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## Possible reform of investor-State dispute settlement (ISDS)

### Draft statute of an advisory centre

#### Note by the Secretariat

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## I. Introduction

1. The Working Group discussed the establishment of an advisory centre on international investment law at its thirty-eighth session in October 2019 (A/CN.9/1004, paras. 28-50), thirty-ninth session in October 2020 (A/CN.9/1044, paras. 22-26, 34 and 39) and forty-third session in September 2022 (A/CN.9/1124, paras. 42-65).
2. At its forty-sixth session in October 2023, the Working Group completed the first reading of the draft provisions on the establishment of an advisory centre on international investment law as contained in document A/CN.9/WG.III/WP.230 and requested the Secretariat to revise the draft provisions based on the deliberations (A/CN.9/1160, para. 85).
3. At that session, general support for the establishment of an advisory centre was reiterated, particularly in order to address the urgent needs of developing States in obtaining assistance with regard to investment disputes (A/CN.9/1160, para. 15). It was widely felt that an advisory centre should be established as an intergovernmental body, which would require the preparation of an international instrument (A/CN.9/1160, para. 17). The Working Group agreed that the establishment of an advisory centre should be independent from other investor-State dispute settlement (ISDS) reform elements (A/CN.9/1160, para. 17) and that it would recommend to the Commission that the draft provisions should be adopted in principle at its next session in 2024 (A/CN.9/1160, paras. 13 and 18).
4. Accordingly, this Note contains a draft statute establishing the advisory centre on international investment law (hereinafter, the “Advisory Centre” or “Centre”). The draft statute has been prepared to form a protocol or an annex to the multilateral instrument on ISDS reform (MIIR) (A/CN.9/1160, para. 17). Therefore, it does not include all of the final clauses typically found in a convention (for example, with regard to the depositary and reservations).

## II. Draft statute of an advisory centre

### Article 1 – Establishment

The Advisory Centre on International Investment Law and Investor-State Dispute Settlement (“Advisory Centre”) is hereby established.

5. Article 1 establishes the Advisory Centre and clarifies its areas of competence. It reflects a suggestion that the naming of the Centre should include a reference to investor-State dispute settlement (ISDS) (A/CN.9/1160, para. 21). However, ISDS is one area of international investment law (IIL) and a broad reference to IIL may suffice for the purposes of identifying the scope of its work. An alternative approach would be to name it the “Advisory Centre on International Investment Dispute Resolution” (see para. 8 below).<sup>1</sup> The Working Group may wish to consider the naming of the Centre after its deliberations of the other articles that contain references to “IIL”, “ISDS” and “international investment dispute proceedings”.

### Article 2 – Objectives

1. The Advisory Centre aims to provide training, support and assistance with regard to [international investment law and investor-State dispute settlement][international investment dispute resolution].
2. The Advisory Centre aims to enhance the capacity of States and regional economic integration organizations in handling international investment disputes, in particular, least developed countries and developing countries.

<sup>1</sup> If this approach is taken, similar changes could be made to the text in articles 2(1) and 6(1).

3. To achieve these objectives, the Advisory Centre shall provide technical assistance and capacity building as outlined in article 6 and legal support and advice with regard to international investment dispute proceedings as outlined in article 7.

6. Article 2 outlines the objectives of the Advisory Centre reflecting a number of suggestions made at the forty-sixth session (A/CN.9/1160, paras. 23-25).

7. Paragraph 1 provides a generic description of the Centre's functions and the scope of its work. It provides the Centre with a broad mandate, which could evolve over time (A/CN.9/1160, paras. 23).

8. Paragraph 2 puts emphasis on the outcome of the Centre's activities, which is to enhance the capacities of States and regional economic integration organizations (REIOs) in handling international investment disputes (A/CN.9/1160, paras. 24). The Working Group may wish to confirm that the use of the phrase "international investment disputes" (which is defined in the UNCITRAL Code of Conduct for Arbitrators in International Investment Dispute Resolution and used in the UNCITRAL Model Provisions on Mediation for International Investment Disputes) is appropriate.<sup>2</sup> This would also reflect the view that the Centre should provide assistance regardless of whether the legal basis of the dispute is an investment treaty, domestic legislation or an investment contract (A/CN.9/1160, para. 29, on possible prioritization among the instruments, see article 7(3)).

9. The Working Group may wish to consider whether paragraph 2 should include an explicit reference to "least developing countries and developing countries" to highlight that they are the main beneficiaries of the Centre (A/CN.9/1160, para. 37). It should be noted that article 4 clarifies that only States and REIOs that are members of the Centre are entitled to its services (with some exceptions provided for in articles 6(4) and 7(5)) and article 7(4) provides for priority to be given to least developing countries (LDCs) and developing countries.

10. Paragraph 3 lists the services that the Centre aims to provide and refers to articles 6 and 7, which detail such services and the beneficiaries (A/CN.9/1160, para. 24). The Working Group may wish to consider whether all of the paragraphs in article 2 would need to be retained.

### Article 3 – General principles

1. The Advisory Centre shall operate in a manner that is effective, affordable, accessible and financially sustainable.
2. The Advisory Centre shall be independent and free from undue external influence, including from its donors.

