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Possible reform of Investor-State dispute settlement (ISDS)

Submission from the Government of Turkey

Note by the Secretariat

This note reproduces a submission received on 22 April 2020 from the Government of Turkey in preparation for the thirty-ninth session of the Working Group. The submission is reproduced as an annex to this Note in the form in which it was received.



Annex

General Remarks:

Turkey supports the establishment of a non-profit international “Advisory Centre” by UNCITRAL. Turkey’s WTO experience on advisory services provided by Advisory Centre on WTO Law (ACWL) has been consistently positive over the course of years and Turkey believes that an ACWL-like Advisory Centre connected with UNCITRAL would be highly beneficial for the developing and less developed countries.

Regarding the structure, function and procedures of the Advisory Centre, ACWL may serve as a model. Nevertheless, one has to remember that with this initiative, we are trying to establish a whole new institution, which ultimately means two things: first, we need to accept the fact that there might be some new challenges on the road that may require unique approaches and solutions. Secondly, although ACWL has proven to be a highly successful example and could be a model for the Advisory Centre, we should also consider new ways to build upon WTO experience. In order to understand the ACWL model better and to establish a modern institution with modern rules and disciplines; the Director of ACWL may be invited to make a presentation about ACWL. In that presentation the questions such as “What are the challenges that ACWL has been facing”, and “What are the fine aspects of ACWL that can be used as a foundation for the Advisory Centre” may be answered.

Beneficiaries:

Regarding the beneficiaries of the Advisory Centre, it has been discussed whether investors should be counted among the beneficiaries of the Centre. Turkey thinks that it would not be feasible to extend the services of the Advisory Centre to all investors, as it would be hard to manage and finance such services properly. We believe such an Advisory Centre should be established essentially with the aim of supporting developing countries and LDCs as well as the SMEs having investments in these countries only.

However, if some Members think that all investors should also take benefit of such advisory services, whether they are large or small companies, they could achieve this goal by establishing national advisory centres in their own countries. Turkey believes that such an arrangement would also be beneficial for SMEs in terms of accessing the ISDS system without bringing unnecessary financial burden to the Advisory Centre.

Services Provided by the Advisory Centre

The Advisory Centre could provide low cost legal advice and advocacy support particularly for developing and least developed countries and small and medium-sized enterprises (SMEs) while it would also support developing and least developed countries in dealing with ISDS cases in order to enable them to better handle and manage investment disputes.

On the other hand, alternative dispute resolution (ADR) methods are increasingly included in investment treaties as part of ISDS provisions. Dispute resolution mechanisms that are alternative to arbitration, such as mediation are not only less time consuming and cost-intensive than arbitration but also offer a high degree of flexibility to the disputing parties and therefore allow sustaining long-term investment relationships.

In connection with the current developments regarding the ADR, such as the signing of the Singapore Convention, it is very crucial for the Advisory Centre to offer ADR services and support for the early settlement of investment disputes. In this regard; the Advisory Centre could also assist developing States by raising awareness and widespread use of ADR methods as well as providing training on dispute prevention and legal advice on how to manage potential disputes. The Advisory Centre could also help the investors and states to find proper mediators for their disputes by providing a roster of experts available to act as mediators.

Financing and Structure:

We believe that the Advisory Centre should be established in the form of an independent international institution rather than being an institution under the United Nations. Especially, financial autonomy should be observed. Such form of establishment would guarantee the Advisory Centre to function outside the United Nations structure and the United Nations decision-making process, consequentially making the institution resistant to criticism.

For the funding of the Advisory Centre, a contribution system would be necessary. Contribution from Members should be expected to create two main outcomes: first, the proper functioning of the Advisory Centre and secondly, as the Members would have a certain financial obligation, active participation in the supervision of the Advisory Centre and using its functions to the full extent.

For example, ACWL works with the model of pro-rata contributions and members benefit from services without paying any additional amount within certain hourly limit. Other than that, any extra support required for particular disputes or cases is funded separately. For such purpose, there is an endowment fund and developed countries are contributing to it on a voluntary basis.

Turkey believes that the Advisory Centre could function on the same basis. Annual contributions by the Members would be enough for routine services, and thus a “service fee” would not be necessary. Legal services for particular dispute cases however would be charged separately by an endowment fund financed by developed countries and NGOs.

On the other hand, Turkey believes that LDCs should be exempt from paying regular contributions but should be responsible for a certain portion of the fees arising from dispute cases.

Confidentiality:

Regarding the subjects the Advisory Centre is going to work on; confidentiality is naturally a highly delicate and important issue. An international code of ethics/conduct should be drafted in order to guarantee the confidentiality and avoid conflicts of interest.

Staff:

The expert staff that will work in the Advisory Centre, especially the lawyers/counsellors, should be selected among those who have a certain amount of experience on investment disputes. There can also be a “Roster System” like ACWL has, which can be used to outsource the legal services to law firms. In addition, we believe it would be highly beneficial if experts/lawyers from Members are allowed to join the staff as “Secondees” within a certain quota.

Training:

We believe training activities should be a crucial part of the Advisory Centre. For example, ACWL has a system of regular training. A similar regular training programme may be established.