

An Assistance Mechanism for International Investment Law: CCSI Scoping Study

**Presented by:
Columbia Center on Sustainable Investment**

UNCITRAL Working Group III 38th Session Preparatory Meeting

October 12, 2019



**Columbia Center
on Sustainable Investment**

A JOINT CENTER OF COLUMBIA LAW SCHOOL
AND THE EARTH INSTITUTE, COLUMBIA UNIVERSITY



Outline

- ◆ **Scoping Study Overview**
- ◆ What issues are states facing with the investment law system?
- ◆ Capacity: what, exactly, are states seeking?
- ◆ Previous attempts to establish an assistance mechanism for IIL
- ◆ Potential models for an Assistance Mechanism for IIL
- ◆ Cross-cutting issues that should guide policymaking

Scoping Study Overview

- ◆ **Question:** How to achieve adequate legal defense for states (particularly developing states) in ISDS disputes?
- ◆ Scoping Study considers, more broadly, the hurdles, financial and otherwise, that states face in achieving their objectives in the international investment law regime and in considering how representation that can help them achieve those objectives can be better secured.
 - ◆ “representation” is considered broadly: it may be in-house or private sector lawyers, non-profit providers, a designated “institution”, or other
- ◆ **Terminology:** Assistance Mechanism, not Advisory Center on International Investment Law

Scoping Study Overview

- ◆ **Methodology**

- ◆ **Desk Research**

- ◆ **Interviews**

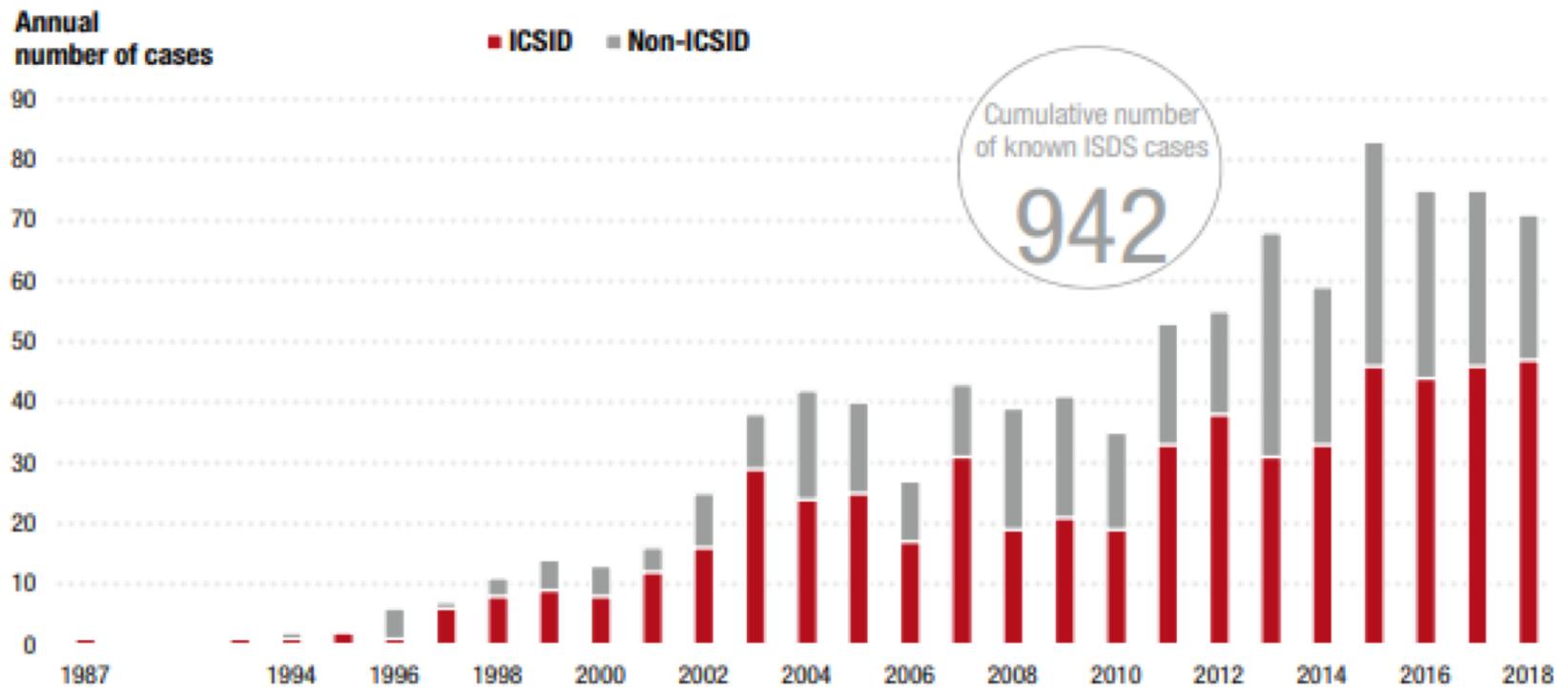
- ◆ **Government Officials** (from low-income, lower middle-income, upper middle-income and high-income economies)
 - ◆ Individuals who have **worked for or established another Assistance Mechanism**
 - ◆ Individuals who have worked for an **arbitral institution**
 - ◆ **Academics** who have written on and/or advised states with respect to international investment law
 - ◆ **Private practitioners** (representing both states and investors)
 - ◆ Representatives of **NGOs/CSOs**
 - ◆ Representatives of **small and medium size enterprises**

