



Columbia Center
on Sustainable Investment

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



SECURING ADEQUATE LEGAL DEFENSE IN PROCEEDINGS UNDER INTERNATIONAL INVESTMENT AGREEMENTS

A SCOPING STUDY

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ABOUT CCSI

The Columbia Center on Sustainable Investment (CCSI), a joint center of Columbia Law School and the Earth Institute at Columbia University, is the only university-based applied research center and forum dedicated to the study, practice and discussion of sustainable international investment. Our mission is to develop practical approaches for governments, investors, communities and other stakeholders to maximize the benefits of international investment for sustainable development.

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High-Level Executive Summary

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 or mechanisms to assist states and other users of the IIA and investor-state dispute settlement (ISDS) system to more effectively participate in and benefit from this system. Throughout the study, and reflecting our broad approach, which catalogues a wide range of issues and options, we refer to possibilities for support as “Assistance Mechanisms.” We use that term to encompass a broad range of potential models and options. The term is not meant to reflect any single approach.

The Scoping Study provides a broad and inclusive overview of issues, concerns, empirical evidence, opinions, lessons learned, and proposed solutions as they relate to potential or expanded Assistance Mechanisms for international investment law. This Scoping Study reflects input received on a confidential basis from: 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. 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 in developing potential solutions.

Identifying Challenges

CCSI’s consultations conducted for the 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 and including effective engagement in formal ISDS proceedings. 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 investor-state dispute settlement processes. The Scoping Study does so through the lens of “capacity challenges,” capturing different challenges related to: investment policy-making; IIA negotiation; implementation and management of their IIAs and associated 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.

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, and its role as a capital importer or exporter (or both) particularly vis-a-vis its investment treaty partners, among other factors. States expressed different priorities in addressing these challenges, some of which seem to be loosely held preferences in light of anticipated resource constraints, and some of which reflected more fundamentally held policy priorities or mandates.

Identifying Potential Ways of Easing Capacity Challenges

Following the identification (and prioritization) of capacity challenges, it will be necessary to consider the model(s) that an Assistance Mechanism could take in order to help address them. The Scoping Study surveys a wide variety of models that Assistance Mechanisms, both with respect to international investment law as well as those employed in other legal fields, have taken and may take to address various concerns. Models that are explored in depth in the Scoping Study include:

- **Institutionalized, multi-service support including legal representation of client governments.** Examples that are discussed in this category include the Advisory Centre on WTO Law, the African Legal Support Facility, and the International Development Law Organization's Investment Support Programme for Least Developed Countries, as well as an investment law "hotline".
- **Institutionalized, multi-service support not including legal representation of client governments.** 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), arbitration centers (such as ICSID, the PCA, and the SCC), and academic and non-profit centers (such as CCSI and IISD).
- **Financial or in-kind inputs.** Examples that are discussed in this category include arbitration trust funds (such as that provided by the PCA), third-party funding, contingent fee representation,

insurance products, and loans.

- **Pro bono, ad hoc legal and expert support.** Examples that are discussed in this category include IDLO's ISP/LDCs program along with other NGO and university-based programs (e.g. TradeLab) that deliver services to states on a no-cost basis.
- **Intergovernmental knowledge-sharing hubs.** Examples that are discussed in this category include formal opportunities for government officials to share knowledge (e.g. IISD's Annual Forum of Developing Country Investment Negotiators) as well as ad-hoc treaty-based or other networks.
- **Discrete capacity-building networks.** Examples that are discussed in this section include trainings and discrete capacity building offered by various Assistance Mechanisms, academic and non-profit institutions, law firms, and other governments, as well as Massive Open Online Courses.
- **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.

Key Considerations in Identifying Feasible and Desirable Options

Various cross-cutting issues emerged from analysis of and experience with existing Assistance Mechanisms. These cross-cutting issues should be considered by policy-makers as they consider the breadth and depth of services as well as the model(s) that an Assistance Mechanism could follow. The cross-cutting issues that are explored in depth in the Scoping Study include:

- 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;
- Institutionalized vs. ad hoc mechanisms;
- "Politics" surrounding the role of an Assistance Mechanism; and
- Intersection with other reforms.

Interviews and desk research reflect a great diversity of perspectives as to how capacity challenges should be prioritized and addressed, and highlight how each of these categories of issues can have crucial implications for the buy-in regarding and viability of any potential Assistance Mechanism.

Furthermore, interviews and research confirm the perhaps not unsurprising conclusion that capacity challenges in the ISDS system are often distinct from other legal systems, and that models used to address challenges in some systems are not readily transferrable to the ISDS context, at least as the ISDS system operates at present. For instance, features such as the asymmetrical nature of treaty-based ISDS cases (with states always respondents), and the significant number of legal and expert hours typically spent on ISDS disputes, distinguish ISDS cases from those under the WTO. These differences in capacity challenges, priorities in addressing them, the practicality and feasibility of doing so, and at what cost, raise questions about the model of Assistance Mechanism that is best suited to the investment law context.

Notably, and as the Scoping Study discusses, there have been several previous attempts to establish an advisory center on international investment law. 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 how a mechanism will be financed) and, perhaps moreso, small policy differences among and between states (such as the location of a mechanism), as an unanticipated difference of opinion can stall or halt efforts, even when the finish line seems near. Identifying such issues at an early stage is important for ensuring that paths pursued are possible and promising.

SME Capacity Challenges and Options for Addressing Them

Finally, the Scoping Study includes a section devoted to investors, with a focus on small and medium-sized enterprises (SMEs) as potential beneficiaries of any Assistance Mechanism. The Scoping Study revealed that although SMEs and states face some of the same issues with respect to their participation in ISDS, the rationales for, considerations regarding, and optimal modes of supporting each group may vary significantly.

The Scoping Study explores evidence related to SME use of ISDS, as well as the hurdles that SMEs are having in effectively relying on IIAs and ISDS as a method to limit risk and resolve disputes. The Scoping Study explores how one might determine the scope of beneficiaries who may benefit from an Assistance Mechanism, and identifies how some Assistance Mechanisms that are or could be made available to states are, or could be, available to SMEs to a greater or lesser extent than government respondents.

Overall, based on the hurdles experienced and concerns expressed, the Scoping Study considers the forms of an Assistance Mechanism that may best assist SMEs in overcoming ISDS access issues. These include an ombuds-type office, pre-dispute technical assistance, market-based Assistance Mechanisms, capacity-building models, and a model incorporating institutionalized defense and legal representation. Depending on the type of assistance that would be offered to investors, consultations suggested fairly widespread hesitation of, or even strong opposition to, also including investors as beneficiaries of an Assistance Mechanism that is created or expanded to benefit states, especially with respect to an Assistance Mechanism focused on supporting ISDS litigation.

