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Executive Summary

A Scoping Study on Securing Adequate Legal Defense in Proceedings under International Investment Agreements

Prepared for the Ministry of Foreign Affairs of the Netherlands
by the Columbia Center on Sustainable Investment¹

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1 Introduction

The Columbia Center on Sustainable Investment (CCSI) prepared a Scoping Study on Securing Adequate Legal Defense in Proceedings under International Investment Agreements (Scoping Study) for the Ministry of Foreign Affairs of the Netherlands. The primary research question that the Scoping Study was requested to address is: How can adequate legal defense for parties in proceedings under International Investment Agreements (IIAs) be better secured? The information provided in the Scoping Study is intended to contribute to discussions on the desirability and feasibility of creating or expanding an Assistance Mechanism to assist states and other users of and stakeholders in the IIA and investor-state dispute settlement (ISDS) system to more effectively participate in and benefit from this system.²

As an initial matter, IIAs, and the ISDS mechanism frequently provided for therein (which may also be provided for in domestic laws or contracts), have come under increasing levels of scrutiny, particularly as the expected benefits of the treaties and additional legal protections are not perceived to have materialized, and the number of claims against states, and defense costs incurred by them, have increased dramatically. Absent fundamental changes to these legal frameworks and/or the dispute settlement mechanisms contained therein, these concerns show no signs of abating.

The Scoping Study provides a broad and inclusive overview of issues, concerns, empirical evidence, opinions, lessons learned, and proposed solutions as they relate to a potential or expanded Assistance Mechanism for international investment law. This Scoping Study reflects input received on a confidential basis from: government officials (of all World Bank Group economic development levels³); individuals who have experience establishing or working for existing or attempted Assistance Mechanisms; individuals who have experience working for an arbitral institution; academics who have written on and/or advised states with respect to international investment law; private practitioners; representatives of non-governmental organizations; and representatives of private sector foreign investors. While this study captures the perspectives of each and all of these categories of individuals (but perspectives are naturally reflective only of individuals actually interviewed), it is the perspective of those who are experiencing and articulating capacity challenges that should serve as the primary guide for both identifying critical areas where assistance is needed, and also in developing potential solutions.

² The term “ISDS” is used throughout the Scoping Study to include the investor-state mechanism in its current form, as well as to include any structural changes made to it, including but not limited to bilateral investment courts, or a proposed multilateral investment court system.

³ For purposes of classifying the economic development level of states, the World Bank Atlas method was used based on the World Bank’s 2020 fiscal year classification. See World Bank Group, *World Bank Country and Lending Groups*, <<https://datahelpdesk.worldbank.org/knowledgebase/articles/906519-world-bank-country-and-lending-groups>> accessed 29 July 2019. Thus, **low-income economies** include those with a GNI per capita of \$1,025 or less in 2018; **lower middle-income economies** are those with a GNI per capita between \$1,026 and \$3,995; **upper middle-income economies** are those with a GNI per capita between \$3,996 and \$12,375; and **high-income economies** are those with a GNI per capita of \$12,376 or more

2 Identifying Capacity Challenges

CCSI's consultations conducted for this Scoping Study revealed that the concerns about IIAs and ISDS are much more fundamental than only the financial costs of participation in this system. Interviewees relayed challenges from investment policy formulation at the domestic level through every step of the investment law and policy spectrum up through and including effective engagement in disputes. A consistent and recurrent theme that emerged during interviews, and which is threaded throughout the Scoping Study, is the expressed desire, particularly on the part of states, for greater capacity to manage and control their investment treaty programs as a whole, as well as related disputes, and the potential of an Assistance Mechanism to assist with capacity development or to supplement capacity challenges.

Thus, as a preliminary matter, the Scoping Study asks the critical question of how one might consider and define "capacity". While "capacity" is a term that may be loosely applied during the course of policy discussions, to the extent an Assistance Mechanism is intended to respond to capacity challenges, the unique and pointed meaning that this term embodies in any particular context is first critical to understand so that an appropriate solution can be crafted. Capacity may be conceptualized in different yet interrelated ways, each of which has implications for the identification of capacity challenges and for any potential efforts to foster capacity building.⁴ For example, capacity may be narrowly categorized as technical expertise in a specific substantive area, or may be conceptualized as a broader ability of governments to promote their national interests and effectively participate in an international legal system.⁵ Capacity may also be temporally-categorized into short- or long-term pillars, where a short-term focus may be the urgent need to prevail in an ISDS dispute.⁶ Moreover, capacity can also be viewed through the lens of the expertise of specific government officials, at the organizational and institutional levels with a focus on shaping and implementing investment policy objectives,⁷ or with respect to the legal, political, and economic ability to participate in a rules-based global economy.⁸ Indeed, the existence of capacity challenges on the part of states has been linked

⁴ Joost Pauwelyn and Mengyi Weng (eds), *Building Legal Capacity for a More Inclusive Globalization: Barriers to and Best Practices for Integrating Developing Countries into Global Economic Regulation* (The Graduate Institute 2019) 1.

⁵ Jan Bohanes and Christian Vidal-Leon, 'The ACWL's Contribution to Enhancing Legal Capacity of Developing Countries' in Joost Pauwelyn and Mengyi Weng (eds), *Building Legal Capacity for a More Inclusive Globalization: Barriers to and Best Practices for Integrating Developing Countries into Global Economic Regulation* (The Graduate Institute 2019) 67-84.

⁶ Anna Joubin-Bret, 'Establishing an International Advisory Centre on Investment Disputes' in Joost Pauwelyn and Mengyi Weng (eds), *Building Legal Capacity for a More Inclusive Globalization: Barriers to and Best Practices for Integrating Developing Countries into Global Economic Regulation* (The Graduate Institute 2019) 101-122.

⁷ Tsotetsi Makong and Thokozani Ngwira, 'Trade Related Capacity Building Measures in African LDCs and the Paradox of the Efficiency-Effectiveness Dichotomy' in Joost Pauwelyn and Mengyi Weng (eds), *Building Legal Capacity for a More Inclusive Globalization: Barriers to and Best Practices for Integrating Developing Countries into Global Economic Regulation* (The Graduate Institute 2019) 169-194.

⁸ Marc L. Busch and Inu Manak, 'Building Legal Capacity: Opportunities, Challenges and Constraints' in Joost Pauwelyn and Mengyi Weng (eds), *Building Legal Capacity for a More Inclusive Globalization: Barriers to and Best Practices for Integrating Developing Countries into Global Economic Regulation* (The Graduate Institute 2019) 199-201

directly to the legitimacy of ISDS itself.⁹ Of course, addressing all or even some capacity challenges may be outside the desirable or feasible scope of an Assistance Mechanism, but any solution should be tailored to respond to specific elements of need.

As such, the Scoping Study considers the range of problems that states and other actors have in engaging with and benefiting from international investment law and in participating effectively in ISDS processes. This analysis is divided into different phases: investment policy-making; IIA negotiation; implementation and management of IIA policies; dispute prevention; and pre-dispute management and consultations. It then considers in depth the capacity challenges that arise in the context of managing actual ISDS disputes, including: case staffing; anticipating, and potentially resolving, ISDS cases at an early phase; appointing arbitrators; dealing with uncertainty and ambiguity; working with experts; and engaging in discovery of and managing information.

Notably, some identified challenges are acknowledged and shared by all or many states, and some differ, based on a state's economic development level, its experience with ISDS claims, or its role as a capital importer or exporter (or both) particularly vis-a-vis its investment treaty partners, among other factors. Government officials expressed different priorities in addressing identified challenges, some of which seem to be loosely held preferences in light of anticipated resource constraints, and some of which were more fundamentally held policy priorities or limitations.

All elements of the Scoping Study that are highlighted in this Executive Summary are described in much greater detail and with much greater nuance in the Scoping Study. The authors strongly encourage policy-makers to consult the Scoping Study as the contours of any Assistance Mechanism are formulated.

2.1 Investment Policy-Making

With respect to investment policy-making, state objectives and policy tools are currently discussed in different fora at both national and international levels – the field is busy and multifaceted.¹⁰ Given the multidimensional aspects and interlinkages among issues of sustainable investment promotion, facilitation, and retention, some governments encounter both substantive and logistical difficulties staying abreast of developments that affect them and ensuring policy coherence across relevant issue areas.

As policy forums and topics are fragmented, so too is support available for states. Support in reviewing, assessing, and developing investment policies naturally has limitations and gaps. Support may target some actors within governments (e.g. treaty negotiators) but not reach others (e.g.

⁹ Jeremy K. Sharpe, 'Control, Capacity, and Legitimacy in Investment Treaty Arbitration' (2018) 211 AJIL Unbound 261.

¹⁰ For example, discussions and negotiations at the Financing for Development Forum, the World Trade Organization (WTO), the United Nations Conference on Trade and Development (UNCTAD), the United Nations Commission on International Trade Law (UNCITRAL), the Organization for Economic Co-operation and Development (OECD), among other international, regional, and national forums, all touch upon sustainable investment promotion, facilitation, and retention.

parliamentarians, state and local officials) whose understanding, buy-in, acceptance, and application of policy decisions may be crucial for ultimate policy effectiveness.

The Scoping Study details certain existing investment policy-making initiatives and resources available to states. First, UNCTAD has mandates to provide a wide variety of support available for states including: UNCTAD’s Investment Policy Framework for Sustainable Development, which is the most comprehensive resource available to help guide investment law policy-makers toward a new generation of international investment agreements;¹¹ UNCTAD’s Investment Policy Review (IPR) program which provides developing countries and countries with economies in transition concrete recommendations to improve policies, strategies and institutions for attracting and benefiting from FDI;¹² and support for policy engagement, dialogue, and knowledge sharing at its World Investment Forum, conferences, and other intergovernmental meetings and trainings.