<sup>2</sup> As the definition of "international investment dispute" in article 1 of the Code of Conduct for Arbitrators in International Investment Dispute Resolution is linked to an instrument upon which the consent to "arbitrate" is based, it might need to be slightly adjusted. Article 1 (a) and (b) read as follows (*emphasis added*):

- (a) "International investment dispute (IID)" means a dispute between an investor and a State or a regional economic integration organization (REIO) or any constituent subdivision of a State or agency of a State or an REIO submitted for resolution pursuant to an instrument of consent;
- (b) "Instrument of consent" means: (i) A treaty providing for the protection of investments or investors; (ii) Legislation governing foreign investments; or (iii) An investment contract between a foreign investor and a State or an REIO or any constituent subdivision of a State or agency of a State or an REIO, upon which the consent to arbitrate is based.

Considering that the scope of work of the Advisory Centre would not be limited to arbitration, it is suggested that IID in the context of the draft statute is understood to mean: "a dispute between an investor and a State or a regional economic integration organization (REIO) or any constituent subdivision of a State or agency of a State or an REIO submitted for resolution pursuant to (i) a treaty providing for the protection of investments or investors; (ii) legislation governing foreign investments; or (iii) an investment contract between a foreign investor and a State or an REIO or any constituent subdivision of a State or agency of a State or an REIO."

3. The Advisory Centre shall cooperate with international and regional organizations and coordinate, as appropriate, its activities to ensure the best use of its resources.

11. Article 3 lists the principles that would guide the operation of the Advisory Centre reflecting a number of the suggestions (A/CN.9/1160, paras. 16 and 31-38).

12. Paragraph 1 underlines the need for the Centre's operation to be efficient and viable in the long term, including by having a sustainable financial structure. It also emphasizes the accessibility of the Centre, in particular that its services should be affordable to LDCs and developing countries (A/CN.9/1160, para. 33). Paragraph 2 provides that the Centre shall be independent in structure, which, however, does not rule out the possibility of the Centre being established under the auspices of an existing or a future body (A/CN.9/1160, para. 16). Paragraph 2 ensures that the Centre would operate without any control by any such hosting organization and without any influence from other entities, including possible donors making voluntary contributions (A/CN.9/1160, para. 34, see also article 8(5)).

13. Paragraph 3 requires the Centre to cooperate and coordinate closely with relevant international and regional organizations, which reflects the views that the services to be provided by the Centre should not overlap with activities of those organizations, such as the United Nations Conference on Trade and Development (UNCTAD), the World Bank and the Organisation for Economic Co-operation and Development (OECD) (A/CN.9/1124, para. 56; A/CN.9/1160, para. 35).

#### Article 4 – Membership

1. A State or a regional economic integration organization may become a Member of the Advisory Centre in accordance with article 10.

2. Each Member is entitled to the services of the Advisory Centre and has the obligations, as set out in this Protocol and the regulations adopted by the Governing Committee.

3. Each Member shall be categorized into least developed countries as listed in Annex I to this Protocol, developing countries as listed in Annex II to this Protocol and others as listed in Annex III to this Protocol.

14. Article 4 provides that the Advisory Centre will be established as an intergovernmental body composed of States and REIOs (A/CN.9/1160, para. 40). Article 10 provides the method for a State or REIO to become a Member, mainly by signing and ratifying or acceding to the draft statute. These matters would need to be further developed in tandem with the MIIR, including whether a State that is not a party to the MIIR may become a Member of the Advisory Centre (A/CN.9/1160, para. 42). If the Centre is established under the auspices of another organization, its membership may be limited to those that are members of that organization (for example, membership of the Advisory Centre on WTO Law (ACWL) is limited to members of the WTO and any State or separate custom territory in the process of acceding to the WTO).

15. Paragraph 2 clarifies that membership in the Advisory Centre entails rights as well as obligations, which are detailed in other articles (services of the Centre are outlined in articles 6 and 7 and the financial obligations of the Members are outlined in article 8) (A/CN.9/1160, para. 43). Paragraph 2 also foresees that the rights (including the type and extent of services) and obligations of each Member will be further elaborated in the regulations to be adopted by the Governing Committee (see article 5(3)(d) and para. 21 below).

16. Paragraph 3 reflects the view that the draft statute would need to categorize potential Members into different groups, which would determine, among others, the priority to be given in obtaining the services of the Centre, the financial contributions to be made and the fees to be paid by each Member (A/CN.9/1160, para. 44). As one possible example, paragraph 3 classifies States and REIOs into three categories: (i)

LDCs; (ii) developing countries; and (iii) others, with the last category including States that do not fall within the first two categories and REIOs (A/CN.9/1160, para. 45). The Working Group may wish to consider means to further develop the classification (including criteria and methodology to be used) and ways to make adjustments (including, whether States and REIOs will be allowed to decide on their classification when they become a Member and whether the Governing Committee may make any adjustments to the classification, A/CN.9/1160, para. 44).

