

# Securing Adequate Legal Defense in Proceedings Under International Investment Agreements

LISE JOHNSON & BROOKE GUVEN

MARCH 24, 2020



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

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

This presentation is intended to briefly describe the study and our findings.

## Scoping Study Available Online



► <http://ccsi.columbia.edu/work/projects/securing-adequate-legal-defense-in-proceedings-under-international-investment-agreements-a-scoping-study/>

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

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

I would like to emphasize that the study does not advocate for a specific model of assistance mechanism but sets forth issues, evidence, lessons learned, and a variety of potential solutions that may be developed to respond to specific capacity challenges.

## Interviews Conducted for Scoping Study

- ▶ **Government officials** (of all World Bank Group economic development levels)
- ▶ Individuals who have experience **establishing or working for existing or attempted Assistance Mechanisms**
- ▶ Individuals who have experience working for **arbitral institutions**
- ▶ **Academics** who have written or advised states on international investment law
- ▶ **Private practitioners**
- ▶ Representatives of **civil society organizations**
- ▶ Representatives of **private sector multinational investors**

Our approach to the scoping study was to conduct desk-based research as well as interviews with:

- government officials (of all World Bank Group economic development levels);
- individuals who have experience establishing or working for existing or attempted Assistance Mechanisms;
- individuals who have experience working for 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.

Interviewees were asked to share their experiences and ideas relating to capacity challenges and how an assistance mechanism could or should address them. The interview protocol is included as an Annex to the Scoping Study.

## Issues Addressed in Scoping Study

- ▶ **Capacity challenges** in the existing investment law context and existing assistance mechanisms available to address concerns
- ▶ **Previous attempts** to establish an international investment law advisory center – lessons learned
- ▶ **Models** that can be considered for an investment law assistance mechanism
- ▶ **Cross-cutting themes** that policy-makers should consider
- ▶ **Investors** as assistance mechanism beneficiaries
- ▶ Annex A: Consultation protocol

The issues set forth in the scoping study include an overview of:

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

This presentation will roughly follow that order. Out of necessity we will be rather brief today but I direct everyone to the scoping study itself for much greater detail on the issues that we will now discuss.



## Capacity Challenges

- ▶ Concerns about investment treaties and ISDS are much more fundamental than only the financial costs
- ▶ Ranged from investment policy formulation and implementation through effective engagement in ISDS proceedings
- ▶ Some challenges shared by many states; other challenges differed
- ▶ States expressed different priorities in addressing challenges

I will start by overviewing the various capacity challenges relating to engagement in the investment treaty and ISDS system that were articulated to CCSI during our consultations.

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

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

Importantly, states expressed different priorities in addressing these challenges. Some priorities were relative and based on resource constraints, but others were much more fundamental opinions about what role an assistance mechanism should or should not take (e.g. whether it should provide direct legal representation or not, or whether it should permit investors to use its services or not).

# Capacity Challenges

## **Policy-making and Pre-dispute Management**

- ▶ Investment policy-making
- ▶ Treaty negotiation
- ▶ Domestic implementation
- ▶ Dispute prevention
- ▶ Ongoing treaty management
- ▶ Pre-dispute management

## **Dispute management**

- ▶ Case Staffing
- ▶ Anticipating and potentially resolving disputes
- ▶ Appointing Arbitrators
- ▶ Dealing with uncertainty and ambiguity
- ▶ Working with experts
- ▶ Discovery and information management

Based on the wide range of challenges articulated to CCSI during our consultations, the study looks at capacity challenges experienced by states in various different phases of investment law, both in the pre-dispute context as well as the dispute context.

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

The thematic areas of investment law that the study considers in depth include those on the screen, and i will now discuss each in turn.

# Investment Policy-Making

## Select capacity challenges

- ▶ Policy-making and discussions occur in multiple fora both nationally and internationally
- ▶ States encounter substantive and logistical challenges staying abreast of developments
- ▶ Support for states is also fragmented

## Select Assistance Mechanisms

- ▶ UNCTAD (Investment Policy Framework for Sustainable Development; Investment Policy Review)
- ▶ OECD (Policy Framework for Investment; Investment Policy Reviews)
- ▶ World Bank Group (Investment Policy & Promotion Team)
- ▶ Academic and policy publications (often behind paywalls)

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

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

- UNCTAD (Investment Policy Framework and Investment Policy Review);
- OECD (national Investment Policy Reviews; Freedom of Investment Roundtable); and
- World Bank Group.

## Investment Agreement Negotiations

### Select capacity challenges

- ▶ State specific assessments
- ▶ Time-sensitive demands
- ▶ Gaps in identifying and articulating specific concerns (e.g. treaty impact on local economy)
- ▶ Organizational hurdles in cross-government communication
- ▶ Systemic obstacles to achieving negotiating objectives

### Select Assistance Mechanisms

- ▶ Decentralized nature of treaty law and negotiations makes support challenging
- ▶ Time-sensitive ad hoc support from academics, NGOs, private sector
- ▶ Less time-sensitive trainings, research and other support

Moving on to investment treaty negotiations, consultations revealed that the negotiation of treaties can place particular and time-sensitive demands on governments. For example, it is necessary to assess and understand the particular domestic impact of certain proposed provisions. Various states described capacity challenges in cross-governmental communication and ensuring a consistent approach to policy-making.

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

There is some, primarily ad hoc, support available to states in this area. The study describes examples from other areas of law to show how more organized support may be given to states in this area (e.g. European Capacity Building Initiative under UNFCCC).