The OECD, under the direction of its Investment Committee, also advances investment policy reform and international co-operation in a number of ways, including through its Policy Framework for Investment, national Investment Policy Reviews, and its Freedom of Investment Roundtable.¹³

The World Bank Group’s (WBG) Investment Policy & Promotion Team supports client countries in attracting, facilitating, and retaining different types of FDI, as well as maximizing positive spillover effects.¹⁴

Some gaps in resources, knowledge, and skills that are experienced by some states are partially filled by materials that academics and others have produced. Research and writing on investment law and policy has ballooned over roughly the last fifteen years in particular. But much of that remains behind paywalls, and much is produced only in English.

In addition, ad hoc trainings, workshops, and dialogues that focus on investment policy-making are provided by academic organizations, NGOs, arbitral centers, and the private sector.

2.2 International Investment Agreement Negotiations

The negotiation of investment agreements imposes particular and often time-sensitive demands on governments. “Capacity” in the context of treaty negotiation is multifaceted and hints at both gaps in the ability to identify and articulate specific concerns (e.g. related to assessing a treaty provision’s impact on the domestic economy and how to draft around that issue), organizational hurdles to doing so (e.g. intragovernmental communication channels), and systemic obstacles to overcome to ensure

¹¹ UNCTAD Investment Policy Hub, *Investment Policy Framework for Sustainable Development*, <<https://investmentpolicy.unctad.org/investment-policy-framework>> accessed 24 July 2019.

¹² UNCTAD Investment Policy Hub, *Investment Policy Reviews*, <<https://investmentpolicy.unctad.org/investment-policy-review>> accessed 24 July 2019.

¹³ OECD, *OECD Investment Policy Reviews*, <<https://www.oecd.org/investment/countryreviews.htm>> accessed 24 July 2019

¹⁴ World Bank Group, ‘Investment Policy and Promotion: Attracting Foreign Investment and Maximizing Impact for the Local Economy’ (2019).

policy priorities are reflected in treaty outcomes. The inability of developing countries to achieve successful negotiation of their models or priorities has systemic effects as it perpetuates the pervasive fragmentation and patchwork of obligations that characterizes developing country treaties and may make compliance more difficult.¹⁵

Because of the decentralized nature of investment treaty law and negotiations, with no central hub of activity or a standing secretariat, it can be difficult for funders and support providers to close capacity gaps related to negotiations. This aspect of investment law also makes it challenging to document and map the existing support providers and efforts directed at supporting investment treaty negotiation in particular.

While more models of negotiation support exist in other legal sectors (e.g. the European Capacity Building Initiative (ecbi) which supports the UN Framework Convention on Climate Change negotiations) some also exist, or have existed, in the investment law context. Currently, ad hoc support to investment treaty negotiators is available from certain academic, NGO, or private sector groups who provide on-call support to respond to specific questions during the course of negotiations. Less time-sensitive trainings, research, and support is also available from various sources with respect to specific negotiations or more generally. There may be scope for greater support to states in the context of treaty negotiation.

2.3 Domestic Implementation of IIA Obligations

After an IIA is concluded, countries may encounter complex and resource-intensive tasks in understanding the scope and nature of their obligations, and in ensuring optimal and effective domestic implementation. These tasks also may be becoming increasingly demanding over time, particularly for certain developing countries that have particularly complex webs of treaty obligations.

A number of state interviewees indicated interest in further understanding and exploring policies and practices for treaty implementation and dispute prevention. However, the task of communicating IIA-compliance lessons across any given state may be daunting and extremely costly. This is likely especially difficult for decentralized states where local and state/provincial jurisdictions have relatively significant governance authority. And given the challenges in articulating with adequate precision what steps compliance with treaty provisions requires, such nationwide training and awareness raising may not even provide domestic actors sufficient guidance to avoid triggering claims.

Moreover, even if dispute prevention policies and practices resulted in no formal ISDS claims, that does not necessarily mean that they should always be judged a success. For example, when claims

¹⁵ J. Anthony VanDuzer, 'Can International Investment Agreements Be Instruments of Sustainable Development? Systemic Capacity Challenges for Developing Countries' Globalization' in Joost Pauwelyn and Mengyi Weng (eds), *Building Legal Capacity for a More Inclusive Globalization: Barriers to and Best Practices for Integrating Developing Countries into Global Economic Regulation* (The Graduate Institute 2019) 31-46.

arise out of the decisions of domestic courts advance guidance may be perceived as threatening judicial independence. Similarly, it is important to ensure that any IIA-compliance and awareness raising activities do not cause government actors to be unduly cautious toward or solicitous of private sector interests and demands due to fears that an otherwise lawful action may trigger a claim from a covered foreign investor somewhere in the corporate chain of an affected investment.¹⁶

A few existing initiatives help states with these challenges. UNCTAD, for example, has worked with governments and other stakeholders relating to treaty implementation and associated dispute prevention policies and practices. Various ad hoc initiatives provide tailored advice or research to respond to specific questions and circumstances. Analysis on these topics is often context specific and nuanced with respect to any state, and indeed, sub-sections and demographics within states, and often requires economic, legal and other expertise. There may be room for greater support to states on these issues.

2.4 Ongoing Engagement and Treaty Management

When states conclude IIAs, that is not the end of their law- or policy-making work, or their engagement with treaty parties and domestic constituents on the contents and implications of the agreements. Rather, there is much that can and should go on post-signature and ratification.

For one, states have a continuing role as “masters of their treaties” to guide interpretation of those agreements. This includes ensuring consistency and coherence in their own pleadings; following disputes their investors file and submitting non-disputing party briefs; reacting to tribunal decisions; intervening in annulment or set-aside proceedings; and issuing interpretations clarifying their understandings of treaty provisions. The treaty parties can also take joint action to more clearly formulate relevant agreements on interpretive questions.

To date, these tasks of ongoing treaty monitoring, engagement, and clarification do not appear to be widely performed. Sharpe has stated that:

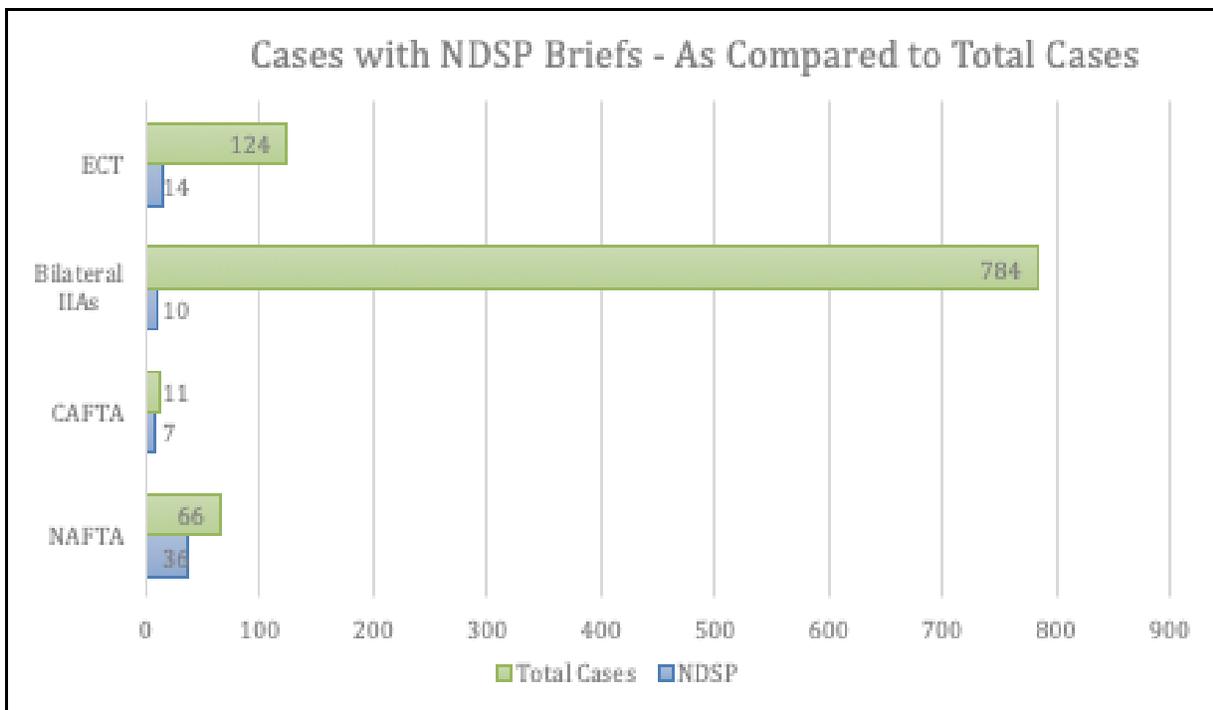
For many States, the various mechanisms for controlling the development of arbitral precedent may be more theoretical than real. Many States lack a dedicated government official with the required knowledge, authority and resources to monitor investment disputes and intervene as a non-disputing party or incorporate the latest arbitral case law into the State’s newest international investment agreements. Such States often turn individual disputes over to outside counsel, who themselves may not fully understand the mechanisms available to States to shape the development of international investment law or who may lack insight into the State’s other cases and treaty negotiations. Through unawareness or

¹⁶ Gus Van Harten and Dayna Nadine Scott, ‘Investment Treaties and the Internal Vetting of Regulatory Proposals: Further Findings from a Case Study from Canada’ (2017) Yearbook on International Investment Law and Policy 2015-2016, 411-443.

incapacity, States may unwittingly forfeit their ability to proactively shape arbitral precedent.¹⁷

Moreover, many capital importing-states may never, or very rarely, find themselves in positions of non-disputing state parties, particularly in the bilateral treaty context, and may thus be more limited in the actions they can take to engage with and clarify treaty provisions.

Data reflected in the table below on the practices of states submitting non-disputing state party (NDSP) briefs indicates that parties to bilateral investment treaties only very rarely make such NDSP submissions. This further suggests that should home governments wish to take action to rein in some of the more expansive interpretations of substantive and jurisdictional treaty provisions and ensure that interpretation is (re)aligned with the intent of the treaty parties, there are many currently unseized opportunities for them to use NDSP briefs to try to do so. Assistance Mechanisms could help respondent states engage with home states on these issues, and could also help home states more closely monitor and participate in cases brought by their investors so as to prevent those investors from advancing (and tribunals from accepting) interpretations of IIAs that differ from the understanding of the treaty 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 PITAD databases, supplemented and corrected by CCSI (internal spreadsheet updated as of October 9, 2019).