What are the issues?

- ◆ Scoping Study Overview
- ◆ What issues are states facing with the investment law system?
- ◆ Capacity: what, exactly, are states seeking?
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Number of Cases

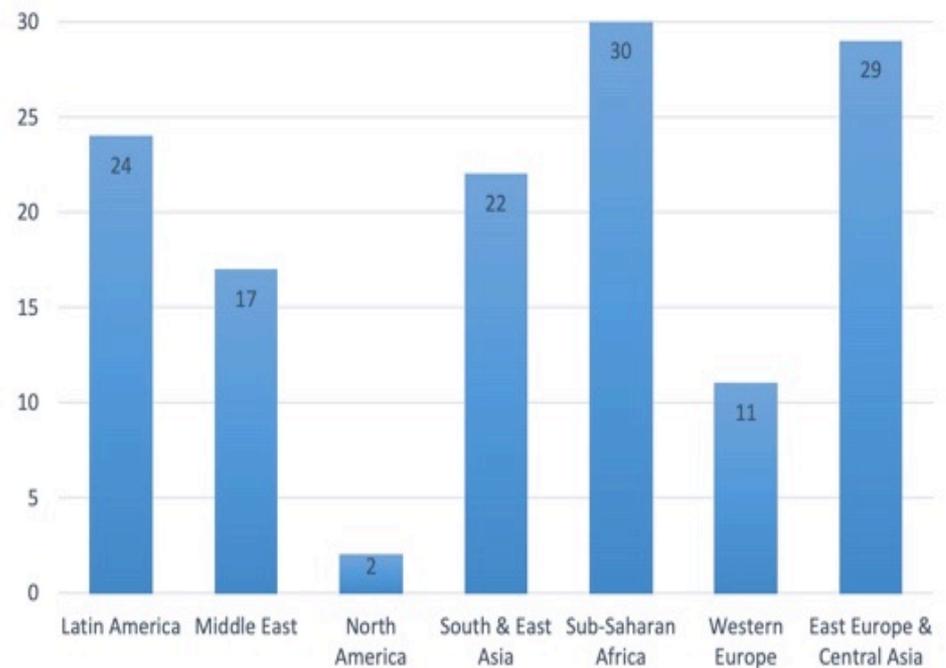
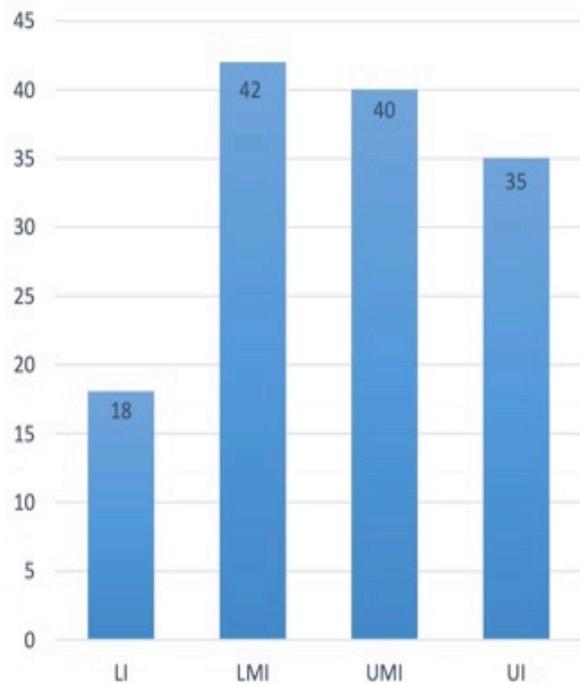
Figure 1. Trends in known treaty-based ISDS cases, 1987–2018



