services to the beneficiaries. Such services would include an assessment of the strengths and weaknesses of a case on a prima facie basis, and identification of the strategy and course of action to adopt, such as whether mediation might be an option and how to properly prepare for the mediation procedure, including counselling the beneficiary during the mediation.
    4. In option 3, the centre would represent and assist the State in mediation. Such option, if retained, could be also merged under draft provision 2(c) below.
    5. In addition to those services, the centre might also act as a platform for exchange of experience and expertise in that field, as provided for under draft provision 1(c)(ii).

**3. Representation and assistance services in ISDS**

* + 1. The Working Group may wish to consider the following draft provision 2(c) regarding the services of representation and assistance in ISDS defence.

***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***

* + - *General remarks*
    1. Assistance and support in ISDS defence aim at assisting State beneficiaries to avoid or minimize liability and/or reduce the defence costs and could potentially increase the legitimacy of the ISDS regime by establishing a level playing. While it was noted that assistance and support in the initial stages of organizing the defence might impose a significant burden on the advisory centre, it was highlighted that such service might be necessary, particularly for LDCs and, for example, in expedited or emergency proceedings (A/CN.9/1004, para. 45). Indeed, when it comes to international arbitration proceedings, there are currently no existing services available to support under-resourced respondent governments that do not have the human and financial resources to defend themselves adequately.
    2. The centre could provide the services in close cooperation with government officials so as to ensure that the line of defence is compatible with the State’s overall approach to, and interpretation of, its investment commitments, (such as treaties, contracts or legislation) as well as to establish credibility before the ISDS tribunal through high-quality legal services (A/CN.9/WG.III/WP.168, para 18).
    - *Representation services*
    1. States have traditionally adopted three different approaches to the defence of their interests in ISDS cases. Some States organize their defence through a dedicated in-house team. Other States use a combination of an in-house team working in various degrees of cooperation with outside counsel. The vast majority of States outsource their defence to outside counsel (see document A/CN.9/WG.III/WP.168, paras. 8 and 9).
    2. Recognizing these different approaches, the Working Group may wish to consider three possible “service models”: (i) facilitating; (ii) supporting; and (iii) representing.
    3. States that primarily rely on in-house or external counsel may wish to avail of facilitation services from an advisory centre. Such services might include advice on specific disputes, such as litigation risks or mitigation measures; advice on dispute resolution options, such as negotiation, settlement, mediation, or arbitration; or strategic arbitration advice, such as arbitrator and counsel selection, available defences, or possible counterclaims. Draft provision 2(c)(ii) detailed below seeks to address such needs
    4. Other States, for reasons of cost-savings, control, or otherwise, may wish to complement their use of in-house or external counsel with support services from an advisory centre. Such States may desire advice on some or all aspects of the dispute-resolution process. Support services may be particularly useful for States seeking to establish or build upon existing in-house capacity. Still other States, particularly less developed States that lack in-house capacity or adequate funds for experienced outside counsel, or where the occurrence of disputes is rare, may require full representation services from an advisory centre. Such States may wish for an advisory centre to play a lead role in assisting them with the dispute-resolution process, and the needs of these two categories of States are addressed in draft provision 2(c)(i), which provides that the advisory centre would take an active part in the defence of State Beneficiaries.
    - *Assistance and support during ISDS proceedings*
    1. The Working Group may wish to note draft provision 2(c)(ii) covers the following services that could be rendered in connection with assistance in organizing the defence: (i) assistance to States for the preparation of the defence of investment disputes, including assessment of the strengths and weaknesses of a case on a prima facie basis; (ii) early assessment of the risks associated with a given claim, so as to permit identification of the strategy and course of action to adopt (this may include, for instance, consideration of whether other dispute resolution mechanisms, such as mediation, might be an option); (iii) determination of the financial implications and earmarking of a budget for the defence of a case; and (iv) assistance in the overall organization for dealing with ISDS. In relation to this last point, the Working Group may wish to note that States need adequate time to respond to claims, as they have to prepare their defence properly (A/CN.9/930/Rev.1, para. 50). For instance, States have to assemble factual information for each case and coordinate among various ministries and agencies. If an advisory centre were to provide assistance in relation to the organization of the defence, the beneficiaries of such services might be better prepared to handle investors’ claims, organize their defence strategy, and coordinate more efficiently. The Working Group may wish to consider whether and how this would have a positive impact on the duration and thereby the cost of ISDS, as lengthy proceedings are likely to result in higher cost (A/CN.9/930/Rev.1, para. 38).
    2. The Working Group may wish to consider whether an advisory centre may assist in risk management, by promoting standard operating procedures for handling notices, proper authorities for representing the State effectively, appropriate coordination within and outside the government, and the ability to properly evaluate and instruct outside counsel. Representation of respondent States implies three essential tasks that are usually either completely or partially outsourced by the respondent State and which include the followings steps.
    3. The first step is related to the selection and appointment of arbitrators/adjudicators to establish the arbitral tribunal. This requires technical expertise, means and resources to research their profiles. In that respect, possible services for an advisory centre may include the following: (i) establishment of a comprehensive database of potential arbitrators/adjudicators with complete and up-to-date profiles available to respondent States; (ii) promotion of exchange of experience and expertise regarding the evaluation of arbitrator services; advice and support in the case of arbitrator challenge; and (iii) assistance regarding procurement of counsel and identification of experts.
    4. The second step relates to written statements, documentary evidence and procedural hearing. During the ISDS proceedings, the parties usually submit a wide range of documents, such as written statements, witness statements, expert reports and documentary evidence. Written statements include the statement of defence, any second round of rebuttal submissions and other submissions that the parties and the arbitral tribunal may consider necessary. Technical expertise is required not only on the substantive law issues, but also on the procedural conduct of ISDS to ensure an effective and adequate defence. An advisory centre could therefore provide briefing services or cooperate with the in-house defence team or outside counsel to ensure high quality in the documents filed by the respondent State.
    5. The third step relates to the representation at hearings. Hearings for the presentation of evidence by witnesses and experts and/or for oral argument are an important phase in ISDS procedures. Availability of high-quality legal services to handle hearings, building on expertise and leveraging the number of cases the advisory centre would take up, could make it a cost-effective and competitive solution. Throughout the process, representatives of the respondent State could be included in the advisory centre’s team. This practice would help to ensure the seamless preparation and the approval of the arguments and the strategy by the State; manage consistency across cases and, hence, improve the quality of State’s defence in ISDS cases; and build capacity within the State for more effective representation in future cases.

