The Columbia Center on Sustainable Investment (CCSI) is a joint center of Columbia law school and the Earth Institute at Columbia University in New York City. Our mission is to develop practical approaches for governments, investors, communities and other stakeholders to maximize the benefits of international investment for sustainable development.

CCSI was commissioned by the Ministry of Foreign Affairs of the Netherlands to conduct a scoping study assessing hurdles experienced in ensuring adequate legal representation in proceedings under international investment agreements.

This presentation is intended to briefly describe the study and our findings.
This study is timely for various reasons, not least of which is that the matter of an international investment law advisory center is also now an element of ISDS reform discussions taking place within UNCITRAL’s WGIII on ISDS reform. CCSI has been participating as an observer organization in those discussions. We hope that this study will usefully assist policy-makers in that context.

In our study we use the term “Assistance Mechanism” rather than advisory center to indicate that a variety of models may be developed, and each may respond to different kinds of challenges and advance different kinds of objectives.

I would like to emphasize that the study does not advocate for a specific model of assistance mechanism but sets forth issues, evidence, lessons learned, and a variety of potential solutions that may be developed to respond to specific capacity challenges.
Our approach to the scoping study was to conduct desk-based research as well as interviews with:

- government officials (of all World Bank Group economic development levels);
- individuals who have experience establishing or working for existing or attempted Assistance Mechanisms;
- individuals who have experience working for arbitral institutions;
- academics who have written on and/or advised states with respect to international investment law;
- private practitioners;
- representatives of civil society organizations; and
- representatives of private sector multinational investors.

Interviewees were asked to share their experiences and ideas relating to capacity challenges and how an assistance mechanism could or should address them. The interview protocol is included as an Annex to the Scoping Study.
The issues set forth in the scoping study include an overview of:

- Capacity challenges identified during consultations;
- A discussion of previous attempts to establish an investment law advisory center;
- Models of assistance mechanisms that may be considered for an investment law assistance mechanism;
- Cross-cutting issues that emerged that are important for policy-makers to consider regardless of the form that an assistance mechanism may take; and
- The particular issues faced by investors, and considerations surrounding investors as beneficiaries of assistance mechanism services.

This presentation will roughly follow that order. Out of necessity we will be rather brief today but I direct everyone to the scoping study itself for much greater detail on the issues that we will now discuss.
I will start by overviewing the various capacity challenges relating to engagement in the investment treaty and ISDS system that were articulated to CCSI during our consultations.

Notably, our consultations revealed that concerns are much more fundamental than only the financial costs of participation in this system, although that concern is also significant.

Interviewees relayed challenges ranging from effectively formulating and implementing investment policy at the domestic level through and including effective engagement in formal ISDS proceedings. Some challenges that we describe were shared by many states, and others differed.

Importantly, states expressed different priorities in addressing these challenges. Some priorities were relative and based on resource constraints, but others were much more fundamental opinions about what role an assistance mechanism should or should not take (e.g. whether it should provide direct legal representation or not, or whether it should permit investors to use its services or not).
Based on the wide range of challenges articulated to CCSI during our consultations, the study looks at capacity challenges experienced by states in various different phases of investment law, both in the pre-dispute context as well as the dispute context.

It also considers whether and to what existing assistance mechanisms are already filling certain capacity gaps in those areas and includes a discussion of what assistance is thus already available to states and to some extent, to investors.

The thematic areas of investment law that the study considers in depth include those on the screen, and I will now discuss each in turn.
Starting with an overview of capacity challenges and existing assistance in the area of investment policy-making, these include challenges that state experience in effectively engaging in the multitude of fora in which investment policy issues are being discussed and advanced (e.g. UNCTAD, OECD, UNCITRAL, Financing for Development agenda, and investment facilitation in the WTO). The hurdles experienced are not limited to financial and human resources but also include the formation of cross-government strategies and communication channels at the domestic level.

