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The Advisory Centre on International Investment Dispute Resolution, ICSID and PCA: Advisable Co-Existence or Risky Fragmentation?

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On 8 April 2024, following lengthy discussions dating back to 2019, the UNCITRAL Working Group III (“WGIII”) completed the [draft statute](#) of an advisory centre on international investment dispute resolution (“Advisory Centre”) (see [previous coverage](#)). The statute, incorporating inputs from over 70 state delegations and 40 international organisations, will be presented for approval at the upcoming 57th Commission session of UNCITRAL, scheduled between 24 June and 12 July 2024.

This post briefly analyses the purpose and main features of the Advisory Centre and considers whether and how it will interact and/or overlap with other existing institutions relevant to investment law and arbitration, namely the International Centre for the Settlement of Investment disputes (“ICSID”) and the Permanent Court of Arbitration (“PCA”).

Purpose and Main Features of the Advisory Centre

The main purpose of the Advisory Centre is to provide State entities with training, support, and assistance regarding international investment dispute resolution. It aims to “enhance the capacity of States and regional economic integration organisations in handling international investment disputes”, with a particular focus on least developed and developing countries, as identified in the annex to the draft statute (Article 2).

To achieve this, the draft statute establishes that the Advisory Centre will provide:

1. Technical training: This involves advising and training its Member States on dispute prevention and resolution techniques and serving as forum for exchanging information and best practices (Article 6);
2. Legal support and assistance: This includes assessing cases, assisting in selecting adjudicators and relevant experts, and participating in drafting case briefs and documents for its Member States (Article 7).

While only States or regional economic integrations can access the draft statute and thereby become Member States (Article 10(3)), the Advisory Centre may still agree to provide the services

outlined in Article 6 (technical training) to non-members or other entities (Article 6(4)). This provision means that the Advisory Centre could theoretically advise and train private investors who might eventually initiate investment arbitration proceedings against its Member States. Although this may seem counterintuitive, it is fair to say that activities of training for potential claimants may genuinely reduce the number of frivolous claims initiated against host States. Instead, the activities of legal support and assistance for foreseeable or pending investment disputes under Article 7 are reserved for Member States only.

The Advisory Centre will feature a governing committee with representatives appointed by each Member State, a Secretariat led by an Executive Committee, and, potentially– if the Governing Committee decides so – an Executive Committee (Article 3). This three-tier structure mirrors the one of the Advisory Centre on WTO Law (“ACWL”). However, [as recently discussed in another post](#), WTO disputes and investment ones differ significantly in terms of the roles of the parties involved, caseload, and strategic considerations. Therefore, it is unlikely the Advisory Centre will heavily rely on the previous experience of the ACWL.

Funding of the Advisory Centre will come from membership fees by its members, fees charged for its services, as well as voluntary contributions “whether monetary or in-kind” from both members and non-members “provided that the receipt of such contribution[s] does not impede [the] independent operation” of the Advisory Centre (Article 8).

The Advisory Centre will have full legal personality and enjoy immunity, similar to ICSID.

Training Activities Carried Out by ICSID and PCA

The Advisory Centre’s main purpose of training and advising States, particularly less developed ones, as well as assisting them with investment disputes is noble and welcome. However, it should not be overlooked that there already exists highly qualified institutions specialised in investment disputes that offer similar activities, at least in part.

Although not explicitly mandated by the [Washington Convention](#), ICSID has long offered specialised [training activities](#) for State officials, practitioners, lawyers, arbitrators, and the wider public. According to its [2021](#), [2022](#), and [2023 Annual Reports](#), ICSID has delivered well over a hundred courses and presentations each year: these include the well-known “ICSID 101”, featuring an introduction to ICSID and general stages of an ICSID arbitration case.

Similarly, the PCA is actively involved in outreach and training programs intended to build awareness of the international investment dispute settlement field. For instance, in June 2022, it co-organised a [training program on investment arbitration for government officials, together with the Ministry of External Affairs of the Government of India](#).

Both ICSID and PCA are inter-governmental institutions established through international treaties signed by their Member States, as the Advisory Centre will be. Their primary focus rests on administering and facilitating disputes as well as assisting adjudicators, rather than training and advising disputing parties. However, their expansion into educational programs throughout the years means that they likely already possess relevant experience, structures, organisation, and material that the Advisory Centre could highly benefit from. Conversely, the Advisory Centre will also provide proper legal support and assistance during disputes: these tasks are not yet part of

ICSID's and PCA's portfolio.

Conclusion

As scholars have highlighted, international investment law is an area of international law where there is a heightened risk of fragmentation (see [Waibel](#)), where fragmentation is defined as the “co-existence of multiple international legal regimes whose competences overlap and whose policies may differ, resulting in a degree of regulatory disorder” (see [Bermann](#)).

While the purpose of the Advisory Centre is to educate and assist its Member States, thereby making the investment dispute settlement system more efficient and smoother, there are reasons to believe that its establishment might contribute to fragmentation. As explained in the first section, the Advisory Centre will provide Member States with both training activities in relation to investment law as well as proper legal assistance for existing disputes. However, as mentioned in the second section above, training programs are also offered and set up by ICSID and PCA, which have been on the investment arbitration market for a long time now.

The author's view is that, without coordination or acknowledgment of potential overlaps with ICSID and PCA's training programs, the creation of the Advisory Centre may lead to a further dangerous example of risky fragmentation in the investment law and dispute settlement scenario. Very often, although creating new institutions from scratch rather than re-shaping and/or improving existing mechanisms may appear easier in the short-term, the long-term costs in terms of efficiency and trust in the system could be significant.

In light of the above, it would be highly advisable for the Advisory Centre, ICSID, and PCA to coordinate their training activities. These three institutions could consider organising joint educational initiatives, sharing information and resources as well as agreeing on common action plans and “best practices”. This collaboration would align their training activities towards the common goal of benefiting the broader investment community.

Among others, the Advisory Centre could greatly benefit from exchanging information with ICSID and PCA, given their extensive experience in registering requests for arbitration and assessing their soundness. Because of such experience, ICSID and PCA can readily identify when a claim lacks merit, falls outside the arbitral tribunal's jurisdiction, and/or will likely be settled during proceedings. The Advisory Centre could use this knowledge to advise private investors, helping them avoid initiating arbitration and encouraging early negotiations with State parties.

To conclude, and as mentioned above, unlike ICSID and PCA, the Advisory Centre's mandate will also include providing proper legal support and assistance to Member States during disputes. Again, coordination with ICSID and PCA would be extremely beneficial, as their legal staff acts as secretaries for arbitral tribunals and regularly interacts with arbitrators, closely engaging with their legal reasoning. Tribunal secretaries have direct access to an extensive collection of awards and have knowledge of what legal issues are approached differently by various tribunals, thereby often contributing to a general sense of inconsistency and incoherence. Finding an appropriate way to share this knowledge with the Advisory Centre would enable the latter to build up State's legal representation and juridical position in a way that mitigates the perceived lack of coherence, ultimately contributing to the harmonisation of arbitration decisions.

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