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Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its forty-seventh session (Vienna, 22–26 January 2024)

Contents

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I. Introduction

1. At its fiftieth session in 2017, the Commission entrusted Working Group III with a broad mandate to work on the possible reform of investor-State dispute settlement (ISDS). From its thirty-fourth to thirty-seventh session, the Working Group identified and discussed concerns regarding ISDS and considered that reform was desirable in light of the identified concerns.[1] From its thirty-eighth to forty-sixth session, the Working Group considered concrete solutions for ISDS reform.[2]

2. At its fifty-sixth session in 2023, the Commission adopted the UNCITRAL Model Provisions on Mediation for International Investment Disputes, the UNCITRAL Guidelines on Mediation for International Investment Disputes and the UNCITRAL Code of Conduct for Arbitrators in International Investment Dispute Resolution with accompanying commentary.[3] The Commission also adopted the UNCITRAL Code of Conduct for Judges in International Investment Dispute Resolution with accompanying commentary in principle.[4]

3. At that session, the Commission expressed its satisfaction with the progress made by the Working Group. The Commission requested the Working Group to continue its work in an effective manner and encouraged it to present the draft text on an advisory centre on international investment law and a guidance text on means to prevent and mitigate disputes for its consideration in 2024.[5]

4. At its forty-sixth session in October 2023, the Working Group considered the draft provisions on the establishment of an advisory centre contained in document A/CN.9/WG.III/WP.230 as well as draft provisions 1 to 6 and 23 on procedural and cross-cutting issues based on documents A/CN.9/WG.III/WP.231 and A/CN.9/WG.III/WP.232.[6]

II. Organization of the session

5. The Working Group, which was composed of all States members of the Commission, held its forty-seventh session from 22 to 26 January 2024 at the Vienna International Centre.

6. The session was attended by the following States members of the Working Group: Afghanistan, Algeria, Argentina, Armenia, Australia, Austria, Belarus, Belgium, Brazil, Bulgaria, Canada, Chile, China, Colombia, Côte d'Ivoire, Croatia, Czechia, Democratic Republic of the Congo, Dominican Republic, Ecuador, Finland, France, Germany, Ghana, Greece, Honduras, Hungary, India, Indonesia, Iran (Islamic Republic of), Iraq, Israel, Italy, Japan, Kenya, Kuwait, Malaysia, Mexico, Morocco, Nigeria, Panama, Peru, Poland, Republic of Korea, Russian Federation, Saudi Arabia, Singapore, South Africa, Spain, Switzerland, Thailand, Türkiye, Uganda, United Kingdom of Great Britain and Northern Ireland, United States of America, Venezuela, Viet Nam and Zimbabwe.

7. The session was attended by observers from the following States: Azerbaijan, Bahrain, Costa Rica, Denmark, Egypt, El Salvador, Gabon, Guatemala, Latvia,

[1] The deliberations and decisions of the Working Group at its thirty-fourth to thirty-seventh session are set out in documents A/CN.9/930/Rev.1; A/CN.9/930/Rev.1/Add.1; A/CN.9/935; A/CN.9/964; and A/CN.9/970, respectively.

[2] The deliberations and decisions of the Working Group at its thirty-eighth to forty-sixth session are set out in documents A/CN.9/1004*; A/CN.9/1004/Add.1; A/CN.9/1044; A/CN.9/1050; A/CN.9/1054; A/CN.9/1086; A/CN.9/1092; A/CN.9/1124; A/CN.9/1130; A/CN.9/1131 and A/CN.9/1160.

[3] *Official Records of the General Assembly, Seventy-eighth session, Supplement No. 17* (A/78/17), paras. 35, 40 and 90. The texts adopted by the Commission are available at https://uncitral.un.org/en/texts/isds.

[4] Ibid., para. 90.

[5] Ibid., paras. 151, 152 and 155.

[6] A/CN.9/1160, paras. 13–85 and 86–124.

Lesotho, Libya, Lithuania, Malta, Netherlands (Kingdom of the), Oman, Pakistan, Paraguay, Philippines, Portugal, Qatar, Romania, Sierra Leone, Slovakia, Sri Lanka, Sweden, Tunisia, United Republic of Tanzania and Uruguay.

8. The session was also attended by observers from the European Union.

9. The session was also attended by observers from the following international organizations:

(a) *United Nations System*: International Centre for Settlement of Investment Disputes (ICSID) and United Nations Conference on Trade and Development (UNCTAD);

(b) *Intergovernmental organizations*: Advisory Centre on World Trade Organization Law (ACWL), African Union (AU), Asian-African Legal Consultative Organization (AALCO), Commonwealth Secretariat, Inter-Parliamentary Assembly of Member Nations of the Commonwealth of Independent States (IPA CIS), Organisation for Economic Co-operation and Development (OECD), Organisation Internationale de la Francophonie (OIF), Organization of the Petroleum Exporting Countries (OPEC), Permanent Court of Arbitration (PCA) and South Centre;

(c) *Invited non-governmental organizations*: Academic Forum, African Association of International Law (AAIL), American Arbitration Association – International Centre for Dispute Resolution (AAA/ICDR), American Bar Association (ABA), American Society of International Law (ASIL), ArbitralWomen, Asian Academy of International Law (AAIL), Association for the Promotion of Arbitration in Africa (APAA), Belgian Centre for Arbitration and Mediation (CEPANI), British Institute of International and Comparative Law (BIICL), Cairo Regional Centre for International Commercial Arbitration (CRCICA), Center for International Investment and Commercial Arbitration (CIICA), Centre for International Law, National University of Singapore (CIL), Centre of Excellence for International Courts (iCourts), Chartered Institute of Arbitrators (CIArb), China Council for the Promotion of International Trade (CCPIT), China International Economic and Trade Arbitration Commission (CIETAC), Climate Change Counsel, Columbia Centre on Sustainable Investment (CCSI), Corporate Counsel International Arbitration Group (CCIAG), European Society of International Law (ESIL), Forum for International Conciliation and Arbitration (FICA), Geneva Centre for International Dispute Settlement (CIDS), Institute for Transnational Arbitration at the Center for American and International Law (CAIL/ITA), Inter-American Bar Association (IABA), International and Comparative Law Research Center (ICLRC), International Institute for Environment and Development (IIED), International Institute for Sustainable Development (IISD), International Law Institute (ILI), Inter-Pacific Bar Association (IPBA), Max Planck Institute for Comparative Public Law and International Law (MPIL), New York City Bar Association (NYCBAR), New York International Arbitration Center (NYIAC), Russian Arbitration Association (RAA), Swiss Arbitration Association (ASA), United States Council for International Business (USCIB) and Vienna International Arbitration Centre (VIAC).