There has been some limited support to assist states in engaging with and managing existing treaties; there remains, however, significant scope for greater support.

¹⁷ Jeremy Sharpe, 'The Agent's Indispensable Role in International Investment Arbitration' (2018) 33 ICSID Review 3, 699-700

2.5 Challenges in Managing ISDS Proceedings

The scoping study highlights key challenges in the defense of ISDS cases highlighted in literature and interviews, and some of the existing initiatives and resources to help address them. It groups these issues into the categories of: (1) case staffing; (2) anticipating, and potentially resolving, ISDS cases at an early phase; (3) appointing arbitrators; (4) dealing with uncertainty and ambiguity; (5) working with experts; and (6) engaging in discovery of and managing information. Each of these issues have implications for costs and dispute outcomes.

2.5.1 Case staffing

The frequency of ISDS claims against a particular state is relevant to the question of whether and to what extent states want to internally staff for those disputes. There are three general models that states employ to handle their legal defense. The most common is a hybrid system (use of some internal staff and outside counsel); the second most common is use of exclusively in-house counsel; and the third most common is to use exclusively external counsel.¹⁸ Several interviewees noted that even in hybrid or outside counsel contexts, a certain level of capacity to engage with outside counsel, make decisions, and effectively manage external advisors is of critical importance to ensuring an effective defense. Interviewees highlighted this as a key area where capacity challenges are widespread, and a critical area for desired capacity development.

It appears that few countries have an identified, dedicated and structured lead agency or management team. As a result, cases are often dealt with on an ad hoc basis with various ministries or agencies leading the defense. This may be particularly the case for states with little ISDS experience regardless of a state's level of economic development. Delays at an early phase in a case can have serious implications for a range of issues, including case management, gathering and preserving evidence, and the ability to appoint adjudicators. Interviewees expressed interest in knowing more about different countries' approaches to these issues, and the advantages, disadvantages, and lessons learned from the different systems they put in place.

States seeking to establish a greater role of in-house capacity raised certain ideas as to the ways in which external assistance could continue to play a useful role. These included, for example, a "hotline"-type mechanism that could assist with discrete questions in tight timeframes, support with discovery and fact gathering, or support in early case assessment and management. The nature of those requests will likely affect the cost to provide the services, the willingness of beneficiaries to pay for the relevant services, and the interest and ability of those other than the users to fund those services.

With respect to states that rely and/or plan to continue to rely on outside counsel, many officials feel they have no choice but to pay the extremely high cost of top counsel. When states have the financial ability to pay, the ability to obtain high-quality counsel was not an expressed concern. Rather, the

¹⁸ Susan D. Franck, *Arbitration Costs: Myths and Realities in Investment Treaty Arbitration* (Oxford University Press 2019) 101-102.

concern for these states was about budgetary trade-offs that result in foregoing other domestic spending priorities. This trade-off is serious, and can have meaningful consequences, particularly for developing countries.

Some interviewees suggested that it may be misguided for states to feel compelled to spend significant sums for counsel. For example, states may need better guidance on how cost savings can be achieved or may overlook regional, lower-cost firms that can be extremely impressive in ISDS representation. For state interviewees, however, the feeling that they must hire the highest-ranked outside counsel appears to stem from the multi-faceted risks associated with hiring lesser-known counsel. For example, any official who makes a hiring decision must be prepared for the consequences if a case is lost, which include personally justifying that decision. It was also stated that when public funds are on the line (in the context of a possible award) it can be politically challenging for individuals within the government, and the government as a whole vis-à-vis its citizenry, to justify why the “best” firm is not chosen in such high-risk circumstances.

In some cases, however, some states may simply not have the liquid funds or may not be willing or able to allocate the amount of funds necessary to hire top-tier, or any, outside counsel. Some important research suggests that developing countries are more willing to settle even unmeritorious ISDS cases than developed countries,¹⁹ which raises serious questions about how and to what extent the high costs of defense and possible awards intersect with decisions to settle ISDS claims or pursue a defense. There may be scope for greater support in this area. It should also be considered how other reforms (related to cost, damages, or otherwise) may also interact with these challenges.

Many interviewees cited procedural hurdles to timely hiring outside counsel. Consequent challenges in conducting a rigorous early assessment of the strength of a claim (on jurisdiction, merits, and quantum) can have serious implications for early decisions that a state must make on settlement or proceeding to arbitrate.²⁰ Some states have accordingly expressed an interest in better understanding options for managing the steps required to: hire and manage outside counsel; craft contractual arrangements with outside counsel, optimally allocate responsibility between in-house and outside counsel; and identify ways to control or limit fees charged by the firms employed.

Notably, there are some initiatives that seek to support states in identifying and contracting/negotiating fees with external counsel. For example, the International Development Law Organization’s Investment Support Program for Least Developed Countries (ISP/LDCs) will assist states in obtaining no-cost legal services with respect to investment law matters (although it has not yet facilitated an ISDS defense engagement and doubts were expressed about this model’s capacity to take on an ISDS defense project). The Permanent Court of Arbitration’s Trust Fund assists certain states with costs related to participation in disputes at the PCA. Outside of the ISP/LDCs program and the PCA Trust Fund, however, it does not appear, in the context of investment law, that a robust service yet exists to assist governments in procuring low-cost outside counsel for ISDS defense.

¹⁹ Anton Strezhnev, ‘Why Rich Countries Win Investment Disputes: Taking Selection Seriously’ (22 September 2017) Unpublished draft (on file with authors).

²⁰ Jeremy Sharpe, ‘The Agent’s Indispensable Role in International Investment Arbitration’ (2018) 33 ICSID Review 3, 686.

2.5.2 Anticipating, and potentially resolving, ISDS cases at an early phase

It was commonly stated by interviewees that anticipating, avoiding, and resolving disputes at an early phase is a key priority, but also a big challenge for states. Challenges arise for a wide variety of reasons, which may be related to: unanticipated reflective loss or shareholder claims, umbrella clauses, inability to prevent certain kinds of disputes (e.g. disputes based on judicial processes), or lack of requirements for domestic exhaustion that hinder states' abilities to spot and resolve problems.

With respect to existing initiatives on dispute prevention, the WBG has been rolling out a Systemic Investor Response Mechanism (SIRM) that seeks to be an early warning and tracking system that identifies problems arising from government conduct, allowing governments to respond to investor grievances at a phase earlier than a dispute. Similarly, Korea's Office of the Foreign Investment Ombudsman (OFIO) was established in 1999 to provide aftercare support and grievance resolution services for foreign investors and foreign-invested companies in Korea. With respect to investment treaty-based approaches, Brazil's Cooperation and Facilitation Investment Agreement (CFIA) model prioritizes investment facilitation and dispute prevention procedures.

In addition, the "cooling off" period of disputes was identified as an important opportunity, but one in which states often struggle to effectively manage, whether due to organizational challenges, lack of effective guidance, or otherwise. One interviewee with experience working for an arbitration center stated that these initial phases see "a limited number of problems arise and it is definitely possible to have a high impact in this area."

Relatedly, governments face challenges reviewing and understanding the strength of a claim asserted in the Notice of Intent or subsequent Notice of Arbitration. More detailed notice requirements may assist governments to conduct useful case assessments and more easily determine the best way forward.

2.5.3 Appointing arbitrators

Another potentially outcome-determinate, time-sensitive, and early-phase task is the appointment of arbitrators. Notwithstanding the increased transparency of arbitral awards in recent years, a significant share of awards and other related material, which can provide insights into arguments that arbitrators may have raised when acting as counsel, and also into what resonates, or not, when they are sitting on a tribunal, are not yet publicly available. This results in asymmetries in terms of who has and benefits from this information. Repeat-player law firms, expert witnesses, third-party funders, and arbitration institutions contain a relative wealth of relevant material in their internal files and networks. There are some ongoing efforts to gather and disseminate information about arbitrators (both paid services and free), but many states with relatively few disputes and/or using either in-house counsel or non-repeat-play firms likely continue to be at a general disadvantage to these other more common or well-resourced players.

2.5.4 Dealing with uncertainty and ambiguity

As recognized in the context of UNCITRAL's Working Group III, states have concerns about inconsistency, uncertainty, and incorrectness of arbitral decisions, all of which complicate domestic officials' abilities to predict whether a claim will succeed or fail.

Some efforts to address these issues of inconsistency, uncertainty, and incorrectness include drafting new language for future agreements; renegotiating existing treaties; using available tools to clarify or bind tribunals to specified interpretations; engaging in treaty committees to consult on and address problematic issues of interpretation; and participating in negotiations such as the ongoing efforts within UNCITRAL's Working Group III to craft reform solutions, including the potential establishment of a more permanent adjudicatory body and/or appellate mechanism to bring more clarity to the content of the law. Interest was expressed in an Assistance Mechanism that could be used to better support states in each of these areas of work.

Consideration should be given to the reasons for which states currently do not choose to engage in joint interpretations or other clarifying efforts (discussed above) and any attempts to increase the prevalence of these efforts may seek to take account of or correct for the reasons underlying the current lack of engagement, to the extent possible and desirable.

2.5.5 Working with experts

Fees for expert witnesses on valuation and other topics are often included in publicly available information within, and not distinguished from, data for legal fees. Some available information indicates that expert fees can rival those of counsel.²¹ Even if more states move more tasks in-house, they may nevertheless continue to feel the need for support in identifying, contracting with, and working with experts on technical topics.

2.5.6 Engaging in discovery and managing information

A final set of issues identified in this Scoping Study relates to the challenges that governments face conducting discovery, and gathering and managing the volumes of evidence that may be required to effectively defend ISDS disputes. These activities may cause governments to engage in court proceedings in foreign jurisdictions in search of evidence and to identify and contract with technical service firms to assist in document retention, review, and disclosure. While such tasks are relatively discrete, there could be important savings in time and cost for states – especially those with in-house teams – to have assistance in performing them. For example, document management systems are often unavailable, as a matter of cost, to developing countries. Making such systems available could assist countries in taking greater levels of ownership over facts related to the defense.