**4. Legal and policy advisory services**

* + 1. The Working Group may wish to consider draft provision 2(d), which covers legal and policy advisory services on matters relating to international investment law.

***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***

* + 1. It may be noted that the following range of advisory services are covered under draft provision 2(d): (i) assistance to States for the review of, and potential amendment to, their international investment instruments; and (ii) legal advice on whether a measure or contemplated measure would violate treaty obligations (which might require considering whether early legal advice by an advisory centre would carry any formal significance).
    2. Many States could benefit from expert advice on international investment law and policy. It may be noted that the expertise necessary to engage in these advisory services may differ (in some cases significantly) from that required for defence services. In that respect, close interaction between defence counsels, treaty negotiators and implementing agencies/authorities is important for a number of reasons and an advisory centre may help to facilitate that interaction. As provided for under draft provision 1(c)(ii), the centre could serve as a convening platform for future monitoring and discussions for all stakeholders. At its thirty-ninth session, the Working Group also underlined that an advisory centre could constitute a means to implement some of the reform suggestions such as on treaty interpretation (A/CN.9/1044, para. 98).

**5. Capacity building and sharing of best practices**

* + 1. The Working Group may wish to consider the following draft provision 2(e) which includes suggestions regarding (i) training of government officials, including in treaty negotiation and the interpretation of investment obligations; (ii) knowledge sharing mechanisms; (iii) data collections and functions as a centralized repository of information; and (iv) additional services that a centre may provide, through appropriate means (A/CN.9/1004, paras. 44 and 49). The Working Group may wish to consider whether this provision could be merged with draft provision 1(c)(ii).