Ways Forward in the Currently Evolving Context

International investment law and ISDS are evolving, and outcomes of that evolution remain uncertain. Those developments must be kept in mind when assessing needs, and the options for addressing them, as each may change in the short-, medium-, and long-term. An Assistance Mechanism developed to be sustainable will need to be flexible to accommodate these developments. It will be important to consider whether and to what extent concerns regarding IIAs and ISDS are best resolved through reforms to treaties and dispute settlement mechanisms thereunder, and whether and to what extent the costs of concerns that are not addressed should be shifted from beneficiaries of an Assistance Mechanism (e.g. certain respondent states and/or SMEs) to an Assistance Mechanism's funders (e.g. other states and their taxpayers).

With respect to both states and investors, this scoping study has set forth a wide variety of existing capacity challenges and detailed existing Assistance Mechanisms that are available. Depending on the issue, robust, some, or no assistance is currently available. 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.

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"). While general support was expressed for establishing an Assistance Mechanism, particularly as such a mechanism could complement other reform options being developed by WGIII, 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, 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.

Categories of Capacity Challenges Related to International Investment Law & Policy and Select Service Providers Profiled in Scoping Study

Broad Categories of Capacity Building Services →	Investment Policy-making (Section 2.2.1)	International Investment Agreement Negotiations (Section 2.2.2)	"hotline" (Section 4.1.4)	Domestic implementation of treaty obligations (Section 2.2.3)	Dispute Prevention (Section 2.3.3)
Select Existing Service Providers ↓					
United Nations Conference on Trade and Development (UNCTAD)	x	x		x	x
Organisation for Economic Co-operation and Development (OECD)	x	x		x	x
World Bank Group (not ICSID)	x	x		x	x
International Development Law Organisation Investment Support Programme for Least Developed Countries (IDLO ISP/LDCs)	x - outsourced	x - outsourced	x - outsourced	x - outsourced	x - outsourced
International Centre for Settlement of Investment Disputes (ICSID)				x	x
The Arbitration Institute of the Stockholm Chamber of Commerce (SCC)					
Permanent Court of Arbitration (PCA)					
International Institute for Sustainable Development (IISD)	x	x	x	x	x
Columbia Center on Sustainable Investment (CCSI)	x	x	x	x	x
TradeLab	x	x		x	x
International Senior Lawyers Project (ISLP)	x - outsourced	x - outsourced	x - outsourced	x - outsourced	x - outsourced
Ad hoc or treaty based state-to-state networks	x	x		x	x

Categories of Capacity Challenges Related to International Investment Law & Policy and Select Service Providers Profiled in Scoping Study

Broad Categories of Capacity Building Services →	Treaty Engagement and Management (Section 2.2.4)	Dispute settlement - claimant/complainant	Dispute settlement - respondent (Section 2.3)	Opinions (Section 4.1.1.3)	"capacity building" trainings (Generally discussed throughout Scoping Study)
Select Existing Service Providers ↓					
United Nations Conference on Trade and Development (UNCTAD)					x
Organisation for Economic Co-operation and Development (OECD)	x				
World Bank Group (not ICSID)					x
International Development Law Organisation Investment Support Programme for Least Developed Countries (IDLO ISP/LDCs)	x - outsourced		x - outsourced		x - outsourced
International Centre for Settlement of Investment Disputes (ICSID)			x - (dispute guidelines)		x
The Arbitration Institute of the Stockholm Chamber of Commerce (SCC)					x
Permanent Court of Arbitration (PCA)					x
International Institute for Sustainable Development (IISD)	x				x
Columbia Center on Sustainable Investment (CCSI)	x				x
TradeLab	x				
International Senior Lawyers Project (ISLP)	x - outsourced		x - outsourced		x - outsourced
Ad hoc or treaty based state-to-state networks	x				

Section 1. Introduction

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This Scoping Study on Securing Adequate Legal Defense in Proceedings under International Investment Agreements (Scoping Study) has been prepared for the Ministry of Foreign Affairs of the Netherlands.

The primary research question that this Scoping Study was requested to address is: How can adequate legal defense for parties in proceedings under International Investment Agreements (IIAs) be better secured?

1.1 Overview

The question of adequate legal defense for respondent states in investor-state dispute settlement (ISDS) proceedings is a timely and important one.¹ The number of claims against states, and defense costs incurred by them, continue to grow, and absent serious and systemic changes to the underlying treaties and national investment laws, or the dispute settlement mechanism provided for therein, show no signs of abating. Even if structural interventions to attempt to control costs of ISDS proceedings succeed, the costs of participation in any IIA-based, international dispute settlement mechanism are likely to remain financially challenging for many states, claimants, and others who engage in and with ISDS disputes. The issue of cost is also closely linked with quality, control, and trust, three other criteria participants in this legal system prioritize.

In undertaking this Scoping Study, CCSI has sought information that will assist policy-makers in understanding what is meant by “adequate legal defense” from the perspective of respondent states and other users of and stakeholders in the system of IIAs and ISDS, and the hurdles (financial and other) that respondent states and other users face in achieving this objective.

The paper follows the outline of our inquiry: As a first step, the study unpacks and provides greater clarity on what challenges states face in developing, advancing, implementing, and enforcing their investment law policies. Next, the study analyzes how and where existing organizations or programs are available to assist, financially or otherwise, states and other users in more effectively engaging in and with the IIA system, including in and with the ISDS mechanism (each such organization or program is generally referred to herein as an Assistance Mechanism), and where there are or seem to be assistance gaps. This is followed by an analysis of the different models any Assistance Mechanism (or Assistance Mechanisms) that could be developed or expanded upon may follow, again using and building on existing Assistance Mechanisms supporting investment policies, but also drawing on mechanisms used in other substantive legal areas, such as international human rights and criminal law.² This section is extensive as identifying what is needed first necessitates an analysis of what is already available, and benefits from an understanding of initiatives, considerations, and approaches in analogous contexts. The study then considers certain “cross-cutting” issues, or areas of consideration that apply to all models of Assistance Mechanism and should be considered and addressed during the process of creating (or expanding) any new Assistance Mechanism.

Finally, a section is devoted to investors, namely small and medium-sized enterprises (SMEs), as potential beneficiaries of any Assistance Mechanism. The Scoping Study revealed that although SMEs and states face some of the same issues with respect to their participation in ISDS, the rationales for, considerations regarding, and optimal modes of supporting each group may vary significantly. Moreover, much less is presently known about the particular experiences, needs, and priorities of SMEs with respect to ISDS than states.

Throughout all sections, CCSI's analysis draws heavily on advice and anecdotes provided during the course of consultations conducted for this Scoping Study, seeking to imbue lessons learned and advice provided throughout.