## Domestic Implementation of IIA Obligations

### Select capacity challenges

- ▶ Complex and resource-intensive tasks necessary to understand and implement scope of treaty obligations
- ▶ Can be more challenging in decentralized states where local/state/provincial jurisdictions have significant governance capacity

### Select Assistance Mechanisms

- ▶ UNCTAD (dispute prevention policies and practices)
- ▶ World Bank (Systemic Investor Response Mechanism)
- ▶ Dispute prevention mechanisms – e.g. Korean Ombuds office

With respect to domestic implementation of IIAs and dispute prevention, many interviewees articulated challenges in this area and also were quite interested in more information about how to better manage these challenges.

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

Existing providers include:

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

Importantly though, some disputes cannot necessarily be, nor should be easily prevented (e.g. certain disputes arising out of judicial processes).

## Investment Agreement Negotiations and Implementation:

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

This slide shows an example of how these issues may play out. As treaties become more complex, capacity challenges may also intensify. This may be the case with, for example, understanding implications of liberalization provisions and restrictions on performance requirements for domestic economic, social, and environmental policies in the short, medium and long term.

We can see here, for instance, that Canada is relatively more protective of its policy space than its treaty counterparties in Asia and Africa. This may be due to disparate capacities to understand implications of these provisions, or disparate negotiating capacities. Regardless of the cause, the disparate approach to carve-outs will likely also result in disparate burdens in terms of implementation.

## Ongoing Treaty Engagement and Management

### Select capacity challenges

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

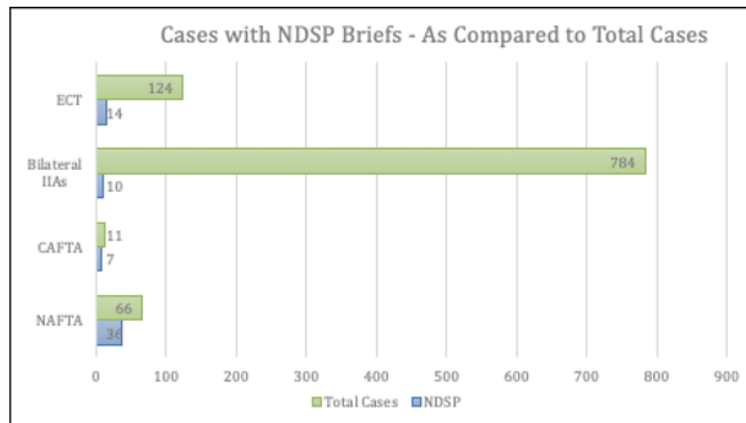
### Select Assistance Mechanisms

- ▶ UNCTAD (dispute prevention policies and practices)
- ▶ World Bank (Systemic Investor Response Mechanism)
- ▶ Dispute prevention mechanisms – e.g. Korean Ombuds office

When treaties are signed it does not signal the end of a state's engagement with its treaties, but really just the beginning. States reported capacity challenges in:

- Ensuring consistency and coherence in pleadings;
- Submitting non-disputing party briefs; and
- Joint treaty interpretations.

Consultations revealed significant scope for support in this area.



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).

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



## ISDS Case Staffing

### Select capacity challenges

- ▶ How states wish to internally staff depends on frequency of ISDS claims
- ▶ Three models:
  - ▶ Hybrid (internal staff; outside counsel)
  - ▶ In-house staff
  - ▶ Outside counsel
- ▶ Few countries have a dedicated agency

### How states address this issue

- ▶ Some states feel compelled to hire the best counsel because officials and the state need to defend that choice in case of loss
- ▶ Some states do not have or choose not to allocate funds to top counsel
- ▶ Research suggests that developing countries are more willing to settle even unmeritorious claims

Case staffing and procurement of outside counsel is obviously a large topic and it is considered in depth in the study.

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

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

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

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

One thing raised by a few states was the idea of a “hotline”, or a “go to” trusted place upon which states can call to get answers to pressing questions (both in the policy implementation, dispute prevention, as well as dispute management context). This was raised both by states that wish to manage claims internally, as well as by states who need help with early decisions before counsel has been procured.

## Anticipating and resolving claims at an early stage

### Select capacity challenges

- ▶ Some claims are possible to identify and manage early
- ▶ Others are more difficult (e.g. shareholder claims, umbrella clauses, disputes based on judicial processes)
- ▶ Cooling-off periods can be difficult to effectively manage
- ▶ Early assessment of strength of claim can be challenging

### How states address this issue

- ▶ Ombuds offices
  - ▶ Korea's Office of Foreign Investment Ombudsman (OFIO)
  - ▶ Brazil's Cooperation and Facilitation Investment Agreement model

This slide on anticipating and potentially resolving disputes at an early phase is very similar to that already discussed but here was intended to focus more on the role of the cooling-off period and the capacity challenges that states have in effectively managing this time. Internal delays, which may be caused due to the lack of efficient command or communication channels, can have long term impacts on the management and success of a defense.

## Appointing Arbitrators

### Select capacity challenges

- ▶ Significant share of awards and other material remains non-transparent
- ▶ Asymmetries of information
  - ▶ Repeat-player law firms, third-party funders, arbitration institutions

### How states address this issue

- ▶ Certain free or paid services to disseminate information about arbitrators

With respect to appointing arbitrators, asymmetries of information about potential arbitrators can create hurdles for certain states. There is scope to have more information publicly available, or available on a no-cost basis.