There are various, primarily international organizations, providing valuable services in this area, for example:

- UNCTAD (Investment Policy Framework and Investment Policy Review);
- OECD (national Investment Policy Reviews; Freedom of Investment Roundtable); and
- World Bank Group.
Moving on to investment treaty negotiations, consultations revealed that the negotiation of treaties can place particular and time-sensitive demands on governments. For example, it is necessary to assess and understand the particular domestic impact of certain proposed provisions. Various states described capacity challenges in cross-governmental communication and ensuring a consistent approach to policy-making.

There are also capacity challenges stemming from systemic hurdles, such as the relative negotiating strength of states, in actually ensuring that a state’s objectives are actually reflected in a negotiated instrument.

There is some, primarily ad hoc, support available to states in this area. The study describes examples from other areas of law to show how more organized support may be given to states in this area (e.g. European Capacity Building Initiative under UNFCCC).
With respect to domestic implementation of IIAs and dispute prevention, many interviewees articulated challenges in this area and also were quite interested in more information about how to better manage these challenges.

Notably, the domestic implementation of treaty obligations can be very state specific and nuanced and thus resource intensive. These challenges may be greater in decentralized states where state, local or provincial jurisdictions have significant governance capacity and decision-making powers.

Existing providers include:
• UNCTAD;
• World Bank is piloting its Systemic Investor Response Mechanism in a large handful of states; and
• Various states are implementing various forms of ombuds offices to better manage and address issues before they turn into an ISDS claim.

Importantly though, some disputes cannot necessarily be, nor should be easily prevented (e.g. certain disputes arising out of judicial processes).
This slide shows an example of how these issues may play out. As treaties become more complex, capacity challenges may also intensify. This may be the case with, for example, understanding implications of liberalization provisions and restrictions on performance requirements for domestic economic, social, and environmental policies in the short, medium and long term.

We can see here, for instance, that Canada is relatively more protective of its policy space than its treaty counterparties in Asia and Africa. This may be due to disparate capacities to understand implications of these provisions, or disparate negotiating capacities. Regardless of the cause, the disparate approach to carve-outs will likely also result in disparate burdens in terms of implementation.
When treaties are signed it does not signal the end of a state’s engagement with its treaties, but really just the beginning. States reported capacity challenges in:

- Ensuring consistency and coherence in pleadings;
- Following disputes investors file; submitting non-disputing state party briefs;
- Issuing unilateral or joint interpretations of treaties;
- Reacting to tribunal decisions.

Consultations revealed significant scope for support in this area.
To show one example of treaty management, this slide reflects data on non-disputing state party submissions. It indicates that in bilateral treaty dispute contexts, non-disputing state party submissions are extremely rare (and even in multilateral treaties, outside of a small handful of treaties, are also extremely rare). This indicates, for example, that should governments wish to try to reign in expansive interpretations of their treaties there are currently unseized opportunities for them to do so. It may be worth understanding why governments are not or cannot engage in this context, and what may be done to assist governments in managing appreciation of treat-party intent through this kind of engagement. Notably, in the bilateral context primarily capital-importing states may, in reality, rarely be non-disputing state parties.

Source: Data on claims under different treaties is from UNCTAD (search done October 9, 2019); data on non-disputing state party submissions is collected from ITTO databases, supplemented and corrected by CCSI (internal spreadsheet updated as of October 9, 2019).
Case staffing and procurement of outside counsel is obviously a large topic and it is considered in depth in the study.

The frequency of cases against a state is perhaps one of the most, if not the most, relevant question for understanding how they wish to staff defense of claim. There are generally three models states use to staff claims: hybrid most common (mix of external and in-house counsel), next is exclusively in house counsel, and third is exclusively outside counsel.

In our consultations some states did express a desire to move to an in-house model. Many states who plan to retain a hybrid model expressed an interest in gaining greater control over the management of their claims and outside counsel, and also wished to understand ways to bring certain activities more in-house.

Procurement of outside counsel, and the costs expended, are driven by a variety of factors. It was noted that some states feel compelled to hire the best outside counsel simply because the state, and the officials themselves, will need to justify that choice to many different stakeholders. Some states may be willing to forego other spending priorities in order to hire certain counsel.