1.2 Methodology

1.2.1 Interviews

For purposes of this Scoping Study CCSI conducted in-person or phone consultations with a wide variety of individuals who engage in the IIA/ISDS system or who otherwise have experience relevant to Assistance Mechanisms available to states in international legal fora. CCSI prepared a consultation protocol and list of questions, attached as **Annex A**. This protocol served as the basis for each consultation, although depending on the nature and experience of the interviewee, certain questions were deemed more relevant and thus prioritized. In all cases, interviewees were encouraged to elaborate on responses beyond the scope of the question, and to provide information that the interviewee deemed relevant to the issue of potential Assistance Mechanisms even if such information did not respond to a specific question asked. The objective was to gain broad perspectives on the concerns that states and other stakeholders have regarding the ability of the current IIA/ISDS system to meet treaty-party objectives, broadly catalog what resources are currently available to address these concerns, identify where and to what extent there are gaps in support, and understand lessons learned from other Assistance Mechanisms (or failed attempts to establish Assistance Mechanisms).

While all perspectives that were expressed during interviews were taken into account and are reflected in this Scoping Study, CCSI deemed it of particular importance to attempt to understand and reflect the concerns expressed by and from the perspective of potential users of a possible Assistance Mechanism.

Such individuals or groups can best identify and articulate the concerns and hurdles experienced and are best placed to suggest or evaluate how a potential Assistance Mechanism may respond to any identified problem.

One or more members of CCSI staff conducted each consultation. Consultations ranged from bilateral, to small groups, to larger groups of up to roughly thirty individuals (although bilateral or small group interviews greatly predominated). All consultations were conducted under the Chatham House Rule, and thus while information received from consultations is included in this Scoping Study, neither the identity nor the affiliation of the interviewee is specified. CCSI has, however, identified interviewees by the following general categories:

- Government officials³
- 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 practitioners⁴
- Representatives of non-governmental organizations (NGOs)⁵
- Representatives of private sector foreign investors.

While consultations were conducted among a broad range of stakeholders, and the authors attempted to obtain input from a diverse range of individuals familiar with investment law and/or existing Assistance Mechanisms, the discussion below is reflective of the particular sample of interviewees, complemented by desk-based research.

1.2.2. Desk research

In addition to interviews conducted for this Scoping Study, CCSI staff undertook desk-based research in the English language.

Section 2.

Contours of the Current International Investment Agreement Regime

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Many governments around the world are thinking critically about their IIAs, the ISDS mechanism that is frequently contained in them, and, more broadly, the role that IIAs are playing, and should be playing, in states' broader investment policy and development objectives. This critical analysis has stemmed from a confluence of factors. In recent years ISDS claims have dramatically increased. The resolution of these cases, whether by pre-award settlement agreement or through issuance and payment of an award, can involve extremely high sums. These include costs of the arbitration proceedings (legal fees, expert fees, arbitrator fees, institutional fees, and other arbitration costs) and damages.

In addition to direct costs that IIAs and ISDS claims can impose on states through claims and awards, other indirect costs can also pose challenges. For example, states may suffer reputational damage as a safe destination for foreign investment from the mere filing of an ISDS claim.⁶ In addition, states are increasingly aware of the value and necessity of keeping abreast of developments in investment law, participating as non-disputing state parties in claims involving a state's treaties, and entering into joint interpretations regarding, or unilaterally clarifying, their treaty language and intent. These efforts create a resource burden for states, and in some cases remain insufficient to ensure that development of investment treaty law and practice align with states' investment policy and legal preferences and intentions.

Efforts to better align IIAs with broader investment policy objectives are occurring in various fora and are based on uni-, bi-, pluri-, and multilateral efforts. For example, states have developed and are negotiating new model agreements, have entered into joint interpretations to clarify existing treaties, and have terminated treaties that no longer meet policy objectives or legal obligations.

However, despite these efforts, fundamental disparities between and among states will likely persist, many stemming from the significant costs of the IIA regime and ISDS mechanism.⁷ ISDS remains a costly endeavor, and those costs are disproportionately felt by developing country states and the stakeholders within them. Developing countries are more commonly on the receiving side of claims than developed countries;⁸ and the same amount expended on defense and/or liability awards represents a greater

share of government revenue and expenditures than for developed country respondents in absolute terms, on a per capita basis, and as a share of GDP.⁹

It is against this background that Assistance Mechanisms to help countries that may find participation in the IIA/ISDS system difficult have been proposed and are currently being explored. In its 37th Session, UNCITRAL's Working Group III (WGIII) the potential was raised for an advisory center to be established as part of the various solutions that it will develop to address concerns about ISDS, and in its most recent 38th Session WGIII discussed in greater depth the ways in which the creation of an Assistance Mechanism may be advanced, and tasked the UNCITRAL Secretariat with conducting further research to assist the WGIII in further advancing this objective.¹⁰

