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Re: Short summary of the informal meetings held on 14-16 June 2021 on the establishment of an advisory centre

Dear Delegates to Working Group III,

It is my pleasure to share with you a summary, prepared by the Secretariat, Rapporteur and me, of the main points discussed during the informal meetings held on 14 to 16 June 2021 on the establishment of an advisory centre. The purpose of the meetings was to consider informally the draft documents on the advisory centre prepared by the Secretariat, available [here](#). No decisions were taken at these meetings. Discussions were helpful in providing feedback to the Secretariat tasked with the preparation of a revised version of the documents. I would also like to encourage delegations to submit written comments on these documents by 15 July.

I noted that up to 154 delegates took part in each one of the meetings. Interpretation in French was provided, with the financial support of the German Federal Ministry for Economic Cooperation and Development (BMZ).

Topics considered included:

- The purpose and scope of activities of an advisory centre;
- The possible services;
- The potential beneficiaries; and
- Financing and governance structure.

General comments

Support for the establishment of an advisory centre as an element of ISDS reform was reiterated. The following general comments and suggestions were also made by participants during the discussions:

- For the sake of efficiency, there should not be overlap with activities of existing institutions as there are already a significant number of existing resources available.
- The advisory centre should render services that are currently not available, such as being a platform for an exchange of experiences among States with regards to ISDS, providing institutional arrangements to prevent and defend against ISDS cases, providing support for treaty drafting and interpretation. The activities of the forum of the centre, referring to the second pillar of the proposed structure of the advisory centre, should be better defined.
- The centre should provide centralised information about what existing resources are available, particularly in terms of capacity building.
- The advisory centre should operate as an independent inter-governmental body to ensure its legitimacy and avoid potential conflicts. While the advisory centre could be created following discussions at UNCITRAL, once established, it should not be linked to UNCITRAL.
- In designing the governing structure of the advisory centre, reference could be taken from the governing structure of the ACWL. Such structure would ensure flexibility in the functioning of the

centre, allow for adjustments in the services to be rendered, the beneficiaries of the services as well as the fee scale and other financial matters.

- The forum of the centre should be open to all States and possibly other stakeholders, and partnerships between the forum and universities and other entities should also be envisaged.
- The link between the establishment of an advisory centre and other reform options, such as the establishment of a multilateral investment court should be considered. In particular, there could be cost effectiveness reaped from having an advisory centre hosted by a multilateral investment court.

In terms of feedback on the Secretariat's draft documents, it was suggested that:

- The documents should better differentiate topics that should be covered in the founding instrument and the more detailed matters that should be placed in rules and regulations of the centre, as that the latter could need to be updated on a regular basis.
- The language used in the various papers should be aligned (for instance, usage of the word "adjudicator" instead of "arbitrators" so as to be consistent with the draft code of conduct under preparation).
- The Secretariat, when revising the documents, should review the replies it received from States to the questionnaire it circulated on this topic, and consider whether further questionnaires could be helpful.

Purpose and scope of activities of an advisory centre

A number of comments and suggestions were made by participants on draft provision 1 concerning the purpose and scope of an advisory centre (see paragraph 7 of the document prepared by the Secretariat), including that:

- Draft provision 1 should address the establishment of an advisory centre, along the lines of "The advisory centre is hereby established in accordance with...", followed then by provision 2 on scope and services.
- Draft provision 1(a) should add a reference to State-to-State dispute settlement, as well as draw a distinction between services of a permanent nature and those rendered occasionally or on an on-demand basis.
- Draft provision 1(b) should be clarified in terms of the listed principles which, as currently drafted, would make compliance difficult to measure. The purpose of the provision was also questioned. It was suggested that it would be better to wait until more clarity is provided on the activities of the centre, before defining applicable principles, or to refer to the principles in the preamble of the instrument that would establish the advisory centre. The Secretariat was requested to provide explanations for the possible meaning of such principles in the revised draft, along the lines of the explanations provided orally during the meeting.

Services

Views were exchanged on the various services that the centre could provide, as described in paragraphs 10 to 47 of the documents prepared by the Secretariat. The following comments and suggestions were made by participants:

- The advisory centre should not provide the services of a mediation centre, as this would change the nature of the centre.
- Regarding the possibility of the centre rendering representation services, there should be safeguards on the independence and impartiality of the centre where it provides such services, as well as the usual safeguards regarding the client-attorney relationship.
- Regarding the question of possible contradictory treaty interpretation by the centre when rendering representation services, an explanation was provided that the advisory centre would not advocate a position in its own name; it would only represent the State. The centre's team of lawyers would

work closely with the State's in-house counsel, and the State would retain control over the case and treaty interpretation.