Source: UNCTAD, ISDS Navigator.

Respondent states

Distribution of Respondent States by WBIG and Region (135)



Sub-Saharan Africa

Legal costs of ISDS proceedings

Study	Period	Arbitral Rules	# in sample	Average claimant costs	# in sample	Average resp. costs	Inflation adjusted year
Commission & Maloo	2011-2017	ICSID	90	6,043,915	88	5,217,247	2017
Commission & Maloo	2010-2017	UNCITRAL	36	6,077,585	41	4,596,807	2017
Behn & Daza	1987	ICSID & UNCITRAL	169	6,067,184	177	5,223,974	2018

*Source: Malcolm Langford, Daniel Behn and Laura Letourneau-Tremblay, 'Empirical Perspectives on Investment Arbitration: What Do We Know? Does It Matter?' (2019) ISDS Academic Forum Working Group 7 Paper, 7.

Costs to Respondent States

RESPONDENT STATE	YEARS ACTIVE	CLAIMS	TOTAL AWARDED	COSTS AVERAGE	FEES AVERAGE	FIRMS
ARGENTINA	1997-2018	63	\$2,964,668,922	\$4,040,953	\$1,635,092	State Ministry
VENEZUELA	1996-2018	53	\$5,843,169,900	\$8,612,807	\$1,329,852	Foley, Curtis, Arnold, Hogan, Boutiques
SPAIN	1997-2018	50	\$406,709,000	\$1,883,551	\$639,411	State Ministry
CZECH REPUBLIC	1999-2018	41	\$775,162,880	\$5,149,649	\$610,443	Squire, Weil, Boutiques
EGYPT	1984-2018	40	\$3,167,094,900	\$1,770,415	\$763,650	Shearman, Bredin Prat, Cleary, Boutiques
POLAND	1992-2018	36	\$5,702,301,000	\$1,045,000	\$500,447	K&L Gates, Bird & Bird, Small Firms
MEXICO	1997-2018	31	\$287,862,000	NA	NA	State Ministry, Pillsbury
ECUADOR	2001-2018	29	\$2,307,601,806	\$5,152,445	\$846,553	Foley, Dechert, Weil
CANADA	1998-2018	28	\$224,804,000	\$5,055,000	\$1,192,768	State Ministry
RUSSIA	1996-2018	27	\$53,042,325,401	NA	NA	Cleary, White & Case, None
UKRAINE	1998-2018	27	\$142,208,185	\$2,085,148	\$691,467	White & Case, Boutiques
INDIA	2010-2018	26	\$210,975,000	NA	NA	Curtis, Foley
PERU	2003-2018	25	\$87,664,000	\$4,803,465	\$1,090,000	White & Case, Sidley
KAZAKHSTAN	1996-2018	23	\$968,811,000	\$15,019,000	\$1,455,000	Reed Smith, Curtis
US	1998-2018	19	\$0	\$2,095,000	\$726,000	State Ministry
LIBYA	2008-2018	19	\$1,498,000,000	NA	NA	Squire, Curtis, Eversheds, Boutiques

Source: Daniel Behn and Ana Maria Daza, ‘The Defense Burden in Investment Arbitration?’ (2019) PluriCourts Working Paper

Investment-policymaking

- ◆ Investment-related policy-making discussions are taking place in different forums (e.g. OECD, UNCTAD, UNCITRAL, WTO, FfD)
- ◆ Governments face substantive, logistical, and financial difficulties staying up-to-date on developments that matter to and affect them
- ◆ Governments are constrained in ensuring that their legal frameworks are:
 - ◆ Coherent
 - ◆ Consistent
 - ◆ Representing best practices
 - ◆ Consistent with their policy objectives