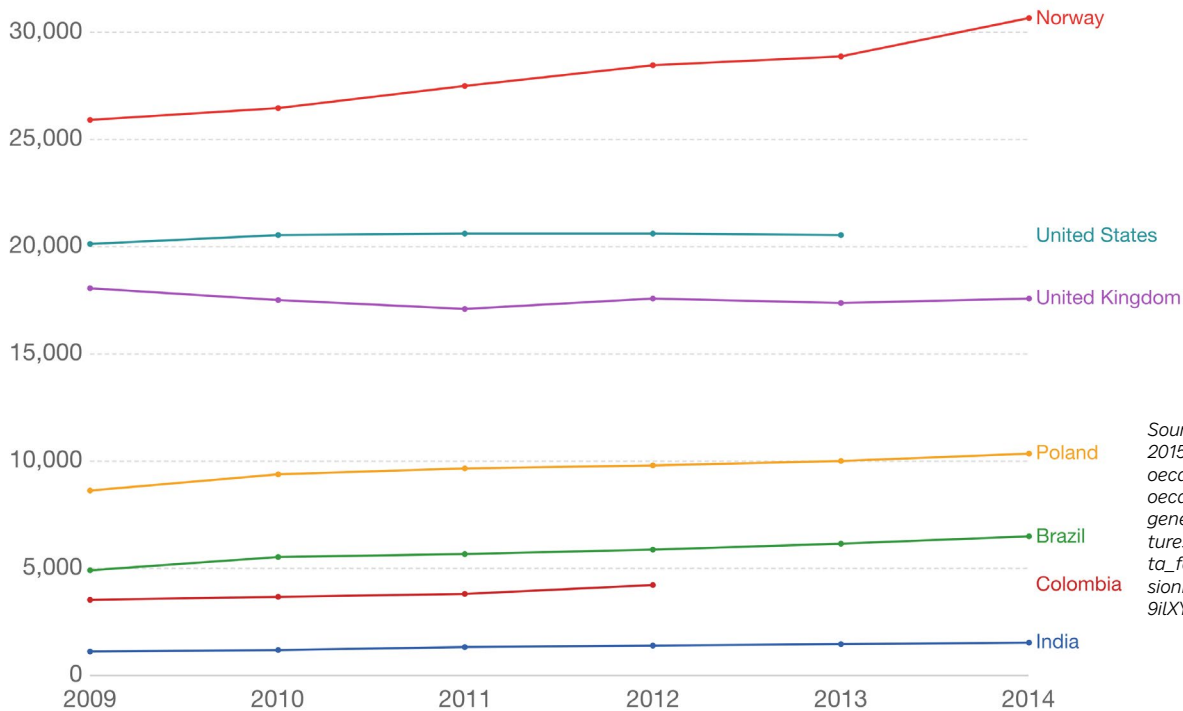
2.1 Identifying capacity challenges

A consistent and recurrent theme that emerged in Scoping Study consultations with government officials, in particular, and within all categories of interviewees more generally, was the issue of capacity; the lack of it, the desire for more of it, and, the potential role for an Assistance Mechanism to assist with its development. The lack of sufficient capacity was identified as a particular problem in the context of actual defense of ISDS claims – with respect to either managing the defense in-house or managing outside counsel – but was also a concern identified with respect to a wide spectrum of investment-law related areas, such as policy development, treaty negotiations, dispute prevention, and the management of and decisions required to be taken in the context of actual disputes.

For example, many interviewees noted that some countries do not have a critical mass of officials who possess sufficient technical knowledge about treaties and disputes required for informed decision-making with respect to treaty negotiations,¹¹ investment policy-making,¹² or to effectively engage with and manage outside counsel during the course of ISDS disputes. They cite difficulties in inter-ministerial coordination and agreement. They are unaware of, or unable to effectively seize, opportunities to participate as non-disputing treaty parties. Even when a country has coherent investment policy objectives, implementation, at international and domestic levels, can present insurmountable hurdles.

Figure 1 Total Government Expenditure per capita (\$PPP)

Total government expenditures across all levels of government. Expenditures include intermediate consumption, compensation of employees, subsidies, property income, and social benefits.



Source: OECD Factbook 2015-2016 https://www.oecd-ilibrary.org/economics/oecd-factbook-2015-2016/general-government-expenditures-and-revenues-per-capita_factbook-2015-79-en;jsessionid=uKq6khJ2ZwN59gk-9iIXYt_Xw.ip-10-240-5-23.

Several interviewees stated that “capacity” is a vague term, and what is needed is actual knowledge transfer. Achieving actual knowledge-transfer in the context of legal assistance requires dedicated thought and planning, and a nuanced understanding of the context in which “capacity building” is intended to occur, and what the specific needs are of the intended beneficiaries.¹³ It was suggested in CCSI’s consultations that abstract and more general technical “capacity building” trainings may have a certain value but are insufficient, without more, to achieve even narrow capacity objectives.¹⁴

Particularly with respect to disputes, several interviewees described the minimum desirable level of required capacity on the part of government officials engaged in investment law disputes as something beyond a general understanding of the substance of treaties and procedure of an arbitration. Rather, the minimum desired level of capacity was described as officials possessing the ability to effectively engage with outside counsel on a technical level, and, importantly, to have the confidence to “say no” to such outside counsel. In other words, the ability to take the advice of counsel to supplement an official’s

own knowledge and ability to make informed decisions in the interest of the state was the minimum amount of capacity deemed to be sufficient.

The ability to internalize knowledge sufficient to make informed decisions and effectively manage cases has both substantive and financial implications for a state. On the substantive side, states, as masters of their treaties, and whose practice and *opinio juris* contribute to customary international law, place a high value on controlling interpretation and application of their international legal obligations. On the financial side, “the less sophisticated the local government officials, the more work a private firm can and will bill because they have to do everything. A sophisticated team inside the government leaves less work to be done and less billing to be had for outside counsel.”¹⁵ In order to effectively manage outside counsel, government officials must fully understand substantive and procedural elements of disputes to ensure that the matter does not escape from their hands, “and even then, this is not easy.”¹⁶ Even if countries continue to rely on outside counsel and other experts to represent them in investment law issues, including disputes, internal capacity development required to be able to effectively engage with and manage outside counsel is a critical issue for states.

However, many individuals consulted during the course of this Scoping Study described capacity challenges that went far beyond the technical ability to engage with outside counsel during the course of disputes. Thus, the question of what, exactly, is meant by capacity in different contexts, and how such capacity can be “built” is important to the consideration of an Assistance Mechanism for international investment law. While it may be that states decide that it is not the objective nor role of an Assistance Mechanism to address any or all capacity challenges, it is at least a purpose of this Scoping Study to identify them for consideration by policymakers when developing or expanding an Assistance Mechanism.

Contributors to Pauwelyn and Wang’s 2019 edited volume, “Building Legal Capacity for a More Inclusive Globalization” perceive capacity in different yet interrelated ways, each of which has implication for the identification of capacity challenges, and for any potential efforts to foster capacity building.¹⁷ For example, capacity can be dichotomized into broad or narrow categories, where narrow capacity refers to technical expertise in a specific substantive area, and broad capacity considers the ability of governments to be aware of and promote their national interests and effectively participate in an international legal system.¹⁸ Capacity can also be temporally-categorized, looking at short- and long-term pillars, where a short-term need may simply and urgently be prevailing in an ISDS dispute.¹⁹

Capacity can also be viewed through the lens of intersecting and interdependent levels of the professional development of individual government officials, as well as the capacity of organizational and institutional levels to effectively shape and manage investment policy objectives,²⁰ or at the inter-related categories of international legal, political, and economic capacity necessary to participate in a rules-based global economy.²¹

The capacity necessary for a state to effectively and efficiently participate in international, economic rules-based systems is nuanced, context dependent, and multidimensional. In a 2009 study assessing capacity challenges in the trade context, Busch, Reinhart and Shaffer found that general proxies commonly used to categorize “capacity,” including per capita income and GDP, were inaccurate and generally did not correlate to a more rigorous assessment of state

capacity in the WTO context, as those proxies did not capture or measure areas where governments actually have capacity challenges in participating effectively in the WTO system.²²

Underscoring the unique contexts of sovereigns participating in an international legal system, Jeremy Sharpe has linked capacity directly to the legitimacy of the investment law system itself. The legitimacy of ISDS “rests in part upon states’ ability to understand and comply with their legal obligations, effectively defend against investor claims, and keep the law on a sensible track. Capacity thus is an integral part of the legitimacy and viability of international investment arbitration.”²³

Throughout this Scoping Study, concerns identified by states, and by other interviewees, are identified, and existing Assistance Mechanisms surveyed. Various forms that an Assistance Mechanism in international investment law may take are discussed. Depending on the desires of policy-makers in this context, any Assistance Mechanism may respond to narrow or broader needs of beneficiaries, and either approach may involve trade-offs, which ideally would be assessed and understood *ex ante*.²⁴ Narrow approaches to addressing capacity challenges may be inadequate or irrelevant to address broader development needs in the context of investment policy.²⁵ At the same time, a narrow approach may fill a gap or complement or build upon other Assistance Mechanisms, or may more effectively respond to an urgent and immediate need of the beneficiary. States may decide that capacity building should be a pillar of any Assistance Mechanism or may decide that an Assistance Mechanism is not intended to fill or develop all gaps in capacity, but to address limited areas of concern and narrow capacity challenges.