## Dealing with uncertainty and ambiguity

### Select capacity challenges

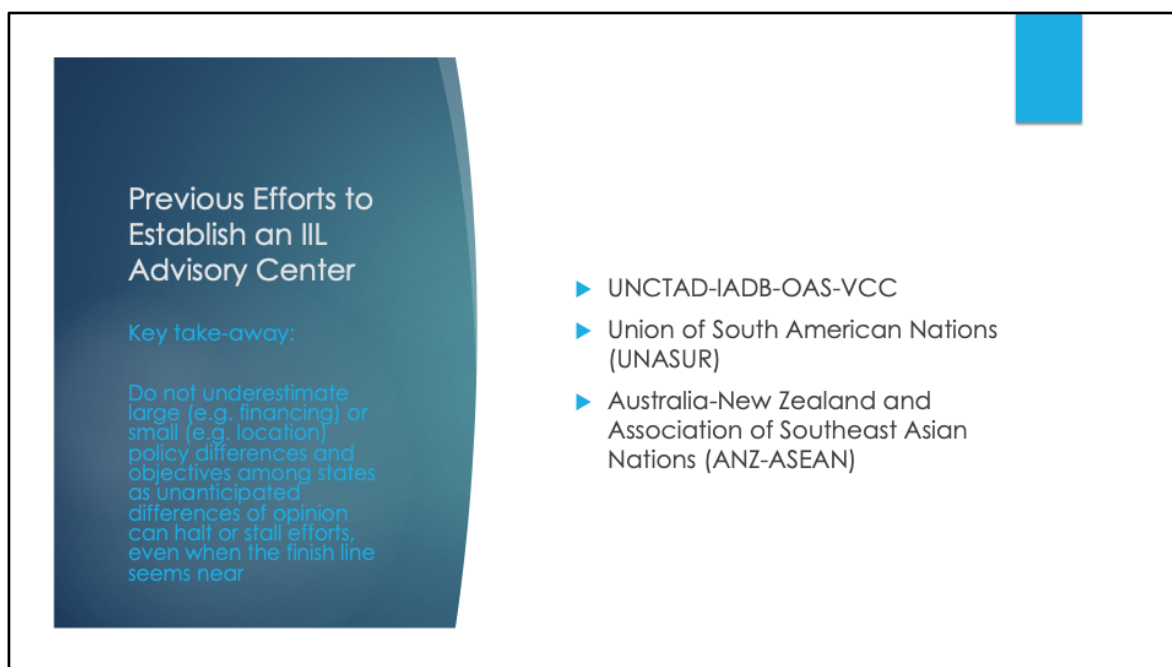
- ▶ Inconsistency, uncertainty, incorrectness of decisions
- ▶ State ability to predict whether a claim will succeed or fail
- ▶ Many states do not respond to requests for joint interpretations or other clarifications

### How states address this issue

- ▶ UNCITRAL WGIII reforms
- ▶ Joint interpretations
- ▶ Clarifying language in new agreements

As is well-articulated in the context of UNCITRAL's WGIII, states struggle in dealing with uncertainty and ambiguity in ISDS claims. There are a variety of ways to manage these issues. These include, among other steps, joint interpretations of existing agreements or clarifying language in new agreements.

Some states experience challenges in entering into joint interpretations and more work may need to be done to understand why joint interpretations are infrequently used (to the extent states do wish to use them).



### Previous Efforts to Establish an IIL Advisory Center

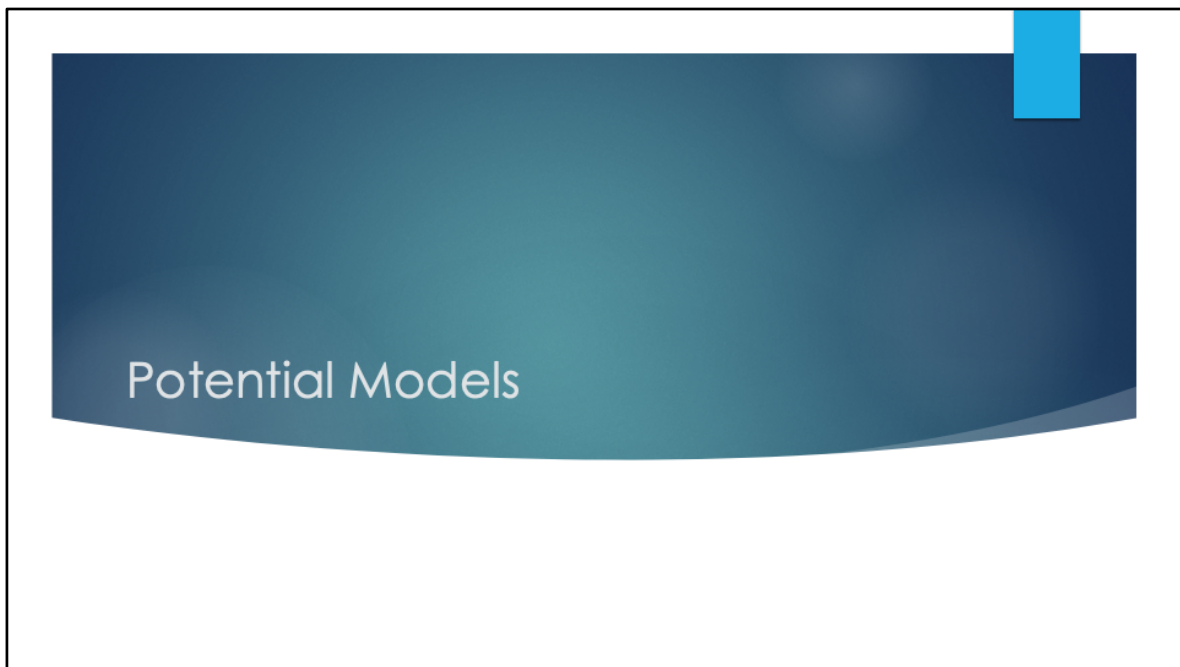
**Key take-away:**

Do not underestimate large (e.g. financing) or small (e.g. location) policy differences and objectives among states as unanticipated differences of opinion can halt or stall efforts, even when the finish line seems near