10. The Working Group elected the following officers:

Chairperson: Mr. Shane Spelliscy (Canada)

Rapporteur: Ms. Natalie Yu-Lin Morris-Sharma (Singapore)

11. The Working Group had before it the following official documents: annotated provisional agenda (A/CN.9/WG.III/WP.234), draft provisions on procedural and cross-cutting issues (A/CN.9/WG.III/WP.231) and annotations thereto (A/CN.9/WG.III/WP.232), summary of the sixth intersessional meeting on ISDS reform submitted by Singapore (A/CN.9/WG.III/WP.233), draft guidelines on prevention and mitigation of international investment disputes (A/CN.9/WG.III/WP.235), and draft statute of an advisory centre (A/CN.9/WG.III/WP.236). In addition, two informal documents, one on the budget and financing of an advisory centre and another containing a compilation of international investment agreement provisions and

arbitration rules related to procedural and cross-cutting issues, were made available to the Working Group for reference purposes. Written comments received on the above-mentioned documents were also made available on the Working Group web page.

12. The Working Group adopted the following agenda:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Possible reform of investor-State dispute settlement (ISDS).
5. Other business.
6. Adoption of the report.

13. As to the scheduling of the session, it was agreed that the discussions would begin with the consideration of the draft statute of an advisory centre, which would be followed by the discussions on the draft guidelines on prevention and mitigation of international investment disputes and the draft provisions on procedural and cross-cutting issues.

14. The Working Group expressed its appreciation for the contributions to the UNCITRAL trust fund from the European Union, the Government of France, and the Swiss Agency for Development and Cooperation (SDC) aimed at allowing the participation of representatives of developing States in the deliberations of the Working Group as well as securing translations for informal sessions, so as to ensure that the process would remain inclusive and fully transparent.

III. Draft statute of an advisory centre (A/CN.9/WG.III/WP.236)

15. The Working Group recalled that general support had been expressed for the establishment of an advisory centre on international investment law at its thirty-eighth, forty-third and forty-sixth sessions (see A/CN.9/1044, A/CN.9/1124, and A/CN.9/1160 respectively). It was further recalled that support had been expressed for establishing the advisory centre as an intergovernmental body, which would require the preparation of an international instrument that could form part of the multilateral instrument on ISDS reform (MIIR) but which should be independent from other ISDS reform elements contained in the MIIR (A/CN.9/1160, para. 17).

A. Establishment, objectives and general principles

Article 1 – Establishment

16. After its deliberations on article 2 (see paras. 17–18 below), the Working Group agreed to revise article 1 as follows:

> "The Advisory Centre on International Investment Dispute Resolution (the 'Advisory Centre') is hereby established."

Article 2 – Objectives

17. With regard to paragraph 1, diverging views were expressed on how best to refer to the scope of the Advisory Centre's activities. One view was that the scope of the Advisory Centre should be broad and that reference should be made to "international investment law", either alone or alongside "ISDS". Another view was that "international investment law" might be too broad, possibly overlapping with the work of other international organizations. Yet another view was that reference should be made only to ISDS, so as to exclude from its scope State-to-State dispute settlement (SSDS).

18. After discussion, it was generally felt that reference should be made to "international investment dispute resolution". It was said that the reference to "international investment dispute resolution" should not be understood as limiting the types of services to be provided by the Centre, which might include services relating to dispute prevention as well as amicable settlement.

19. Considering the divergence in views on whether the Advisory Centre should provide services relating to SSDS, the Working Group decided to consider the issue in conjunction with articles 6 and 7, including whether to include an express reference to SSDS or to exclude it from the scope of the Centre's work (see para. 73 below).

20. With regard to paragraph 2, it was agreed that reference should also be made to "preventing" international investment disputes.

21. It was agreed that paragraph 3 should be deleted as it was redundant and articles 6 and 7 detailed the functions and services of the Advisory Centre. A suggestion to include the words "in the forms envisaged by this Statute" at the end of paragraph 2 in lieu of paragraph 3 did not receive support.

22. After discussion, the Working Group agreed to revise article 2 as follows.

> "1. The Advisory Centre aims to provide training, support and assistance with regard to international investment dispute resolution.
>
> 2. The Advisory Centre aims to enhance the capacity of States and regional economic integration organizations in preventing and handling international investment disputes, in particular, least developed countries and developing countries."

Article 3 – General principles

23. A suggestion to place the general principles embodied in article 3 in the preamble to the draft statute did not receive support.

24. A suggestion was made to delete the word "undue" in paragraph 2 as it introduced a subjective notion, and as the Centre should be free from any external influence. In response, it was said that there might be instances where external influence could be justified and appropriate (for example, instructions by a State receiving representation services from the Centre) and that it would thus be necessary to qualify the influence that the Centre should be free from. After discussion, it was agreed to retain the word "undue" in paragraph 2.

25. It was said that paragraph 2 emphasized that even if the Centre were to be established within the auspices of another organization, its structure should be independent from that organization while the Centre might rely on it for certain operational matters.

26. With regard to paragraph 3, a suggestion was made to replace the phrase "to ensure the best use of its resources" with "to achieve the objectives of the Centre". That was not supported as the focus of the paragraph was to avoid the work of the Centre overlapping with those of other international and regional organizations.

27. It was agreed that the word "best" should be replaced with the word "efficient" in paragraph 3. Subject to that change, the Working Group approved article 3.

B. Membership and structure

Article 4 – Membership

28. It was clarified that article 4 did not address whether the draft statute would be developed in tandem with the multilateral instrument on ISDS reform (MIIR) or whether a State needed to be a party to the MIIR to become a member of the Advisory Centre, which were to be discussed later in the context of article 10.

29. With regard to paragraph 2, it was clarified that membership of a regional economic integration organization (REIO) to the Advisory Centre would not entitle member States of the REIO to benefit from the services of the Centre, unless they were Members themselves.

30. A suggestion to add the phrase “pursuant to article 5” at the end of paragraph 2 did not receive support, as the Governing Committee would be adopting regulations pursuant to article 5 in any case and it would not be necessary to mention that every time reference was made to the “regulations”.

31. It was agreed that paragraph 2 should be revised as follows: “Each Member is entitled to the services of the Advisory Centre, is subject to the obligations as set out in this Protocol, and shall comply with the regulations adopted by the Governing Committee”.

32. Regarding paragraph 3, it was widely felt that there was merit in classifying the Members into different categories, which would determine, among others, the priority to be given in obtaining the services of the Centre, their financial contribution as well as the fees to be paid. On the other hand, it was suggested that classifications should be avoided as they would not necessarily reflect the objective needs in international investment dispute resolution assistance and that rules on priority could ensure the efficient provision of services.