**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***

* + 1. Regarding capacity-building, it was emphasized in the Working Group that there is a deficit over capacity to organize and engage on the part of developing and least-developed States, particularly with respect to financial and human resources. Therefore, it is often considered that capacity-building should aim at increasing the capabilities of the beneficiaries over time, rather than making them dependent on the services. In this regard, the development of secondment programs with States could also play a role.
    2. In this regard, it is proposed that the centre could provide training services or “capacity building” platform and activities to States representatives and government officials. These services could be implemented through training programmes, offering trainee and secondment positions to allow first-hand experience on ISDS cases and by providing information on ISDS, including managing a database of cases. This would allow State representatives to be engaged with information on ISDS and be fully informed on the full range of investment issues, increasing their awareness on potential investment claims, and this would enhance their readiness to respond to such claims.
    3. Additionally, the Working Group may wish to note the existing resources available to help States with investment-related issues. The centre could also play a role in compiling, organizing and disseminating existing resources to relevant State officials as a way to coordinate the sharing of best practices and information (A/CN.9/WG.III/WP.168, para 24), also regarding best practices for States on dispute prevention and mitigation (A/CN.9/1044, para. 26), as information and resources are often dispersed across multiple institutions.
    4. Such services include the promotion of exchange of experience and expertise regarding the evaluation of arbitrator services as well as establishment of a comprehensive database of potential arbitrators, mediators as well as experts with complete and up-to-date profiles available to respondent States. Support could also be directed to access to database and research tools, developing of specialized online courses and user-driven capacity building workshops and peer exchanges.

**6. Prioritization of services and flexibility**

* + 1. The Working Group may wish to note that draft provision 3 below reflects the view expressed in the Working Group at its thirty-eighth session that a flexible approach should be taken with regard to the services to be provided and that the advisory centre should be able to adjust its services to the requests it received (A/CN.9/1004, para. 46). The Working Group may wish to consider whether this, however, might create some tensions regarding staffing and budget.

***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.*

**7*.* Avoidance of duplication of services**

* + 1. The Working Group noted that duplication of the work with other organizations should be avoided when constructing the objectives and functions of the centre. It requested that information about services currently provided by States, regional and international organizations should be gathered with a view to identify possible services to be provided by the advisory centre. Efforts should be made to avoid overlaps and to address possible gaps (A/CN.9/1004, para. 42).
    2. In that light, the Working Group may wish to note the information contained in a Submission regarding a scoping study.[[7]](#footnote-8) The study notes that there is already a wealth of resources available to States with investment-law related issues. Services that are currently available include services that operate on the “clearing house model”, facilitating legal relationships between private practitioners and government clients, by providing supports in engaging with outside counsels, on top of other services ranging from negotiations, litigation support, capacity building and knowledge management (for instance, the African Legal Support Facility (ALSF)).[[8]](#footnote-9) There are also some forms of legal support that may be limited or have a different focus provided by organizations (for instance, International Development Law Organization (IDLO) [[9]](#footnote-10) and the Association TradeLab),[[10]](#footnote-11) also taking the form of hosting events and training on arbitration-related issues (for instance, by the International Centre on Settlement of Investment Disputes (ICSID) and the Permanent Court of Arbitration (PCA)),[[11]](#footnote-12) of financial assistance to qualifying States through trust funds (for instance, by the PCA and the International Court of Justice (ICJ)),[[12]](#footnote-13) and of establishing intergovernmental knowledge-sharing and capacity building hubs (for instance, by the Center for the Advancement of the Rule of Law in the Americas (CAROLA) and the African Legal Support Facility (ALSF)).[[13]](#footnote-14)
    3. The study illustrates that full legal representation services, which could be an essential support for the beneficiaries are not available. Further, there is no mention of the availability of programs which could allow government officials to undertake hands-on experience through a training focused on defense of the State, as organized by UNCTAD two decades ago. Finally, a platform or a body that could assist with compiling, organizing, and disseminating information about existing resources to relevant government officials seems not to be available and hence, may also provide a great value to the existing models.
    4. The Working Group may wish to note that the Institute for Transnational Arbitration (ITA) has also conducted a study to map the services offered by non-governmental organizations.[[14]](#footnote-15) The study identifies how the existing and future services could be integrated in an advisory centre. The ITA study shows that the existing services comprise mainly capacity building and dispute prevention services. Organizations that participated in the study indicated their readiness to provide services in the frame of an ISDS advisory centre, including capacity building, as well as assistance at various stages of ISDS proceedings.
    5. The findings of the two studies demonstrate that services relating to the full legal representation of States involved in ongoing ISDS cases is currently not offered. In addition, there is currently no focal point for collecting, organising, compiling, and disseminating information on available support.