- ▶ UNCTAD-IADB-OAS-VCC
- ▶ Union of South American Nations (UNASUR)
- ▶ Australia-New Zealand and Association of Southeast Asian Nations (ANZ-ASEAN)

The Scoping Study details previous attempts to establish an advisory center. It considers a joint effort by UNCTAD, the Inter-American Development Bank, the Organization of American States, and the Vale Columbia Center on Sustainable International Investment (a predecessor to CCSI) which started around 2006 and ended unsuccessfully in 2010, although significant progress was made. It also considers efforts by the Union of South American Nations at a similar time, and an Australia-New Zealand-ASEAN effort in 2012, which advanced less than those above.

Based on research and interviews with those involved in these efforts, a key take-away is that one cannot underestimate large policy differences (e.g. the scope of services of a mechanism or how it will be financed) but also seemingly small decisions (e.g. where a mechanism will be located) as disagreements can halt any effort, even when it is very close to the finish line.



I'll now move on to a brief overview of the different models that an assistance mechanism may take, each of which is discussed in much greater detail, using examples, in the scoping study



One model we analyze is that providing institutionalized, multi-service support, including legal representation. Such a model may include services such as capacity building, negotiation support, policy advice, legal opinions, or defense in proceedings.

Examples of this model that are considered include:

- Advisory Center on WTO Law (which we will discuss in more depth in a moment);
- The African Legal Support Facility; and
- IDLO's investment support program for LDCs.

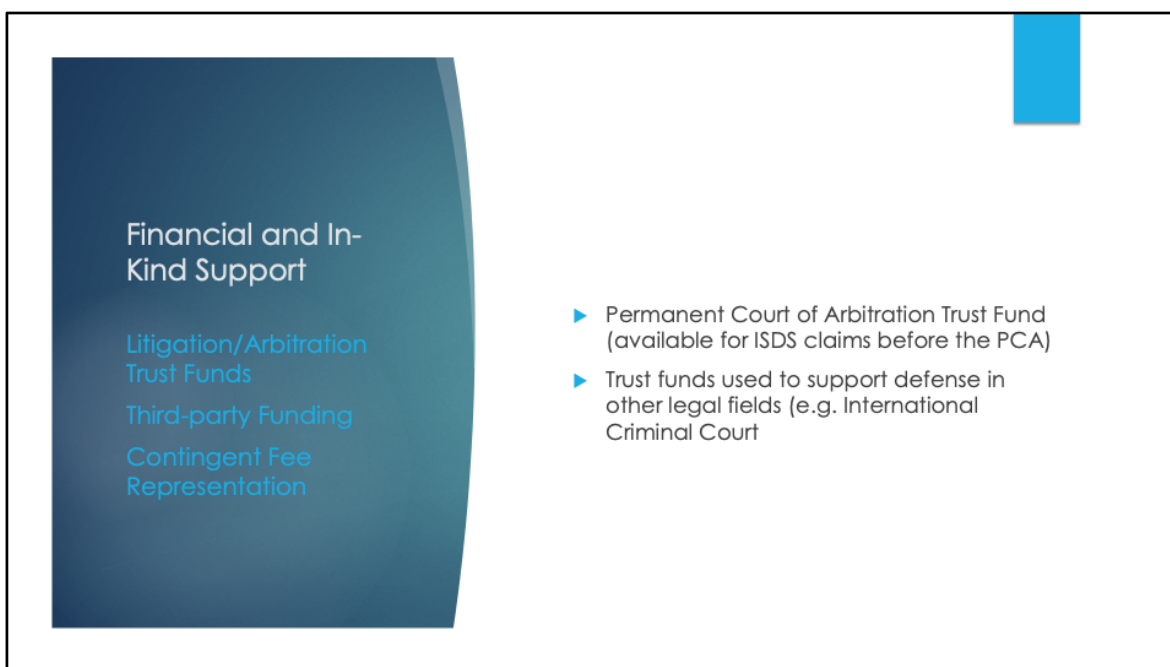


A second model is that of institutionalized, multi-service support but this time not including legal representation. So one potentially offering services including capacity building, negotiation support, or policy advice.

Examples of this kind of support provider include:

- International organizations (e.g. UNCTAD, OECD);
- Arbitration centers;
- Academic institutions; and
- non-profit organizations.