33. As to the categorization, it was stated that paragraph 3 provided a sound basis for discussion. General support was expressed for including least developed countries as recognized by the United Nations as one category of Members. However, views diverged about classifying Members into developing and developed or other countries, particularly on the basis of a classification developed for statistical purposes within the United Nations (see A/CN.9/WG.III/WP.236, paras. 55 and 56). It was suggested that objective criteria should be developed taking into account the aims of the Centre. References were made to GDP per capita, FDI flows, trade volume and other economic indicators. It was suggested that lists created by and criteria used by other international organizations, for example, those to assess the official development assistance (ODA) eligibility of States, could offer inspiration. It was also suggested that the lack of prior experience in handling investment disputes and lack of financial resources could be considered. It was said that the criteria for classifying the Members into different categories for purposes of determining their financial contribution and fee would not need to be the same as that for giving priority to certain Members to obtain services.

34. Preference was expressed for classifying the Members at the outset of the Centre’s operation, while giving the authority to the Governing Committee to make the necessary adjustments either after a periodic review (for example, every three years, as the list of least developed countries was reviewed every three years by the United Nations) or upon the request of a Member. It was stated that such adjustment should be based on objective criteria, which could be set out in the regulations.

35. Different views were expressed on whether States should be able to determine the category to which they belong. In support, it was said that that was the general practice and that States had a better understanding of their own economic and developmental situation and needs, allowing for a nuanced approach. A different view was that self-determination would introduce elements of subjectivity, potentially leading to inconsistencies in the classification process.

36. It was suggested that the Secretariat could be tasked to prepare the list in Annexes I to III in accordance with paragraphs 55 to 57 of A/CN.9/WG.III/WP.236. In addition, it was proposed that article 5(3) could indicate the authority of the Governing Committee to make adjustments to the categorization in Annexes I to III along the following lines: “Make necessary adjustments to the categorization of Members in Annexes I to III based on objective criteria to be developed by the Governing Committee, upon review every three years after the establishment of the Centre or upon the request by a State or REIO with regard to that State or REIO’s classification.”

37. In response, it was said that the criteria to be used for making the adjustments should be set out in the draft statute (possibly in a list), rather than being left to the Governing Committee to develop. The need for periodic review and a Member being allowed to make a request for reclassification were questioned and it was suggested that the Governing Committee should have the authority to review the list and make adjustments, when necessary.

38. It was suggested that a Member's ability to pay the contributions in Annex IV and the fees in Annex V as well as its ability to afford representation services should be taken into account in the classification of Members.

39. After discussion, it was agreed that the Secretariat should prepare Annexes I to III in accordance with paragraphs 55 to 57 of A/CN.9/WG.III/WP.236 as an indicative list for consideration by the Commission, which would be without prejudice to the names to be given to each category. It was further agreed that the classification of Members could be subject to adjustments following the consideration by the Commission and prior to the finalization of the draft statute based on criteria to be determined.

40. In addition, it was agreed that the Governing Committee should have the authority to make adjustments to the classification in Annexes I to III (see para. 34 above). It was also agreed that paragraph 3 should include additional language providing that the classifications were solely for the purposes of the draft statute and without prejudice to classifications in other instruments and organizations.

41. It was agreed that the definition of non-Members, as provided for in article 6 (5) should be included in article 4 as the last paragraph.

Article 5 – Structure

A possible three-tier structure – paragraphs 1 and 7

42. There was general support for the two-tier structure as envisaged in paragraph 1. However, it was suggested that article 5 should foresee the establishment of an Executive Committee as an independent organ of the Advisory Centre, rather than leaving the decision to the Governing Committee as provided for in paragraph 7. It was said that an Executive Committee could insulate the direct influence of the Governing Committee on the Secretariat and could possibly ensure efficiency. It was suggested that members of the Executive Committee could be appointed by the Governing Committee in their personal capacity, whereas representatives of Members in the Governing Committee would be expected to function in their official capacity. On the other hand, some doubts were expressed about the need to establish an Executive Committee and how it would be composed.

43. The Working Group welcomed the presence of the Executive Director of the Advisory Centre of WTO Law (ACWL), who provided a presentation on the operation of the ACWL and addressed questions thereto (see also para. 85 below). The Working Group expressed its appreciation to the Executive Director for sharing the experience of the ACWL. Noting the three-tier structure of the ACWL consisting of the General Assembly, the Management Board and the Executive Director, it was said that such a structure allowed the ACWL to act more independently of its members under the guidance and supervision of the Management Board, which was composed of six persons serving in their personal capacity without any renumeration and meeting two or more times a year. It was said that the Management Board allowed for quick and streamlined decision-making and efficient management of the ACWL. It was also stated that the Management Board functioned as a sounding board for the Executive Director faced with complex and sensitive issues (including those that involved any conflict of interest) and where confidentiality was required and as such it would not be possible to bring these issues to the General Assembly of the ACWL.

44. In that context, it was said that paragraph 7 provided the flexibility to the Governing Committee to establish an Executive Committee at a later stage of the Centre's operation and that there was no need to include further provisions on the

Executive Committee in the draft statute. On the other hand, it was said that there was merit in setting forth the composition and the functions of the Executive Committee in the draft statute, with the possibility to adjust the composition of the Executive Committee based on the number of Members of the Advisory Centre. The following text was suggested for the Working Group's consideration:

> "*. The Executive Committee shall consist of six members. The Executive Director shall also serve ex officio on the Executive Committee. Each group of Members as listed in Annexes I, II and III shall nominate two members of the Executive Committee for appointment by the Governing Committee. The members of the Executive Committee shall serve in their personal capacity and shall be selected on the basis of their professional qualifications in international investment dispute resolution.
>
> *. The Executive Committee shall report to the Governing Committee. The Executive Committee shall meet as often as necessary and shall:
>
> (a) Propose for adoption by the Governing Committee rules on the procedure of the Executive Committee;
>
> (b) Take decisions necessary to ensure the efficient and effective operation of the Advisory Centre in accordance with this Protocol;
>
> (c) Review the annual budget for the Advisory Centre and submit it for approval by the Governing Committee;
>
> (d) Appoint the Executive Director in consultation with the Governing Committee;
>
> (e) Provide advice to the Executive Director, including on the administration of the budget;
>
> (f) Adopt the staff regulations setting out the services and rights and obligation of the Executive Director and staff members of the Secretariat;
>
> (g) Supervise the administration of the Secretariat; and
>
> (h) Perform other functions in accordance with the Protocol."

45. After deliberations, it was widely felt that there were benefits of having a three-tier structure.

46. It was agreed that the Governing Committee should be tasked with the appointment of the members of the Executive Committee, taking into account geographical representation and gender balance. It was suggested that the members of the Executive Committee could be chosen from the members of the Governing Committee, which could assist in realizing the objectives of the Advisory Centre. It was, however, suggested that the detailed composition of the Executive Committee could be determined by the Governing Committee at a later stage and that, if there was a need to adjust its composition, the Governing Committee could amend the relevant articles of the draft statute. It was agreed that the Governing Committee may assign additional functions to the Executive Committee. It was also agreed that the adoption of the staff regulations and the appointment of the Executive Director remain with the Governing Committee.