IIA Negotiation

- ◆ Demands on governments may be time-sensitive
- ◆ Narrow challenges involve narrow technical knowledge and negotiating capacity
- ◆ Broader challenges include assessing how treaties, and provisions of treaties, are going to impact domestic companies and the country more broadly
- ◆ Countries face challenges having a united perspective on specific agreements and issues (e.g. a president may sign an agreement with which negotiators disagree)
- ◆ Less powerful countries face structural challenges in effectively incorporating their interests into treaties

IIA Negotiation

Canada – reservations for existing and future non-conforming measures in specified sectors and policy areas	Negotiating party – reservations for existing and future non-conforming measures in specified sectors and policy areas	Date of signature
Canada - 9	Moldova - 1	12 June 2018
Canada – 9	Mongolia – 6	8 September 2016
Canada – 9	Hong Kong, China SAR - 4	10 February 2016
Canada – 9	Guinea – 0	27 May 2015
Canada – 9	Benin – 4	12 May 2014
Canada - 9	Burkina Faso - 8	20 April 2015
Canada - 9	Côte ‘d’Ivoire – 5	30 November 2014
Canada - 9	Mali - 4	28 November 2014
Canada – 9	Senegal – 0	27 November 2014
Canada - 9	Serbia - 4	1 September 2014
Canada - 9	Nigeria – 7	6 May 2014
Canada – 9	Cameroon - 7	3 March 2014

Domestic Implementation of IIA Obligations

- ◆ Particularly developing state have a complex web of treaty obligations that are not uniform
- ◆ Decentralized states face challenges in communicating treaty obligations
- ◆ States face challenges in internal communications – lessons learned from disputes are not adequately communicated to negotiators and decision-makers
- ◆ What do you communicate to prevent breaches of FET? (Communication re local content/liberalization/non-discrimination obligations may be easier)

Management of existing treaties

- ◆ States are “masters of their treaties”
- ◆ States face constraints in:
 - ◆ Maintaining consistency and coherence in a state’s own pleadings over time
 - ◆ Following disputes that outward investors file
 - ◆ Participating as non-disputing parties
 - ◆ Reacting to tribunal decisions
 - ◆ Intervening in annulment or set-aside proceedings
 - ◆ Issuing interpretations clarifying their understanding of treaty provisions
 - ◆ Engaging with treaty-counterparties to issue joint interpretative statements

Issues related to Disputes

- ◆ Case Staffing: In-house vs. hybrid vs. outside counsel models
 - ◆ Influenced by many factors
 - ◆ What makes sense to retain in-house and what makes sense to outsource?
 - ◆ Where can there be cost savings?
 - ◆ What are trade-offs?

Issues related to disputes

- ◆ When states decide to hire outside counsel, they did not widely report concerns about the quality of representation
- ◆ Concerns included:
 - ◆ The **high cost** of representation
 - ◆ **Misalignment of interests** and cost-sensitivities between in-house and outside counsel
 - ◆ Challenges **effectively supervising and controlling** the management of the case
 - ◆ Difficulties in **timely procuring outside counsel**
 - ◆ The ability to obtain **external input on discrete issues** or questions of dispute prevention outside of a dispute

Issues related to disputes

- ◆ Concerns about anticipating and resolving disputes at an early phase:
 - ◆ Unexpected shareholder claims
 - ◆ No domestic exhaustion
 - ◆ Inability to intervene domestically to address the issue (e.g. judicial decisions)
 - ◆ Notices of intent with few factual details
 - ◆ Korea and South Africa models
 - ◆ What does dispute prevention look like in practice?
- ◆ Appointing Arbitrators
 - ◆ Non-transparency of other awards and materials
 - ◆ More information is held by law-firms and paid services

Issues related to disputes

- ◆ Dealing with inconsistency, uncertainty, incorrectness
 - ◆ Overlaps with other reform efforts
- ◆ Discovery and managing information
 - ◆ Court proceedings in other jurisdictions
 - ◆ Document management systems

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- ◆ **Capacity: what, exactly, are states seeking?**
- ◆ Previous attempts to establish an assistance mechanism for IIL
- ◆ Potential models for an Assistance Mechanism for IIL
- ◆ Cross-cutting issues that should guide policymaking

What do we mean by “capacity”?