#### Article 5 – Structure

1. The Advisory Centre shall consist of a Governing Committee and a Secretariat headed by an Executive Director.
2. The Governing Committee shall be composed of representatives of the Members of the Advisory Centre. Each Member shall appoint one representative to the Governing Committee.
3. The Governing Committee shall:
  - (a) Evaluate and monitor the performance of the Advisory Centre and adopt the annual report prepared by the Executive Director;
  - (b) Appoint the Executive Director;
  - (c) Adopt its rules of procedure;
  - (d) Adopt regulations on the operation of the Advisory Centre;
  - (e) Adopt the annual budget of the Advisory Centre prepared by the Executive Director; and
  - (f) Perform other functions in accordance with this Protocol.
4. The Governing Committee shall meet at least once a year.
5. The Governing Committee shall endeavor to make all decisions by consensus. Each Member of the Advisory Centre shall have one vote.
6. If a decision cannot be made by consensus, the subject matter may be submitted to a vote, which requires the presence of a majority of the representatives. Decisions shall be made by a majority of the representatives present and voting, except with regard to [...], which shall require two-thirds majority of the representatives present and voting. Representatives who abstain from voting shall be considered as not voting.
7. The Governing Committee may decide to establish an Executive Committee and delegate some of its functions for the purposes of ensuring an effective operation of the Advisory Centre.
8. The Executive Director shall be appointed by the Governing Committee for a term of [...] years and may be eligible for re-appointment.
9. The Executive Director shall:
  - (a) Manage the day-to-day operation of the Advisory Centre;
  - (b) Employ and manage the staff members of the Secretariat in accordance with the staff regulations adopted by the Governing Committee;
  - (c) Prepare the annual budget of the Advisory Centre for adoption by the Governing Committee;
  - (d) Prepare the annual report on the operation of the Advisory Centre for adoption by the Governing Committee; and
  - (e) Represent the Advisory Centre externally.
10. The Executive Director shall be accountable to the Governing Committee.

11. The Executive Director shall not hold any other employment or engage in any other occupation without the approval of the Governing Committee.

17. Article 5 sets out the governance structure of the Advisory Centre. Paragraph 1 provides for a two-tier structure consisting of the Governing Committee and the Secretariat, while paragraph 7 foresees the establishment of a managerial body (the “Executive Committee”) at a later stage and when necessary to ensure a more effective operation of the Advisory Centre (A/CN.9/1160, para. 46).<sup>3</sup> For example, the Governing Committee may decide to establish the Executive Committee when the number of Members exceed a certain threshold and/or when administrative decisions need to be taken more regularly as a result of expanded services.

18. Paragraph 2 establishes that the Governing Committee consists of the representatives of all Members, with each Member appointing one representative to the Governing Committee (A/CN.9/1160, para. 47).

19. Paragraph 3 lists the functions to be carried out by the Governing Committee, including taking key decisions on matters relating to the operation of the Centre. The Governing Committee would be responsible for setting the long-term and short-term strategies as well as concrete goals of the Centre (A/CN.9/1160, para. 49).

20. While subparagraph 3(c) provides that the Governing Committee would adopt its rules of procedure (which could address the composition of the bureau members, when and where to hold its meetings, means to submit a matter to a vote and others), paragraphs 4 to 6 sets out the parameters for decision-making by the Governing Committee (A/CN.9/1160, paras. 47, 48 and 50). This allows for decisions to be made in a timely manner. Paragraph 6 is based on the understanding that administrative matters could be subject to decisions by a simple majority, while certain important questions would require a qualified majority. The Working Group may wish to consider which key policy issues including matters listed in paragraphs 3 and 7 should require a qualified majority (for example, reclassification of the category of Members in Annexes I to III, revision of the rules of procedure).

21. Subparagraph 3(d) allows for the Governing Committee to adopt regulations regarding the operation of the Advisory Centre. Such regulations may address, for example:

- Entitlement of services and obligations of Members (see para. 15 above);
- Scope of services and beneficiaries under articles 6 and 7, including rules on prioritization among Members under article 7(4) and any conflict of interest (see para. 40 below);
- The provision of services to non-Members, other persons or entities under articles 6(4) and 7(5) and the criteria to be applied (see paras. 33 and 41 below);
- Adjustments to the contribution to be made by each Member under article 8(3) and fees to be charged under article 8(4) (see paras. 43 and 44 below);

<sup>3</sup> In contrast, the ACWL was established as a three-tier structure composed of the General Assembly, the Management Board and the Executive Director. The Management Board is responsible for taking decisions necessary to ensure the efficient and effective operation, including the appointment of the Executive Director. The six members of the Management Board are selected on the basis of their personal qualifications in the field of WTO law or international trade relations and development, with three nominated by the developing country members, two by the developed country members and one by the least developed countries (A/CN.9/WG.III/WP.212, footnote 4). Considering that the composition of the Advisory Centre, including the number of its Members, is not yet known, article 5 suggests a two-tier structure, which could be expanded to a three-tier structure at a later stage. The composition of the Executive Committee (representation and the possibility of appointing outside experts) and the functions to be delegated would need to be determined by the Governing Committee when it decides to establish the Executive Committee.

- Rules on the receipt of voluntary contributions under draft provision 8(5);
- Treatment of information, including confidentiality of certain information (A/CN.9/1160, para. 36); and
- Conditions of services and rights and obligations of staff members of the Secretariat (staff regulations).<sup>4</sup>

22. Subparagraph (f) provides for flexibility and allows the Governing Committee to adapt to changing circumstances or unforeseen needs (A/CN.9/1160, para. 49). One such function may be to adjust the classification of States in the annexes to the Protocol.

23. Paragraph 8 details the process for appointing the Executive Director and the term of his or her services. Paragraphs 9 and 10 set forth the responsibilities of the Executive Director and clarifies the relationship with the Governing Committee, mainly that the Executive Director is accountable to it (A/CN.9/1160, para. 51).