47. In response to a suggestion to include in the functions of the Executive Committee oversight over procurement of goods and services as well as audits, it was said that such functions would fall under subparagraph (b) ("taking decisions to ensure the efficient and effective operation of the Centre"). In that context, it was agreed that decisions referred to in that subparagraph should be made in accordance with the regulations. Furthermore, it was agreed that the Executive Committee should appoint the external auditor. In response to the suggestion that the annual number of meetings and periodicity of reporting to the Governing Committee be specified in the paragraph, it was stated that such details be included in the regulations adopted by the Governing Committee.

48. After discussion, the Working Group agreed to replace paragraph 7 with the following two paragraphs:

> "*. The Executive Committee shall consist of six members. The Executive Director shall also serve ex officio on the Executive Committee. Each group of Members as listed in Annexes I, II and III shall nominate two members of the Executive Committee for appointment by the Governing Committee. The members of the Executive Committee shall serve in their personal capacity and shall be selected on the basis of their professional qualifications in international investment dispute resolution.
>
> *. The Executive Committee shall report to the Governing Committee. The Executive Committee shall meet as often as necessary and shall:
>
> (a) Propose for adoption by the Governing Committee rules on the procedure of the Executive Committee;
>
> (b) Take decisions necessary to ensure the efficient and effective operation of the Advisory Centre in accordance with this Protocol and the regulations adopted by the Governing Committee;
>
> (c) Review the annual budget of the Advisory Centre and submit it for approval by the Governing Committee;
>
> (d) Provide advice to the Executive Director including on the administration of the budget;
>
> (e) Appoint the external auditor;
>
> (f) Supervise the administration of the Secretariat; and
>
> (g) Perform other functions in accordance with the Protocol and as assigned by the Governing Committee."

49. It was suggested that article 5 should be split into three or more articles to make it more comprehensible.

50. With regard to paragraph 1, suggestions to replace the word "consist" with "have" and to add the word "Technical" before the "Secretariat" did not receive support.

51. It was suggested that rules on the operation of the Governing Committee (including the election of the chair and how meetings were to be convened) should be set out in article 5. In response, it was pointed out that paragraph 3(c) anticipated that such rules of procedure would be adopted by the Governing Committee.

Paragraph 3

52. With regard to paragraph 3, it was suggested to:

- Include the words "and functioning" after the word "performance" in subparagraph (a);
- Replace the word "appoint" in subparagraph (b) with "designate" or "approve";
- Add the words "or dismiss" after the word "appoint" in subparagraph (b);
- Add the words "and adopt rules and conditions of terms of services of the Executive Director" at the end of subparagraph (b) and delete paragraph 8;
- Add the words "or amend" after the word "adopt" in subparagraphs (c) and (d);
- List the following as functions of the Governing Committee: (i) Set the long-term and short-term strategies of the Centre; (ii) select the member of the Executive Committee, if such a committee were to be set up; and (iii) adopt amendments to the Protocol and its Annexes;
- Include a footnote in subparagraph (d) describing the regulations to be adopted by the Governing Committee;

- Reorder the subparagraphs;

- Include the second sentence of article 7(3) as an additional subparagraph; and

- Merge paragraph 8 into subparagraph (b).

53. After discussion, the Working Group agreed to revise paragraph 3 (see para. 65 below).

54. In that context, it was understood that the term “adopt” in the subparagraphs included the authority for the Governing Committee to also amend or revise the texts. In the same vein, it was understood that the term “appoint” encompassed the authority of the Governing Committee to dismiss or remove an individual from the role of the Executive Director.

Paragraph 4

55. The Working Group approved paragraph 4, unchanged.

Paragraphs 5 and 6

56. With regard to the decision-making process, it was widely felt that the Governing Committee should make decisions by consensus to the maximum extent possible and that paragraph 5 could be revised to further emphasize this. It was also felt that, failing consensus, a threshold higher than a simple majority (for example, four-fifth majority present and voting) should be applied, with a quorum for any vote.

57. Different views were expressed regarding whether the same high threshold should apply to all decisions to be taken by the Governing Committee, or whether some decisions could be taken by a simple majority if allowed for in the rules of procedure adopted by the Governing Committee. It was suggested that all amendments to the Protocol and its annexes should require consensus or unanimity, while views were expressed that flexibility could be provided regarding some types of amendments (for example, the fees to be charged to Members). It was said that the revisions and amendments to the Protocol and its annexes could be addressed in the final provisions.

58. It was suggested that paragraph 6 should provide for votes to be held at a subsequent meeting of the Governing Committee, if a vote could not take place due to the quorum not being met. It was said that this would tailor for instances where Members could block decisions by not being present for a vote.

59. It was also suggested that the meaning of “presence” and the methods of voting should be clearly set forth in the rules of procedure. A question was raised whether an REIO should have the same right to vote in addition to the member States of the REIO. It was said that a REIO could be a Member in its own right and hence have a right to vote individually (see also para. 29 above).

60. The following suggestion for paragraphs 5 and 6 was made for the Working Group’s further consideration:

> “5. The Governing Committee shall endeavour to make all decisions by consensus.
>
> 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 Members. Each Member of the Advisory Centre shall have one vote. Decisions shall require a four-fifths majority of the Members present and voting. If the majority of the Members are not present, the same subject matter may be submitted for a second vote at the next meeting of the Governing Committee, the decision of which may be made by a four-fifths majority of the Members present and voting.”

61. After discussion, the Working Group approved the text, unchanged.

Paragraph 8

62. With regard to paragraph 8, the Working Group agreed that the term of the Executive Director should be four years with the possibility of re-appointment. It was further agreed that paragraph 8 could be merged into paragraph 3 listing the functions of the Governing Committee (see para. 65 below).

Paragraph 9

63. A suggestion to include a subparagraph that the Executive Director should perform other functions in accordance with the draft statute or as assigned by the Governing Committee did not receive support.

Paragraph 11

64. It was suggested that the words "without the approval of the Governing Committee" be deleted to ensure that the Executive Director would be working full-time and be committed to the Centre. However, it was generally felt that flexibility should be provided for the Executive Director to engage in outside activities in exceptional circumstances (for example, teaching at an academic institution) with the approval of the Executive Committee (see para. 65 below).

Summary

65. In light of its decision on a three-tier structure for the Advisory Centre and the composition and role of the Executive Committee (see paras. 45–48 above) and after further deliberations, the Working Group agreed that paragraphs 1, 3, 9 and 11 shall read as follows:

"1. The Advisory Centre shall consist of a Governing Committee, an Executive Committee and a Secretariat headed by an Executive Director.