**D. Beneficiaries**

* + 1. The Working Group may wish to consider draft provisions 1(a) above and 4 below on beneficiaries and their access to the services. The list of possible beneficiaries include (i) all respondent States; or (ii) all or some developing countries and LDCs or only LDCs; as well as on an ad hoc basis (iii) States with little experience in the field and States that face difficulties (for instance, situations where States have very limited financial capacities, or are in situation of political turmoil); and may be extended to (iv) SMEs fulfilling certain requirements (such as having a legitimate claim with certain chances of success and being unable to financially afford the legal claim, having regard to size, origin and other relevant items). In addition, depending on the scope of services, beneficiaries could also include claimant or respondent States in State-to-State proceedings; non-disputing State parties seeking to provide input into disputes filed under treaties they are part of; amicus curiae; and/or other potential intervenors.

***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)***

* + - **States**
    1. At the thirty-eighth session of the Working Group, it was suggested that the beneficiaries should be States, preferably least developed and developing States as well as States with limited experience in ISDS ([A/CN.9/1004](about:blank), para. 30). The Working Group may wish to decide which approach would be best suited to determine potential State beneficiaries as there are different approaches on how to classify States.[[15]](#footnote-16)
    2. The Working Group may further wish to consider whether developed States could be beneficiaries of certain limited services as reflected in draft provision on objectives and functions of the centre.
    3. To the extent an advisory centre is intended to address issues and capacity challenges related to policy formulation of investment treaties and implementation, beneficiaries could be limited to investment treaty negotiators; or they could include a wider range of stakeholders, such as national parliamentarians or ministry/agency officials, state/provincial or local-level government actors, and civil society organizations, all engaged in efforts to understand how to attract, retain, and benefit from inward investment, and whether, how, and when to promote outward investment. The Working Group may wish to consider whether this would permit for much broader capacity across governments to be developed. Decisions regarding intended beneficiaries in this context will naturally depend on broader decisions regarding what kind of capacity, if any, an advisory centre is intended to address (e.g. narrow technical capacity, or broader or longer-term organizational, institutional and cross-sectoral capacities) and the nuanced context of capacity needs and gaps experienced by and within particular States.[[16]](#footnote-17)
    4. In the context of investment treaty disputes, the beneficiary most commonly identified for additional support from an advisory centre is the respondent host State. This category of beneficiaries could and would likely need to be further defined, e.g. whether developing or only least developed States are targeted.
    - **SMEs**

The Working Group expressed differing views on whether small and medium sized enterprises (SMEs) should be able to access the services of an advisory centre ([A/CN.9/1004](about:blank), para. 30). The Working Group may wish to note that it might be difficult to set objective criteria on which enterprises could be given access ([A/CN.9/1004](about:blank), para. 30). There is no standardized international definition of what constitutes a SME, since each economy will define its own parameters for each size of business by taking into account its own specific economic context (see A/CN.9/WG.I/WP.92, para 11).

* + 1. 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.
    2. 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.[[17]](#footnote-18) However, such an approach would result in governments funding claims against themselves from foreign investors.
    3. The Working Group may wish to note that a scoping study provides an insightful analysis on SMEs’ access to ISDS. In this regard, the study concluded that the SMEs’ experiences with ISDS are hard to draw given the significant data gaps.[[18]](#footnote-19) According to the study, SMEs are reportedly facing constraints in financing claims due to high costs of litigation and limited access to capital. Based on the hurdles experienced and concerns expressed, the scoping study considers the forms of available assistance that may assist SMEs in overcoming ISDS access issues. These include an ombuds-type office, pre-dispute technical assistance, market-based assistance mechanisms, capacity-building models, and a model incorporating institutionalized defence and legal representation.[[19]](#footnote-20)

