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Dispute Settlement Reform)
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Possible reform of investor-State dispute settlement (ISDS)

Advisory Centre

Note by the Secretariat

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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 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
2. At its thirty-eighth session, the Working Group expressed general support for further consideration of the establishment of an advisory centre and requested the Secretariat to continue undertaking preparatory work (A/CN.9/1004*, 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 preparatory work on this topic (A/CN.9/1044, paras. 26 and 39).
3. Accordingly, this Note, including its addendum, aims to assist the Working Group in the consideration of the establishment of an advisory centre on international investment law (hereinafter the “advisory centre” or “centre”). This Note covers the scope and governing structure of an advisory centre, as well as the services and beneficiaries, and the addendum covers the possible legal structures, location and cost and financing. As is the case for other documents provided to the Working Group, this Note was prepared with reference to a broad range of information³ and does not seek to express a view on the possible reform options, which is a matter for the Working Group to consider.

II. Advisory centre

A. Background information

4. 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 identified concerns, including with respect to the cost of ISDS proceedings, correctness and consistency of decisions, as well as access to justice. It was also

¹ *Official Records of the General Assembly, Seventy-second Session, Supplement No. 17 (A/72/17)*, 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 and its Addendum, A/CN.9/935, A/CN.9/964, and A/CN.9/970, respectively.

² Document A/CN.9/WG.III/WP.166 and its Addendum provides an overview of reform options.

³ This Note was prepared based on comments received during an informal meeting held online on 14-16 June 2021 as well as comments received from Governments and other interested stakeholders. It was also prepared with reference to a broad range of published information on the topic, including: “Securing Adequate Legal Defence in Proceedings under International Investment Agreements – A Scoping Study”, 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> and endorsed in A/CN.9/WG.III/WP.196, Submission from the Governments of the Netherlands, Peru and Thailand (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; 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*, available at: https://uncitral.un.org/sites/uncitral.un.org/files/aciil_note_on_costs_financing_24_august_2020_final_updated.pdf; A/CN.9/WG.III/WP.161, Submission from the Government of Morocco; A/CN.9/WG.III/WP.162, Submission from the Government of Thailand; A/CN.9/WG.III/WP.174 and A/CN.9/WG.III/WP.197, Submissions from the Government of Turkey; A/CN.9/WG.III/WP.179, Submission from the Government of the Republic of Korea; A/CN.9/WG.III/WP.183, Submission by the Government of the Republic of Guinea; A/CN.9/WG.III/WP.188, Submission from the Government of the Russian Federation, and A/CN.9/WG.III/WP.196, Submission by the Government of the Netherlands, Peru, and Thailand.

mentioned that an advisory centre could contribute to enhancing transparency in ISDS (A/CN.9/1004*, para. 28).

5. The Working Group provided guidance on how the preparatory work should be conducted (A/CN.9/1004*, paras. 40-49) and requested the Secretariat to prepare draft provisions (A/CN.9/1004*, para. 41). It was suggested that the Advisory Centre on WTO Law (the “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”. It was also pointed out that the structure of an advisory centre and the scope of its services should be considered in light of how such a centre would interact with the international investment dispute settlement regime and its reform efforts (A/CN.9/1004*, para 37). An advisory centre should therefore address the specific needs of the international investment dispute settlement regime and respond to identified concerns (see above, para. 4). The Working Group may wish to consider the draft provisions below in that light.

B. Preambular considerations and establishment of a centre

1. General principles

6. The Working Group may wish to consider that the instrument establishing the centre could contain in its preamble some general principles outlining the main guiding elements relating to the functioning of a centre (see A/CN.9/1004*, paras. 47 and 48) as follows.

The Centre shall render the Services: (a) in a sustainable, affordable and efficient manner; (b) free from any external influence, including from donors; (c) without incurring overlaps with the work conducted by other entities, so as to maximise the use of resources; and (d) by maintaining confidentiality of information that it receives in rendering the Services.