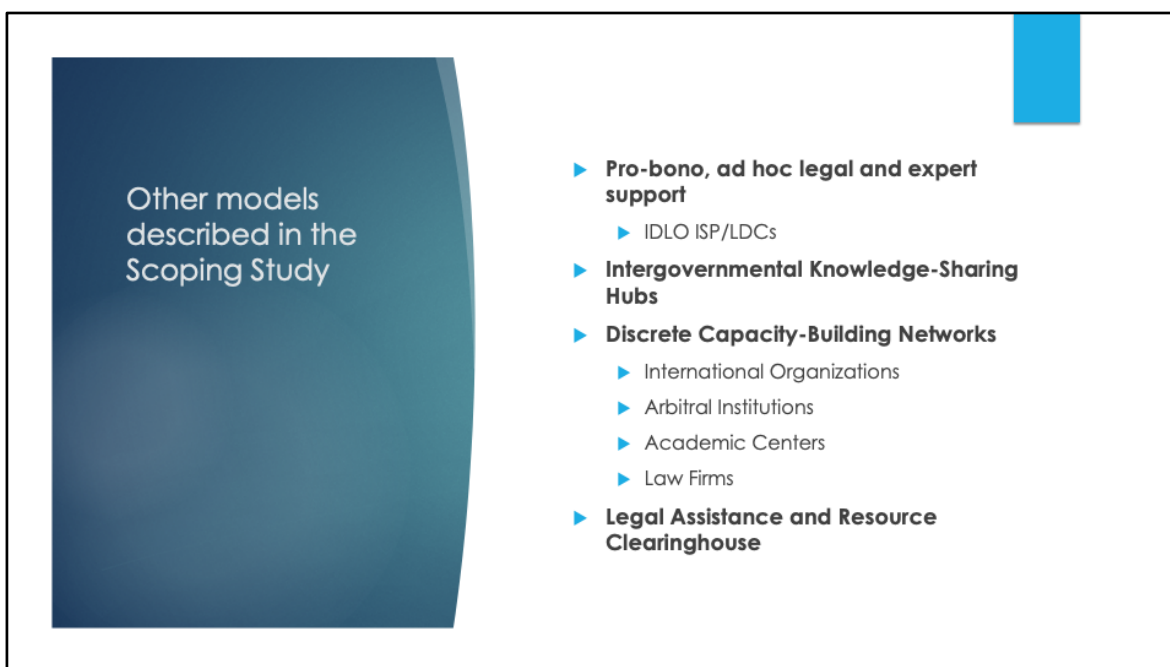




Financial or in-kind support is another model detailed in the study.

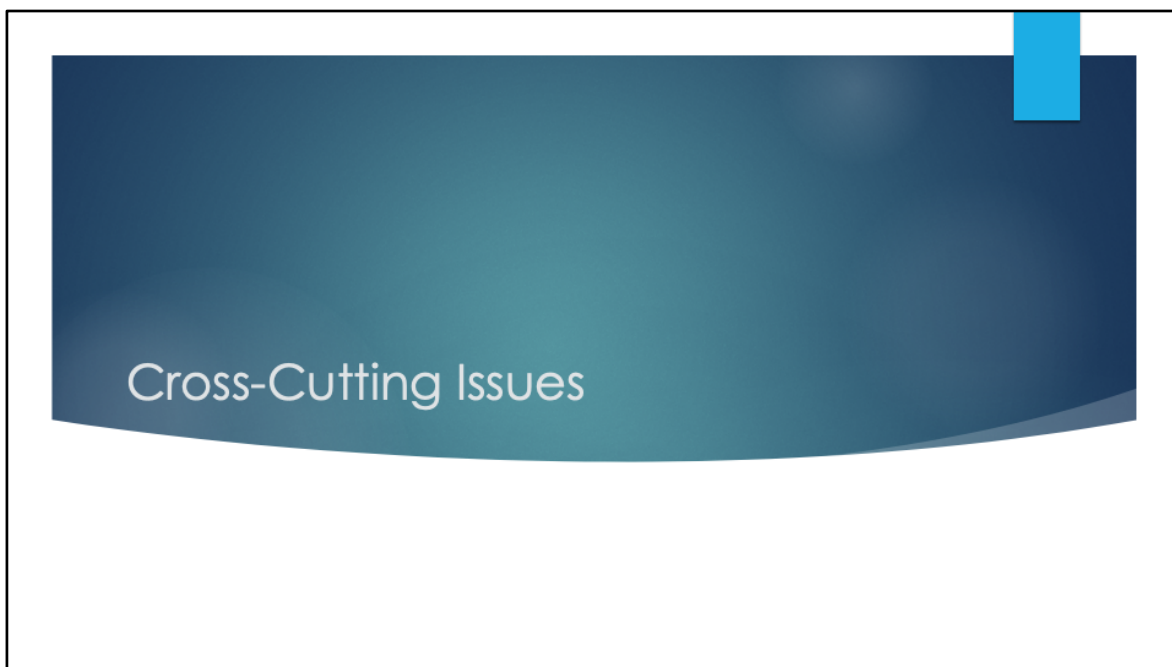
This model includes:

- Trust funds (e.g. Permanent Court of Arbitration Trust Fund. This model is particularly prevalent in other areas of international law, such as criminal and human rights law;
- Third Party Funding; and
- Contingent representation by law firms .



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

- Pro-Bono, ad hoc legal support (e.g. IDLO's ISP/LDC program, which uses outsourced law firm and other organization pro bono support);
- Intergovernmental Knowledge Sharing Hubs (there was expressed desire on the part of governments for more opportunities to share experiences and lessons learned);
- Discrete Capacity Building Networks (including trainings or courses offered by International organizations, law firms, academic and non-profit institutions); and
- A legal assistance or resource clearinghouse (a place where governments can go simply to understand the range of existing services available to them).