- Certain services could be left to a further stage of development of the centre, given their possible cost implications, and draft provision 3 should reflect this possibility, as well as the possibility of adding new services, which could be expressly spelled out, such as research on investment law, undertaking studies on specific areas of law, and setting up of a database of arbitrators.
- The centre's services should not be described in too much detail in any founding treaty, and only broad categories should be provided for, with more detail provided in the centre's rules and regulations, which could be more easily amended.
- The provisions on the implementation of the centre's services would need to be addressed by the centre itself once created, and the focus of the Secretariat's documents should be on the main principles, services, features and governance of the centre, leaving the centre's operation to a set of operational rules.

Beneficiaries

Participants expressed a number of views regarding the potential beneficiaries of the services of the centre, consideration of which can be found in paragraphs 48 to 59 of the document prepared by the Secretariat. The following comments and suggestions were made by participants:

- The different categories of beneficiaries should be better defined, and more information on these categories should be provided in the Secretariat's draft documents.
- Regarding the connection between the members of the advisory centre and the beneficiaries, the forum of the centre should be open to States and other entities that would not necessarily be members of the centre, so as to widen the exchange of experience and practices.
- Regarding the participation of SMSEs, their participation could open a plethora of cases and risk conflicts of interest.
- Additional beneficiaries should be considered, such as the non-disputing States, and other actors concerned, such as communities or NGOs who could intervene as *amicus curiae*. Such actors usually played an important role in the early stages of a dispute, as well as in the actual settlement of a dispute, and they could play a role in the context of mediation.
- There was a need to prioritise the beneficiaries of services based on their level of economic development. Other criteria mentioned regarding priority included whether the questions concerned larger public policy issues, whether the beneficiary had an ability to pay for the services, the potential impact of issues to a country or to investment law more generally. Additionally, criteria should be developed to also take into consideration capacity building, so that if a State had already benefited from the services of the centre, and was building capacity, such State should continue to benefit from the centre's services. It was suggested that services should be rendered in priority to least developed countries, and then prioritization may be left to be developed by the centre itself as it may be difficult to devise criteria in advance.
- Regarding how conflicts of interest could be managed, there were established mechanisms and practices to avoid such conflicts, such as ensuring that staff would be structurally separate. The possible conflicts of interest could be categorised, so that only those that are problematic need to be addressed.

Financing and governance structure

Finally, the financing and governance structure of the advisory centre was discussed on the basis of addendum 1 to the document prepared by the Secretariat.

The budget was presented, and it was clarified that, at this early stage of the discussions, it broadly suggested an order of magnitude and a way to ascertain whether the hypothesis used for establishing the budget was realistic. The budget focused mainly on representation services as the cost of obtaining legal advice was by far the largest cost for States. It was also clarified that the staff provided for in the budget could, in addition to representation services, provide training, capacity building services and facilitate a


forum for exchanging information and best practices. Such staff, by working closely with States' in-house counsels who are in charge of the disputes, would also contribute to capacity building while working on cases.

The following comments and suggestions were made by participants:

- The advisory centre could start with a smaller team of lawyers and then expand over time, as at an initial stage the workload would not be easily predictable. This would mean beginning with the lower numbers (10 lawyers, including 2 secondees and 2 lawyers dedicated to mediation) and a capacity to handle up to 4 cases.
- The capacity and possible increase should be left to the governing structure of the centre and not feature in the statute or treaty establishing it.
- The advisory centre could have regional offices, which should be staffed with personnel who have more knowledge of the region. This would have potential budget implications.
- The need for a sufficient and stable income from diverse sources was crucial for the advisory centre to remain independent and self-sustainable.
- A member fee could be levied.
- There should be a user's fee for the legal services, which should be determined according to the user State's level of development. The scale of user's fees might be adjusted, for instance the fee for mediation services might be discounted so as to incentivize parties to use such services.
- If SMSEs were included as beneficiaries, they should also contribute financially to the advisory centre.
- Other potential sources of funding include funding from private entities. However, this might create some conflicts of interest. Funding from private entities would need to be channelled in such a way that they are not used for particular litigations and including private donors in the list of potential members of the advisory centre should not mean that they can take part in its administration. The fine line between independence of the centre and its accountability would need to be found and reflected in the provisions.
- There could be other ways to support the centre, such as through in-kind contributions.
- Voluntary contributions could serve as an additional means of funding the centre. Voluntary contributions could be made to an Endowment Fund, to enable the sustainable financing of the centre.

I would like to seize this opportunity to thank you for your active participation to this first series of informal meeting. We efficiently considered all topics on the agenda. The comments and suggestions made will be extremely helpful to present a more elaborate working paper and technically sound draft provisions on the advisory centre. I also look forward to the written comments on this topic.

Yours sincerely,



Shane Spellisey
Chair
UNCITRAL Working Group III