²¹ See e.g., *Grand River v United States*, UNCITRAL, Submission on Costs of Respondent United States of America, 31 March 2010 (noting that expert advice cost USD1.36 million, roughly half of the total cost of USD2.79 million).

3 Previous Attempts to Establish an Advisory Center on International Investment Law

The Scoping Study considers previous attempts to establish an advisory center on international investment law, looking closely at efforts undertaken by: (1) UNCTAD, the Inter-American Development Bank (IADB), the Organization of American States (OAS), and the Vale Center on Sustainable International Investment (VCC); (2) the Union of South American Nations (UNASUR); and (3) the Australia-New Zealand and the Association of Southeast Asian Nations (ANZ-ASEAN) Forum.

A key theme that emerged from interviews with those involved in or knowledgeable about these efforts was that policy-makers should not underestimate large (such as financing) and, perhaps moreso, small (such as location) policy differences and objectives among and between states, as an unanticipated difference of opinion can stall or halt efforts, even when the finish line seems near.

4 Potential Models for Securing Adequate Investment Law Support

Following the identification (and prioritization) of capacity challenges, it will be necessary to consider the model that an Assistance Mechanism or Mechanisms could take in order to address them. The Scoping Study surveys a wide variety of existing models of Assistance Mechanisms including those in international investment law as well as those employed in other legal fields. Models that are explored in depth in the Scoping Study include: (1) institutionalized, multi-service support including legal representation of client governments, (2) institutionalized, multi-service support not including legal representation of client governments, (3) financial or in-kind inputs, (4) pro bono, ad hoc legal, and expert support, (5) intergovernmental knowledge-sharing hubs, (6) discrete capacity-building networks, and (7) a legal assistance and resource clearinghouse.

4.1 Institutionalized, multi-service support including legal representation of client governments

One model for an Assistance Mechanism would be an institutionalized mechanism that is able to pursue a range of functions, depending on the context and need of a particular beneficiary, and which could include a menu of services (e.g. capacity building, negotiation support, policy advice, legal opinions, and/or defense). Examples that are discussed in this category include the Advisory Center on WTO Law (ACWL), the African Legal Support Facility (ALSF), and the IDLO's ISP/LDCs program, as well as an investment law "hotline".

4.1.1 The Advisory Center on WTO Law

The ACWL model is often raised in the context of an Assistance Mechanism in international investment law and is thus assessed in granularity and great breadth and depth (including its organizational governance, scope of services, funding, budget, and allocation of costs). The Scoping Study, however, sets forth several key differences between the trade and investment law systems that are important to note. These differences, which relate most starkly to the resource-intensity of litigation under the two systems, should be seriously considered when assessing whether and to what extent the ACWL model can apply in the IIA/ASDS context.

The legal services offered by the ACWL can be generally divided into three categories: (1) assistance in WTO dispute proceedings; (2) legal advice on issues of WTO law; and (3) “training on WTO law,” or what is more commonly described as “capacity building”. The table below reflects the ACWL’s activities over the past ten years.

ACWL Activities: 2008-2018

ACWL Activities	2018	2017	2016	2015	2014	2013	2012	2011	2010	2009	2008
Total WTO disputes in which the ACWL provided ongoing or new support	17	14	14	10	8	8	8	3	7	6	7
New requests for support in WTO disputes	5	3	4	4	1	3	5	0	4	3	2
Legal opinions	237	186	196	181	204	215	231	218	206	194	175
Certificates of training	39	37	38	34	37	37	30	31	29	34	32

In terms of the distribution of person-hours across these activities, one estimate is that between 40 and 60 percent of the ACWL’s work is in its non-dispute-related activities (i.e., legal opinions and training/capacity building).²²

For paid services (legal defense) ACWL Members and LDCs are charged specified hourly rates, while non-Member developing countries must pay a higher hourly rate for ACWL services. One of

²² ACWL, ‘Report of the Task Force’ (2015) ACWL/GA/W/2015/5, 6; see also Nora Plaisier and Paul Wijnenga, ‘Evaluation of Trade-Related Technical Assistance, Three Geneva Based Organizations: ACWL, AITC, and QUNO’ (2004) IOB Working Document, 11.

the most frequently cited benefits of the ACWL's direct representation structure is that it serves as a repository of expertise that allows infrequent WTO litigants to compete on more or less equal terms with some of the WTO's largest users.

In the event of conflicts of interest (usually, when two adverse countries entitled to the ACWL's services both request the ACWL's assistance in the same dispute), the ACWL will represent the first country that requested its assistance. With respect to the other country, the ACWL maintains a curated list of lawyers and law firms who have agreed to represent ACWL Members and LDCs on the same terms as those provided by the Centre, including with respect to fixed rates.²³ The ACWL has an External Counsel Fund, fixed at CHF300,000, that is used to pay these attorneys (depending on the eligibility of the client country for free or reduced fee services). For 2018, it was expected that the expenditures would not exceed CHF75,000.

Capacity building for developing countries and LDCs who access its services is integral to the design of the ACWL and takes three forms: first, traditional capacity building through trainings and seminars; second, hands-on training for government officials through organized secondments to the Centre; and third, inherent capacity building through close collaboration with government officials making use of the Centre's direct representation services.

When the ACWL was established, it was envisioned that, after an initial five-year transition period (2001-2005), it would be self-sustainable, funded by a combination of (1) earnings on an Endowment Fund funded by contributions of developed and developing country ACWL Members and other governments, and (2) fees charged to developing countries and LDCs for support in WTO disputes. It has not achieved self-funded sustainability.

The Endowment Fund is primarily funded by its developed country Members, which now number eleven (there are also thirty-six developing country members, one associate developed country member, and forty-four LDCs entitled to services without membership). At the end of 2015 the Endowment Fund had reached roughly CHF26 million.

With respect to user fees, the ACWL charges developing countries and LDCs for access to the ACWL's direct representation services on a tiered payment scale, with country categorizations based on their underlying economic activity or GNP per capita (country categories A, B, C, LDC). In addition to offering services at discounted hourly rates, ACWL provides detailed "time budgets" for different types of representation that include a projected number of hours for each activity and a total maximum cost.²⁴ Income from legal fees averaged only CHF161,000 per year from 2002-2014, constituting on average roughly 4 percent of the ACWL's annual revenues.

²³ For more information about private sector representation through the ACWL, see generally Advisory Centre on WTO Law, *Revised Rules for Support in WTO Dispute Settlement Proceedings through External Legal Counsel* (2007) (detailing the rules for subcontracting cases to external legal counsel and providing a sample contract engaging the services of external counsel).

²⁴ See ACWL, 'Decision 2007/7 Adopted by the Management Board on 19 November 2007: Billing Policy and Time Budget' (2007) ACWL/MB/D/2007/7.

Hourly and Maximum Total Charge to States in WTO Panel Proceedings²⁵

Category	CHF per hour	Maximum fee for a WTO panel proceeding
Category A Member	324	CHF 46,628
Category B Member	243	CHF 35,721
Category C Member	162	CHF 23,814
Least developed country	40	CHF 5,880

While demand for all of the ACWL’s services has increased, a significant portion of that demand continues to be for legal opinions and training/capacity building activities, services for which the ACWL does not charge. Due to the increased demand for ACWL services and associated staffing needs, the annual budget of the ACWL has grown (albeit modestly) each year, and for 2019, it was estimated at roughly CHF4.7 million.²⁶ Taking into account revenue from the Endowment Fund that could be withdrawn to fund the ACWL over the 2017-2021 window, an additional CHF20 million in additional voluntary contributions is deemed necessary to cover the ACWL’s financial needs through 2021.²⁷

In the context of WTO law, the ACWL is highly respected and has generated high levels of trust and satisfaction among states who use its services.

4.1.2 The African Legal Support Facility

The ALSF, based in Abidjan, Côte D’Ivoire, is a public international, treaty-based organization hosted by the African Development Bank (AfDB) Group. ALSF is a “broker-plus” model. ALSF helps countries to engage outside counsel, and facilitates low-cost legal representation, but ALSF in-house counsel also give advice and guide governments on what that outside counsel is saying and in managing this relationship. ALSF’s eight technical staff maintain an internal knowledge base and expertise and are thus able to help governments interpret and enact the advice that they receive from outside counsel, as well as to assist governments with relevant capacity building and other tools that will strengthen the ability of governments to act on their own.

ALSF, which operates upon the request of governments, engages in a wide range of services ranging from negotiations, litigation support, capacity building, and knowledge management, and will coordinate with outside services providers to engage, as appropriate, to facilitate these services. ALSF engages in capacity building on a project/client-specific basis as well as through the ALSF

²⁵ Data adapted from Decision 2007/7 Adopted by the Management Board on 19 November 2017, Billing Policy and Time Budget, ACWL/MB/D/2007/7.

²⁶ ACWL, ‘Budget for 2019: Proposal of the Management Board’ (2015) ACWL/MB/W/2018/6, 1.

²⁷ ACWL, ‘Report on the Thirty-Third Meeting of the General Assembly’ (2015) ACWL/GA/R/2015/2, 6.

Academy. ALSF also facilitates grants and loans to client countries to facilitate their ability to pay for legal services.

Users of the ALSF's services report high levels of trust in this relationship, although its contribution to deep capacity building that actually results in knowledge transfer was questioned.

4.1.3 The International Development Law Organization's Investment Support Program for Least Developed Countries

The ISP/LDCs program provides on-demand legal and professional assistance to LDC governments and eligible state-owned (SOEs) or private sector small and medium-sized entities for investment-related negotiations, dispute settlement, and other investment-related matters, along with training and capacity building activities. The ISP/LDCs program has established a roster of law firms and other experts who are willing to provide advice and assistance to eligible beneficiaries at no cost to the beneficiary (typically services are provided on a pro-bono basis, but in all cases any residual cost would be paid by the program). ISP/LDCs has secured commitments for pro-bono services from all members of its current roster and envisions adding more experts as it grows. Thus far, commitments from listed roster-members are anywhere from 10-20 hours, to "unlimited," and everything in between.