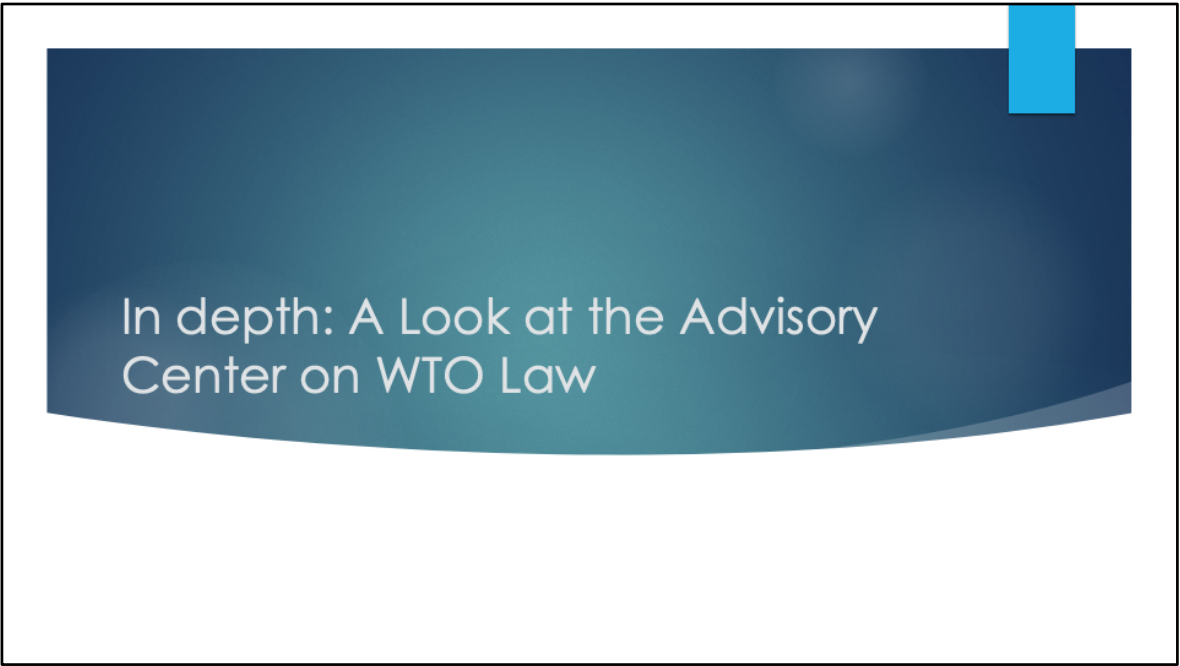
I will now quickly overview the cross-cutting issues that are applicable to all models of assistance mechanism before Lise discusses some of these in greater depth in the context of the WTO Advisory Center.

## Cross-cutting issues

- ▶ Quality, reliability, reputation, trust
- ▶ Funding and scope of services
- ▶ Costs – who pays?
- ▶ Conflicts of interest and tensions
- ▶ Who benefits?
- ▶ Location, staffing, remuneration
- ▶ Long-term sustainability
- ▶ Institutionalized vs. Ad hoc
- ▶ “Politics”
- ▶ Intersection with other reforms

- Quality, reliability, reputation, trust was stated to be *the* key issue during our consultations. Interviewees stressed that there must be an alignment of interests between any assistance mechanism and the state, including but not limited to financial interests.
- With respect to funding and scope of services, it is clear that the depth of countries that can access services and the breadth of services that can be offered will be highly dependent on funding.
- With respect to Costs of support and who bears them, a few models are explored, including where the Service provider pays (e.g. pro bono), the donor pays (e.g. development agencies), or the user pays (market or reduced fees). These can be used in combination
- With respect to stakeholder conflicts of interest and tensions, different relationships between donors, support providers, client governments, private or government-owned investors, and other stakeholders will become more or less prevalent depending on the range of services provided by an assistance mechanism. In some cases these may be more or less serious.
- The question of who should benefit from an assistance mechanism’s services is a critical question, and one that is closely tied to identified capacity concerns and the mechanisms objectives. For example, treaty negotiators, officials who defend

- claims, other government officials responsible for domestic implementation, SMEs, and other stakeholders are all among those who could potentially benefit.
- The location, staffing, remuneration of a mechanism and its employees elicited many differences of opinion. Answers to these questions have also been an issue in previous attempts to create an advisory center. The way in which one approaches these issues also depends on role of the mechanism - for example, if a mechanism is more involved in legal representation, it may make sense to place in a commercial hub such as Paris or DC, but the mechanism is then far removed from government clients. There were suggestions for a mechanism that may have multiple locations, with obvious cost implications.
  - With respect to staff, there was a focus not only diversity in staff, but also on what staff would be appropriate. For example that individuals with a development policy background be prominent on teams of other legal advisors.
  - The long term sustainability and governments ability to rely on services was considered key.
  - The degree of institutionalization of a mechanism was also raised. For example, whether more informal networks should be given support for expansion rather than creating an entirely new institution.
  - “Politics” surrounding the creation or expansion of an assistance mechanism are also explored. This has a few facets. For example, how and whether the mechanism should be tied to any particular form of reform (i.e. structural vs. not structural). Also, previous efforts to create an advisory center reportedly did not receive the support of law firms. It was, however, noted that law firms are not monolithic, and that outside of a small handful of firms most firms make most money off claimant work.
  - Finally, policy-makers should bear in mind how the challenges that an assistance mechanism is intended to address intersect with other reforms. For example, other efforts to reduce costs or limit claims. For example, reform of reflective loss claims, state-to-state filters, or domestic exhaustion requirements may address some of the issues that could be the subject of an assistance mechanism.



## In depth: A Look at the Advisory Center on WTO Law

As Brooke noted, I'm going to provide some information on the ACWL, as that is often seen as a model that could be incorporated in the ISDS context, and will also use it as an example to further elaborate on some of the cross-cutting issues Brooke had mentioned.