Some states cannot or choose not to allocate funds to top counsel. One study had indicated that lower-income states may be more willing to settle claims, even of poor quality. The systemic impacts of this finding may be extremely relevant when considering a role for an assistance mechanism.

One thing raised by a few states was the idea of a “hotline”, or a “go to” trusted place upon which states can call to get answers to pressing questions (both in the policy implementation, dispute prevention, as well as dispute management context). This was raised both by states that wish to manage claims internally, as well as by states who need help with early decisions before counsel has been procured.
This slide on anticipating and potentially resolving disputes at an early phase is very similar to that already discussed but here was intended to focus more on the role of the cooling-off period and the capacity challenges that states have in effectively managing this time. Internal delays, which may be caused due to the lack of efficient command or communication channels, can have long term impacts on the management and success of a defense.
With respect to appointing arbitrators, asymmetries of information about potential arbitrators can create hurdles for certain states. There is scope to have more information publicly available, or available on a no-cost basis.
As is well-articulated in the context of UNCITRAL’s WGIII, states struggle in dealing with uncertainty and ambiguity in ISDS claims. There are a variety of ways to manage these issues. These include, among other steps, joint interpretations of existing agreements or clarifying language in new agreements.

Some states experience challenges in entering into joint interpretations and more work may need to be done to understand why joint interpretations are infrequently used (to the extent states do wish to use them).
The Scoping Study details previous attempts to establish an advisory center. It considers a joint effort by UNCTAD, the Inter-American Development Bank, the Organization of American States, and the Vale Columbia Center on Sustainable International Investment (a predecessor to CCSI) which started around 2006 and ended unsuccessfully in 2010, although significant progress was made. It also considers efforts by the Union of South American Nations at a similar time, and an Australia-New Zealand-ASEAN effort in 2012, which advanced less than those above.

Based on research and interviews with those involved in these efforts, a key take-away is that one cannot underestimate large policy differences (e.g. the scope of services of a mechanism or how it will be financed) but also seemingly small decisions (e.g. where a mechanism will be located) as disagreements can halt any effort, even when it is very close to the finish line.
I’ll now move on to a brief overview of the different models that an assistance mechanism may take, each of which is discussed in much greater detail, using examples, in the scoping study.
One model we analyze is that providing institutionalized, multi-service support, including legal representation. Such a model may include services such as capacity building, negotiation support, policy advice, legal opinions, or defense in proceedings.

Examples of this model that are considered include:

- Advisory Center on WTO Law (ACWL);
- African Legal Support Facility (ALSF);
- International Development Law Organization’s Investment Support Program for Least-Developed Countries (ISP/LDCs).

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A second model is that of institutionalized, multi-service support but this time not including legal representation. So one potentially offering services including capacity building, negotiation support, or policy advice.

Examples of this kind of support provider include:

- International organizations (e.g. UNCTAD, OECD);
- Arbitration centers;
- Academic institutions; and
- Non-profit organizations.
Financial or in-kind support is another model detailed in the study.

This model includes:
• Trust funds (e.g. Permanent Court of Arbitration Trust Fund. This model is particularly prevalent in other areas of international law, such as criminal and human rights law;
• Third Party Funding; and
• Contingent representation by law firms.
Other models of assistance mechanisms are also described in more depth in the scoping study, including:

- **Pro-bono, ad hoc legal and expert support**: IDLO ISP/LDCs
- **Intergovernmental Knowledge-Sharing Hubs**
- **Discrete Capacity-Building Networks**
  - International Organizations
  - Arbitral Institutions
  - Academic Centers
  - Law Firms
- **Legal Assistance and Resource Clearinghouse**

Other models of assistance mechanisms are also described in more depth in the scoping study, including:

- Pro-Bono, ad hoc legal support (e.g. IDLO’s ISP/LDC program, which uses outsourced law firm and other organization pro bono support);
- Intergovernmental Knowledge Sharing Hubs (there was expressed desire on the part of governments for more opportunities to share experiences and lessons learned);
- Discrete Capacity Building Networks (including trainings or courses offered by International organizations, law firms, academic and non-profit institutions); and
- A legal assistance or resource clearinghouse (a place where governments can go simply to understand the range of existing services available to them).
I will now quickly overview the cross-cutting issues that are applicable to all models of assistance mechanism before Lise discusses some of these in greater depth in the context of the WTO Advisory Center.
• Quality, reliability, reputation, trust was stated to be the key issue during our consultations. Interviewees stressed that there must be an alignment of interests between any assistance mechanism and the state, including but not limited to financial interests.