The ISP/LDCs program, established in 2017, is at an early phase. It has begun providing advice to countries on negotiations of investment treaties and is in discussions with beneficiaries and support providers to begin facilitating the representation of states in ISDS proceedings, although the extent to which ISP/LDCs can facilitate support for an entire ISDS proceeding remains to be seen, as several interviewees questioned whether any firm would do such work on a pro bono basis.

With respect to operational funds for the program, in its initial phase, the ISP/LDCs program is aiming to raise €2 million, a large portion of which has been pledged, although it remains unclear to CCSI how much has actually been donated. At the IDLO ISP/LDCs kickoff event at UN Headquarters in September 2017, for example, the Director General for International Cooperation and Development of the European Commission announced a decision to set aside €1 million for the ISP/LDCs program, but the program has yet to receive those funds.

As established, the ISP/LDCs program has very slim overhead and a lean institutional set-up required to oversee the program. It is not envisioned that more than three individuals would be necessary to oversee the program, given the ability to call upon and coordinate with IDLO's larger staff of eighty-plus individuals as specific needs and expertise arise.

4.1.4 An investment law "hotline"

Drawing on their experience with the ACWL, several government officials, representing each of the four economic development levels, noted the potential value of an Assistance Mechanism that could act as a "hotline" (which may complement other services offered). A wide range of issues were noted

by governments as areas in which they would envision relying upon such assistance, including questions related to policy-making in other sectors (e.g. how certain actions may impact investment law obligations), investment law policy-making, dispute prevention, early dispute management, and questions that may arise during the course of an active dispute. It was noted that unless there is an actual dispute warranting a full procurement, it is difficult to find the opportunity to ask these kinds of questions to outside experts.

4.2 Institutionalized, Multi-Service Support Not Including Legal Representation of Client Governments

There are a wide variety of Assistance Mechanisms that offer multiple services to governments, but which do not provide or facilitate legal representation. Examples that are discussed in this category include the kinds of support provided by: international organizations (such as UNCTAD, the OECD, and the World Bank Group) (also discussed elsewhere in the study); arbitration centers (such as ICSID, the PCA, and the SCC), which offer trainings and more specific guidance on institution-specific procedural matters; and academic and non-profit centers (such as CCSI and the International Institute for Sustainable Development (IISD)), which offer trainings, forums for information sharing, technical legal assistance, and tools to facilitate policy development.

4.3 Financial or In-Kind Inputs

In addition to models that focus, more directly, on facilitating legal or policy advice to client governments by providing or connecting the beneficiary directly with a support provider, as described in the previous sections, an Assistance Mechanism may also focus, to a greater extent, on financial or in-kind transfers being made to beneficiary governments to offset the financial obligations of services that the government itself procures. Models including litigation/arbitration trust funds, third-party funding for respondent states, and contingent fee representation are discussed.

4.3.1 Litigation/arbitration trust funds

Various international dispute resolutions institutions have established trust funds to financially assist certain litigants with arbitration/litigation costs and/or costs related to execution of awards. In some cases, the funds are more institutionalized and also provide matching services with counsel. The Scoping Study details establishment and management of each trust fund, its budget and expenditures (where available), and criteria applied to assess potential beneficiaries, along with other information that may assist policymakers in assessing whether such a model would be useful in the investment law context.

For example, the Permanent Court of Arbitration's Financial Assistance Fund for the Settlement of International Disputes (PCA Fund) provides financial assistance to states party to a PCA Convention (or an institution or enterprise owned or controlled by such state) that are listed on the OECD's DAC

List of Aid Recipients in disputes before the PCA. The purpose of the PCA Fund is to enable beneficiaries in whole or part to meet certain defined expenses in disputes before the PCA. For unknown reasons, the PCA Trust Fund has not been highly used by states in ISDS disputes.

In CCSI's consultations, reactions to a trust fund in the context of investment law were mixed, and seemed to depend a great deal on what the particular interviewee deemed to be the objective of an investment law Assistance Mechanism as well as whether capacity building should play a prominent role in such mechanism's mandate. While facilitating more financial resources that can be used to pay for certain investment-law related services, namely ISDS defense, to states was generally welcomed by interviewees, qualifications often followed or concerns were raised. One concern was that if capacity building, in any of its broad or narrow conceptions, is to be an objective of an Assistance Mechanism, a trust fund would not (or to a very limited extent) address capacity challenges. Other interviewees found a trust fund approach to be too narrowly focused on litigation when governments may themselves prioritize assistance in different areas. Other government officials felt that it would be politically challenging to finance a mechanism that may ultimately be used by beneficiary governments to defend against claims brought by a donor country's outward investors (a cross-cutting concern that also was raised in discussion of other Assistance Mechanisms receiving funding from donor governments).

4.3.2 Third-party funding of respondent states

While investors suing governments in ISDS are increasingly turning to third parties to finance their litigation, as a practical matter, third-party funding is available to claimants and in most cases, not to respondent states. This is because (1) under nearly all existing treaties states cannot initiate but can only defend claims, and (2) the possibility of counterclaims is limited. Therefore, states do not have a financial "upside".

With that said, some forms of respondent funding have reportedly been successful in some circumstances, such as portfolio funding or insurance-like products. However, even successful third-party funding for respondents may raise certain policy issues that should be considered.²⁸ UNCITRAL's Working Group III is considering the issue of third-party funding in ISDS, and an Assistance Mechanism should internalize outcomes and outputs of the Working Group, particularly as they relate to respondent-side funding.

4.3.3 Contingent fee representation for respondent states

Law firms may engage to act on a full or partial contingency fee basis in representing respondents in ISDS disputes. Law firms are private sector participants with a very specific role in ISDS disputes. Unlike third-party funders, law firms have fiduciary and other ethical obligations to the client government. An increase in counsel's ability to offset the funds necessary for the defense of a claim could address liquidity problems experienced by some governments in the context of ISDS defense.

²⁸ Brooke Guven and Lise Johnson, 'The Policy Implications of Third-Party Funding in Investor-State Dispute Settlement' (2019) Columbia Center on Sustainable Investment (CCSI) Working Paper.

To the extent counterclaims or other predictable fee-shifting practices were introduced more systematically in ISDS, respondent-side contingency arrangements may become conceivable. However, the cost of supporting, and risking, contingent fee arrangements is not insignificant, and many law firms are not able to assume significant financial risks, particularly on the kind of large claims and expenses intrinsic to ISDS disputes. Certain developments in insurance options, which are enabling firms to hedge fee risks, and in third-party funding arrangements, where portfolio arrangements can enable firms to take on more contingent fee work while mitigating fee risk and cash flow concerns, may make contingency arrangements possible on a larger scale. Yet to the extent contingency representation may be coupled with third-party funding, or other financial products at the law firm level, consideration should be given as to whether and how such practices are or should be regulated.

4.4 Pro Bono, Ad Hoc Legal and Expert Support to Respondent States

The provision of pro bono legal and expert assistance may be a useful way to provide services to client governments, or to complement paid services, and CCSI's consultations made clear that pro bono legal support can be valuable and important to respondent states in many contexts and circumstances. As described in previous sections, IDLO's ISP/LDCs program, for instance, focuses entirely on providing free investment-related legal services to beneficiaries.

Nevertheless, limits to pro bono support are important to acknowledge. Government officials raised concerns that service providers did not prioritize pro bono clients in the same way as paying clients (with respect to both conflicts of interest and time). Additionally, both governments and private practitioners recognized the costs (in terms of direct costs and opportunity costs) of providing pro bono services, and the fact that it would consequently be unlikely for for-profit service providers to be able to support large investment law matters (e.g. defense) on a pro bono basis.

4.5 Intergovernmental Knowledge-Sharing Hubs

Many government interviewees, from each of the four economic development categories, stressed the importance and value of information sharing and opportunities for governments to "compare notes". They noted existing, ad hoc opportunities to engage, and certain existing efforts to create more organized platforms for governments to convene, discuss relevant investment law topics, and learn from other governments that had or were currently considering similar issues. Many interviewees felt that while some opportunities to engage with other governmental officials exist, more could be done to organize and facilitate these networks, and that certain existing efforts could be better funded or more institutionalized.

4.6 Discrete Capacity-Building Networks

Identification of capacity challenges, and capacity building, as a general matter, were identified as a thematic issue that may impact consideration and formulation of any Assistance Mechanism. Notably interviewees, particularly government officials from states that may be likely beneficiaries of an Assistance Mechanism, stressed that while general capacity building not unwelcome, it is actual knowledge transfer that they seek. Their objective in capacity development is very nuanced and state-specific support that will deepen and broaden their ability to participate in and benefit from their treaty programs. Considerations of capacity building as it relates to an Assistance Mechanism should bear in mind these perspectives. Secondments, for example, may transfer very different kinds of knowledge than classroom-based trainings, and each may be different than support in the context of a very specific negotiation.

Many international organizations provide investment-law related capacity building services to states. These include UNCTAD, the OECD, UNCITRAL, the WBG, among others. Similarly, arbitral institutions, academic centers, NGOs, law firms, and other organizations provide trainings and discrete capacity building opportunities ranging from paid to free for government officials. Massive Open Online Courses (MOOCs) are also gaining in popularity and may be a mechanism by which certain trainings are and could be further conducted.

In recent years, efforts to “democratize” investment law through paid or free services have also found increasing levels of success, and some of these efforts are described in the Scoping Study. Due to persistent confidentiality in cases, the amount of relevant information behind paywalls, and the concentration of materials in the English language, there nevertheless remains an asymmetry in information as between most states on the one hand, and private sector law firms, arbitral institutions, third-party funders, and other repeat investment-law players on the other.