- ◆ ”Capacity” was a recurrent theme in interviews
 - ◆ States want **greater capacity to manage and control their investment treaty programs**
 - ◆ States want **greater capacity to manage and control disputes**
 - ◆ Some states want “**capacity development**”
 - ◆ The lack of capacity was identified in a wide-variety of areas, including:
 - ◆ policy development
 - ◆ treaty negotiations
 - ◆ dispute prevention
 - ◆ Managing ISDS cases in-house
 - ◆ Engaging with and effectively managing outside counsel

What do we mean by “capacity”?

- ◆ Technical expertise in a specific area?
- ◆ Ability to handle all or a portion of an ISDS dispute in-house?
- ◆ Ability to effectively manage outside counsel?
- ◆ Expertise of specific government officials (e.g. negotiators, defense counsel, legislators)?
- ◆ Government’s overall internal organizational and institutional ability to shape and implement policy objectives?
- ◆ Legal, political, economic ability to participate effectively in IIA system?

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Earlier attempts at assistance

- ◆ The most advanced was the UNCTAD-IADB-OAS model:
 - ◆ 2009 Steering committee formed
 - ◆ Agreed:
 - ◆ Intergovernmental organization
 - ◆ Established and run by states
 - ◆ Modeled on Advisory Center for WTO Law (in-house counsel)
 - ◆ Financially self-sufficient
 - ◆ Functions: Advisory and defense s
 - ◆ Why did the attempt not succeed?
 - ◆ Countries disagreed on scope and role of center
 - ◆ Highly political debate on location and nationality of staff
 - ◆ Difficult to finalize technical details for financing (e.g. member contributions and whether based on economic development level)
 - ◆ Changes to negotiators

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Potential Models

- ◆ Institutionalized, multi-service support including legal representation of client governments
- ◆ Institutionalized, multi-service support not including legal representation of client governments
- ◆ Financial or in-kind inputs
- ◆ Pro bono, ad hoc legal and expert assistance
- ◆ Intergovernmental knowledge sharing hubs
- ◆ Legal assistance and resources clearinghouse

Potential Models

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

◆ **The Advisory Center on WTO Law**

- ◆ In-house legal services supporting client governments
- ◆ Fees paid on tiered scale
- ◆ Available for ad hoc questions, opinions, etc

◆ **The African Legal Support Facility**

◆ **International Development Law Organization's Investment Support Programme for Least Developed Countries**

- ◆ Matches client governments with private law firms (and other support providers) working on a pro bono basis
- ◆ Services are free to client governments
- ◆ Extent of services remains unclear

Potential Models

Institutionalized, multi-service support not including legal representation of client governments

◆ **International Organizations**

- ◆ UNCTAD
- ◆ OECD
- ◆ The World Bank Group

◆ **Arbitration Centers**

- ◆ ICSID
- ◆ The PCA

◆ **Academic Institutions**

- ◆ CCSI

◆ **Non-profit organizations**

- ◆ IISD

Potential Models

Financial or in-kind inputs

- ◆ **Litigation/Arbitration Trust Funds**
 - ◆ PCA Financial Assistance Trust Fund
 - ◆ Other similar funds (ICJ, ITLOS, international criminal courts, international human rights courts)
- ◆ **Third-Party Funding for Respondent States** (not currently scalable)
- ◆ **Contingent Fee Representation for Respondent States** (challenging at scale)

Potential Models

Pro bono, ad hoc legal and expert assistance

◆ IDLO's ISP/LDCs Program

- ◆ Est. 2017
- ◆ Specifically targeted at investment law
- ◆ Matches client governments with support providers for “investment law related” representation

◆ Other ad hoc providers

- ◆ Generally for broader research questions or ad hoc advice
- ◆ E.g. Trade Lab, CCSI, IISD, International Senior Lawyers Project

Potential Models

Intergovernmental knowledge sharing hubs

- ◆ Existing treaty-based networks
- ◆ IISD's Annual Investment Treaty Negotiator's Forum
- ◆ Other formal and informal opportunities to share experiences and lessons learned