…

3. The Governing Committee shall:

(a) Adopt its rules of procedure;

(b) Adopt regulations on the operation of the Advisory Centre;

(c) Appoint the members of the Executive Committee taking into consideration geographical diversity and gender balance;

(d) Assign any other functions to the Executive Committee;

(e) Adopt the staff regulations on the conditions of services and rights and obligations of the Executive Director and staff members of the Secretariat;

(f) Appoint the Executive Director for a term of 4 years, who shall be eligible for re-appointment;

(g) Evaluate and monitor the performance of the Advisory Centre and adopt the annual report prepared by the Executive Director;

(h) Adopt the annual budget of the Advisory Centre prepared by the Executive Director and reviewed by the Executive Committee;

(i) Periodically assess and if needed, adjust the scope and type of services of the Advisory Centre, including by deciding to phase in some of the services at a later stage of its operation;

(j) [Make necessary adjustments to the categorization of Members in Annexes I to III based on objective criteria to be developed by the Governing Committee, upon review every three years after the establishment of the Centre or upon the request by a State or REIO with regard to that State or REIO's classification;] and

(k) Perform other functions in accordance with this Protocol.

…

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 report on the operation of the Advisory Centre for adoption by the Governing Committee;

(d) Prepare the annual budget of the Advisory Centre for review by the Executive Committee; and

(e) Represent the Advisory Centre externally.

…

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

C. Functions and services

Article 6 – Technical assistance and capacity-building activities

Paragraphs 1 and 2

66. With regard to paragraph 1, it was suggested to delete the phrase "and engage in capacity-building activities" to avoid overlap with other international and regional organizations. After discussion and pursuant to its decision on article 2 (see para. 22 above), the Working Group agreed that paragraph 1 would read as follows: "The Advisory Centre shall provide technical assistance to its Members and engage in capacity-building activities with regard to international investment dispute resolution."

67. With regard to paragraph 2, it was suggested that:

- The word "may" in the chapeau be replaced by the word "shall";
- The wording be revised to ensure a proactive rather than reactive engagement by the Centre;
- References be made to dispute "avoidance" and "mitigation" in subparagraph (a) and to "preventing" disputes in subparagraph (b);
- Cross-references be made to the objectives of the Centre (art. 2) and the general principles (art. 3); and
- Reference be made to the Centre operating a programme where government officials of Members would be seconded as part of capacity-building.

68. After further discussion, the Working Group agreed to merge paragraphs 1 and 2 as follows (see also para. 86 below):

"1. The Advisory Centre shall provide technical assistance to its Members and engage in capacity-building activities with regard to international investment dispute resolution, including by:

(a) Advising on issues pertaining to dispute prevention;

(b) Providing training with regard to possible means of preventing and resolving disputes;

(c) Functioning as a forum for the exchange of information and sharing of best practices;

(d) Functioning as a repository of information and related resources; and

(e) Performing any other functions assigned to it by the Governing Committee."

69. In that context, it was understood that the term “prevent” included the notions of dispute avoidance and mitigation. It was further understood that the Advisory Centre would not have any authority with regard to treaty interpretation, even though it might provide advice on whether a measure would comply with an investment treaty. It was agreed that the possibility of a secondment programme could be detailed in the staff regulations of the Advisory Centre.

Paragraph 3

70. With regard to paragraph 3, it was suggested that:

- The words “to avoid duplication” be inserted after the words “regional organizations”;
- The words “to achieve the objectives set out in article 2” be inserted after the words “regional organization” and that the latter part of the paragraph form a new sentence beginning with “In so doing, it may …”; and
- The criteria for selecting “other persons or entities”, particularly that they should not pose any conflict of interest, be mentioned.

71. After discussion, the Working Group agreed that paragraph 3 (renumbered to paragraph 2) would read as set forth in paragraph 86 below.

72. It was understood that the need to avoid any conflict of interest when engaging other persons or entities would be set out in the regulations of the Advisory Centre.

73. With regard to whether express reference should be made in the draft statute with regard to services pertaining to SSDS, differing views were expressed. One view was that there was merit in including such a reference – as SSDS was increasingly becoming a means to resolve investor-State disputes. Another view was that it should not be included – as the mandate of the Working Group was limited to ISDS reform and the establishment of the Advisory Centre was sought to address the concerns arising from ISDS. Yet another view was that the approach might need to differ for services under article 6 and those under article 7, with doubts expressed about the Centre providing representation services in SSDS. A further view was that there was no need to include an explicit reference to SSDS in the draft statute and the question could be left to the Governing Committee as it considered the scope and type of services to be provided by the Centre.

Paragraph 4

74. With regard to paragraph 4, diverging views on whether non-Members and other persons or entities might access the services listed in article 6 were reiterated (see A/CN.9/1124, para. 64; A/CN.9/1160, paras. 56–61). Discussions revolved around the advantages and the disadvantages of allowing such participation as well as the criteria to be applied in allowing such participation.

75. It was stated that allowing investors to participate in technical assistance activities could reduce frivolous claims. It was also stated that including small and medium-sized enterprises as potential beneficiaries of the Centre could attract donors and reflected a compromise for those that had wanted all services of the Centre to be available to small and medium-sized enterprises. It was further noted that the phrase “other person or entity” should not be understood as referring only to investors or potential claimants but to a wide range of entities that could participate in the activities of the Centre, which could be beneficial to the Members. Reference was made to international governmental and non-governmental organizations, academic institutions and practitioners, all of which would not be able to become a Member of the Centre.

76. On the other hand, it was stated that the priority of the Centre should be to provide services to Members and that participation of non-Members, other persons and entities should be limited, particularly as their participation could run contrary to the objectives of the Centre and the interest of its Members. It was suggested that allowing other persons and entities to participate in the activities of the Advisory

Centre could lead to conflicts of interest. It was pointed out that offering services exclusively to Members could serve as an incentive for States to join the Centre. It was also mentioned that participation by non-Members, other persons and entities may be permitted if doing so would ensure the financial sustainability of the Centre. In this regard, it was said that a fee significantly higher than that for Members should be charged. It was proposed that a non-Member in the process of becoming a Member could be given some preferential treatment, in accordance with the regulations to be adopted by the Governing Committee.

77. It was suggested that the criteria for participation in the Centre's activities should be strict and set out in the regulations to be adopted by the Governing Committee. It was also suggested that the criteria could be different for non-Members and for other persons or entities. It was also suggested that access could be limited only to the services listed in paragraph 1(c) and (d) (see para. 68 above), while it was as well suggested that activities relating to dispute prevention listed in paragraph 1(b) could be quite useful for other persons or entities and contribute to meaningful dialogue with the Members. Concerns focused on paragraph 1(a) as advice on dispute prevention, particularly with regard to a dispute which has not yet crystallized into a claim, could lead to claims against Members.

78. In addition, a number of draft suggestions were made to:

- Replace the phrase "benefit from the services" in the first sentence with "participate in the activities", and likewise the word "benefit" in the second sentence with "participate";
- Include the words "to be included in the regulations" after the word "criteria" in the second sentence; and
- Delete the phrase "whether it is beneficial to the Members".