2. Establishment, membership, scope, and internal organization

7. The Working Group may wish to consider the following draft provisions 1 to 4 on establishment, membership, scope, and governing structure of the centre.

Draft provision 1 – Establishment

The Advisory Centre on International Investment Law (“Advisory Centre”) is hereby established.

Draft provision 2 - Membership

The Advisory Centre shall remain open to membership by States and regional economic integration organizations (“the Members”) in accordance with the provisions of this Agreement.

Draft provision 3 - Scope

The Centre shall provide the services referred to in draft provisions 6 and 7, as adjusted if need be in accordance with draft provision 8, in matters relating to international investment law, and international investment dispute settlement (the “Services”).

Draft provision 4 – Governing Structure

1. There shall be a governing board composed of representatives of the Members of the Advisory Centre (referred to as “the Governing Board”). The Governing Board shall meet regularly and as appropriate to ensure the functioning of the Centre.

2. The Governing Board shall carry out the functions assigned to it by this Agreement.

3. Its main functions would be to:

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- (a) Establish the rules of procedure of the Advisory Centre, and update them on a regular basis;*
 - (b) Evaluate and monitor the performance of the Advisory Centre;*
 - (c) Determine the fee structure and necessary adjustments;*
 - (d) Assess and, if needed, adjust the scope of Services and list of Beneficiaries in accordance with article 8;*
 - (e) Adopt the necessary rules to regulate potential conflicts of interest, prioritization, and other aspects related to the provision of Services to Beneficiaries; and*
 - (f) Take the necessary measures to the functioning of the Centre, such as developing partnerships with relevant organizations, including universities.*

[4. There shall be an advisory board, composed of representatives of micro, small and medium-size enterprises (MSMEs) [and natural persons investors,] (the "Advisory Board"). The Advisory Board shall carry out the functions assigned to it by this Agreement.]

Comments

Establishment

8. Draft provision 1 provides for the establishment of the advisory centre (see also document A/CN.9/WG.III/WP.212/Add.1, paras. 1 to 4 on the possible models).

Membership

9. Draft provision 2 deals with the membership of the centre. 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.⁴ It is contemplated that the advisory centre would operate as, or within the frame of, an independent inter-governmental body to ensure its legitimacy and avoid potential conflicts.

Scope

10. Draft provision 3 serves to define in a generic manner the services of the centre, indicating that the focus of its activities relates to international investment law and international investment dispute settlement, which would include State-to-State and

⁴ As an illustration, the Working Group may wish to note the internal organization of the ACWL, which consists of the General Assembly, Management Board, and Executive Director. The General Assembly is the ACWL's highest decision-making body, consisting of 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 from 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.

investor-state dispute settlement (“ISDS”). Draft provision 3 will need to be adjusted based on the consideration by the Working Group of the services that the centre would render, in particular, whether the centre would focus on certain services and beneficiaries at an initial stage.

11. The Working Group may wish to note that draft provision 3 implies that the advisory centre could provide services on any type of international investment dispute, not only disputes arising pursuant to the investment promotion and protection provisions in an international treaty. It may wish to consider whether the centre should focus on treaty-based proceedings only.

12. A number of interconnected issues might be noted, 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 (it may be possible to expand the scope of services gradually taking into account the available funds and the same could apply to the determination of beneficiaries); (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.⁵

Governing structure

13. Draft provision 4 foresees an independent governing board consisting of members from both developed and developing States and regional economic integration organizations. Their work could be supported by full-time professional staff to further ensure the independence of the centre.

14. If the centre were to provide services to certain categories of investors, they may also be represented in the governing structure. In that case, options would need to be explored in order to exclude possible conflicts of interest of entities other than governments. It is suggested under article 4(4) that an advisory board be set up composed of a balanced representation of such investors (both micro, small and medium-size enterprises (MSMEs) beneficiaries and individual and vulnerable investors, see also below, para. 61). The Working Group may wish to consider whether an advisory board would also need to include other categories of non-State actors.