Potential models

Legal assistance and resources clearinghouse

- ◆ An assistance mechanism could help states to understand and navigate the many different mechanisms that already exist to provide assistance
- ◆ This may mean assessing the governments area of need/request and working with the government to determine the most appropriate provider

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- ◆ **Cross-cutting issues that should guide policymaking**

Cross-cutting considerations

- ◆ Quality, reliability, reputation, trust
- ◆ Financing an assistance mechanism
- ◆ Costs of support and who bears them
- ◆ Tensions that may arise between different stakeholders
- ◆ Identifying the client/beneficiary
- ◆ Location, staffing, remuneration
- ◆ Long-term sustainability
- ◆ Institutionalized vs. Ad hoc
- ◆ “Politics” surrounding the creation of an assistance mechanism
- ◆ Intersection with other reform efforts

Quality, reliability, reputation, trust

- ◆ **Quality, reliability, reputation of support provider were stressed by all governments**
 - ◆ Answerable to populations - need to justify retention of anyone outside the government
 - ◆ Immense political pressure involved in choosing legal counsel
 - ◆ If the government loses, pressures increased to justify counsel
- ◆ **Many governments said that these four issues would be more important than cost**
- ◆ **E.g. ALSF**
 - ◆ Has benefitted from relationship with AfDB – a known and trusted institution
- ◆ **E.g. ACWL**
 - ◆ Quality has been built up over time
 - ◆ Its leadership is credited with establishing its reputation

Quality, reliability, reputation, trust

- ◆ **Trust was stressed as the top priority**
 - ◆ Crucial for government clients to be candid and open about the dispute
 - ◆ Must be built over time
 - ◆ Financial and policy interests of the support provider must be (1) understood, and (2) ideally aligned with that of the government
- ◆ **E.g. ACWL**
 - ◆ Works during the course of disputes and in non-dispute related matters (e.g. trainings, opinions, legal questions) and has established relationships that extend beyond disputes
 - ◆ Mandate to address legal and not policy questions

Financing an assistance mechanism

- ◆ Financing a mechanism is going to be a central question to its scope and mandate
- ◆ For comparison, the ACWL in 2018:
 - ◆ 17 disputes (5 new that year)
 - ◆ 237 legal opinions
 - ◆ 39 certificates of training
- ◆ **ACWL 2019 budget = \$4.7 million**
- ◆ Funded by:
 - ◆ Endowment fund (membership fees and official development assistance) (\$18 million)
 - ◆ User fees charged for disputes (scale based on GNP per capita)

Financing an assistance mechanism

- ◆ Financing a mechanism is going to be a central question to its scope and mandate
- ◆ ACWL (roughly USD 5 million/yr) v Investment Assistance Mechanism

Proceeding	Hours	Cost to beneficiary of legal services
WTO Consultations	147	CHF47,628 (max ACWL charge)
WTO Panel	444	CHF143,856 (max ACWL charge)
WTO AB	263	CHF85,212 (max ACWL charge)
ISDS Case (Eli Lilly)	20,142.71	CAD4,579,260.92
ISDS Case (Mesa Power)	19,616.00	CAD4,225,547.67

¹¹ *Eli Lilly and Company v. Government of Canada*, UNCITRAL, ICSD Case No. UNCT/14/2, Canada's Submission on Costs (22 August 2016), 10.

¹² *Mesa Power Group v. Government of Canada*, UNCITRAL, PCA Case No. 2012-17, Canada's Submission on Costs (3 March 2015), 20.

Financing an assistance mechanism

- ◆ Assuming ISDS proceeding requires roughly 45 times the hours of a WTO Panel proceeding (per ACWL budget),
- ◆ would budget for Advisory Centre handling ISDS need to be 45 times larger to handle a similar number of ISDS cases? (USD 225 million/yr?)
- ◆ What factors would raise or lower the number?
 - ◆ e.g., more advisory opinions, fewer cases might lower the budget;
 - ◆ but what are the resources required for advisory opinions under WTO as compared to under IIAs

Who bears the costs?