79. After discussion, it was suggested that paragraph 4 (renumbered to paragraph 3) could read as follows:

> "3. In accordance with the regulations adopted by the Governing Committee, the Executive Director may allow a non-Member, other person or entity to participate in the certain activities organized by the Advisory Centre pursuant to paragraph 1, subparagraphs (b) to (e), such as training sessions, forums and conferences. The regulations shall require the Executive Director to set fees for participation and shall include criteria for such participation, for example, whether allowing the participation contributes to the objectives of the Centre, creates any conflict of interest and has resource implications on the Centre."

80. While support was expressed for the suggestion, it was stated that non-Members, other persons or entities should not be allowed to participate in the activities listed in paragraph 1(b) (see para. 68 above). It was stated that that participation in trainings with regard to possible means of preventing and resolving disputes could eventually empower investors to launch claims against States. On the other hand, it was stated that training sessions and conferences could be more general, providing best practices with regard to investment disputes, and could be open to Members and the broader audience. It was also observed that the Centre would be able to conduct training more tailored to a specific Member(s) and hold conferences which would be exclusively for Members, which could address more sensitive issues and share strategies on how to address claims. It was, however, mentioned that even in such instances, there might be benefits in engaging non-Members, other persons or entities to provide a wide range of perspectives.

81. In that light, it was proposed that paragraph 3 should clearly differentiate between non-Members and other persons or entities so that non-Members would have broader access to the types of services listed in paragraph 1, whereas other persons and entities would only have access to the services listed in paragraph 1(c) and (d).

82. To address some of the concerns, it was suggested that Members should be given the right to object to the participation of non-Members, other persons or entities, the

question of which would be addressed by the Governing Committee. It was stated that such a procedure could be set out in paragraph 3 or in the regulations adopted by the Governing Committee. Another suggestion was that participation of other persons or entities should only be allowed when endorsed by a Member.

83. As to the fees to be charged to non-Members, other persons or entities, it was mentioned that the Executive Director should be given the discretion to waive the fees in certain instances, for example, when the non-Member was a least developed country or when the non-Member, other person or entity provided in-kind contributions to the activities of the Centre. It was stated that the regulations should provide for the discretion to charge appropriate fees.

84. It was suggested that non-Members should also be able to obtain the services in paragraph 1(a). It was also suggested that the list of services in paragraph 1 was an indicative list and when assigning new functions the Governing Committee should be required to determine whether other persons or entities should be allowed to participate in such activities. It was clarified that not allowing other persons or entities to participate in activities listed in paragraph 1(a) (advising on issues pertaining to dispute prevention), was not intended to prevent them from attending seminars or conferences on topics of dispute prevention, but so that they would not receive tailored advice on dispute prevention.

85. During the session, the Executive Director of the ACWL presented additional information about the operation of the ACWL and responded to questions from the Working Group, which was useful in considering the range of aspects relating to the establishment of the Advisory Centre (see also para. 43 above). The presentation and the responses to the questions touched upon: (a) the negotiations among interested World Trade Organization (WTO) Members, which led to the Agreement Establishing the ACWL; (b) the entry into force of that Agreement, which required twenty instruments of ratifications and a pre-determined financial threshold; (c) the financing structure of the ACWL, which was initially envisaged to rely on income generated from the endowment fund and fees charged but now mostly relied on voluntary contributions; (d) timing of payments of contributions by Members upon accession; (e) services being provided to non-Members and conditions thereto, which were at a higher rate to provide an incentive to become a Member; (f) the handling of cases, the number of which exceeded initial expectations, and how work was allocated among staff members; (g) training programmes on WTO law, which were provided free of charge; (h) the fee structure of the ACWL, which was largely based on a maximum or flat fee rather than an hourly rate; (i) issues arising with regard to the composition of the Management Board in relation to its members' independence and impartiality; (j) priority among Members (first-come, first-served) and in case of a conflict, the possibility to refer Members to a law firm on the ACWL's roster; (k) the legal status of the ACWL as an intergovernmental organization with privileges and immunities pursuant to the Agreement and the host country agreement with Switzerland; (l) the focus on providing advice with regard to WTO law and providing services mainly in Geneva; and (m) liability issues, which had not arisen in the context of the ACWL, as decisions in the WTO Dispute Settlement Body did not involve monetary compensation.

Summary

86. After discussion, the Working Group agreed that article 6 should read as follows:

> "1. The Advisory Centre shall provide technical assistance to its Members and engage in capacity-building activities with regard to international investment dispute resolution, including by:
>
> (a) Advising on issues pertaining to dispute prevention;
>
> (b) Providing tailored training with regard to possible means of preventing and resolving disputes;
>
> (c) Holding seminars and conferences;

(d) Functioning as a forum for the exchange of information and sharing of best practices;

(e) Functioning as a repository of information and related resources; and

(f) Performing any other functions assigned to it by the Governing Committee.

2. The Advisory Centre shall coordinate and cooperate with international and regional organizations in accordance with articles 2 and 3. The Advisory Centre may engage other persons or entities in providing the services in paragraph 1.

3. In accordance with the regulations adopted by the Governing Committee, the Executive Director may allow:

(a) Non-Members to participate in the activities organized by the Advisory Centre pursuant to paragraph 1; and

(b) Other persons or entities to participate in the activities pursuant to paragraph 1, subparagraphs (c) to (e). When the Governing Committee assigns any other functions in accordance with paragraph 1, subparagraph (f), it shall also determine the extent to which the Executive Director may allow other persons or entities to participate in those activities.

The regulations shall require the Executive Director to set appropriate fees for such participation, and include criteria for allowing participation, such as whether it contributes to the objectives of the Centre, whether it creates any conflict of interest and the resource implications on the Centre."

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

Paragraphs 1 to 3

87. The importance of the services to be provided by the Advisory Centre under article 7 was reiterated. It was thus suggested that the word "may" in paragraph 1 be replaced with "shall". Another suggestion was that the first sentence of paragraph 3 be reflected in paragraph 1 instead, by adding the phrase "and subject to the resources available to the Advisory Centre" after the phrase "Upon the request by a Member". It was also observed that the Centre should provide the services throughout the entirety of the proceedings. It was agreed that paragraphs 1 and 2 would be combined, to mirror article 6 (see paras. 68 and 86 above).

88. With regard to the services listed in paragraph 2, it was suggested that:

- Subparagraph (b) include a reference to the diversity of legal systems;
- Subparagraph (d) clarify that the representation in a hearing would be at the instructions of the Member and jointly with its legal team; and
- The phrase "to provide the above-mentioned services" in subparagraph (e) be deleted.

89. With regard to paragraph 2(e), it was said that the Centre should provide rankings or recommendations along with a list of law firms that would provide their services pro bono or at discounted rates. On the other hand, it was stated that the maintenance of the roster should be transparent and open to allow all those that wished to be listed. It was observed that the Centre's role would merely be to facilitate the appointment of external legal counsel and the appointment would be the sole responsibility of the Member.

