An Assistance Mechanism for International Investment Law: CCSI Scoping Study

Presented by:
Columbia Center on Sustainable Investment

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October 12, 2019
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
**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?
- Previous attempts to establish an assistance mechanism for IIL
- Potential models for an Assistance Mechanism for IIL
- Cross-cutting issues that should guide policymaking
Figure 1. Trends in known treaty-based ISDS cases, 1987–2018

Cumulative number of known ISDS cases

Source: UNCTAD, ISDS Navigator.
Respondent states

## Legal costs of ISDS proceedings

<table>
<thead>
<tr>
<th>Study</th>
<th>Period</th>
<th>Arbitral Rules</th>
<th># in sample</th>
<th>Average claimant costs</th>
<th># in sample</th>
<th>Average resp. costs</th>
<th>Inflation adjusted year</th>
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</thead>
<tbody>
<tr>
<td>Commision &amp; Maloo</td>
<td>2011-2017</td>
<td>ICSID</td>
<td>90</td>
<td>6,043,915</td>
<td>88</td>
<td>5,217,247</td>
<td>2017</td>
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<td>Commision &amp; Maloo</td>
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<td>UNCITRAL</td>
<td>36</td>
<td>6,077,585</td>
<td>41</td>
<td>4,596,807</td>
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<td>Behn &amp; Daza</td>
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<td>ICSID &amp; UNCITRAL</td>
<td>169</td>
<td>6,067,184</td>
<td>177</td>
<td>5,223,974</td>
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</table>

## Costs to Respondent States

<table>
<thead>
<tr>
<th>RESPONDENT STATE</th>
<th>YEARS ACTIVE</th>
<th>CLAIMS</th>
<th>TOTAL AWARDED</th>
<th>COSTS AVERAGE</th>
<th>FEES AVERAGE</th>
<th>FIRMS</th>
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<tbody>
<tr>
<td>ARGENTINA</td>
<td>1997-2018</td>
<td>63</td>
<td>$2,964,668,922</td>
<td>$4,040,953</td>
<td>$1,635,092</td>
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<td>VENEZUELA</td>
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<td>53</td>
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<td>$8,612,807</td>
<td>$1,329,852</td>
<td>Foley, Curtis, Arnold, Hogan, Boutiques</td>
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<tr>
<td>SPAIN</td>
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<td>50</td>
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<td>$1,883,551</td>
<td>$639,411</td>
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<tr>
<td>CZECH REPUBLIC</td>
<td>1999-2018</td>
<td>41</td>
<td>$775,162,880</td>
<td>$5,149,649</td>
<td>$610,443</td>
<td>Squire, Weil, Boutiques</td>
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<tr>
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<td>1984-2018</td>
<td>40</td>
<td>$3,167,094,900</td>
<td>$1,770,415</td>
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<td>POLAND</td>
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<td>36</td>
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<td>31</td>
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<td>NA</td>
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<td>28</td>
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<td>RUSSIA</td>
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<td>27</td>
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<td>LIBYA</td>
<td>2008-2018</td>
<td>19</td>
<td>$1,498,000,000</td>
<td>NA</td>
<td>NA</td>
<td>Squire, Curtis, Eversheds, Boutiques</td>
</tr>
</tbody>
</table>

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

- Particularly developing states 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?
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
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
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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Cross-cutting issues that should guide policymaking
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
  - 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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Cross-cutting issues that should guide policymaking
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
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
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 government's area of need/request and working with the government to determine the most appropriate provider.
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
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
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 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

<table>
<thead>
<tr>
<th>Proceeding</th>
<th>Hours</th>
<th>Cost to beneficiary of legal services</th>
</tr>
</thead>
<tbody>
<tr>
<td>WTO Consultations</td>
<td>147</td>
<td>CHF47,628 (max ACWL charge)</td>
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<tr>
<td>WTO Panel</td>
<td>444</td>
<td>CHF143,856 (max ACWL charge)</td>
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<td>WTO AB</td>
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<tr>
<td>ISDS Case (Mesa Power)</td>
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</table>

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?

<table>
<thead>
<tr>
<th>ACWL Costs structure</th>
<th>CHF per hour</th>
<th>Maximum fee for a WTO panel proceeding</th>
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</thead>
<tbody>
<tr>
<td>Category A Member</td>
<td>324</td>
<td>CHF46,628</td>
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<tr>
<td>Category B Member</td>
<td>243</td>
<td>CHF35,721</td>
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<tr>
<td>Category C Member</td>
<td>162</td>
<td>CHF23,814</td>
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<tr>
<td>Least developed country</td>
<td>40</td>
<td>CHF5,880</td>
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</table>
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?
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
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 IIA s 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

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