- ◆ Three models:
 - ◆ **Legal service providers bear the costs of services provided to users**
 - ◆ E.g. pro bono support (IDLO ISP/LDCs); policy advice etc
 - ◆ **Service users pay for (all or some of) the costs of services provided to them**
 - ◆ Could be market rate, negotiated rate, pre-set rate, rate based on economic development
 - ◆ E.g. ACWL and ALSF
 - ◆ **Third-parties (neither service provider nor user) bear the costs of services**
 - ◆ E.g. donors, philanthropies

Who bears the costs?

ACWL Costs structure	CHF per hour	Maximum fee for a WTO panel proceeding
Category A Member	324	CHF46,628
Category B Member	243	CHF35,721
Category C Member	162	CHF23,814
Least developed country	40	CHF5,880

Who bears the costs?

- ◆ Should an assistance mechanism support:
 - ◆ Full ISDS defense?
 - ◆ Memos on particular legal issues
 - ◆ Access to information and advice on specific issues (e.g. arbitrator appointment)
 - ◆ Support to facilitate internal government organization around disputes
 - ◆ Support on retaining and using experts for valuation and damages
 - ◆ Development of peer exchanges or networks
 - ◆ IIA negotiation support
 - ◆ Low or no-cost access to data or document management systems

Stakeholder tensions

- ◆ Will funder governments be willing to support and fund an assistance mechanism focused on disputes if that is, or is perceived to be, at odd with their outward investors?
- ◆ Will funders be willing to support a defense of all state actions?
 - ◆ Direct expropriations?
 - ◆ Evidence of government corruption?
 - ◆ Sanctions lists?
 - ◆ Contested leadership?
- ◆ Will support providers; interests be sufficiently aligned with client governments?

Identifying the client

- ◆ Who should benefit from an assistance mechanism?
 - ◆ Treaty negotiators
 - ◆ Officials defending disputes?
 - ◆ Parliamentarians?
 - ◆ Civil society?
 - ◆ Domestic judges?

Location, staffing, remuneration

- ◆ These can be critical and highly political discussions
- ◆ Location: will depend on mandate, role, budget
 - ◆ Should it be in major arbitration centers?
 - ◆ Should it be located in a developing country hub?
 - ◆ Should there be more than one advisory center location?
 - ◆ Should it be regional?
 - ◆ Should it be affiliated with existing institutions (e.g. ALSF)?
- ◆ Staffing:
 - ◆ Who should lead?
- ◆ Remuneration
 - ◆ UN Common System?
 - ◆ WTO Scale?
 - ◆ International Financial Institution market approach?

Long term sustainability

- ◆ Beneficiaries must trust a mechanism to see them through the length of engagement
- ◆ Donors must trust that the mechanism has long-term viability

Institutionalized vs. Ad Hoc

- ◆ Degree of institutionalization will depend on:
 - ◆ Mandate
 - ◆ Which services are to be provided, to whom
 - ◆ Funding and finances
 - ◆ Timing (a formal mechanism will take longer to establish)
- ◆ More formal = more political = more difficult consensus?

Politics

- ◆ ISDS Reform Discussions
 - ◆ Should it be embedded in larger structural reform?
 - ◆ Should it be a stand alone options?
 - ◆ Should services be opt-in?
- ◆ Private practitioners
 - ◆ Many firms primarily represent investors so may not be terribly concerned
 - ◆ Previous efforts have seen private sector opposition
 - ◆ The ACWL has lowered market rates in WTO law – this could be a concern
- ◆ Civil Society Perspectives
 - ◆ More help is good, but this will entrench the existing system
 - ◆ If an assistance mechanism is developed it should solve actual problems
 - ◆ Should be developed and led by intended beneficiaries

Intersections with other reforms

- ◆ Some of the problems that an Assistance Mechanism is intended to solve may be better solved through other reforms
- ◆ Any mechanism may wish to consider ongoing reforms and be established in a way that makes it adaptable to changes in IIAs and ISDS

Investors as beneficiaries

- ◆ Should Investors, particularly small and medium sized enterprises, benefit?
- ◆ Would this present actual or perceived conflicts of interests? Could those be solved?
- ◆ How would this impact political and financial support?
- ◆ Could investors benefit from some, but not all, services?
- ◆ Could investors be added at some point in the future?

Thank you

Lise Johnson (lj2107@columbia.edu)

Brooke Güven (brooke.guven@law.columbia.edu)



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