#### Article 6 – Technical assistance and capacity building

1. The Advisory Centre shall provide technical assistance to its Members and engage in capacity building activities with regard to [international investment law and investor-State dispute settlement][international investment dispute resolution].
2. For this purpose, the Advisory Centre may:
  - (a) Advise on issues pertaining to dispute prevention;
  - (b) Provide training with regard to possible means of resolving disputes;
  - (c) Function as a forum for the exchange of information and sharing of best practices;
  - (d) Function as a repository of information and related resources; and
  - (e) Perform any other functions assigned to it by the Governing Committee.
3. The Advisory Centre shall coordinate and cooperate with international and regional organizations and may engage other persons or entities in providing the services in paragraphs 1 and 2.
4. The Executive Director may allow a non-Member, other person or entity to benefit from the services in paragraphs 1 and 2 in accordance with the regulations adopted by the Governing Committee. The criteria shall include, among others, whether allowing a non-Member, other person or entity to benefit from the Centre's services contributes to the objectives of the Centre, whether it is beneficial to the Members, whether it creates any conflict of interests and the resource implications on the Centre.
5. For the purposes of this Protocol, a "non-Member" refers to a State or a regional economic integration organization that is not a Party to the Protocol.

24. Article 6 addresses the technical assistance and capacity building function of the Advisory Centre, which constitutes one of the two pillars of its activities (A/CN.9/1160, paras. 52 and 53).

25. Paragraph 1 provides that such services would be available to all Members and that they would relate broadly to issues of international investment law and investor-State dispute settlement (see paras. 5 and 8 above on the possible use of the phrase "international investment dispute resolution"). Paragraph 2 lists examples of

<sup>4</sup> In adopting the staff regulations, the Governing Committee should aim to ensure that the staff members of the Secretariat possess sufficient expertise and experience to deliver a wide range of high-quality services. It should also aim to ensure gender balance and representation among different geographical regions and legal traditions, yet mindful of the composition of the Members as well as the size of the Secretariat. It should also address potential conflict-of-interest situations faced by staff members, including rules on disclosure (A/CN.9/1160, para. 51).

activities to be conducted by the Centre under paragraph 1, with subparagraph (e) noting that the Governing Committee could assign additional functions as it deems appropriate (A/CN.9/1160, paras. 53 and 54).

26. Combined, paragraphs 1 and 2 provide a broad mandate for the Advisory Centre to engage in a wide range of technical assistance and capacity building activities. For example, under subparagraph 2(a), it would be possible for the Centre to provide advice to a State regarding a measure it wishes to take, including whether such a measure may lead to potential claims by an investor (A/CN.9/1160, paras. 30 and 52). Similarly, under subparagraph 2(b), it would be possible for the Centre to conduct training on the use of mediation to resolve investment disputes (A/CN.9/1160, para. 30). Under subparagraph 2(c), the Centre could host conferences and webinars where Members could exchange information.

27. Considering the divergence in views with regard to whether the Centre may provide services with regard to State-to-State dispute settlement (SSDS) (A/CN.9/1160, paras. 26-28), the Working Group may wish to consider whether technical assistance and capacity building on SSDS should be explicitly excluded from the scope. It should, however, be noted that SSDS is being used to resolve investment disputes (A/CN.9/1160, para. 28) and that it might be helpful to Members if States that utilize SSDS to resolve investment disputes share their experience, for example, in the forum. Therefore, this question may need to be treated separately from whether the Centre should provide legal advice and support in a SSDS proceeding (see para. 35 below).

28. Paragraph 3 reiterates the general principle in article 3(3) and obliges the Centre to cooperate closely with international and regional organizations and other persons or entities in providing the services mentioned in the previous paragraphs. This is to avoid duplication of work and to allow the Centre to engage a wide range of institutions and individuals (for example, academic and training institutions, experts and practitioners in the field) when providing its services (A/CN.9/1160, paras. 56 and 62).

29. Paragraph 4 addresses the possible request for technical assistance by non-Members, other persons or entities as well as their possible participation in capacity building activities of the Centre. Articles 4(2) and 6(1) make it clear that only Members are entitled to the services of the Advisory Centre. However, in light of the views that States and REIOs that are not members of the Centre (defined as “non-Members” in paragraph 5) and other persons or entities (for example, micro-, small- and medium-sized enterprises (MSMEs), dispute resolution institutions, academics, and private individuals) should also be able to benefit from the services of the Centre, paragraph 4 provides that the Executive Director may allow non-Members, other persons or entities to benefit from the services, but only in accordance with the regulation adopted by the Governing Committee<sup>5</sup> (A/CN.9/1160, para. 60). It further mentions some of the criteria, which can be further developed in that regulation (A/CN.9/1160, paras. 61-62).

30. One advantage of allowing “non-Members” to benefit or participate in the activities of the Centre is that they would gain first-hand experience of the services provided by the Centre, which may incentivize them to seek membership (A/CN.9/1160, para. 62). This might be especially important at the early phase of the Centre’s operations. The Working Group may wish to confirm that it should be possible for non-Members to benefit from the services under the set-forth conditions.