***Comments on draft provision 4(b) to (d)***

* + 1. The Working Group may wish to consider that, in order to ensure the sustainability of the centre, rules may need to be developed regarding whether certain services would be available to certain categories of beneficiaries only, and how prioritization could to be set up (A/CN.9/1004, para. 43). On that basis, the Working Group may wish to consider whether and how a sliding scale of services could be implemented for States at different levels of development, and more generally for the various categories of potential beneficiaries (see Annex 2).
    2. Draft provision 4(b) to (d) foresees qualifying criteria for the prioritization of services, such as that least developed State beneficiaries could be prioritized in the accorded precedence, subject to any conflicts of interest and on a first-come-first-served basis.
    3. The most resource-intensive services, such as advisory and defence services in relation to cases, may indeed require such rules on prioritization. Also, should the centre provide such advisory or defence services, rules might be needed to address situations where the centre has too many cases from the same beneficiary, limiting capacity for new cases from other beneficiaries. Similarly, if beneficiaries include investors, a balance might need to be found regarding the feasibility of rendering services to such beneficiaries and sustainability of the centre.
    4. The Working Group may wish to note the issue of internal conflicts of interest that can arise where an advisory centre would provide substantive guidance in both treaty formulation, interpretation, and legal defence.

**E. Possible legal structures and other topics**

**1. Possible models for the establishment of the centre**

* + 1. The Working Group identified that, to ensure the legitimacy of the centre, independence and impartiality are central values (A/CN.9/1004, para. 37). The Working Group may wish to consider the legal status that the advisory centre could have, which includes being established as an independent body, or hosted by an existing body with a separate trust fund, or other possible form. The level of institutionalisation may have an impact on the manner in which the services are rendered, as well as on its independence or perceived independence and on the funding scheme.
    2. In that light, the Working Group may wish to consider the possible institutional setting of the centre, whether the centre would be (i) a legally independent intergovernmental body (with eventually regional branch offices to be accessible within different geographical areas); or (ii) attached to a structure that could be any existing international organization, a standing multilateral first instance and/or appellate court that would be set up as part of the ISDS reform, or one or more (if the centre were to be set-up in a decentralized fashion) existing arbitral institutions (A/CN.9/1004, para. 37).
    3. The Working Group may wish to note that the main advantage of a legally independent intergovernmental body would be that the centre could define the nature, scope, and prioritization of its activities. Such an independent centre could avoid real or perceived influence from, or conflicts of interest with, the activities of the organization hosting it.
    4. If the centre were to be attached to an existing structure or a structure to be created as part of the reform (a standing body, for instance), synergies between such permanent structure and the activities of the centre should be considered and developed. Such host structure could assist the advisory centre with institutional resources and build on existing trust and relationships. However, the attachment to an existing institution might also be perceived as hampering confidence and trust building.

**2. Membership and internal organization**

* + 1. The Working Group may wish to consider the following draft provision 5 on membership.

***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***

* + 1. The membership, including the rights attached to it, would need to be carefully considered in light of the services to be rendered by the centre, its beneficiaries, and potential conflicts of interest.[[20]](#footnote-21)
    2. Whatever the structure ultimately selected, the Working Group may wish to consider the functions that might need to be fulfilled by the members of the centre, such as to evaluate and monitor its performance; to agree on rules for the nomination, term of office and removal of the governing bodies; to agree on the fee structure and necessary adjustments; and to adopt the necessary rules to regulate potential conflicts of interest, prioritization and other aspects related to the provision of services to beneficiaries.
    3. 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.[[21]](#footnote-22) 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.

**3. Virtual centre/Location or locations**

* + 1. The Working Group may wish to consider draft provision 6 on the location of the centre.

***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***

* + 1. The location, or locations, of an advisory centre could depend on a range of factors, including the form that such a mechanism would take, its mandate and roles, the identity and preferences of its beneficiaries and donors, its legal needs, and its budget. This question is also connected to the sustainability of the centre. The Working Group may wish to consider the objective of an advisory centre to assist States and ensure that the perspective of the various regions is taken into account, and the impact of this on its location.
    2. It may be conceived that an advisory centre could have several offices, located in different regions of the world, although this may raise costs and associated funding challenges. Given the implications on budget and sustainability of the centre, it could be decided to set up virtual centres in the form of dedicated desks at the centre or in regional development banks or relevant institutions and structures in various regions.