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

## ACWL – Overview of Activities

**Table 5 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 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

The ACWL provides support in a number of ways. It offers:

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

The table on this slide, which is in the report and from an ACWL annual report, helps illustrate the quantity and breakdown of activities: e.g., in 2018, it received 5 new requests for assistance and was handling 17 disputes at various phases; it provided 237 legal opinions, and provided 39 certificates of training.

## ACWL – Fees and costs for assistance in WTO disputes

*Hourly and maximum total charge to complainants and respondents in WTO panel proceedings*

Category	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

Focusing on the dispute settlement role, the ACWL charges member users and LDCs a fee; the fee has a set hourly rate and a maximum fee cap per phase of the proceeding. This table shows the fee for panel proceedings. Each country category is based on a formula determined by the country's economic profile.

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

So ACWL litigation support is partly a user-fee model, though it is also a third-party funder and service-provider funder model: the fees for litigation are subsidized by payments by donor countries and member countries, as well as from returns from the ACWL's endowment. In contrast, there are no user fees for ACWL legal opinions and trainings.



## ACWL as a model? WTO and ISDS compared

*WTO and ISDS disputes have similarities, but also differences, e.g., as shown in this table: hourly and maximum total charges to complainants and respondents in WTO panel proceedings compared to ISDS proceedings*

Proceeding	Hours	Cost to beneficiary of legal services
WTO Consultations	147	CHF47,628 (max charge)
WTO Panel	444	CHF143,856 (max charge)
WTO AB	263	CHF85,212 (max charge)
ISDS Case (Eli Lilly) <sup>764</sup>	20,142.71	CAD4,579,260.92
ISDS Case (Mesa Power) <sup>765</sup>	19,616.00	CAD4,225,547.67

One important consideration is whether handling WTO disputes is comparable to handling ISDS disputes. There are some differences often noted - including that WTO disputes are state-to-state, and states can be both claimants and respondents. But another important question flagged to us by an interviewee who had worked in both systems, and that we dug into further, is whether WTO disputes and ISDS disputes are comparable in terms of the amount and nature of resources required. It seems like there are fundamental differences between these two systems.

In particular, the ACWL estimates each case will require a set number of hours and sets a corresponding maximum charge to users. The estimate for the number of person hours required for a WTO panel proceeding was, in 2018, 444 hours. Now let's compare that to ISDS proceedings. It is actually difficult to gather data on hours required as the public portions of cost submissions generally do not provide the number of attorney-hours worked. We did, however, manage to locate that data in a couple of filings, which are listed here. Note that the hours for two relatively recent ISDS disputes - each filed against Canada - were roughly 20,000. This also appears somewhat representative as the overall legal fees expended seem to track - potentially at the low end - average fees expended by respondent states in ISDS cases.

Now, it may be that the WTO estimates are underestimates. But it is unlikely that they depart wildly from reality given that these estimates would presumably be reflected in and inform the ACWL's budget and staffing needs. And even if low, it seems like the person hours required for WTO panel disputes, and those required for ISDS cases, differ by an order of magnitude. This, then, may raise substantial questions about the financial sustainability of an ACWL-type system for ISDS, and about its reach in terms of impact. Key questions include: How many disputes would an ACWL-type ISDS assistance mechanism realistically be able to handle and at what cost to users and third-party funders? Would it be able to have a meaningful impact on the experiences of a significant number of states? If not, is this ok? Or should the scope of services be reduced, and be more focused, so as to reach a broader number of beneficiaries? These issues of possible scope of services and related funding needs are among the cross-cutting issues that apply to consideration of all potential models.

## ACWL as a model? Funding sustainability - inputs and activities

- 40-60% of time spent on litigation
- User fees from litigation have amounted to roughly 4% of ACWL's annual revenues
- Suggestions to charge user fees for legal opinions have been rejected on the basis that they would unduly limit recourse to that service
- Despite initial vision, income from user fees and endowment income have not been adequate to ensure ACWL is self-sustaining, creating need for ongoing calls for funding

This slide further illustrates the issues: when it was established, the ACWL was predicted to be self-sustaining, operating based on income from a donor- and member-funded endowment, as well as from user fees. But that has not materialized; the ACWL needed, for instance, roughly 20 million of additional funds for the five-year period between 2017 and 2021. User fees for litigation have, on average, represented 4% of its annual revenues; and litigation occupies roughly 40-60% of its time. Suggestions to also charge for legal opinions have been rejected on the ground that they might unduly deter such requests, impeding the ACWL's mission.

So, an important takeaway here is that the issue of funding sustainability - even for an established and well-regarded institution -- is not one to gloss over. And this is especially the case given the fact that a given ISDS dispute may require 40-50 times more hours -- and corresponding resources -- than an average WTO dispute.

## ACWL as a model? Stakeholder tensions

- There are three broad categories of tensions we describe:

- Donor-beneficiary
- Service provider-beneficiary
- Donor-service provider

**Eg., for a donor government, the priority may be to**

- ▶ ensure legitimacy and functioning of system, which in the long-term helps advance its commercial aims and economic policies;
- ▶ ensure developing countries can effectively participate in law making and dispute resolution processes; or
- ▶ ensure investment law, in substance and process, supports sustainable development at national and international levels.

**Beneficiary in specific case, e.g.,:**

- ▶ Priority is to prevail in dispute (or minimize liability or settlement costs).