31. With regard to “other persons or entities”, there may be a number of different types of other parties or entities that could participate in the Centre’s activities and benefit from them. The participation of investors might be useful in preventing claims and fostering a better understanding between the parties, possibly resulting in an

<sup>5</sup> Such a regulation could specify (i) criteria to be applied in making the determination which may differ depending whether it is a non-Member or other person or entity; (ii) the procedure for requesting services or participation; (iii) the procedure for the Executive Director to make the determination including any reporting or review process; (iv) the fees to be charged (see annex V); (v) means to conflict of interest situations (A/CN.9/1160, para. 62).



amicable settlement. This may also benefit the home State of the investor (A/CN.9/1160, para. 59). A training course on investment mediation could enhance the capacity of potential mediators. An induction course on services of the Centre may provide law firms that are willing to provide their services at a reduced rate (see para. 37 below) a better understanding of the needs of their potential clients. The participation of international and regional organizations in the forum mentioned in subparagraph 2(c) as observers could enable them to better understand the objectives of the Centre and could enhance cooperation and coordination as expected under articles 3(3) and 6(3).

32. Concerns about the participation of other persons or entities focused on “investors” benefitting from the services, mainly that it would be contrary to the objectives of the Centre and might lead to additional claims against States (A/CN.9/1160, para. 58). Diverging views were expressed with some support for limiting access only to MSMEs (A/CN.9/1160, paras. 57-59).

33. In that context, article 2(2) makes it clear that the objective of the Centre is to enhance the capacity of “States and regional economic integration organizations” in handling international investment disputes. Furthermore, article 6(4) ensures that participation of “investors” in the activities of the Centre (as is with any other category of persons or entities) should only be allowed if it serves the objectives of the Centre and is in the interest of the Members. Their participation should also not put a burden on the Centre’s resources and the Governing Committee is expected to adopt detailed regulations, which would guide the Executive Director in allowing other persons or entities’ access to the technical assistance and capacity-building services on a case-by-case basis (A/CN.9/1160, para. 60). The Working Group may wish to consider whether additional guidance needs to be provided to the Governing Committee in preparing such regulations or to exclude certain category of persons or entities from benefitting from those service entirely.

#### **Article 7 – Legal advice and support with regard to international investment dispute proceedings**

1. Upon the request by a Member, the Advisory Centre may provide legal support and advice with regard to an international investment dispute proceeding prior to and after its initiation.
2. For this purpose, the Advisory Centre may:
  - (a) Provide a preliminary assessment of the case, including the appropriate means to resolve the dispute;
  - (b) Assist in the selection of mediators, arbitrators or other types of adjudicators (including any challenges) as well as experts and in so doing, shall take into account geographical diversity and gender;
  - (c) Support the preparation of statements, pleadings and evidence as well as other aspects of the proceeding;
  - (d) Represent the Member in the proceeding including in a hearing, possibly in conjunction with a team of that Member;
  - (e) Facilitate the appointment of external legal counsel to provide the above-mentioned services; and
  - (f) Perform any other functions assigned to it by the Governing Committee.
3. The provision of services listed in this article is subject to the resources available to the Advisory Centre. The Governing Committee shall periodically assess, and if needed, adjust the scope and type of services, including by deciding to phase in some of the services at a later stage of its operation.
4. In rendering the services in this article, the Advisory Centre shall, in principle, give priority to Members listed in Annex I to the Protocol followed by Members listed in Annex II to the Protocol in accordance with the regulations adopted by the

Governing Committee. In the event that requests are received from Members in the same category, priority shall generally be given to the Member that requested the services first.

5. The Executive Director may allow a non-Member to request the services in this Article in accordance with the regulations adopted by the Governing Committee. Whether the requesting non-Member may benefit from the services and the extent of the services to be provided by the Centre shall be determined by the Governing Committee. In making the determination, the Governing Committee shall consider whether allowing a non-Member to benefit from the Centre's services contributes to the objectives of the Centre, whether the non-Member is in the process of becoming a Member, whether it creates any conflict of interests and the resource implications on the Centre.

34. Article 7 addresses the assistance to be provided by the Centre with regard to international investment dispute (IID) proceedings, which constitutes one of the two pillars of its activities (A/CN.9/1160, para. 63). Whereas article 6 provides for services to be delivered by the Centre relating broadly to issues of international investment dispute resolution (see para. 24 above), article 7 focuses on legal advice and support with regard to specific IID proceedings.

35. Paragraph 1 clarifies that the Centre may provide legal advice and support upon the request by any Member, which may also be prior to the formal initiation of the proceeding (A/CN.9/1160, paras. 24 and 64). The Working Group may wish to consider whether the generic reference to IID proceeding is appropriate, which is not limited to investment arbitration and covers different legal bases of the disputes (see para. 8 above). Considering the divergence in views with regard to whether the Centre should provide services with regard to SSDS (A/CN.9/1160, paras. 26-28, 64 and 73, see also para. 27 above), the Working Group may wish to consider whether paragraph 1 should expressly exclude SSDS proceedings.

36. Paragraph 2 elaborates the types of legal support and advice to be provided by the Centre reflecting the discussions of the Working Group (A/CN.9/1160, paras. 65-70). It is intended to be a non-exhaustive list as indicated in subparagraph (f) (A/CN.9/1160, para. 70).