**Annex 1 – Table of services**

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| No. | Services to be provided by the Advisory Centre | | | |
| 1 | Pre-dispute and dispute avoidance services | Pre-dispute phase | Acts as a platform for sharing of best practices and information on the drafting of investment treaties and conflict management to build a stable climate for investment. | |
| Assistance regarding the establishment of a lead agency that would ensure proper attention to potential investor-State disputes, provide adequate responses to problems with foreign investors, and defend the interests of the State at each stage. | |
| Post-dispute phase | Assistance to resolve investor-State disputes at the national level to avoid escalation of disputes into an adversarial proceeding. | |
| 2 | Mediation and other alternative dispute resolution (ADR) methods | Risk assessments | Analysis of the case in terms of its strengths and weaknesses. | |
| Assessment of appropriate dispute resolution method. | |
| Reflection on necessary resources to defend the case. | |
| Offers ADR services and supports early settlement disputes (e.g., cooling-off period) | Functioning as a mediation institute. | |
| Providing advisory services to respondent in mediation, *inter alia*, assessment of cases, identification of strategies, course of actions, preparation for mediation procedures, counselling to States during mediation. | |
| Representing or assisting State Beneficiaries in a mediation procedure. | |
| 3 | Defence services | Models of services | Facilitation in organizing defence with the in-house or external counsel by advising on litigation risks, dispute resolution options, strategic arbitration, available defence and/or possible counter claim. | |
| Supporting services on some or all aspects of the dispute resolution process to establish or build upon existing in-house capacity. | |
| Representing fully in the dispute resolution proceedings as playing the lead role in assisting State. | |
| Assistance in defence and its organization | 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. | |
| Early assessment of the risks associated with a given claim | |
| Advice for the non-disputing treaty parties. | |
| Cooperating with government to ensure the compatibility of the line of defence with the State’s overall approach to and interpretation of its investment commitments. | |
| Advice on dispute resolution options and/or strategic arbitration centres. | |
| Assistance to States for the preparation of the defence of investment disputes, including assessment of the strengths and weaknesses of a case on a prima facie basis. | |
| Determination of the financial implications and earmarking of a budget for the defence of a case. | |
| Assistance in the overall organization for dealing with ISDS. | |
| Support during dispute settlement proceedings | Selection and appointment | Assistance in selecting and appointing the arbitrators/ adjudicators. |
| Assistance regarding procurement of counsel and identification of experts. |
| Written statements, documentary evidence | Briefing services and cooperation to in-house defence team of State to prepare high quality documents filed by State. |
| Assistance to State in reviewing documents, conducting witness interviews, researching issues of law, facts and drafting correspondences |
| Representation at hearings | Advice during the procedure as to the arbitrator challenges. |
| Providing high quality legal services as a cost-effective and competitive solution in handling hearing. |
| 4 | Legal and policy advisory services | Policy development | Assistance to States for the review of, and potential amendment to, their international investment instruments. | |
| Assistance to States regarding the setting-up of conflict management systems, including early dispute prevention policies and alert procedures. | |
| Advisory services | Legal advice on whether a measure or the contemplated measure would violate treaty obligations (which might require considering whether early legal advice by an advisory centre would carry any formal significance). | |
| Facilitation and monitoring | Facilitation of close interaction between defence counsels and treaty negotiators and implementing authorities/ agencies. | |
| Serving as a platform for future monitoring and discussion for all stakeholders. | |
| 5 | Capacity building and sharing of best practices. | Capacity building | Capacity of building of the government lawyers to take responsibility for future cases. | |
| Training of government officials, including in treaty negotiations and the interpretation of investment obligations. | |
| Offering trainee and secondment positions to allow first-hand experience on ISDS cases, and by providing information on ISDS, including managing a database of cases, creating awareness on potential investment claims, and enhancing readiness to respond. | |
| Knowledge sharing | Promotion of exchange of experience and expertise regarding the evaluation of arbitrator/ adjudicators services. | |
| Contribution in compiling, organizing disseminating existing resources to relevant government officials as a way to coordinate the sharing of best practices and information. | |
| Assistance regarding best practices for States on dispute prevention and mitigation across multiple institutions. | |
| Repository of information | Establishment of a comprehensive database of potential arbitrators/adjudicators, mediators as well as experts with complete and up-to-date profiles available to respondent States. | |
| Data collections and functions as a centralized repository of information. | |
| Acting as “a resource for governments” providing information as to where, from whom and at what cost, the assistances of existing mechanisms are available in specific context. | |
| Additional services | Any other additional services that could be provided through appropriate means. | |