The question of what is meant by capacity is thus critically important. The identified concerns of users of the IIA/ISDS system can be characterized in many ways by different conceptions of capacity. A nuanced consideration of the “capacity needs” from the perspective of intended Assistance Mechanism beneficiaries is thus critical to unpack and understand because it forms the basis for identifying the problem that any Assistance Mechanism might seek to remedy.²⁶

2.2 Stocktaking: Identified concerns and existing Assistance Mechanisms available to states in IIA-related areas other than disputes

Various existing Assistance Mechanisms provide legal and/or policy advice to states to support them in areas of: investment policy-making, IIA negotiation, implementation and management of their IIA policies, dispute prevention, pre-dispute management and consultations, management of notices of intent, and management of active disputes. Existing support available to states at each of these phases of investment policy-making, short of management of notices of intent and active disputes are discussed in this section, whereas management of notices of intent and disputes, the more formalized steps in the dispute process, are discussed separately in the following section. Satisfaction, criticisms, or gaps identified by interviewees with respect to specific Assistance Mechanisms or general topical areas are also identified and discussed.

2.2.1 Investment policy-making

International investment law responds to, and raises, myriad policy questions: What do states want from international investment (inward and outward)? What are the policy tools they can use to achieve those objectives? What are the costs and benefits of different policy tools, and how are those costs and benefits distributed across stakeholders within and across countries?

These issues are being discussed in different fora at national and international levels. The field is busy and multifaceted. The Financing for Development agenda is, for instance, bringing governments, the private sector and others together to identify ways to increase international investment (including FDI) in the places and with respect to activities necessary to advance sustainable development, and to prevent such capital movements and interests from undermining achievement of the Sustainable Development Goals;²⁷ there are structured discussions on investment facilitation taking place at the WTO; there are national, regional, and international policy-assessment and -making initiatives on investment screening,

with governments and other stakeholders examining and updating policies on whether and how to review inward and outward flows of capital; there are domestic reviews of IIA policies and practices, including efforts by legislatures/parliamentarians and others to investigate the aims and performance of those treaties; and there are corresponding discussions on IIA policy and reform taking place at United Nations Conference on Trade and Development (UNCTAD), the United Nations Commission on International Trade Law (UNCITRAL), and the Organisation for Economic Co-operation and Development (OECD), albeit with varying levels of formality, breadth, and inclusivity. With respect to policy-formulation, as discussed below, these international organizations' mandates are broad and there is high potential for any additional Assistance Mechanism to duplicate efforts or create other tensions with existing mandates.

It is important to recognize the multidimensional aspects of and interlinkages among these fora and issues, and the difficulties government officials and other actors may consequently encounter both in staying abreast of the developments that do or may affect them, and in ensuring policy coherence across relevant issue areas. The complications are substantive as well as logistical. Relevant discussions are taking place across issue areas and fora, meaning that they are not being exclusively handled by officials in government capitals, or permanent delegations sitting in one place, such as New York or Geneva. Governments with limited resources to staff investment policy teams and to travel to conferences, meetings, and negotiations may struggle to follow and engage in the relevant dialogues and processes, much less find the time and resources to proactively develop positions with other government officials, agencies, and stakeholders at home, and then articulate and advance (or defend) their country's interests, concerns and priorities at the international level.

The resources, knowledge, and skills required for these policy formulation and articulation activities are essential ingredients for the other activities discussed throughout this Scoping Study including IIA negotiation and ISDS defense. While there are various initiatives to support countries in these activities – reviewing, assessing, and developing investment policies – there are limitations and gaps. Content, for instance, may fail to reflect the diversity of perspectives on investment policy, options for policy-makers, or implications for different issues and actors. Additionally, support may

target some actors within government (e.g., treaty negotiators), but not reach others (e.g., civil society, parliamentarians, state and local officials, officials responsible for other relevant areas of domestic law and policy) with a stake in the content of investment (and IIA) policy, and whose understanding, buy-in, and acceptance of policy decisions may be crucial for ultimate policy effectiveness. Moreover, even if legal or other financial assistance is available, some governments have turned down offers of policy-making support because of perceived conflicts of interests on the part of the service provider (i.e. that the advice would not necessarily be in the state's best interest) or divergences in ideology between the state and service provider as to the role that investment policy-making should play in advancing the state's development objectives.²⁸

Some of the gaps in resources, knowledge and skills 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 15 years in particular. But much of that remains behind paywalls,²⁹ and much is produced only in English. Non-English-language sources are also infrequently translated, making it difficult to share resources, knowledge, and insights across language barriers.

The subsection below profiles the major existing investment policy-making initiatives and publicly available resources identified through this Scoping Study that are most relevant to IIAs and ISDS.

2.2.1.1 Existing investment policy-making initiatives

2.2.1.1.1 UNCTAD

UNCTAD is an intergovernmental organization with key mandates related to investment policy-making. For example, the UN Financing for Development Conference has requested UNCTAD to continue its program of meetings and consultations with Member States related to investment agreements, and the UNCTAD 14 Conference (July 2016) mandated UNCTAD to develop and promote a new generation of investment promotion and facilitation strategies, institutions, and best-practice policies to align investment with inclusive and sustainable development objectives.³⁰

UNCTAD's work is based on three activity pillars: research and analysis, international consensus building, and technical assistance and advisory services. These services are discussed in greater depth here and in other sections of this Scoping Study.

UNCTAD has comprehensive resources available to all states with respect to investment law policymaking. UNCTAD's Investment Policy Framework for Sustainable Development, launched in 2012 provides guidance for investment law policymakers moving toward a new generation of international investment agreements.³¹

The Investment Policy Framework consists of Core Principles that frame three different action menus focused on: national investment policies, international investment agreements, and investment promotion for sustainable development.³² These Core Principles set forth a set of "design criteria" that can assist states in integrating investment policy into overall sustainable development strategies.³³ The National Investment Policy Guidelines then translate the Core Principles into concrete guidelines applicable at the national level in order to ensure that investment policy is coherently integrated into other policy areas.³⁴ Finally, the Policy Options for IIAs translate the Core Principles into concrete options for those international instruments.³⁵

Based on the Investment Policy Framework, UNCTAD provides on-demand reviews of a country's model investment treaties and IIA network. Since 2012, seventy-five countries and regional economic organizations have benefitted from such reviews.³⁶ UNCTAD has also provided comments or inputs into the development of regional investment treaties, such as the African Continental Free Trade Agreement's investment protocol and the Common Market for Eastern and Southern Africa Investment Area.