37. Subparagraph (a) refers to an assessment of the dispute at hand and not general policy advice as to whether a measure complies with the Member's obligations in an investment agreement (see article 6(2)(a), para. 26 above). Subparagraph (b) relates to assistance in identifying a suitable mediator, arbitrator or other types of adjudicators and requires the Centre to take into account geographical diversity and gender in providing such services (A/CN.9/1160, para. 67). Subparagraph (c) mentions the support to be provided with regard to the various aspects of the proceeding, which is not necessarily limited to the early stages of the proceeding (A/CN.9/1160, para. 66, for example, the enforcement of an award). Subparagraph (e) provides that the Centre could facilitate the engagement of outside legal counsel by the Members (rather than directly hiring the legal counsel), for example, by managing a list of law firms, which may be willing to provide the services listed in article 7 to Members on a pro bono basis or at a reduced rate (A/CN.9/1160, para. 69).

38. Different views were expressed on the extent to which the Centre should provide representation services, particularly due to their resource-intensive nature (A/CN.9/1160, paras. 66 and 68). Considering that one of the objectives of establishing the Centre is to reduce the significant financial burden of States in obtaining representation services, subparagraph 2(d) lists it as one of the services to be provided by the Centre (A/CN.9/1160, para. 73). Subparagraph 2(d) also foresees that such services could be provided in close cooperation with the team of Government officials, which would ensure consistency in the Member's approach and might enhance the capacity of the Members in other IID proceedings.

39. However, paragraph 3 allows the Governing Committee to determine the scope and type of services to be provided under article 7 based on the resources available to

the Centre, including to phase in, for example, representation services (A/CN.9/1160, para. 73). This should also be read in conjunction with subparagraph 2(f), which allows the Governing Committee to assign new functions to the Centre. Paragraph 3 also allows the Governing Committee to determine the priority to be given to services listed in article 7 in relation to those listed in article 6 (A/CN.9/1160, para. 63).

40. The resources of the Centre might not be sufficient to respond to all requests by Members and it may be necessary to prioritize among the requesting Members. Paragraph 4 provides that priority shall be given to Members that are LDCs followed by Members that are developing countries (A/CN.9/1124, para. 47; A/CN.9/1160, para. 72). In the event that requesting Members fall within the same category, priority is to be given to the Member that has requested the service first.<sup>6</sup> Paragraph 4 foresees that the Governing Committee may adopt regulations on the allocation of support, which may further elaborate on these priority rules. Such a regulation may include reference to diverse criteria, such as the potential impact of the proceeding on the Member's economy or on investment law more generally, the particular needs or circumstance of the requesting Member, including whether the Member is already receiving any such support or has received support in the past as well as the overall resource implications on the Centre.<sup>7</sup>

41. Paragraph 5 addresses the situation where a non-Member requests the services listed in article 7, the procedure for which is to be detailed in a regulation adopted by the Governing Committee. In contrast to article 6, requests for services listed in article 7 may only be made by "non-Members" (and not other persons or entities) and the determination of whether to provide services and the extent of such services falls within the authority of the Governing Committee (and not the Executive Director). The paragraph further sets out possible criteria to be used by the Governing Committee in making the determination, including whether the requesting non-Member is in the process of becoming a Member (A/CN.9/1160, paras. 71 and 73).

#### Article 8 – Financing

1. The operation of the Advisory Centre shall be funded by the contributions of Members, the fees for services rendered by the Advisory Centre and voluntary contributions.
2. The Advisory Centre may set up a trust fund for the purposes of receiving and managing the financial contributions and fees referred to in paragraph 1.
3. Each Member shall make financial contributions in accordance with Annex IV, which is subject to adjustments by the Governing Committee. If a Member is in default of its contributions, the Governing Committee may decide to limit its rights under this Protocol.
4. The Advisory Centre shall charge fees for its services as set forth in Annex V, which is subject to adjustments by the Governing Committee.
5. The Advisory Centre may receive voluntary contributions, whether monetary or in-kind, from Members, non-Members, international and regional organizations, and other persons or entities in accordance with the regulations adopted by the Governing Committee and provided that the receipt of such contribution is consistent with the objectives of the Advisory Centre and does not impede its independent operation.

<sup>6</sup> For comparison, if two countries entitled to the ACWL's services seek advice in the same dispute, the ACWL applies the first-come-first-served rule. However, to avoid impinging the rights of the second country, the ACWL has created a roster of external counsel consisting of leading law firms and lawyers practising in WTO law, which could also assist countries that are denied direct assistance of the ACWL due to a conflict of interest.

<sup>7</sup> Countries facing financial, economic, political, or environmental challenges with limited experience in ISDS may be given priority. Priority may also be given to a category of States, for example, land-locked developing countries, small island developing countries, and countries in conflict and post-conflict situations.

6. The budget and expenditure of the Advisory Centre shall be subject to internal and external audit.

42. Paragraph 1 lists the sources of the funding required for the establishment and operation of the Advisory Centre, composed mainly of contributions by Members, fees charged for services and voluntary contributions (A/CN.9/1160, paras. 75 and 80). Paragraph 2 mentions the possibility of setting up trust funds for receiving and managing the financial resources (A/CN.9/1160, para. 75). The Working Group may wish to consider whether paragraph 2 is necessary, as a trust fund is one way of managing the financing of an organization.

43. Paragraph 3 provides that the amount of contributions to be made by each potential Member are set out in Annex IV,<sup>8</sup> which is subject to adjustments by the Governing Committee. Annex IV foresees the possibility of Members making a one-time contribution in lieu of annual contributions (A/CN.9/1160, para. 74). It also foresees that the financial obligations of the Members shall differ depending on which of the three categories they belong to (A/CN.9/1160, para. 76).