**Annex 2 - Chart on Beneficiaries of services**

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
|  | | **Least-Developed Countries (LDC)** | **Developing Countries** | **Developed Countries** | **SMEs** |
| **Pre-dispute and dispute avoidance services** | | X | X |  |  |
| **Mediation and other alternative dispute resolution (ADR) methods** | | X | X |  |  |
| **Defence services** | | X | X |  |  |
| **Legal and policy advisory services** | | X | X |  |  |
| **Capacity building and sharing of best practices** | **Training of**  **government officials** | X | X |  |  |
| **Secondment positions** | X | X |  |  |
| **Access to data collections** | X | X | X | X |
| **Exchange of**  **information and**  **sharing of best practices** | X | X | X | X |

1. *Official Records of the General Assembly, Seventy-second Session, Supplement No. 17* ([A/72/17](about:blank)), paras. 263 and 264. The deliberations and decisions of the Working Group at the thirty-fourth to thirty-seventh sessions are set out in documents [A/CN.9/930/Rev.1](about:blank) and its Addendum, [A/CN.9/935](about:blank), [A/CN.9/964](about:blank), and [A/CN.9/970](about:blank), respectively. [↑](#footnote-ref-2)
2. Document [A/CN.9/WG.III/WP.166](about:blank) provides an overview of reform options. [↑](#footnote-ref-3)
3. This Note was prepared with reference to a broad range of published information on the topic, including: Scoping study Securing adequate legal defence in Proceedings under International Investment Agreements, prepared by the Columbia Centre for Sustainable Investment (CCSI) on behalf of the Government of the Netherlands, available at: [https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/securingadequatedefense.pdf](about:blank) (referred to as the Scoping Study); the publication by the Academic Forum, Karl P. Sauvant, An Advisory Centre on International Investment Law: Key Features, available under “ISDS fora” at: [https://uncitral.un.org/en/library/online\_resources/investor-state\_dispute](about:blank); Nicolas Angelet, Ndanga Kamau, Benjamin Remy, Karl P. Sauvant, Carlos Jose Valderrama, and Don Wallace, Note on the costs and financing of an Advisory Centre on International Investment Law; [A/CN.9/WG.III/WP.161](about:blank) Submission from the Government of Morocco; [A/CN.9/WG.III/WP.162](about:blank), Submission from the Government of Thailand; [A/CN.9/WG.III/WP.164](about:blank) and [A/CN.9/WG.III/WP.178](about:blank), Submission from the Government of Turkey; [A/CN.9/WG.III/WP.179](about:blank), Submission from the Government of the Republic of Korea; [A/CN.9/WG.III/WP.188](about:blank), Submission from the Government of the Russian Federation, [A/CN.9/WG.III/WP.183](about:blank), Submission by the Government of the Republic of Guinea; [A/CN.9/WG.III/WP.196](about:blank), Submission by the Government of the Republic of The Netherlands, Peru and Thailand. [↑](#footnote-ref-4)
4. See also Section 5 of the Scoping Study. [↑](#footnote-ref-5)
5. See for further information World Bank Group, Retention and Expansion of Foreign Direct Investment (Echandi, R.), http://documents.worldbank.org/curated/en/387801576142339003/pdf/ Political-Risk-and-Policy-Responses.pdf as well as the Note by the Secretariat on Dispute prevention and mitigation - Means of alternative dispute resolution, A/CN.9/WG.III/WP.190, available at https://undocs.org/en/A/CN.9/WG.III/WP.190 [↑](#footnote-ref-6)
6. UNCTAD has a long-standing programme to provide training on the negotiation of investment treaties, based on extensive and in-depth research and the monitoring of trends, informed by intergovernmental deliberations in its Investment Commission and its “Reform Package for the International Investment Regime (see https://investmentpolicy.unctad.org/publications/1190/unctad-s-reformpackage-for-the-international-investment-regime-2018-edition-) and upon request, supplemented by country-specific advisory services (see [https://unctad.org/meetings/en/SessionalDocuments/wpd290add1\_en.pdf](about:blank)); UNCTAD’s “Investment Policy Hub” provides comprehensive information about the principal IIA matters, including information on investment treaties, investment disputes, investment laws, and policy measures (see [https://investmentpolicy.unctad.org](about:blank)); The OECD has an intergovernmental body dealing with investment issues whose deliberations are partly related to the organization’s Policy Framework for Investment (see [https://www.oecd.org/investment/pfi.htm](about:blank)); The Investment Policy and Promotion Unit of the World Bank Group provides training in the international investment area (see https://www.worldbank.org/en/topic/investment-climate/brief/investment-policy-and-promotion) [↑](#footnote-ref-7)
7. [A/CN.9/WG.III/WP.196 - Submission from the Governments of The Netherlands, Peru and Thailand](about:blank); the Scoping Study: “Securing Adequate Legal Defense in Proceedings under International Investment Agreements” is available on the UNCITRAL website in English: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/securingadequatedefense.pdf [↑](#footnote-ref-8)
8. Scoping Study pp. 59-62 [↑](#footnote-ref-9)
9. Ibid, pp. 63-65 [↑](#footnote-ref-10)
10. Ibid, pp. 77-78 [↑](#footnote-ref-11)
11. Ibid, pp.66- 67 [↑](#footnote-ref-12)
12. Ibid, pp. 67-71 [↑](#footnote-ref-13)
13. Ibid, p. 79 [↑](#footnote-ref-14)
14. ITA: *Proposal for an ISDS Advisory Centre: Survey on the Non-State Observers' Contribution*