4.7 Legal Assistance and Resource Clearinghouse

Finally, a very basic form of Assistance Mechanism may provide great value by simply compiling, organizing, and disseminating information about existing resources to relevant government officials.²⁹

5 Cross-Cutting Issues Applicable Generally to Assistance Mechanisms

²⁹ An idea advanced by Jeremy Sharpe in ‘An International Investment Advisory Center: Beyond the WTO Model’ (EJIL: Talk! July 26, 2019) < <https://www.ejiltalk.org/an-international-investment-advisory-center-beyond-the-wto-model/>> accessed July 31, 2019.

During the course of CCSI's analysis of existing Assistance Mechanisms and interviews, several thematic, cross-cutting, substantive areas of consideration emerged, each of which are agnostic to the eventual institutional form that an Assistance Mechanism may take and are thus relevant for general consideration as the contours of an Assistance Mechanism take place. The Scoping Study sets forth and explores in depth these cross-cutting areas for further consideration.

- Quality, reliability, reputation, and trust;
- Funding of an Assistance Mechanism and scope of services;
- Costs of support and who bears them;
- Stakeholder tensions;
- Identifying the client/beneficiary;
- Location, staffing, and remuneration;
- Long-term sustainability of an Assistance Mechanism;
- Institutionalized vs. ad hoc mechanisms;
- "Politics" surrounding the role of an Assistance Mechanism; and
- Intersection with other reforms.

5.1 Quality, Reliability, Reputation, and Trust

Government officials stressed that the key factor in any decision to use an Assistance Mechanism, particularly in the context of dispute settlement, is the quality, reliability and reputation of the support provider. These factors were of greater importance than cost. It is one thing for a state to sense an insurmountable capacity challenge or even to decide that it needs assistance, but it is entirely a different thing for a government to put its reliance in an outside Assistance Mechanism. Government officials must be confident in the utility, the advice, the quality of the service, and the long-term sustainability of the mechanism. One government interviewee noted that attention to reputation should not be underestimated as the first reaction of any country facing an ISDS dispute, which in most cases are infrequent but of the highest stakes, will be to turn to a well-established law firm.

Closely related to issues of quality, reliability, and reputation is the issue of trust. Interviewees stressed that with any legal service, *the* key component is trust. Many government and other interviewees stressed that trust must be built over time and that the financial and policy interests of support providers must be understood, and ideally aligned, with that of the government. They stated that during their current internal procurement process, great attention is paid to the interests and perspectives of outside legal assistance. Explicit consideration is given to which counsel they can trust to handle politically, economically, socially, or otherwise sensitive legal matters and truly represent the country's interest.

The sensitivity to alignment of perspectives and avoidance of even perceptions of conflicts of interest was stressed not only with respect to direct representation in claims, but also with respect to more general policy advice or discrete questions.

Some existing Assistance Mechanisms, such as the ACWL and ALSF, have built up significant levels of trust between the mechanism and client governments.

5.2 Funding of an Assistance Mechanism and Scope of Services

The funding of an Assistance Mechanism will be dependent on and interrelated with its mandate and scope of services – the more money available, the more services can be provided. There will also be tradeoffs in breadth of services offered and depth in the number of countries to whom those services might be offered. Thus, the Scoping Study incorporates comparisons between existing Assistance Mechanisms and the investment law context, primarily discussing comparisons with the ACWL, but also other Assistance Mechanisms.

5.2.1 Scope of services

In comparisons with the ACWL, the WTO and investment law legal systems may have important differences that may impact the design and functioning of an Assistance Mechanism. First, in the WTO context firmer lines may be drawn between legal and policy assistance and advice. As noted routinely by interviewees discussing the ACWL is that key to its success is its focus on legal, and not policy, input. While that line is not always clear, it may be even more difficult to maintain in the investment law context where the standard-based nature of core IIA obligations provide a greater space for integrating policy considerations into those obligations' interpretation and application. While private sector law firms currently advise states on legal matters, where and how these issues stray into policy questions is not as closely scrutinized as such advice may be if delivered by an ACWL-like mechanism.

Another issue that may arise is whether and how negotiation, training, and legal support or representation in the IIA context might need to look and be structured differently than for WTO-focused activities, or where cost implications may arise. In contrast to WTO negotiations and disputes, where the hub of activity and relevant delegations is in Geneva, IIA negotiations and disputes (to some extent) take place around the world and are not tied to any particular existing institution, secretariat, or negotiating framework or agenda. Several interviewees suggested that regional Assistance Mechanisms may be desirable for related reasons, enabling service providers to be closer to service users.

5.2.2 Costs and funding sustainability

Expenses associated with any Assistance Mechanism will vary based on the type of service being offered and the nature of the service provider. Full support for ISDS defense or prosecution could be offered, or if budgetary constraints are limiting factors, available services could be restricted. Interviewees in CCSI's consultations, suggested, for example, that support could be limited to discrete aspects of ISDS litigation (e.g., provision of memos on particular legal issues; access to information and advice on counsel and/or arbitrator selection; support on retaining and using experts

for valuation and damages; support on gathering and managing documentary evidence). It was also suggested that if resource constraints arose, support could be directed to activities other than arbitration, such as for provision of low- or no-cost access to databases and research tools; development of specialized online course content; development of user-driven capacity building workshops and peer exchanges; and support for investment policy development, and as relevant, IIA negotiation, review, and implementation. Some interviewees prioritized knowledge-transfer capacity building efforts to direct representation services.

One major focus of attention on comparisons with the ACWL is time that the ACWL spends on any given matter and the related cost of its services. The ACWL uses time budgets for its cases, estimating the resources necessary and capping the fees that can be charged. The table below indicates the current time budget for ACWL representation compared with hours required for an ISDS proceeding.³⁰ Comparing a WTO panel phase with an ISDS proceeding reveals that the ISDS proceeding may require 40-50 times more person-hours.³¹ Furthermore, over the past ten years, the ACWL has handled between 0 and 5 new requests for dispute settlement assistance each year. One could imagine a broader desire for support in ISDS disputes, capacity building, and other areas than in the WTO context given the larger number of overall disputes.

³⁰ While it is difficult to find publicly available data regarding the number of hours spent on legal defense in ISDS cases, the information available suggests a reasonable estimate of 20,000 hours per case, although this number could, of course, vary greatly depending on the complexity, duration, and other unique attributes of any given case. Data is even more difficult to find regarding the hours expended by level of experience. In light of the lack of relevant publicly available information, and for the purpose of conducting this Scoping Study, CCSI sent a survey to private practitioners seeking to collect data on hours expended on ISDS cases. The survey included questions about total hours expended per case, and hours expended based on qualification of the staff member working on the case (e.g., paralegal v attorney) and level of experience (e.g., junior associate v partner). CCSI received no responses to that survey.

³¹ Interviewees acknowledged that the ACWL often exceeds its budgeted time for any given case, so numbers are indicative based on the information that the ACWL makes publicly available.

Time Budget - WTO vs. ISDS Case

Proceeding	Hours	Cost to beneficiary of legal services
WTO Consultations	147	CHF 47,628 (max charge)
WTO Panel	444	CHF 143,856 (max charge)
WTO AB	263	CHF 85,212 (max charge)
ISDS Case (<i>Eli Lilly</i>) ³²	20,142.71	CAD 4,579,260.92
ISDS Case (<i>Mesa Power</i>) ³³	19,616.00	CAD 4,225,547.67

Depending on whether an investment law Assistance Mechanism also engaged in other activities of the ACWL, such as capacity building or providing opinions, the financial and personnel resources required by an investment law Assistance Mechanism may need to be greater by an order of some magnitude, with financing implications, when compared to the ACWL to provide the desired level of support in the investment law context.

Comparisons with other Assistance Mechanisms area also useful. under the International Criminal Tribunal for the former Yugoslavia's legal aid system, monthly, lump-sum payments were made to counsel for representation. Trials were assigned a complexity level of 1-3 which was a proxy for hours required. For a Complexity level 1 case, maximum amounts that would be paid to legal counsel appearing on the ICTY "Rule 45" list for a proceeding were €151,786, for a complexity level 2 case, €260,895, and for a complexity level 3 case, €424,731.³⁴ For other legal counsel appearing before the ICTY, maximum hours that could be submitted for reimbursement were, in the pre-trial phase, a maximum of 150 hours per month per team member, of two, three or five persons, depending on the complexity of the case, and a total of 3,000, 4,500 or 6,000 (respectively) hours total could be remunerated.³⁵ For the trial phase, a maximum of two, three or five team members may be remunerated for up to 150 hours per person, for a total of 300, 450 or 700 (respectively) hours total, and at the appeals phase a maximum of 600 to 900 hours total could be billed for the entire phase, with up to 100 hours per defense team member per month.³⁶

³² *Eli Lilly and Company v. Government of Canada*, UNCITRAL, ICSD Case No. UNCT/14/2, Canada's Submission on Costs (22 August 2016), 10.

³³ *Mesa Power Group v. Government of Canada*, UNCITRAL, PCA Case No. 2012-17, Canada's Submission on Costs (3 March 2015), 20.

³⁴ United Nations International Criminal Tribunal for the former Yugoslavia, *Legal Aid*, <<http://www.icty.org/en/sid/163>> accessed 22 July 2019. These amounts do not include travel and daily subsistence amount, which are separately covered.

³⁵ United Nations International Criminal Tribunal for the former Yugoslavia, *Legal Aid*, <<http://www.icty.org/en/sid/163>> accessed 22 July 2019.

³⁶ United Nations International Criminal Tribunal for the former Yugoslavia, *Legal Aid*, <<http://www.icty.org/en/sid/163>> accessed 22 July 2019.

These numbers suggest that the profile of ISDS cases is notably different than that of other international law disputes involving public funding for litigants. This has implications for the budgetary needs of the Assistance Mechanism and its funding sustainability. These issues should be areas of major focus in the exploration and development of legal support for ISDS disputes. Realities of existing Assistance Mechanisms are also useful in this context.