15. The Working Group may wish to consider the functions that might need to be fulfilled by the governing board listed under draft provision 4(3). Similarly, the role of the advisory board would need to be defined based on the services that the centre would render to non-State actors. The rules for the nomination, term of office, and removal of the governing and advisory boards’ representatives would also need to be determined in due course.

16. The Working Group may wish to consider further how working procedures should be developed to avoid conflicts and address governing issues as between the members of the advisory centre, the governing board, the advisory board, beneficiaries of the services, donors, support providers, governments, private- and government-owned investors and investments, and other stakeholders. Assuming contributions or donations from the public and private organizations are accepted, such procedures would be particularly important to ensure that the advisory centre’s role and its services remain in keeping with the reform objectives.

17. On a different note, the internal organization and staffing of the advisory centre also has 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

⁵ See also Section 5 of the Scoping Study.

perspective and interest between a support provider and the beneficiaries might create difficulties in the operation of the centre.⁶

18. The Working Group may also wish to note that an advisory centre would need to have diverse staff, including a diversity of expertise and experience, as well as diversity in legal, social, and governmental backgrounds, in addition to the geographical and gender diversity. The staff require sufficient expertise to ensure that they can deliver the highest quality services, and sufficient experience to independently render the full range of required services, including assistance and defence in international investment dispute settlement cases.

C. Services

1. Internal organization of the advisory centre, with two pillars

19. The Working Group may wish to note that the list of possible services that an advisory centre could render includes (i) assistance in (a) mediation and other alternative dispute resolution (“ADR”) methods; and (b) organizing the defence and support during dispute settlement proceedings; and (ii) a forum for sharing of best practices, including on pre-dispute and dispute avoidance services, mediation and other forms of ADR, as well as legal and policy advisory services.

Draft provision 5 – Assistance Mechanism and Forum

The Advisory Centre shall be composed of:

(a) An Assistance Mechanism to provide the Services referred to in draft provision 6; and

(b) A Forum, where exchange of information and policy considerations on prevention, avoidance, management of investment disputes should be provided for, including on available services and technical assistance opportunities offered by stakeholders, and on the collection and promotion of best practices, building upon available resources, as provided for under draft provision 7.

20. Draft provision 5 suggests a possible internal structure with two pillars, underlining that services would be rendered through an assistance mechanism and that the centre would also serve as a forum, the activities of which could be further delineated. Such a structure will need to be considered further, based on the determination of the services that the centre would render and the beneficiaries. For instance, as long as the function of the advisory centre is limited to an assistance mechanism for proceedings, the circle of beneficiaries could be limited to least developed countries. Once it becomes a forum for sharing information and experience, the circle of beneficiaries could be extended to all States regardless of their level of economic development (as well as MSMEs and natural person investors, if it is decided that they should also benefit from certain services).

21. The Working Group may also wish to consider whether, in its initial stages, the advisory centre should focus on certain services only and, if so, which ones. In that context, the Working Group may wish to note the degree of flexibility reflected in draft provision 8 below which allows the governing body to modify such list of services as appropriate over time.

⁶ 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; and 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), see p.96.

2. Assistance mechanism

22. The Working Group may wish to consider draft provision 6 below regarding the services to be rendered under the assistance mechanism.

Draft provision 6 - Services under the Assistance Mechanism

The Centre shall provide, to the beneficiaries referred to in draft provision 9, assistance and representation Services in international investment dispute settlement proceedings, which includes:

- (a) Providing advice, including on the selection of the most appropriate dispute resolution method, and other advisory services and assistance in relation to mediation and other forms of alternative dispute resolution (ADR) methods; and*
- (b) Representation before any international forum and under any procedural rules, including jointly with the defence team of the beneficiary where so requested by such beneficiary;*
- (c) Close cooperation, assistance, and support in preparing for, or organizing the defence, including for:*
 - (i) 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, as well as assistance with confidential or time-sensitive issues upon request;*
 - (ii) The determination of the financial implications and earmarking of a budget for the defence of a case;*
 - (iii) The selection of mediators, adjudicators, procurement of counsels if needed, and identification of potential experts;*
 - (iv) The preparation of written statements, and documentary evidence; and*
 - (v) Technical support on the substantial and procedural conduct of the proceedings.*

Comments

Umbrella

23. The Working Group may wish to clarify the term international investment dispute settlement, in particular whether it includes disputes based on investment contracts and national investment laws.