UNCTAD also has an Investment Policy Review (IPR) program that provides developing countries and countries with economies in transition concrete recommendations to improve policies, strategies and institutions for attracting and benefiting from FDI.³⁷ The IPR process is country-specific and involves:

1. The review of the policy, regulatory and institutional environment for investment;
2. The identification of strategic investment priorities consistent with the SDGs and in line with national development objectives; and
3. A set of concrete recommendations.³⁸

UNCTAD offers follow-up support with respect to implementing its recommendations.³⁹ In the past 20 years, UNCTAD has conducted IPRs in more than fifty countries.⁴⁰

UNCTAD also supports policy engagement, dialogue, and knowledge sharing at its World Investment Forum, conferences, and other intergovernmental meetings,⁴¹ as well as in trainings it organizes and attends. As part of its technical assistance activities, UNCTAD has built on its policy research and analysis and has trained approximately 500 government officials on key IIA and ISDS issues (mostly as a part of regional training courses).

UNCTAD makes publicly available a wealth of information on international investment law, including UNCTAD's own work and analysis as well as publicly available investment laws, treaties, awards, and other related materials, through its Investment Policy Hub, which is described further in Section 4.2.1.⁴²

Key to UNCTAD's success is its unique ability to reinforce its work through its three interdependent pillars of research and analysis, technical assistance, and intergovernmental consensus building. Through expert meetings, workshops and regional conferences (all with capacity building elements), training materials, advisory services, and providing access to databases, best-practices, and online fora (e.g. blogs) UNCTAD has been successful in improving the institutional capacity of beneficiary countries, technical capacity of officials, and in raising the role that international investment can take in pursuit of the SDGs.⁴³ Beneficiaries of UNCTAD's

support report high satisfaction rates, but acknowledge that for ensuring the sustainability of project activities, challenges lie in the level of institutional capacity, which is largely the responsibility of national governments.⁴⁴ The sustainability of UNCTAD's project results is impacted by the institutional capacity of the applicable country.⁴⁵

Country beneficiaries of UNCTAD's support have stated satisfaction with the UNCTAD policy-option menu and for the comprehensive guidance on investment policymaking for sustainable development.⁴⁶

2.2.1.1.2 OECD

Under the direction of its Investment Committee, the OECD advances investment policy reform and international co-operation in a number of ways with the unifying aim of improving the contribution of international investment to growth and sustainable development worldwide.

The OECD's Policy Framework for Investment (PFI) forms the basis for national Investment Policy Reviews (IPRs).⁴⁷ IPRs reflect the OECD's mission to help governments enhance their investment climate through peer learning and sharing best practices. Some IPRs are undertaken as a part of the adherence process to the OECD Declaration on International Investment and Multinational Enterprises.⁴⁸ In other cases, non-member countries, including major emerging economies, undertake IPRs to benchmark their investment policy against OECD best practices. While it is possible for a country to undertake its own self-assessment based on the PFI, in practice the assessment is typically conducted by an inter-ministerial task force in coordination with the OECD.⁴⁹ Completed IPRs involving around fifty countries are available on the OECD's website.⁵⁰ The OECD's IPR unit is currently working on IPR projects with Egypt, Myanmar, Thailand, Indonesia, Georgia, Morocco, Uruguay and Bulgaria.

The OECD's PFI looks at twelve different domestic policy areas that have a particular impact on investment (including with respect to investment treaties): investment policy, investment promotion and facilitation, competition, trade, taxation, corporate governance, finance, infrastructure, developing human resources, policies to promote responsible business conduct, investment in support of green growth, and public governance.⁵¹ The PFI is structured as a checklist setting out key elements in each policy area permitting policy strands to be considered together in order to ensure policy coherence.⁵²

The PFI has been used for capacity building and private sector development strategies by bilateral and multilateral donors.⁵³ It has also been used as a basis for dialogue at a regional level for countries in the Middle East and North Africa (MENA) region, Southeast Asia, Latin America and the Caribbean.⁵⁴ OECD regional programs on investment involve strategic partnerships between OECD-member and non-member governments to share knowledge, expertise and good practices with the aim of contributing to the development of inclusive, sustainable and competitive economies across the regions involved.⁵⁵

The OECD Investment Committee also hosts the Freedom of Investment (FOI) Roundtable, an intergovernmental forum that brings together sixty-two economies from around the world together with representatives from the private sector, civil society and other stakeholders, to support countries' efforts to maintain and extend open, transparent and non-discriminatory policy frameworks for international investment. Through analysis and regular multilateral dialogue, the Roundtable promotes the sharing of experiences with investment policy design and implementation. It also helps countries to address policy concerns that international investment may raise. Policy monitoring by Roundtable participants promotes observance of countries' international investment policy commitments, including those taken under the OECD investment instruments and in the context of the G20. The OECD Secretariat also produces extensive, technical research support and analysis for the FOI Roundtable – primarily on investment treaties and investment policies related to national security – which is made publicly-available on a dedicated webpage together with summaries of discussion from meetings of the FOI Roundtable.⁵⁶ Recent FOI Roundtable discussions have focused on

the balance of investor protection and governments' right to regulate in investment treaties; arbitrators, adjudicators and appointing authorities; and the societal benefits and costs of investment treaties.