As noted above, the ACWL is funded in small part by user fees and also in part by revenues from its endowment; the bulk of its funding at present, however, must come through voluntary contributions. Over the five-year window from 2017-2021, the ACWL needed an additional CHF 20,000,000 million in such voluntary contributions to cover its financial needs.³⁷

With respect to IDLO's ISP/LDCs program, the program is aiming to raise €2 million in its initial phase, a large portion of which has been pledged, although it is unclear to CCSI how much of ISP/LDCs' pledged money has actually been received by the program.³⁸

With respect to the PCA Trust Fund, the PCA Secretary General appeals every year to PCA members, varying levels of fundraising success are realized. One interviewee stated that in this interviewee's experience, states are not unwilling to donate, but general "rule of law" objectives tend to be insufficient to permit states to muster the political will to do so on a large or sufficient scale.

The Scoping Study details the funding sustainability, and struggles, of the various other Assistance Mechanisms profiled, including with respect to donations and user-fees.

5.3 Costs of Support and Who Bears Them

There are three general models for allocation of costs, each of which has financing and financial implications:

- **Legal service providers bear the costs of services provided to users:** These Assistance Mechanisms are not cost-free but the direct costs of services are often borne by the service providers (e.g., the law firms, universities, or non-profit organizations) rather than the beneficiary, and the overhead costs of the mechanism are funded through external donations. The ISP/LDCs program fits this model, as do discrete pro bono services provided by law firms and university-based legal clinics or other non-governmental organizations.
- **Service users pay for (all or some of) the costs of services provided to them:** Service users (i.e. Assistance Mechanism beneficiaries) may pay for services provided at market rates, pre-set rates, or negotiated rates. The ACWL and the ALSF fit this model, as do certain trust funds that provide lists of approved counsel. Third-party funding or other contingency

³⁷ ACWL, 'Report on the Thirty-Third Meeting of the General Assembly' (2015) ACWL/GA/R/2015/2, 6.

³⁸ Interview with individual with experience with existing Assistance Mechanism for states in ISDS conducted on 26 April 2019 (on file with authors).

fee arrangements do not involve up-front payment but the user would commit to share a portion of a favorable award or outcome.

- **Third-parties (i.e., neither the service provider nor the service user) pay for costs of services:** These models may rely more heavily or even exclusively on third-party donors to fund assistance (e.g. national government development and aid agencies; private philanthropies).

Not all models are desirable or viable for all types of services, service providers, or service users. Similarly, potential service users may not be able -- as a legal or policy matter -- to equally employ those different cost-allocation models.

5.4 Stakeholder Tensions

Actual, apparent, or possible conflicts of interests can arise in the context of an Assistance Mechanism with respect to relationships between and among donors, support providers, client governments, private- and government-owned investors and investments, and other stakeholders. Many of these types of issues are not unprecedented, arising in other areas of domestic and international law. As described further below in connection with discussing various existing legal support mechanisms, there exist myriad lessons and tools for trying to avoid and address these challenges, including care in establishing independent governance mechanisms for legal support institutions; clear and transparent rules on allocation of decision-making authority; and appropriate, comprehensive, and effective rules regarding professional responsibility. The extent of conflicts, and the most effective way to manage such conflicts, would in many ways depend on the scope of an Assistance Mechanism.

With respect to tensions between beneficiary governments and donor governments, conflicts may include: general conflicts of interest in outcomes of the assistance (e.g. negotiations, disputes, etc.); justifications for providing funding (e.g. official development assistance or investment liberalization vs. empowerment of decision-making); conflicts with internal stakeholders (e.g. outward investors); the nature of the respondent government (e.g. evidence of corruption, contested leadership) and/or; the nature of the claim (e.g. direct expropriation). The ACWL, for example, has navigated many of these issues but doing so can be complex and challenging.

With respect to tensions between client governments and support providers, support providers may have a financial interest in the investment law system and, in particular, a continuous flow of services providing revenue-generating opportunities. Misalignment of perspectives and interests between a support provider and the beneficiary, or concerns on the part of the beneficiary that the advice is not in its best interest, were noted as key causes for concern among government official interviewees. The ALSF has to some extent navigated these issues, which are highly interrelated with issues of trust.

Tensions between donors and support providers, such as questions regarding the role of the donor and its ability to control the type or content of services provided, can arise from differences in objectives and incentives of these different parties.

An Assistance Mechanism may also have internal tensions (or conflicts) relating to the scope of its mandate, particularly to the extent an Assistance Mechanism tries to do both policy formulation and legal defense.

5.5 Identifying the Client/Beneficiary

Identify relevant beneficiaries of an Assistance Mechanism will be closely tied to decisions about what concerns an Assistance Mechanism is intended to address, and how its objectives are framed, as well as its funding and financing.

For example, Assistance Mechanisms could, for example, provide tiers of available support to states based on certain state characteristics (e.g. OECD's DAC list), or require tiers of fees to access certain services. Fees may be up-front membership fees, and/or fees based on the services used.

Even within states, beneficiaries may vary. To address concerns surrounding policy formulation and/or domestic implementation of treaty obligations, for example, beneficiaries could be limited to a discrete set of government officials, or could be broader stakeholders in domestic jurisdictions, such as *amicus curiae*.

Related issues concern whether eligible beneficiaries are entitled to services of an Assistance Mechanism, or whether the mechanism (or service providers) can decline to provide all or some services, and based on what criteria and under what circumstances. Similarly, if an Assistance Mechanism (or support provider) begins to provide services, based on what criteria and under what circumstances could such services be withdrawn. Several existing Assistance Mechanisms have navigated these challenges.

5.6 Location, Staffing, and Remuneration

The location and staffing of an Assistance Mechanism can be critical decisions with respect to which finding consensus may be challenging.

The location, or locations, of an Assistance Mechanism could be depend on a range of factors, including the form that such mechanism takes, its mandate and roles, the identity and preferences of its beneficiaries and funders, its legal needs, and its budget. For example, with respect to an Assistance Mechanism that is solely focused on ISDS disputes using in-house counsel (such as the ACWL), it may make sense to locate such a mechanism near major dispute centers, such as Washington DC or Paris. However, some interviewees expressed concern that this puts the center physically distant from many countries, and government officials that would be expected to use its

services. It was suggested during CCSI's consultations that an Assistance Mechanism may have several offices, located in different regions of the world, although this may raise costs and associated funding challenges.

It was stated that any institutionalized Assistance Mechanism would need to have a diversity of staff, including many staff from developing countries. This was not to suggest that lawyers from the developed world are incapable of adequately advising developing countries, but that a wide variety of legal, social and governmental backgrounds would be helpful to the actual defense, as well as with respect to building trust and legitimacy of such a mechanism. The kind of staff will also depend on the breadth, scope, and mandate of an Assistance Mechanism. Staff dedicated to investment policy formulation and implementation can have a greater diversity of backgrounds than staff focused only on disputes, although even with respect to staffing of disputes, it was stated that not only arbitration lawyers should be sought, but that lawyers and other staff who have a deep understanding of how international investment law impacts the development objectives of states should be prioritized. The diversity of staff also has budgetary implications.

Most interviewees felt that working with an Assistance Mechanism would generally be viewed as an attractive early or mid-career option, even if remuneration were less than the private sector because they offer other benefits that the private sector does not. The two benefits most cited were a better "work-life" balance and greater responsibilities for junior lawyers. Options for remuneration scales include the UN Common System scale, the WTO scale, the approach of IFIs, or another approach or benchmark. Much will, of course, depend on the role of an Assistance Mechanism, the perceived "competition" from a hiring perspective, and the personnel budget (which involves trade-offs against other areas of an Assistance Mechanism budget). It will also depend, to a certain extent, on whether the Assistance Mechanism's primary mandate is in capacity building or actual legal representation in claims.

5.7 Institutionalized vs. Ad Hoc Mechanisms

The degree of institutionalization of an Assistance Mechanism will, naturally, be dependent on the services provided, to whom, and how funding and finances are to function. Generally speaking, high-level thoughts on the level of institutionalization were raised by several interviewees.

For example, it was noted that negotiation of a formal institutional, treaty-based Assistance Mechanism may be quite a challenge. It was suggested that a preliminary, and more informal, model may be an interim solution. One government official suggested that building upon existing mechanisms could help to build up support where it is needed more organically and avoid political challenges. Others suggested that regional mechanisms, perhaps building on existing and trusted institutions, may be well-received by states.

5.8 "Politics" Surrounding the Role of an Assistance Mechanism

The creation, or expansion, of any Assistance Mechanism cannot be removed from the geopolitical and socioeconomic realities in which it has been conceived, discussed, and may be placed.

In the context of UNCITRAL’s Working Group III, which is considering an Assistance Mechanism as part of its ISDS reform process, some interviewees felt that an Assistance Mechanism should be embedded in a larger package of structural reform solutions to make it more feasible to develop. Others noted that it would be important, for various reasons, to ensure that discussions in Working Group III surrounding an Assistance Mechanism not be pegged to any specific structural reform.

Interest groups outside of states will also be paying attention to the formation or expansion of an Assistance Mechanism, including its intended role and beneficiaries. For example, in the context of other (unsuccessful) efforts at establishing an Assistance Mechanism in the investment law context, the opposition of private practitioners has been noted. However, “private practitioners” do not have uniform interests or perspectives, and it was stated that the only real competition to private practitioners would be in the context of direct representation. Even then, it was stated that to the extent most firms that represent states still make most of their money from representation of claimants (as state-representation is typically billed at a lower rate and also forms a smaller percentage of the overall client base) the development of an Assistance Mechanism will, in reality, not be real economic competition for these firms.

With respect to NGOs, there were mixed perceptions. Many felt that an Assistance Mechanism that focused on disputes would be missing an opportunity to assist with the origins of the problems (which are both systematic and also arise earlier in the investment policy and treaty process). All interviewed NGOs emphasized that to the extent an Assistance Mechanism is developed or expanded it should respond to needs and concerns that have been identified from the perspective of intended beneficiaries, in actual coordination with and leadership by such beneficiaries. NGOs also highlighted the opportunity costs associated with an Assistance Mechanism. They asked whether it was preferable to reduce the role of ISDS through, for instance, moving to state-to-state dispute settlement or requiring exhaustion of local remedies, as opposed to putting additional state money into efforts to “legitimize” a flawed system.