• With respect to funding and scope of services, it is clear that the depth of countries that can access services and the breadth of services that can be offered will be highly dependent on funding.

• With respect to Costs of support and who bears them, a few models are explored, including where the Service provider pays (e.g. pro bono), the donor pays (e.g. development agencies), or the user pays (market or reduced fees). These can be used in combination.

• With respect to stakeholder conflicts of interest and tensions, different relationships between donors, support providers, client governments, private or government-owned investors, and other stakeholders will become more or less prevalent depending on the range of services provided by an assistance mechanism. In some cases these may be more or less serious.

• The question of who should benefit from an assistance mechanism’s services is a critical question, and one that is closely tied to identified capacity concerns and the mechanisms objectives. For example, treaty negotiators, officials who defend
claims, other government officials responsible for domestic implementation, SMEs, and other stakeholders are all among those who could potentially benefit.

- The location, staffing, remuneration of a mechanism and its employees elicited many differences of opinion. Answers to these questions have also been an issue in previous attempts to create an advisory center. The way in which one approaches these issues also depends on role of the mechanism - for example, if a mechanism is more involved in legal representation, it may make sense to place in a commercial hub such as Paris or DC, but the mechanism is then far removed from government clients. There were suggestions for a mechanism that may have multiple locations, with obvious cost implications.

- With respect to staff, there was a focus not only diversity in staff, but also on what staff would be appropriate. For example that individuals with a development policy background be prominent on teams of other legal advisors.

- The long term sustainability and governments ability to rely on services was considered key.

- The degree of institutionalization of a mechanism was also raised. For example, whether more informal networks should be given support for expansion rather than creating an entirely new institution.

- “Politics” surrounding the creation or expansion of an assistance mechanism are also explored. This has a few facets. For example, how and whether the mechanism should be tied to any particular form of reform (i.e. structural vs. not structural). Also, previous efforts to create an advisory center reportedly did not receive the support of law firms. It was, however, noted that law firms are not monolithic, and that outside of a small handful of firms most firms make most money off claimant work.

- Finally, policy-makers should bear in mind how the challenges that an assistance mechanism is intended to address intersect with other reforms. For example, other efforts to reduce costs or limit claims. For example, reform of reflective loss claims, state-to-state filters, or domestic exhaustion requirements may address some of the issues that could be the subject of an assistance mechanism.
As Brooke noted, I’m going to provide some information on the ACWL, as that is often seen as a model that could be incorporated in the ISDS context, and will also use it as an example to further elaborate on some of the cross-cutting issues Brooke had mentioned.

Overall, the ACWL is a highly regarded mechanism established to help developing countries participate effectively in the WTO system. Based on interviews and desk research, there seems to be a high degree of trust in and respect for the ACWL, the role it plays, and services it offers.
The ACWL provides support in a number of ways. It offers:

- Reduced-cost direct assistance to claimants and respondents in WTO dispute proceedings;
- Provision of private counsel at pre-set rates in some contexts;
- Free training;
- Free legal opinions on a range of issues that may relate, for instance, to negotiations, implementation, and claims;
- Secondments; and
- And it has a fund for use of expert witnesses.

The table on this slide, which is in the report and from an ACWL annual report, helps illustrate the quantity and breakdown of activities: e.g., in 2018, it received 5 new requests for assistance and was handling 17 disputes at various phases; it provided 237 legal opinions, and provided 39 certificates of training.
Focusing on the dispute settlement role, the ACWL charges member users and LDCs a fee; the fee has a set hourly rate and a maximum fee cap per phase of the proceeding. This table shows the fee for panel proceedings. Each country category is based on a formula determined by the country’s economic profile.