Generally – there are several categories of tensions we describe in the study that can arise from different funding models. Those tensions are:

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

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

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

ACWL governance documents provide a helpful illustration of how these tensions among stakeholders intersect with issues of funding and trust. For instance, some donors, which include government development organizations, have expressed a

desire to have the ACWL monitor and report on how its work advances donor governments' development policy aims; some members and beneficiaries, however, have countered that reporting and assessments along those lines may not necessarily be consistent with the particular needs or interests of ACWL users or the ACWL itself. Similarly, the ACWL has reportedly had challenges securing funding from private sources due to concerns about whether those funders would seek to influence legal positions. These issues of perceived, potential, and actual conflicts have reappeared throughout the research and interviews regarding other potential assistance mechanisms as well, and are key considerations that should inform discussions around what is created, and how it is funded and governed.



## Investors as Assistance Mechanism Beneficiaries

## Considerations around investors as beneficiaries

- ▶ Nature and scope of concerns that an Assistance Mechanism is intended to address
- ▶ Challenges that investors face when investing abroad
- ▶ Options for addressing investor challenges
- ▶ Strong differences of opinion on whether investors should be included as beneficiaries

When thinking about SMEs as beneficiaries, issues to consider include:

- Whether and to what extent states wish to include investors as beneficiaries for all or only some services;
- If so, which investors? Would it only be for individuals, or SMEs? In that context, what is an SME?
- Other sets of threshold issues relate to the nature and scope of concerns that an Assistance Mechanism is intended to address; is this, as some might say, an access to justice problem? Or, as others argue, is the issue of access to ISDS something very distinct from the issue of access to justice?
- In this sense, it is important to identify the aims of assistance, the particular challenges that investors investing abroad face; and, more narrowly, what challenges SMEs face in the context of investor-state disputes
- Then finally, whether and what policy and market interventions are appropriate?

Threshold question: which investors would be eligible

- There could be various conditions for eligibility
- Among the most frequently mentioned relate to size – providing support to SMEs
- But what is an SME?

Illustrative Quantitative Thresholds for SMEs

Criterion	European Commission	Kenya <sup>78</sup>	Mexico <sup>79</sup>	Singapore	Vietnam <sup>76</sup>	United States <sup>77</sup>
Number of Employees	< 250	≤ 99	< 250 (industry) < 100 (trade) < 100 (services)	< 200	< 300	< 500 (most manufacturing and mining industries) < 100 all wholesale and trade industries)
Turnover	< € 50 million	< Ksh 800 million		< \$5100 million		< \$6.5 million (most retail and service industries) < \$31 million (most general and heavy construction industries)
Balance Sheet	< €43 million					
Capital/Investment					< VND 10 billion	

Let's start with the threshold issue of what is an SME: As this chart illustrates, definitions vary: quantitative thresholds are often used, but criteria differ from country to country. And this is impactful: as authors Gibson and van der Veet stated in a report, and as is cited in our study, definitions used by some intergovernmental organizations “would include the manufacturing subsidiaries of both Nestle and Unilever in Ghana, clearly not the intended objects of development interventions.” (Scoping Study p. 106).

So what approach should be used in this context? We thought a World Bank evaluation of its work to support SMEs was insightful. This evaluation stated that in order for the term “SME” to be, and here I quote, a “meaningful category of enterprises, it should be a group of firms that is specifically differentiated from others by the way that it experiences particular policy, institutional, or market failures, or the way it benefits the economy or the poor.” Once the relevant category is identified, it is possible to determine whether and what type of policy interventions are appropriate, and also assess the cost associated with them. (Scoping Study p. 107).



## Financial constraints faced by SMEs and related options for addressing them

Reported challenge: SMEs face constraints in financing claims due to high costs of litigation and limited access to capital.

Question for policymakers: what are other policy and/or market options for addressing those challenges?

Option	Significance for SME Constraints
Improving the market for counsel	Linked to the market for legal services available to the SME
Use of contingency fee arrangements	Linked to the strength of the SME's claim
Improved access to finance	Linked to the value & operating context of the SME
Use of litigation insurance	Linked to the insurance market & litigation risk of the SME
Use of third-party funding	Linked to the size of the SME's claim

Inspired by this, we sought to identify particular challenges that may be faced by SMEs, to articulate when those constraints were/were not particularly relevant, and also to highlight some other options for addressing them.

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

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

## In Conclusion...

- ▶ Consultations reveal that concerns around IIAs and ISDS are much more fundamental than only the financial costs of participation
- ▶ There are many different models that an assistance mechanism could take
- ▶ In crafting solutions it will be important to:
  - ▶ Understand the capacity challenges that potential users are experiencing
  - ▶ Determine what challenges it will address
  - ▶ Take cross-cutting issues
- ▶ Consider specific context of investment law system

We will close with five key takeaways:

- One, our consultations revealed that the concerns about IIAs and ISDS are much broader and more fundamental than only the financial costs of participation in this system.
- Two, there are many different models that an assistance mechanism could take, and important initiatives already underway.
- Three, as policy-makers consider the creation or expansion of an assistance mechanism, it will be important to:
  - Understand the capacity challenges that potential users of an assistance mechanism are experiencing, and their preferences in terms of overcoming those challenges;
  - Determine the role that an assistance mechanism should take, and what gaps it should fill; and
  - Take into consideration all of the cross-cutting issues identified in the study, such as funding, location, trust and quality, etc.
- Four, any assistance mechanism should be tailored to the investment law system. Mechanisms that work in other contexts, such as the ACWL, may not be well suited here.
- Fifth and finally, it is important to consider this initiative in the broader context of investment law reform; there are a range of options available for addressing concerns about IIAs and ISDS, how does this fit into the mix? What are the advantages and disadvantages of different options, and to different stakeholders, and how might those advantages and disadvantages evolve over time? Particularly when government resources are scarce, how can we be most strategic regarding demands on those resources, and ensure policy coherence across initiatives?