    *to an ISDS Advisory Centre,* available at [https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/ita\_advisory\_centre\_survey.pdf](about:blank) [↑](#footnote-ref-15)
15. There is no established convention for the designation of “developed” and “developing” States in the United Nations system. However, the M49 standard has been used for global reporting in the final report of the Millennium Development Goals (MDG), is also the agreed standard for global reporting in relation to the 2030 Agenda for Sustainable Development Goals (SDG) and it is used by the international agencies that provide data to the United Nations Statistics Division (UNSD). [↑](#footnote-ref-16)
16. See the Scoping study. [↑](#footnote-ref-17)
17. For more information about private sector representation through the ACWL, see generally Advisory Centre on WTO Law, *Revised Rules for Support in WTO Dispute Settlement Proceedings through External Legal Counsel* (2007) (detailing the rules for subcontracting cases to external legal counsel and providing a sample contract engaging the services of external counsel). [↑](#footnote-ref-18)
18. CCSI *Scoping Study,* 107 [↑](#footnote-ref-19)
19. Ibid 110 [↑](#footnote-ref-20)
20. As an illustration, the Working Group may wish to note the internal organization of the ACWL, which consists of the General Assembly, the Management Board and the Executive Director. The General Assembly is the ACWL’s highest decision-making body, consisting of the representatives of the Members of the ACWL and of the LDCs entitled to the services of the ACWL. It oversees the functioning of the ACWL, monitors the ACWL’s finances and approves the annual budget. It meets at least twice a year. The ACWL’s Management Board is responsible for the decisions necessary to ensure the efficient and effective operation of the ACWL. It functions independently (and free form political interferences) of the General Assembly. The Management Board appoints the Executive Director in consultation with Members, prepares the annual budgets for adoption by the General Assembly, supervises the administration of the Endowment Fund, and proposes regulations on various matters for adoption by the General Assembly. The Management Board consists of six persons. Under the Agreement establishing the ACWL, the Members of the Management Board are to be selected on the basis of their personal qualifications in the field of WTO law or international trade relations and development. Three are nominated by the developing country Members, two by the developed country Members and one by the LDCs. In addition, the Executive Director of the ACWL serves as an ex officio member. The Members of the Management Board serve for two-year terms, which may be renewed. To ensure the independence of the operations of the ACWL from influence by its Members, the Management Board members serve in their personal capacities and independently of their national affiliations. They undertake not to seek or accept instructions in the performance of their duties from any government or any other source external to the ACWL. The Management Board meets at least twice a year and otherwise as needed to ensure the effective operation of the ACWL. All decisions of the Management Board are reported to the General Assembly. The Executive Director manages the ACWL’s day-to-day operations and represents the ACWL externally. [↑](#footnote-ref-21)
21. The Scoping Study highlights that a connected issue is the question of financial arrangements between any external service provider and the centre, as this may have an impact on how the services are rendered (if they are paid by hours worked, they may have an incentive to raise frivolous arguments or engage in other actions that prolong hours worked in proceedings; if they are paid based on a flat fee, they may be reluctant to incur costs that would result in their running the case at a loss or shrink their profit; if they are paid based on a contingency fee arrangement, they may push for (or against) any pre-award settlement or other outcome that affects their returns). [↑](#footnote-ref-22)