Representation and assistance services in mediation and other forms of ADR

24. The Working Group may wish to consider draft provision 6(a), which is based on the understanding that disputes could be avoided or settled through mediation, where disputing parties may benefit from advice and ADR services before the disputes escalate into formal proceedings such as arbitration.

25. The centre would play an important role with regards to risk assessment ([A/CN.9/1004*](#), para. 45), which could include an analysis of the case, its weaknesses and strengths, and the choice of the appropriate dispute resolution method. It would also represent and assist the State beneficiary in mediation.

Representation and assistance services in international investment dispute settlement

- *General remarks*

26. Assistance and support in international investment dispute settlement defence aim at assisting mainly developing State and LDCs beneficiaries to avoid or minimize liability and/or reduce the defence costs and could potentially increase the legitimacy of the international investment dispute settlement regime by establishing a level playing field. 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 services 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 adequately defend themselves. Such Governments have expressed that they lack the human and financial resources to adequately defend themselves in international investment proceedings and are seeking comprehensive assistance in case management, up to and including representation in arbitration hearings. The work of the advisory centre could therefore be aimed at providing support and coaching throughout the case process with a view to building the long-term capacity of States to lead and manage such cases. The work of the advisory centre could focus on extensive support for a State-led litigation strategy.

27. 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 tribunal through high-quality legal services (A/CN.9/WG.III/WP.168, para. 18). In addition, the services could be provided in close cooperation with the State's officials to prepare written statements, and other relevant procedural steps. The case-specific assistance would be provided with a view to building longer-term defence capacity within developing countries (A/CN.9/1004*, para. 45).

▪ *Representation services*

28. States have traditionally adopted three different approaches to the defence of their interests in international investment dispute 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).

29. Recognizing these different approaches, the Working Group may wish to consider three possible "service models": (i) facilitating; (ii) supporting; and (iii) representing.

30. States that primarily rely on in-house or external counsel may wish to avail themselves 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/adjudicators and counsel selection, available defences, or possible counterclaims. Draft provision 6(a) and (c)(i) seeks to address such needs.

31. 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 request 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 counsels, 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 6(a) and (b), which provides that the advisory centre would take an active part in the defence of State beneficiaries.

▪ *Assistance and support during the proceedings*

32. The Working Group may wish to note draft provision 6(c) 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 the 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 the settlement of international investment disputes. 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 properly prepare their defence ([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 on the cost of the international investment dispute settlement, as lengthy proceedings are likely to result in higher costs ([A/CN.9/930/Rev.1](#), para. 38).

33. 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 counsels. 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.

34. The first step is related to the selection and appointment of arbitrators/adjudicators to establish the arbitral tribunal. This requires technical expertise, as well as means and resources to research candidate profiles. In this 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/adjudicator services; (iii) advice and support in the case of arbitrator/adjudicator challenge; and (iv) assistance regarding procurement of counsels and identification of experts.

35. The second step relates to written statements, documentary evidence, and procedural hearing. During international investment dispute settlement 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 the international investment dispute settlement 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 counsels to ensure that the documents filed by the State are of high quality.

36. The third step relates to the representation at hearings. Hearings for the presentation of evidence by witnesses and experts and/or for oral arguments are an important phase in the proceedings. 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 proceedings; and build capacity within the State for more effective representation in future cases.

3. Forum for sharing of best practices and capacity building

37. The Working Group may wish to consider the following draft provision 7 which addresses the role of the Forum (A/CN.9/1004*, paras. 44 and 49).