The OECD's Investment Committee and its subsidiary bodies also provide fora for policy dialogue and analysis on a wide range of other topics related to investment policy, including responsible business conduct, green finance, investment promotion and facilitation, linkages between trade and investment, infrastructure investment, MNE divestment decisions, sustainable development indicators, and FDI statistics. The OECD Secretariat publishes all of its analytical work on investment policy on a dedicated webpage.⁵⁷

2.2.1.1.3 World Bank Group

The World Bank Group's (WBG) Investment Policy & Promotion Team (part of the Investment Climate Practice Group under the Trade and Competitiveness Global Practice), supports client countries in attracting, facilitating, and retaining different types of FDI, as well as maximizing positive spillover effects.⁵⁸ The WBG provides direct technical assistance to governments in developing an FDI strategy and reform map, improving the effectiveness of policies and efforts aimed at attracting and facilitating FDI, promoting good practices and improving the effectiveness of investment incentives, and promoting a legal and regulatory environment that reduces investment risk, including by focusing on reducing investor risk through IIAs and national investment laws.⁵⁹ The World Bank also helps countries to establish dispute prevention policies and practices (discussed further in Section 2.3.3).⁶⁰

The WBG's work on investment law forms a part of its broader approach of "Maximizing Finance for Development."⁶¹ Pursuant to this initiative, WBG institutions including the International Bank for Reconstruction and Development,⁶² the International Development Association,⁶³ the International Finance Corporation,⁶⁴ and the Multilateral Investment Guarantee Agency,⁶⁵ work in concert to achieve the development objectives by improving the investment enabling environment, developing regulatory conditions, building domestic capacity, putting in place standards related to investment, financing initial investments (a first mover or innovator), and reducing risk.⁶⁶ This represents a shift toward a much more

coordinated approach to the public and private sides of development, using four WBG institutions to consider a broader spectrum of solutions, consider public and private opportunities and risks, and facilitate financing opportunities.⁶⁷

2.2.1.1.4 Ad hoc investment law trainings, workshops, and dialogues

While a multitude of trainings on investment law aimed at boosting technical knowledge and understanding are available to government officials, several of these trainings focus more specifically on investment law policymaking. Initiatives in this category include (among others):

- International Institute for Sustainable Development (IISD) Annual Forum of Investment Negotiators⁶⁸
- Columbia Center on Sustainable Investment (CCSI) Executive Training on Investment Treaties and Arbitration for Government Officials⁶⁹
- Trainings held around and focused on specific treaty or policy negotiations
- UNCTAD's various training workshops and other events focused on technical knowledge (see Section 4.2.1)
- OECD events, including Freedom of Investment (FOI) Roundtables, annual conferences on investment treaties and investment policies related to national security, Investment Treaty Dialogues and other events.⁷⁰

2.2.1.1.5 Other ad hoc technical assistance

Some technical ad hoc investment policy-making assistance provided directly or indirectly by several non-profit organizations is available to states at a no or low-cost basis. Certain organizations, such as the International Development Law Organization's Investment Support Program for Least Developed Countries⁷¹ (described further in Section 4.2.3), and TradeLab⁷² (described further in Section 4.6.2) are available to address discrete or general policy issues or questions upon request by states or other parties or stakeholders by matching appropriate support providers with the requesting beneficiary. Other non-profit and/or academic organizations, such as CCSI and IISD, among others, provide this kind of specific

technical assistance directly to requesting governments.

Unless a government is able to finance the time and expense of the non-profit service providers, these organizations require a sufficient level of outside grant funding. Even if the services provided are limited to matching governments with law firms or other service providers, funding is needed for staff and overhead necessary to perform those tasks.

2.2.2. IIA negotiation

Activities related to formulation of investment law and policy are a broad category and overlap with IIA negotiation activities. But negotiation activities represent a discrete subset imposing particular and often time-sensitive demands on governments. Negotiation needs often involve translating policy objectives into specific language or reacting to specific language proposed by a negotiating counterparty. Adequate internal government policies and procedures must be in place to ensure a coherent and effective approach to these activities.

Desk research and consultations conducted for this Scoping Study demonstrate that "capacity" in the context of treaty negotiation is multifaceted and hints at both gaps in ability to identify and articulate concerns, organizational hurdles to doing so, and systemic obstacles to overcome to ensure policy priorities are reflected in treaty outcomes.

While narrow, in-house technical capacity is deemed insufficient to address all of these issues, it is nonetheless considered to be an important objective. A certain level of in-house capacity was deemed important because it was recognized by interviewees that in many cases negotiation assistance is not neutral assistance, but rather comes from the perspective of the assisting party (and its interests) and not necessarily the interests of the negotiating state. Treaty negotiation support offered by private sector law firms was specifically identified as cause for hesitation, although international organizations were also highlighted as having their own mandate that does not necessarily mirror the interests of the state. One interviewee who was involved in establishing an existing Assistance Mechanism stated bluntly "I will say this: firms are terrible at giving advice on treaties. Generally speaking, they are private litigants and that is a really big risk you run."⁷³ Another noted an automatic tendency of both private-sector as well as international

organization advisors to include standard arbitration provisions in treaties without considering the state's broader investment policy interests or priorities.⁷⁴

Government officials interviewed for this Scoping Study who noted these issues stated that it was one distinct cause of concern when support is offered (or provided) that is not (or not perceived as) "neutral" or in the state's interest, but that the mere availability of this kind of support can also cause separate but related concerns. It was stated that an official making the decision to turn down outside assistance (for this or other reasons) must then be personally accountable domestically for that decision, and all of its implications, and "many officials will not take that risk" and will accept assistance offered even if it is not perceived to be in the state's best interest.⁷⁵ These dynamics are important when considering where and from whom external assistance is offered, and it is thus important that potential users of an Assistance Mechanism manage decision-making over the structuring and placement of an Assistance Mechanism.⁷⁶

However, it was stressed that even when advisors may have conflicts of interest, it cannot be assumed that the advice given will not be in the state's interest, and more importantly, in many negotiations highly technical and skilled legal and/or policy advisors can be extremely valuable to the state and its decision-making process. Therefore, at a basic level, it was expressed in consultations there must be a minimum level of technical capacity within the government to be able to evaluate the advice and determine whether it is in the interest of the state, and accept, reject, and/or use it accordingly.⁷⁷

Some existing Assistance Mechanism models specifically focus on treaty negotiation support for government officials. These initiatives (which, as discussed below, are only available to a limited extent in the investment treaty context) include timely assistance to negotiators with legal and policy questions about issues under negotiation; and supporting negotiators' travel to and attendance at negotiations.

Other initiatives that in some cases extend support beyond treaty negotiators are also viewed as important for helping ensure that negotiators (and other officials) are able to effectively identify, and make the case to negotiating counterparties, what the country's needs and priorities are, what is, and is not, negotiable, and what needs to be specially addressed through non-conforming measures provisions, annexes, and exceptions.