In the study, we outline three basic, and often overlapping models of funding: service-provider funded support; user-funded support; and third-party funded support.

So ACWL litigation support is partly a user-fee model, though it is also a third-party funder and service-provider funder model: the fees for litigation are subsidized by payments by donor countries and member countries, as well as from returns from the ACWL’s endowment. In contrast, there are no user fees for ACWL legal opinions and trainings.
One important consideration is whether handling WTO disputes is comparable to handling ISDS disputes. There are some differences often noted - including that WTO disputes are state-to-state, and states can be both claimants and respondents. But another important question flagged to us by an interviewee who had worked in both systems, and that we dug into further, is whether WTO disputes and ISDS disputes are comparable in terms of the amount and nature of resources required. It seems like there are fundamental differences between these two systems.

In particular, the ACWL estimates each case will require a set number of hours and sets a corresponding maximum charge to users. The estimate for the number of person hours required for a WTO panel proceeding was, in 2018, 444 hours. Now let’s compare that to ISDS proceedings. It is actually difficult to gather data on hours required as the public portions of cost submissions generally do not provide the number of attorney-hours worked. We did, however, manage to locate that data in a couple of filings, which are listed here. Note that the hours for two relatively recent ISDS disputes - each filed against Canada - were roughly 20,000. This also appears somewhat representative as the overall legal fees expended seem to track - potentially at the low end - average fees expended by respondent states in ISDS cases.
Now, it may be that the WTO estimates are underestimates. But it is unlikely that they depart wildly from reality given that these estimates would presumably be reflected in and inform the ACWL’s budget and staffing needs. And even if low, it seems like the person hours required for WTO panel disputes, and those required for ISDS cases, differ by an order of magnitude. This, then, may raise substantial questions about the financial sustainability of an ACWL-type system for ISDS, and about its reach in terms of impact. Key questions include: How many disputes would an ACWL-type ISDS assistance mechanism realistically be able to handle and at what cost to users and third-party funders? Would it be able to have a meaningful impact on the experiences of a significant number of states? If not, is this ok? Or should the scope of services be reduced, and be more focused, so as to reach a broader number of beneficiaries? These issues of possible scope of services and related funding needs are among the cross-cutting issues that apply to consideration of all potential models.
This slide further illustrates the issues: when it was established, the ACWL was predicted to be self-sustaining, operating based on income from a donor- and member-funded endowment, as well as from user fees. But that has not materialized; the ACWL needed, for instance, roughly 20 million of additional funds for the five-year period between 2017 and 2021. User fees for litigation have, on average, represented 4% of its annual revenues; and litigation occupies roughly 40-60% of its time. Suggestions to also charge for legal opinions have been rejected on the ground that they might unduly deter such requests, impeding the ACWL's mission.

So, an important takeaway here is that the issue of funding sustainability - even for an established and well-regarded institution -- is not one to gloss over. And this is especially the case given the fact that a given ISDS dispute may require 40-50 times more hours -- and corresponding resources -- than an average WTO dispute.
Generally – there are several categories of tensions we describe in the study that can arise from different funding models. Those tensions are:

- Tensions between donors and beneficiaries;
- Tensions between service providers and beneficiaries; and
- Tensions between donors and service providers.

There may also be tensions within these stakeholder groups, such as conflicts within the beneficiary host country in terms of the proper litigation position to take, or whether or on what terms to settle, or who controls litigation; and there may be conflicts within the donor country about whether/whom/what to fund.

This slide provides some examples of how goals of donors may differ from goals of beneficiaries. In many cases, these different goals can coexist happily; but, in others, they will conflict.