90. After discussion, the Working Group agreed to revise paragraphs 1 to 2 as follows:

"1. Upon the request by a Member, the Advisory Centre shall provide legal support and advice with regard to an international investment dispute proceeding prior to and after its initiation, including by:

(a) Providing a preliminary assessment of the case, including the appropriate means to resolve the dispute;

(b) Assisting in the selection of mediators, arbitrators or other types of adjudicators (including any challenges) as well as experts, taking into account geographical diversity and gender balance;

(c) Supporting the preparation of statements, pleadings and evidence as well as other aspects of the proceeding;

(d) Representing the Member in the proceeding including in a hearing, at the instruction of and in conjunction with a team of that Member;

(e) Facilitating the appointment of external legal counsel; and

(f) Performing any other functions assigned to it by the Governing Committee.

2. The provision of services listed in paragraph 1 is subject to the resources available to the Advisory Centre."

91. It was understood that any legal interpretation advocated by the Advisory Centre in providing the services listed in paragraphs 1(c) and (d) would represent the interpretation of the Member concerned and not that of the Advisory Centre nor of other Members. It was further understood that advocating for such interpretation on behalf of a Member would not preclude it from advocating for a different interpretation on behalf of another Member. It was agreed that this understanding need not be reflected in the draft statute.

Paragraph 4

92. It was observed that priority among the Members would be determined by the Executive Director, in consultation with the Executive Committee when necessary. It was said that the potential impact of a proceeding on investment law should not be a criterion to determine priority (see A/CN.9/WG.III/WP.236, para. 40).

Paragraph 5

93. It was suggested that the paragraph be deleted as the services in paragraph 1 should only be available to Members. However, it was stated that paragraph 5 would provide flexibility in the operation and cater for exceptional circumstances, for example, where a request from a non-Member might generate revenue for the Centre or where a non-Member was in the process of becoming a Member (for instance, where a State had signed but not ratified the Protocol). It was mentioned that paragraph 5 should not disincentivize non-Members to consider becoming a Member.

94. A suggestion was made that the determination of whether a non-Member could benefit from the services in article 7 be left to the Executive Committee. Another suggestion was to have the Governing Committee retain that role in light of the significance of the decisions on the Centre's operation. It was understood that the requests by non-Members would be considered on a case-by-case basis with priority retained for Members and that the Governing Committee would be able to take decisions without necessarily meeting in person. It was suggested that non-Members would be required to pay fees higher than those for Members to be determined by the Governing Committee (see para. 105 below).

95. The Working Group approved paragraph 5, unchanged.

D. Financing

Article 8 – Financing

96. The Working Group approved paragraph 1, unchanged.

97. With regard to paragraph 2, it was agreed that the Centre be allowed to set up "trust funds" as necessary (which could include endowment funds) and that it be placed after paragraph 5. With those changes, the Working Group approved paragraph 2.

98. With regard to paragraph 3, a question was raised whether the contributions would be fixed in the Annex or indicative and assessed annually. As adjustments to the Annexes were to be addressed in the article addressing the amendments to the draft statute, it was agreed that the phrase "which is subject to adjustments by the Governing Committee" be deleted in paragraphs 3 and 4.

99. It was suggested that the notion of "default" in paragraph 3 be further clarified and that the phrase "limit its rights" be expanded on (for example, if payment was made by a Member but it could not be received by the Centre due to external circumstances, that would not constitute "default"). It was noted that the consequences for a default should be based on existing criteria (for example, by referring to the duration of the default or whether it was repeated) and not determined ad hoc by the Governing Committee. However, it was agreed that these criteria could be set in the regulations. After discussion, the Working Group agreed to revise the second sentence of paragraph 3 as follows: "If a Member is in default of its contributions, the Governing Committee may decide to limit or modify its rights or obligations in accordance with the criteria established in the regulations adopted by the Governing Committee." Subject to those changes (see also para. 98 above), the Working Group approved paragraph 3.

100. As to Annex IV, there was general support for allowing Members to make annual, multi-year or one-off contributions to provide Members with flexibility. It was further suggested that it should be possible for Members to make contributions in instalments. It was suggested that the link between the deposit of the instrument of accession and the payment of contributions be detailed in the regulations.

101. Regarding multi-year or one-off contributions, it was noted that such contributions would be useful in the early stage of the Centre's operation to cover the initial set-up costs and to guarantee long-term sustainability (particularly if those contributions generated sufficient returns). It was also noted that such contributions might ensure more predictability than annual contributions.

102. However, a question was raised on how one-off contributions would work, including whether it would require any subsequent contribution to retain membership status. Questions were also raised on the appropriate amount of the multi-year or one-off contributions, which would need to take into account the returns that could be generated by the contributions. For example, it was noted that a Member making a multi-year contribution upfront should be considered to have made a larger contribution than another Member that had contributed the same amount through annual contributions. On the other hand, considering that the returns from the contributions might fluctuate, it was said that rules should be developed to ensure that the obligations of the Members in the same category were on an equal footing regardless of the scheme of payment. It was also stated that the amount of contributions of Members in Annex III should not be too high as Members in that category were unlikely to benefit from the services of the Centre under article 7.

103. In light of the importance of the financial sustainability and viability of the Centre, it was agreed that the financial obligations of the Members and the different means to pay the dues (which might include annual payments, payments in instalments, multi-year payments and a one-off payment) should be clearly set out. It was also said that the different formulas should be elaborated in the regulations.

104. Regarding paragraph 4, the Working Group agreed that the services under article 6 should be free of charge for all Members and that the fee for non-Members, other persons and entities should be determined by the Executive Director.

105. It was widely felt that fees for services under article 7 should differ depending on the category of the Member (a sliding scale) and that non-Members should be charged a higher fee, either equal to or higher than that charged to Members in Annex III. It

was suggested that an hourly rate should not be the only way to calculate the fees and that different means of calculation (for example, a flat rate for different stages of the proceedings or for specific services) could be applied. Doubts were expressed about whether the actual fees or rates needed to be detailed in Annex V. It was suggested that fees for non-Members be determined by the Governing Committee.

106. It was said that regulations should be developed so that a Member that received the representation services of the Centre could recover the full costs of the services provided by the Centre (including possibly at market rate) and not only the costs based on reduced fees (also in light of the contribution that the Member would have made under paragraph 3). It was also said that regulations should address the possible default by a Member or a non-Member in paying the fees by requiring the terms and conditions of the services and the charging of fees to be set forth clearly. Accordingly, it was agreed to add the following at the end of paragraph 4: "… and in accordance with the regulations adopted by the Governing Committee."

107. Subject to those changes (see also para. 98 above), the Working Group approved paragraph 4.

108. With regard to paragraph 5, it was suggested that receipt of voluntary contribution should be included in the annual report to ensure transparency and that such receipt must not create any conflict of interest. Therefore, it was agreed that the latter part of the sentence should read as follows: "… provided that the receipt of such contribution is consistent with the objectives of the Advisory Centre, is reported in the annual report, and does not create a conflict of interest or otherwise impede its independent operation." Subject to that change, the Working Group approved paragraph 5.