44. Fees to be charged by the Centre should be the main source of income once the Centre's operation stabilizes. Paragraph 4 provides that the amount of fees to be charged are set out in Annex V,<sup>9</sup> which is subject to adjustments by the Governing Committee (A/CN.9/1160, para. 77). Annex V foresees that the fees to be charged would differ depending on whether the services are provided under articles 6 or 7 and depending on the category of the Member receiving the services. It also foresees fees being charged to non-Members, other persons or entities that receive the services of the Centre, which are higher than those charged to Members.

45. Paragraph 5 outlines the rules accepting voluntary contributions, which would be further elaborated in the guidelines adopted by the Governing Committee. It is expected that the initial set-up cost of the Centre may be borne by the Member hosting the Centre as a voluntary contribution. Robust rules on transparency should be imposed, particularly with regard to private donations, to safeguard the independence of the Centre (see article 3(3)) (A/CN.9/1160, para. 78).

46. Paragraph 6 provides that the budget and expenditure of the Centre shall be subject to internal and external audit to maintain the integrity of the Centre (A/CN.9/1160, para. 79). It should, however, be noted that if established under the auspices of another organizations, financial rules and regulations governing that organizations would apply to matters addressed in article 8, including the requirements on audits.

#### **Article 9 – Legal status and liability**

1. The Advisory Centre shall have full legal personality. It shall have the capacity to contract, to acquire and dispose of immovable and movable property, and to institute legal proceedings.

2. The Advisory Centre shall be headquartered in [...] based on a host country agreement with [...].

3. To fulfil its objectives, the Advisory Centre shall enjoy in the territories of each Member the privileges and immunities as set forth in this Protocol.

4. The Advisory Centre, its property and assets shall enjoy immunity from all legal process, except when the Advisory Centre waives this immunity.

<sup>8</sup> The Secretariat is currently updating the sample budget figures of the Advisory Centre in A/CN.9/WG.III/WP.221/Add.1. Based on the updated figure, an indicative scale of contributions expected of Members in each category will be provided in an informal document (A/CN.9/1160, para. 80).

<sup>9</sup> The indicative fee structure of the Centre will be provided in an informal document (A/CN.9/1160, para. 80).

5. The Advisory Centre, its assets, property and income, and its operations and transactions authorized by this Protocol shall be exempt from all taxation and customs duties. The Advisory Centre shall also be exempt from liability for the collection or payment of any taxes or customs duties.

6. The Executive Director and staff members of the Secretariat shall enjoy immunity from legal process with respect to acts performed by them in the exercise of their functions, except when the Advisory Centre waives this immunity.

7. No tax shall be levied on or in respect of expense allowances paid by the Advisory Centre to the Executive Director, or in respect of salaries, expense allowances or other emoluments paid by the Advisory Centre to the staff members of the Secretariat.

47. Article 9 addresses the legal status of the Centre with the understanding that it would be established as an intergovernmental organization. It is largely based on articles 18 to 24 of the ICSID Convention and would need to be adjusted particularly if the Centre is established under the auspices of the United Nations or another organization as there may be existing rules to govern these matters.

48. Paragraph 1 address the Centre's legal capacity to function and operate properly (A/CN.9/1160, para. 81).

49. Paragraph 2 addresses the location of the Centre and the need to conclude a host country agreement. As to a suitable location for the Centre, a number of elements should be taken into account, such as the accessibility for the beneficiaries of the services and the overall efficiency in providing services, including remotely (A/CN.9/1160, para. 84). The willingness of the host State to financially contribute to the establishment and operation of the Centre could also be a factor to consider. The setting up of regional offices can also be foreseen, which would broaden the scope of coverage but would also require additional financial resources.

50. Paragraphs 3 to 5 address the privileges and immunities necessary of the Centre to protect its integrity and independence. Paragraph 6 addresses the functional immunity of the Executive Director and the staff members of the Secretariat to shield them from external pressures that might hinder the provision of services. This relates, in particular to legal advice and support as outlined in article 7. Without such immunity, the Centre may need to obtain a professional insurance policy for its staff members, which may put a heavy burden on the budget of the Centre. This, however, does not mean that the Executive Director and the staff members of the Secretariat would not be held accountable for their conduct (see article 5(10)), which may be regulated further in the staff regulations adopted by the Governing Committee (see para. 21 above, Article 5(3)(b) is understood to mean that the Governing Committee also has the authority to dismiss the Executive Director (A/CN.9/1160, para. 51). The process for dismissing the Executive Director and other relevant actions on staff members could be detailed in the staff regulations).

51. It is foreseen that the Centre may provide services to non-Members, other parties or entities (see articles 6(4) and 7(5)), which are not bound by the Protocol nor the host country agreement. In that case, the Centre would need to ensure that the same level of privileges and immunities are granted to the Centre, for example, by concluding an agreement with the non-Member or requiring them to waive their rights to raise any claim against the Centre and its staff members for the services obtained.

#### **Article 10 – Signature, ratification, acceptance, approval, accession**

1. This Protocol is open for signature by a State or a regional economic integration organization [place and time to be determined].

2. This Protocol is subject to ratification, acceptance or approval by the signatories.

3. This Protocol is open for accession by a State or a regional economic integration organization that is not a signatory from the date of it is open for signature.