ACWL governance documents provide a helpful illustration of how these tensions among stakeholders intersect with issues of funding and trust. For instance, some donors, which include government development organizations, have expressed a
desire to have the ACWL monitor and report on how its work advances donor governments’ development policy aims; some members and beneficiaries, however, have countered that reporting and assessments along those lines may not necessarily be consistent with the particular needs or interests of ACWL users or the ACWL itself. Similarly, the ACWL has reportedly had challenges securing funding from private sources due to concerns about whether those funders would seek to influence legal positions. These issues of perceived, potential, and actual conflicts have reappeared throughout the research and interviews regarding other potential assistance mechanisms as well, and are key considerations that should inform discussions around what is created, and how it is funded and governed.
Investors as Assistance Mechanism Beneficiaries
When thinking about SMEs as beneficiaries, issues to consider include:

- Whether and to what extent states wish to include investors as beneficiaries for all or only some services;
- If so, which investors? Would it only be for individuals, or SMEs? In that context, what is an SME?
- Other sets of threshold issues relate to the nature and scope of concerns that an Assistance Mechanism is intended to address; is this, as some might say, an access to justice problem? Or, as others argue, is the issue of access to ISDS something very distinct from the issue of access to justice?
- In this sense, it is important to identify the aims of assistance, the particular challenges that investors investing abroad face; and, more narrowly, what challenges SMEs face in the context of investor-state disputes
- Then finally, whether and what policy and market interventions are appropriate?
Let’s start with the threshold issue of what is an SME: As this chart illustrates, definitions vary: quantitative thresholds are often used, but criteria differ from country to country. And this is impactful: as authors Gibson and van der Veet stated in a report, and as is cited in our study, definitions used by some intergovernmental organizations “would include the manufacturing subsidiaries of both Nestle and Unilever in Ghana, clearly not the intended objects of development interventions.” (Scoping Study p. 106).

So what approach should be used in this context? We thought a World Bank evaluation of its work to support SMEs was insightful. This evaluation stated that in order for the term “SME” to be, and here I quote, a “meaningful category of enterprises, it should be a group of firms that is specifically differentiated from others by the way that it experiences particular policy, institutional, or market failures, or the way it benefits the economy or the poor.” Once the relevant category is identified, it is possible to determine whether and what type of policy interventions are appropriate, and also assess the cost associated with them. (Scoping Study p. 107).
Inspired by this, we sought to identify particular challenges that may be faced by SMEs, to articulate when those constraints were/were not particularly relevant, and also to highlight some other options for addressing them.

So, for instance, for many SMEs, the challenge of bringing legal claims is potentially a broader challenge of limited access to finance; this is an issue that transcends access to ISDS; so one issue to consider is whether broadening access to finance for SMEs is preferable to litigation support for ISDS in terms of possible policy interventions; another constraint may be the high costs of ISDS cases - something that is not uniquely felt by SMEs; thus, in this context the question is whether a preferable policy intervention is an effort to reduce costs of disputes, or to channel disputes into less expensive fora. Of course, governments may pursue more than one path, but not all paths are equal in terms of their aims, and advantages and disadvantages, including spillover effects.

One reason we flagged these issues is that, as a general matter, even interviewees who in principle support the inclusion of investors as mechanism beneficiaries recognize that doing so will create not insignificant challenges in terms of garnering support for a mechanism that may already face rather large hurdles.
We will close with five key takeaways:

• One, our consultations revealed that the concerns about IIAs and ISDS are much broader and more fundamental than only the financial costs of participation in this system.

• Two, there are many different models that an assistance mechanism could take, and important initiatives already underway.

• Three, as policy-makers consider the creation or expansion of an assistance mechanism, it will be important to:
  • Understand the capacity challenges that potential users of an assistance mechanism are experiencing, and their preferences in terms of overcoming those challenges;
  • Determine the role that an assistance mechanism should take, and what gaps it should fill; and
  • Take into consideration all of the cross-cutting issues identified in the study, such as funding, location, trust and quality, etc.

• Four, any assistance mechanism should be tailored to the investment law system. Mechanisms that work in other contexts, such as the ACWL, may not be well suited here.

• Fifth and finally, it is important to consider this initiative in the broader context of investment law reform; there are a range of options available for addressing concerns about IIAs and ISDS, how does this fit into the mix? What are the advantages and disadvantages of different options, and to different stakeholders, and how might those advantages and disadvantages evolve over time? Particularly when government resources are scarce, how can we be most strategic regarding demands on those resources, and ensure policy coherence across initiatives?