Draft provision 7 – Technical Assistance Services and Capacity Building Activities under the Forum

1. The Centre shall provide technical assistance and capacity building through a Forum, which would act as a platform to:

(a) Direct the beneficiaries referred to in draft provision 9 to existing resources for established dispute prevention mechanisms, and where non would be relevant, assist the State to set-up conflict management systems, including early dispute prevention policies and alert procedures;

(b) Share relevant information and experience on mediation and other forms of ADR; and

(c) Provide, upon request, legal and policy advice on matters relating to international investment law, including assistance for the review of, and potential amendment to, international investment instruments; and the assessment of compliance with treaty obligations of measures or contemplated measures

2. The Forum would also, more generally:

(a) Provide data collection services;

(b) Facilitate exchange of information among the beneficiaries on, and development of guidelines on best practices for, matters relating to international investment law and international investment dispute settlement; and

(c) Carry out training and capacity building activities, including regarding dispute prevention as well as State-to-State and investor-state dispute settlement, through appropriate means.

Comments

Paragraph 1

- *Pre-dispute and dispute avoidance services*

38. 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 the creation of a stable and predictable climate for investment and played a significant role in both attracting and retaining investment (A/CN.9/1044, para. 17).

39. Draft provision 7(1)(a) provides that pre-dispute and dispute avoidance services could be geared towards assisting State beneficiaries with the establishment of (a) conflict management systems, including early dispute prevention policies and alert procedures; and (b) a lead agency that would ensure the proper attention to potential disputes, provide adequate responses to problems with foreign investors, and defend the interests of the beneficiary at each stage. The reference to “directing States to existing resources” is intended to avoid duplication of services, as for instance the United Nations Conference on Trade and Development (“UNCTAD”)⁷ currently

⁷ 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

offers advisory services with respect to dispute avoidance. The Working Group may wish to note that the focus of these services is to help to develop conflict management systems and not to interfere with the management of specific conflicts between foreign investors and host countries at the national level.

40. In this light, as provided for draft provision 7(2), in addition to offering services covered under draft provision 7(1)(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. A possible way forward regarding the pre-dispute phase would be for the centre to develop or update existing guidelines based on the practices of States that have experience in dispute prevention and management, building on work that has already been undertaken by other organisations, such as the World Bank⁸ and Energy Charter Secretariat⁹. Capacity building and training activities could then be delivered on the basis of such guidelines.

▪ *Mediation and other forms of ADR*

41. Under draft provision 7(1)(b), the centre would also provide information on available mediation resources which could facilitate technical assistance in conducting mediation. 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 in draft provision 7(2).

▪ *Legal and policy advisory services*

42. It may be noted that the following range of advisory services are covered under draft provision 7(1)(c): (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). Many States could benefit from expert advice on international investment law and policy.

43. 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). Such service would however need to be tailored based on existing resources, in particular taking into account services currently rendered by UNCTAD on the basis of, for example, its Investment Policy Framework for Sustainable Development and the recently launched IIA Reform Accelerator.

Paragraph 2

44. Article 7(2) provides that the centre could be a facility that can coordinate access to the many sources of information that are available regarding the different elements

https://unctad.org/meetings/en/SessionalDocuments/wpd290add1_en.pdf); 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>). 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>); 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>).

⁸ See for further information World Bank Group, Retention and Expansion of Foreign Direct Investment (Echandi, R.), available at <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.

⁹ See the Guide on Investment Mediation, available at <https://www.energycharter.org/fileadmin/DocumentsMedia/CCDECS/2016/CCDEC201612.pdf>; See the Model Instrument on Management of Investment Disputes, available at https://www.energycharter.org/fileadmin/DocumentsMedia/CCDECS/2018/CCDEC201826_-_INV_Adoption_by_correspondence_Model_Instrument_on_Management_of_Investment_Disputes. On the basis of these texts, the Energy Charter Secretariat is delivering training on a regular basis.

of an international investment dispute case and could provide a forum to States and others with relevant experience to exchange best practices that can be compiled for future reference and use.

- *Data collection*

45. The Working Group may wish to note that, in light of the existing resources available to help States with investment-related issues, the centre could 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), as information and resources are often dispersed across multiple institutions.