5.9 Intersection with other reforms

Consideration of the desirability, role, and mandate of an Assistance Mechanism should also consider the extent to which other reform efforts (particularly those proceeding multilaterally through UNCITRAL’s Working Group III) may interact. For example:

- other efforts to reduce costs may mitigate some of the need for expanded low-cost options;
- the introduction of counterclaims may make more market-based financing products available to respondent states;
- inclusion of domestic exhaustion requirements may make the anticipation and prevention of ISDS disputes more manageable; or
- more robust state filters on certain kinds of claims may similarly make prevention of unwarranted disputes easier to achieve.

Thus, if progress achieved in IIA/ISDS reform efforts is meaningful and impactful, Assistance Mechanisms can play narrower and potentially less costly roles than they would if they were created to address the wide set of concerns identified as arising under the status quo system.

6 Investors as Assistance Mechanism Beneficiaries

One important question relating to the potential beneficiaries of any Assistance Mechanism is whether and under what circumstances and terms the relevant support should be available to investors. At present, many of the models of Assistance Mechanisms discussed in this Scoping Study could be adapted to, or indeed already do, provide services to investors. Indeed, certain of them, such as third-party funding, contingent fee arrangements, and political risk and other forms of insurance, are already available to investors on a much greater scale than they are to respondent states. Nevertheless, some have suggested that investors – and particularly small- and medium-sized enterprises (SMEs) need and should be able to benefit from further assistance to help them participate in the investment law system.

Whether or not, and to what extent, states, as the creators of an Assistance Mechanism, would desire to include investors as beneficiaries of all or some services may depend on a range of factors, including the nature and scope of concerns that an Assistance Mechanism is intended to address, perceptions of the challenges different investors face when investing abroad and seeking to participate in the investment law system, different options for addressing those challenges, and the relevant state's role (in particular vis-à-vis its treaty partners) as primarily capital-exporting, importing, or both.

During CCSI's consultations, some interviewees considered investors to be deserving beneficiaries of an Assistance Mechanism, akin to those in international human rights fora in which indigent claimants may have access to services or funds that permit them to bring international legal claims.

However, most interviewees either had certain hesitations, or opposed, the provision of Assistance Mechanism services to investors, and did so for varying reasons. For example, many interviewees cited the complexity (political, financial, and otherwise) of creating an Assistance Mechanism, noting that the inclusion of investors would greatly complicate those efforts, raise complex conflict of interest issues, and would divide support for an Assistance Mechanism. Other governments, primarily capital-importing states, were much more categorically opposed to inclusion of investors as Assistance Mechanism beneficiaries, noting that their payment to any mechanism that also supports investors suing them is a political challenge, among other reasons. More broadly, it was noted that while public support for private citizens is provided in other legal contexts (e.g., criminal defense for indigent defendants), the policy rationales for supporting investors' economic claims through ISDS were less clear, particularly if less costly domestic recourse for alleged harms were available.

For the most part, policy discussions surrounding investors as beneficiaries of an Assistance Mechanism focus on the potential provision of services to small and medium enterprises (SMEs) and

the Scoping Study thus explores the various definitions of and ways of considering SMEs. According to one comparative analysis of definitions used across the world, the definitions used are “generally exclusively quantitative,” with the “most unanimously accepted criterion being the number of employees.”³⁹ Other criteria, if used, include annual turnover, assets, and/or investments, again with different users commonly employing different quantitative thresholds.⁴⁰ Definitions also diverge in terms of whether and how other issues, such as the relevant sector of operations and ownership structure of the enterprise, are taken into account. While, for instance, the EU’s definition does not vary depending on the relevant sector, Canada, China, Japan, Korea, and the United States are among the countries that do have specific definitions for SMEs that are based upon relevant sector of the firm.

These definitional issues complicate this Scoping Study’s analysis. While, for instance, there are some studies looking at SMEs’ experiences with ISDS, it is not always clear what definitions are being used, how rigorously they are being applied, and what the nature of the firm really is. While such studies do seem to demonstrate that SMEs are using ISDS, they also illustrate that conclusions regarding SME invocation of ISDS are hard to draw, and that data gaps are significant. They leave unanswered several important questions on usage rates, capacity challenges, and solutions that may be available or desirable. Related but similarly understudied questions ask whether and how the experiences of SMEs may be distinct from those of larger firms, and seek to understand the policy implications of those differences and advantages and disadvantages of different policy interventions. Answers to these questions will likely further shape state positions regarding which entities should be available for which types of support.

Reflecting these data gaps, a common theme among many interviewees was a threshold desire for greater information regarding what capacity challenges different investors are facing.

According to research and interviews with private sector participants outlined in the Scoping Study, at least some SMEs – not surprisingly -- appear to be facing difficulties when bringing ISDS claims. Some of these relate to uncertainties in the state of the law and difficulties understanding whether

³⁹ Adil El Madani, ‘SME Policy: Comparative Analysis of SME Definitions’ (2018) 8 International Journal of Academic Research in Business and Social Sciences, 106.

⁴⁰ In the EU, “SME” comprises three general categories – micro, small, and medium-sized – and consists of those companies employ fewer than 250 persons and that have an annual turnover not exceeding €50 million, and/or an annual balance sheet total not exceeding €43 million (See European Commission, Commission Recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises [2003] OJ L124/36). According to the OECD:

SMEs are generally considered to be non-subsiary, independent firms which employ fewer than a given number of employees. This number varies across countries. The most frequent upper limit designating an SME is 250 employees, as in the European Union. However, some countries set the limit at 200, while the United States considers SMEs to include firms with fewer than 500 employees. Small firms are mostly considered to be firms with fewer than 50 employees while micro-enterprises have at most ten, or in some cases, five employees.

OECD, *Glossary of Statistical Terms: Small and Medium-Sized Enterprises*, <<https://stats.oecd.org/glossary/detail.asp?ID=3123>> accessed 20 July 2019).

and how to document their positions and argue their claims. Other difficulties relate to the high costs of disputes and the challenges in accessing financing to pursue cases. These challenges mirror some of the challenges also faced by states. Nevertheless, the availability and appropriateness of solutions may also differ between the two groups. While, for instance, states may have more revenue than SMEs to draw upon to help fund their litigation, SMEs may have greater abilities to secure contingency and risk insurance to support their suits.

Overall, however, there are initiatives that could benefit each side. For instance, reform options seeking to reduce the costs of cases or to facilitate appropriate early resolution of disputes through creation of ombuds-type offices could reduce costs in a manner attractive to states and investors. Additionally, Assistance Mechanisms aiming to help states manage their treaties and bring clarity to meaning of IIAs, as well as efforts to democratize the law, could help investors better understand their treaty benefits and whether and when to invoke them. Both states and investors may also benefit from an institutionalized, multi-service Assistance Mechanism that provides legal representation. But, as noted by a number of interviewees, there appear to be significant concerns and complexities (e.g., relating to conflicts of interest, political challenges, resource constraints, and other issues) that arise when the same Assistance Mechanism provides services to both investors and states. Indeed, perceived benefits of such a mechanism for states may decrease if it has the effect of increasing the number and frequency of investor claims.

7 Conclusion

With respect to both states and investors, the Scoping Study sets forth a wide variety of existing capacity challenges, details existing Assistance Mechanisms that are currently available to address concerns, and highlights where there may be gaps in support. It also draws from Assistance Mechanisms in other areas of law to help further identify opportunities and challenges for legal and policy support. These elements are crucial for three reasons: First, any creation or expansion of an Assistance Mechanism should take into account existing support, building upon and using it, and complementing it as necessary and desirable. Second, it is crucial to internalize lessons learned to date from investment law and beyond with similar issues and initiatives. And third, it is the perspective of those who are experiencing and articulating capacity challenges that should serve as the primary guide for both identifying critical areas where assistance is needed, and in developing potential solutions.

In UNCITRAL's most recent 38th Session, government delegates commenced a substantive discussion on the contours of an Assistance Mechanism (referred to in that context as an advisory center).⁴¹ While general support was expressed for establishing an Assistance Mechanism, particularly as such a mechanism could complement other reform options being developed by WGIII,

⁴¹ See UNCITRAL, 'Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-eight session (Vienna, 14-18 October 2019) (2019) A/CN.9/1004, para 28-50.

preliminary thoughts and consideration of questions regarding the establishment of such a mechanism revealed much work yet to be done. Delegates discussed a wide range of possibilities as they relate to: potential beneficiaries of a mechanism, the potential scope of services that a mechanism could provide (with those outlined in Secretariat Note A/CN.9/WG.III/WP.168 providing a good basis for further discussion), the possible structure of an Assistance Mechanism and how it could be financed,⁴² and other considerations and issues that must be born in mind (e.g. quality and reliability of services, staffing and remuneration, stakeholder tensions, a mechanism's impact on the ISDS system as a whole, and long-term sustainability of an Assistance Mechanism).

The Working Group provided guidance to the UNCITRAL Secretariat in conducting certain preparatory work to assist the Working Group in these considerations. Requested information related to potential conflicts of interest and burdens on an Assistance Mechanism (particularly as they relate to the scope of its mandate), information on Assistance Mechanisms that are already providing services, criteria that may be applied to determine beneficiary states and services, how capacity building may apply to various elements of investment treaty practice and dispute settlement proceedings, and options for financing and staffing an Assistance Mechanism.

As the content and contours of any Assistance Mechanism take shape, the authors are grateful for the opportunity to contribute the evidence and perspectives in this Scoping Study to that discussion. The challenges are varied and issues complex, requiring a close and realistic look at the problems being articulated and the strengths and weaknesses of different options for ameliorating them.

⁴² UNCITRAL, 'Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-eight session (Vienna, 14-18 October 2019) (2019) A/CN.9/1004, para 37-38.