4. Instruments of ratification, acceptance, approval or accession are to be deposited with the depositary.

#### Article 11 – Entry into force

This Protocol shall enter into force sixth months after deposit of the [ ] instrument of ratification, acceptance, approval or accession provided that:

- (1) At least [a number to be determined] States or regional economic integration organization listed in Annex III have deposited their instrument; or
- (2) The expected contribution by States or regional economic integration organization that are parties to the Protocol in accordance with article 8 exceeds [to be determined].

52. Article 11 provides for rules on entry into force of the Protocol, which also sets forth a minimum threshold for the operationalization of the Advisory Centre. While the entry into force of the Protocol depends largely on the number of Members, the conditions for establishment and initiating operation depends more on the financial resources available or anticipated (see article 3(1)). The Working Group may wish to consider whether the approach taken in article 11 is appropriate and suggest possible thresholds (for example, 20 Members and 80% of the anticipated budget for the first five years of operation).

#### Annex I – List of least developed countries

The current list of the 46 least developed countries (LDCs) is available at <https://www.un.org/development/desa/dpad/least-developed-country-category/ldcs-at-a-glance.html>. They include: Afghanistan, Angola, Bangladesh, Benin, Bhutan, Burkina Faso, Burundi, Cambodia, Central African Republic, Chad, Comoros, Democratic Republic of the Congo, Djibouti, Eritrea, Ethiopia, Gambia, Guinea, Guinea-Bissau, Haiti, Kiribati, Lao People’s Democratic Republic, Lesotho, Liberia, Madagascar, Malawi, Mali, Mauritania, Mozambique, Myanmar, Nepal, Niger, Rwanda, Sao Tome and Principe, Senegal, Sierra Leone, Solomon Islands, Somalia, South Sudan, Sudan, Togo, Tuvalu, Uganda, United Republic of Tanzania, Yemen and Zambia.

The list of LDCs is reviewed every three years by the Committee for Development Policy, a group of independent experts that reports to the Economic and Social Council (ECOSOC) of the United Nations. This list is also updated according to the decisions by the United Nations General Assembly.

#### Annex II – List of developing countries

There is no established convention for the designation of developed or developing countries or areas in the United Nations system. However, in 1996, the distinction of “developed” and “developing” regions was introduced solely for statistical use (known as M49). It did not express a judgement about the stage reached in the development process. Over time the use of this distinction became increasingly problematic as it did not reflect reality. Since 2017, the Sustainable Development Goals report<sup>10</sup> and the statistical annex to the Secretary General’s annual report on SDGs progress<sup>11</sup> use geographic regions instead. Following consultation with other organizations active in

<sup>10</sup> The Sustainable Development Goals reports are available at <https://unstats.un.org/sdgs/report/2023/>.

<sup>11</sup> See, for example, document E/2023/64, annex available at [https://unstats.un.org/sdgs/files/report/2023/E\\_2023\\_64\\_Statistical\\_Annex\\_I\\_and\\_II.pdf](https://unstats.un.org/sdgs/files/report/2023/E_2023_64_Statistical_Annex_I_and_II.pdf).

the area of official statistics, the distinction was removed from M49 in December 2021. Following the removal, users expressed the need to maintain the distinction based on the understanding that being part of either developed or developing regions was through sovereign decision of each State.

The historical classification of developed and developing countries as of December 2021 and updated as of May 2022 can be found at <https://unstats.un.org/unsd/methodology/m49/historical-classification-of-developed-and-developing-regions.xlsx>. The classification includes 67 developed regions and 181 developing regions. The 46 LDCs listed in Annex I appear as developing regions in the above-mentioned classification. Therefore, the list of developing countries in Annex II may consist of those States that are listed as developing regions in the classification, excluding LDCs listed in Annex I.

### **Annex III – List of others**

The list of others in Annex III may consist of States that are listed as developed regions in the above-mentioned classification as well as regional economic integration organizations, which are not listed in that classification.

### **Annex IV – Scale of contributions**

Minimum contributions of States and REIOs

	Minimum annual contribution	Minimum one-time contribution
Members listed in Annex I		
Members listed in Annex II		
Members listed in Annex III		

### **Annex V – Schedule of fee for services rendered by the Advisory Centre**

Article 6-type services (Technical assistance and capacity building)

Members listed in Annex I	
Members listed in Annex II	
Members listed in Annex III	
Non-Members <sup>12</sup>	
Other persons or entities <sup>13</sup>	

Article 7-type services (Legal advice and support with regard to international investment dispute proceedings) (to be charged per hour or by case)

Members listed in Annex I	
Members listed in Annex II	
Members listed in Annex III	
Non-Members <sup>14</sup>	

<sup>12</sup> The amount should be higher than the fees charged to Members.

<sup>13</sup> The amount should be higher than the fees charged to non-Members.

<sup>14</sup> The amount should be higher than the fees charged to Members.

### **III. Way forward**

53. During its forty-seventh session in October 2023, the Working Group agreed to recommend to the Commission that the draft statute be adopted in principle, which would allow for adjustments at a later stage. It was further anticipated that once the draft provisions were adopted in principle by the Commission, efforts would need to be made the Working Group and the Secretariat to operationalize the Advisory Centre by addressing relevant issues that arise in its implementation (A/CN.9/1160, para. 18). In this regard, the Working Group may wish to consider how to make progress with regard to the draft statute, including its annexes and with regard to regulations and other texts to operationalize the Centre.

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