46. Such services could include exchange of experience and expertise regarding the evaluation of arbitrator/adjudicator services, as well as the establishment of a comprehensive database of potential arbitrators/adjudicators, mediators, and experts with complete and up-to-date profiles available to respondent States. Support could also be directed to providing access to databases and research tools, as well as to the development of specialized online courses and user-driven capacity building workshops and peer exchanges.

- *Exchange of information and development of guidelines on best practices*

47. As provided for under draft provision 7(2)(b), the centre could serve as a convening platform for future monitoring and discussions for all stakeholders. 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. In addition, providing a forum for regular exchange of best practices from States that have in-house legal counsels may be a means to promote capacity building for countries that do not have such teams, which could have a durable impact on States' ability to defend against international investment dispute settlement cases. This approach would also provide States a cost-effective means to consider how to manage their defence. In that sense, the forum would provide a peer-to-peer approach for States to seek information about the different elements of dispute prevention and settlement.

- *Training and capacity building*

48. Regarding training and capacity-building, it was emphasized in the Working Group that there is a deficit of 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.

49. Therefore, it is proposed under draft provision 7(2)(c) that the centre could provide training services or function as a capacity-building platform for States' representatives and government officials. These services could be implemented through training programmes, offering trainee and secondment positions to allow first-hand experience on international investment dispute settlement cases and by providing information on such cases, including managing a database of cases. This would allow State representatives and government officials to be alerted and fully informed on a full range of investment issues, thereby increasing their awareness of potential investment claims and enhancing their readiness to adequately respond to issues with investors. It would be for each State to determine who is a representative and government official for this purpose.

4. Prioritization of services and flexibility

50. The Working Group may wish to note that draft provision 8 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 would receive

(A/CN.9/1004*, para. 46). The Working Group may also wish to consider whether the determination of additional services could be left to the governing board, which would assess the feasibility of adding new services or the advisability of removing certain services, in light of needs, staffing, and budget.

Draft provision 8 – Review of the scope and the list of services

1. The Centre shall perform any other functions, assigned to it by the Governing Board, which relate directly to its purpose, and in accordance with the obligations and functions of the Centre, based on available resources.

2. The Governing Board shall periodically assess, including in light of available resources, and if needed, adjust, the scope of Services and list of beneficiaries starting from [12 months] after the date of the establishment of the Centre.

5. Avoidance of duplication of services

51. The Working Group 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).

52. In that light, the Working Group may wish to note the Scoping Study endorsed by a Submission.¹⁰ The Scoping 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” which facilitates legal relationships between private practitioners and government clients by providing support in engaging with outside counsels in addition to other services ranging from negotiation, litigation support, capacity building, and knowledge management (for instance, the African Legal Support Facility (“ALSF”)).¹¹ There are also (i) some forms of legal support that may be limited or have a different focus provided by organizations (for instance, by the International Development Law Organization (“IDLO”)¹² and the Association TradeLab);¹³ (ii) training on arbitration and mediation related issues (for instance, by the International Centre on Settlement of Investment Disputes (“ICSID”) and the Permanent Court of Arbitration (“PCA”));¹⁴ (iii) financial assistance to qualifying States through trust funds (for instance, by the PCA and the International Court of Justice (“ICJ”));¹⁵ and (iv) the provision of 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 ALSF).¹⁶

53. 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 does not seem to be available and may thus provide a great value added to the existing models.

54. 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-

¹⁰ A/CN.9/WG.III/WP.196 - Submission from the Governments of The Netherlands, Peru, and Thailand.

¹¹ Scoping Study, pp. 59-62.

¹² Ibid, pp. 63-65.

¹³ Ibid, pp. 77-78.

¹⁴ Ibid, pp. 66- 67.

¹⁵ Ibid, pp. 67-71.

¹⁶ Ibid, p. 79.

governmental organizations.¹⁷ The ITA study identifies how the existing and future services could be integrated in an advisory centre and 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 and assistance at various stages of ISDS proceedings.