109. The Working Group approved paragraph 6, unchanged.

E. Way forward

110. With regard to the possible establishment of the Advisory Centre, the Governments of France, Ghana, Netherlands (Kingdom of the), Paraguay and Thailand expressed their interest in hosting the headquarters of the Centre or regional offices thereof. The Working Group expressed its gratitude to the Governments for their interest. Other States and REIOs were called upon to express their interest in becoming a Member of the Advisory Centre in advance of its establishment.

111. Noting that there was not sufficient time to address all of the articles of the draft statute, the Working Group agreed that the remaining articles and the Annexes as well as additional articles – including on the amendment of the Protocol and its Annexes – would be addressed at the next session. It was also agreed that some of the overarching questions (such as the relationship of the draft statute with the MIIR, whether the Advisory Centre would be established as a body under the United Nations system (with or without budget implications), whether the services of the Advisory Centre would cover SSDS, financial assumptions underpinning the estimates for fees and contributions, and further work to be undertaken to make progress on the establishment as well as the form of such work) would be addressed at that session. In that light, the Secretariat was requested to outline the advantages and disadvantages of establishing the Centre as a body under the United Nation system and the implications and to explain the rationale for the draft statute providing for absolute immunity for the Advisory Centre. The Secretariat was further requested to revise the draft statute based on the deliberations and decisions of the Working Group.

IV. Draft guidelines on prevention and mitigation of international investment disputes (A/CN.9/WG.III/WP.235)

112. In view of the limited time and the need to proceed with deliberations on other reform elements during this session and the upcoming session, the Working Group tasked the Secretariat with updating the draft guidelines on prevention and mitigation

of international investment disputes based on written comments received from delegations and inputs received during the inter-sessional meeting scheduled in early March 2024, as well as any drafting groups. Delegations were requested to provide inputs by 5 February 2024. The Secretariat was further requested to provide an informal document for consideration by the Working Group at its next session, based upon which the Working Group would decide whether to present the document for adoption by the Commission at its fifty-seventh session in 2024.

V. Draft provisions on procedural and cross-cutting issues (A/CN.9/WG.III/WP.231 and A/CN.9/WG.III/WP.232)

113. The Working Group recalled that at its forty-sixth session it had engaged in a preliminary discussion on how to make progress with the draft provisions on procedural and cross-cutting issues and considered draft provisions 1 to 6 and 23 based on document A/CN.9/WG.III/WP.231. At the current session, it was reiterated that procedural reform was a crucial pillar of the ISDS reform to tackle the concerns identified by the Working Group. In light of the limited time, the Working Group discussed how to efficiently advance the work.

114. A wide range of views were expressed on the priority to be given to each of the draft provisions as well as possible exclusion from the agenda of the Working Group. Some expressed support for developing only a subset of the rules, for example, those where consensus could be achieved on developing harmonized rules. The need to develop rules of particular interest to developing countries was also expressed. It was also stated that work could build on the 2022 ICSID Arbitration Rules. It was also said that some of the draft provisions need not be worked on further, those that did not necessarily fall within the mandate of the Working Group as they touched upon substantive obligations in investment treaties. Reference was made to work being undertaken by other international organizations. It was also said that draft provisions that would apply regardless of the applicable rules could be given priority. A view was expressed that some of the draft provisions could serve as procedural rules to a standing mechanism and it was suggested that procedural rules for a standing mechanism could be prepared through informal preparatory work.

115. It was generally felt that the final form of the draft provisions could vary – some could take the form of articles in arbitration rules (possibly as a supplement to the UNCITRAL Arbitration Rules); some could form treaty provisions either in the MIIR or as models for States to adopt; and some could be formulated as guidelines. In that context, it was said that arbitration rules would be easier to amend as practice developed, compared to those included in a treaty. The need to ensure coordination of such treaty provisions with the applicable arbitration rules as well as the need to promote the cohesive scheme of the applicable arbitration rules were mentioned.

116. After discussion, the Secretariat was requested to classify the draft provisions largely into three categories: (i) those that aimed to achieve harmonization with existing procedural rules (including the 2022 ICSID Arbitration Rules) and could form a supplement to the UNCITRAL Arbitration Rules; (ii) those that would build on existing procedural rules and provisions found in recent investment treaties, which could be drafted as treaty provisions for adoption by States; and (iii) those that were not found in procedural rules addressing the so-called cross-cutting issues. It was felt that such an analysis would allow the Working Group to prioritize its work at a later session, without excluding possible work on any draft provision. To assist the Secretariat in this exercise, delegations were invited to submit written comments, possibly indicating the priority to be given and how they wished to make progress on the draft provisions.

VI. Other business

117. During the session, it was said that the Working Group should aim to maintain a balance between structural reforms and non-structural reforms noting that the deliberations had been focused on structural reforms with the next session also scheduled to address the standing mechanism. In response, it was stated that the previous sessions of the Working Group had focused on non-structural reforms and constant efforts were being made to maintain the balance.

118. The Working Group was also informed about the resource constraints of the United Nations Secretariat including temporary staffing constraints, which put pressure on the work of the UNCITRAL Secretariat.

119. The Government of Belgium informed the Working Group that preparations were well under way for the Seventh Inter-sessional Meeting to be held on 7 and 8 March 2024 at the Egmont Palace in Brussels under the theme of "Improving Access to Justice for All".

120. The Working Group heard an update on the consultations with Governments that had offered to host intersessional meetings on ISDS reform in 2024 as reflected below.

Government	*Location and dates (hybrid)*	*Proposed topics*
China	Chengdu (28 and 29 October or early November 2024)	Appellate mechanism and the MIIR
Thailand	Bangkok (late August or September 2024)	Implementation of the Advisory Centre
Republic of Korea	Seoul (31 October and 1 November 2024)	Procedural and cross-cutting issues

121. While appreciation for the offers was reiterated, concerns were expressed about the frequency and the number of intersessional meetings. It was said that intersessional meetings should aim to ensure maximum participation and meaningful engagement and facilitate progress being made at the Working Group. It was also said that efforts should be made to hold intersessional meetings in different regions, and in States that had not hosted one previously. It was generally felt that not more than one intersessional meeting in between the forty-ninth and the fiftieth sessions might be appropriate. After discussion, the Secretariat was requested to consult further with Governments.

122. With regard to the agenda of the forty-eighth session, the Working Group agreed to continue its deliberations on the remaining issues with regard to the draft statute of the Advisory Centre and to review the updated informal text of the draft guidelines on dispute prevention and mitigation, with an aim to submit both texts to the Commission for its consideration at the fifty-seventh session. It was further agreed that the Working Group would consider the topics of a standing mechanism and an appellate mechanism.