55. 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

56. The Working Group may wish to consider draft provision 9 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) MSMEs 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 criteria). 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; amici curiae; and/or other potential intervenors.

Draft provision 9 - Beneficiaries of Services and order of priority

1. Services outlined in draft provisions 6 are available to developing and least developed States, whereas the Services outlined in draft provision 7 are available to all States, [regardless of whether the State beneficiary of the Services under draft provisions 6 or 7 is a Member], [and to MSMEs [and natural persons investors]], subject to further decisions by the Governing Board.

2. In the event that two or more States 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 Board]: priority shall be given to least-developed State; if both States are on the same economic level of development, priority shall be given to the State that has requested the Service first.

Option 1: [3. If the State, even if it is a least developed State, which made the request first is already represented by the Centre in another case, the State not otherwise represented shall have priority to use the Service.

4. If both States having requested the services of the Centre are already represented by the Centre in other cases, the least developed State 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, and if both States have been represented in the same number of cases, the State that requested the Service first shall have priority.]

Option 2: [3. The Governing Board shall determine, in addition to the level of development of the requesting States, any further applicable priority rules which may include reference to diverse criteria, such as which request was presented first, the

¹⁷ 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/mediadocuments/uncitral/en/ita_advisory_centre_survey.pdf.

potential impact of issues to a country or to investment law more generally and the capacity building needs of the requesting States.]

Comments

▪ *States*

57. 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 international investment dispute settlement (A/CN.9/1004*, para. 30). The Working Group may wish to decide which approach would be best suited to determine potential State beneficiaries given that there are different approaches on how to classify States.¹⁸

58. The Working Group may further wish to consider whether developed States could be beneficiaries of certain limited services as reflected in the draft provisions 6 and 7.

59. To the extent that 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 (for example narrow technical capacities, 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.¹⁹

60. 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, for example, whether developing or only LDCs are targeted and whether the centre should start with focusing initially on LDCs and possibly gradually expand its scope in the future.

▪ *MSMEs and natural persons*

61. The Working Group expressed differing views on whether MSMEs should be able to access the services of an advisory centre (A/CN.9/1004*, 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*, para. 30). There is no standardized international definition of what constitutes a MSME since each economy will define its own parameters by taking into account its own specific economic context (see A/CN.9/WG.I/WP.92, para. 11). In that respect, the Working Group may wish to consider whether a definition of MSME beneficiaries should also include individual and vulnerable investors (referred to by the words “natural person investors”).

62. In addition, the Working Group may wish to note that possible conflict of interests might arise from the inclusion of MSMEs as beneficiaries of the services of an advisory centre. This would depend largely on the nature and scope of the services

¹⁸ 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 (“MDGs”) and is the agreed standard for global reporting in relation to the 2030 Agenda for Sustainable Development Goals (“SDGs”) and is used by the international agencies that provide data to the United Nations Statistics Division (the “UNSD”).

¹⁹ See the Scoping Study.

that the centre would offer. For instance, if MSMEs 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.

63. 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.²⁰ However, such an approach would result in governments funding claims from foreign investors against themselves.

64. The Working Group may wish to note that the Scoping Study provides an insightful analysis on SMEs access to ISDS. In this regard, the Study concluded that SMEs' experiences with ISDS are hard to draw given the significant data gaps.²¹ 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.²²

- *Order of priority*

65. 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 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. The Working Group may wish to note that the assistance mechanism (comprising assistance and representation services) could be reserved for least developed and developing countries, whereas the forum services could be open to all beneficiaries, including developed countries and MSMEs.

66. Draft provision 9(2) to (4) foresees qualifying criteria for the prioritization of services with two options. The first option seeks to address the order of priority in detail, whereas the second option leaves it to the governing board to determine such order, and the criteria are only indicative. The most resource-intensive services, such as advisory and defence services in relation to cases, may indeed require such rules on prioritization. Moreover, 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.

67. 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.

²⁰ 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).

²¹ Scoping Study, p. 107.

²² *Ibid.*, p. 110.