While at least one high-income government official interviewed felt that existing Assistance Mechanisms provide sufficient investment law negotiation support for developing countries,⁷⁸ this sentiment was not echoed among low and middle-income government officials. For example, one official from a lower middle-income economy that does not have well-developed and consistent approach to investment policy, and which has not developed a model investment agreement, stated that the country's negotiators "accept most of what the negotiation counterparty brings to the table."⁷⁹ One interviewee noted "copy and pasted sections" from one treaty to another.⁸⁰ One interviewee with experience working at an arbitration center, noting that treaty negotiation support can greatly impact ISDS dispute outcomes, commented on certain very poorly drafted treaties that have and can lead to confusion among policy-makers and can exacerbate issues surrounding disputes.⁸¹

Relevant IIA-negotiation-related activities for an Assistance Mechanism may include support for analysis of potential social, environmental, and economic impacts of particular agreements under negotiation; and support for intra-governmental and multi-stakeholder consultation and engagement on negotiating objectives and priorities (which can also be crucial for subsequent ratification and implementation of agreed texts). For example, one upper middle-income government official said that its country's negotiators struggle with finding the adequate balance of protection of foreign investors and ensuring that local companies retain comparable rights, because it is difficult to anticipate, and analyze, treaty impacts on domestic SMEs.⁸²

Similarly, in addition to understanding and communicating the country's needs and priorities at the required level of detail during the course of negotiations, it may be important for negotiators to have support in development of negotiation strategies and tactics and forming alliances. Performing well in all of these areas may be difficult for many states. One reason may be that treaty negotiation is not necessarily the primary focus of certain officials' jobs, or they transition between subject areas and are unable to gain sufficient expertise in the specifics of investment law.⁸³ Another is that ultimate decision-makers may agree to or sign an agreement containing provisions with which treaty negotiators disagree or do not support, particularly when a political decision has been taken to sign a particular IIA.⁸⁴

Broader structural concerns were also identified during interviews. For example, one official from a lower middle-income state felt that technical capacity at the negotiating table can be critical in negotiations and lead to successes in certain discrete areas.⁸⁵ However, in instances in which the negotiating power of the parties is significantly disproportionate (e.g. negotiations between primarily capital exporting/importing states), this and several other government officials agreed that regardless of technical negotiating capacity on the part of specific officials, at the end of the day, politics and power-dynamics will prevail.⁸⁶ Higher income economies may simply be unwilling to move from a certain position, even with respect to issues the lower-income economy has identified as a particular concern, and even when that country is negotiating from a technically skilled capacity.⁸⁷ While all countries likely have certain non-negotiable positions, there was concern among some interviewees that some states become particularly rigid when broader power (im)balances are factored in.

Looking broader still, VanDuzer has identified systemic barriers that may prevent developing countries from adopting new and better approaches to IIAs that go well beyond the negotiating table.⁸⁸ Noting that unlike in trade negotiations, where there may be a more balanced give and take because developed countries also need to compromise, the objective of a developed country in an IIA negotiation may be much simpler – maintain a model as close to the developed country's as possible.⁸⁹ While certain

low or middle income countries may be able to maintain stronger adherence to their own models, or certain elements within their models, many low and middle income economies are not similarly situated. Evidence of this effect may be gleaned from the continued dominance of developed-country treaty models, which tend to incorporate developing country interests only when the developed country revises its own model in a host-friendly way.⁹⁰ To the extent resources exist to help developing countries identify and articulate their interests, these resources may be insufficient to address these systemic hurdles.⁹¹ Moreover the inability of developing countries to achieve successful negotiation of their models has systemic effects as it perpetuates the pervasive fragmentation and patchwork of obligations that characterize developing country treaties and may make compliance more difficult.⁹²

An example of these issues is potentially reflected in the variation in how different countries are identifying, articulating, and protecting existing and future non-conforming measures in their treaties, with developed countries in a number of treaties carving out more from these types of treaty obligations than their developing country counterparties. Table 1 shows outcomes from the bilateral investment treaties that Canada has signed with countries over roughly the past five years (from 1 January 2014 - 1 January 2019). Table 1 indicates the number of reservations that Canada and its treaty parties each included in their respective annexes to shield certain sectors and policy areas from restrictions on pre- and post-establishment national treatment obligations, restrictions on performance requirements, and/or restrictions on requirements relating to boards of directors, senior management, and entry of personnel. These disparate practices may be due to any of a number of factors, including disparities in negotiating parties' respective mandates from other domestic actors; abilities to identify the issues and sectors for which it is useful to retain policy space; understanding of whether/when a carve-out is necessary to retain that policy space; and/or other capacity to achieve a successful negotiated outcome.

This example also demonstrates that the texts of treaties themselves may impose asymmetrical obligations, which has implications for: the costs and benefits that each treaty party will experience from the treaty, the nature and flow of costs and benefits that accrue to each treaty party from the concluded agreements, and treaty parties' exposure to and ability to manage exposure

to ISDS cases.⁹³ However, even in instances where the language of a treaty formally imposes identical obligations on each treaty party, the (nearly or completely) unidirectional flow of investment between the parties may mean that the commitments are not of equal practical significance for the states.⁹⁴

The challenges in closing power and capacity gaps in the negotiation context is likely exacerbated by the relatively decentralized nature of international investment law. In contrast to other negotiations, such as negotiations under the United Nations Framework Convention on Climate Change, and under the World Trade Organization, there is no central hub of activity or Secretariat. Instead, separate bilateral, plurilateral, and multilateral (e.g., the Energy Charter Treaty and other negotiations between overlapping states) negotiations on IIAs, which may be stand-alone agreements or chapters in larger trade agreements,

can proceed in parallel. Without attention to this aspect of investment law it may be difficult for an Assistance Mechanism to help states close capacity gaps related to negotiations. The decentralized nature 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.

Section 2.2.2.1 below offers some examples of relevant initiatives pertaining to investment treaty negotiation. The text boxes also provide some illustrations of support for negotiators in other processes that could be useful to consider in the context of IIA negotiations (Box 1, Box 2, Box 3). Then, Section 4.2.1 provides more detailed information on another institution, the Advisory Centre on WTO Law (ACWL), that provides negotiation support in the WTO context.

Table 1 Reservations Protecting Non-Conforming Measures in Sectors & Policy Areas

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

2.2.2.1 Existing and past investment law treaty negotiation initiatives

Several existing and past initiatives provide or have provided technical support surrounding negotiations, whereas others provide or have provided financial support to allow negotiators to travel to relevant conferences and negotiations.

One lower middle-income government official said that in accepting financial support, particularly in the context of negotiations, conflicts of interest can easily arise, and that as a government it is important to accept that you cannot attend without the assistance, but remain intellectually divorced from the support provider and ensure that negotiations proceed with only the best interests of the state in mind.⁹⁵

2.2.2.1.1 UNCTAD facilitation rounds

In the late 1990s through mid-2000s, UNCTAD organized “facilitation rounds” to support negotiation of IIAs.⁹⁶ These facilitation rounds brought country officials together to sign agreements. UNCTAD promoted the process by bearing the costs of travel, full board, and lodging for developing country officials as well as organizing the necessary facilities and substantive support. The process began in 1999, when UNCTAD organized a negotiation round after G-15 governments had encouraged UNCTAD to help them conclude BITs to ‘further promote economic cooperation and FDI’. The round was sponsored by the Swiss government and the United Nations Development Programme (UNDP).

Since around 2012, with the launch of UNCTAD’s Investment Policy Framework for Sustainable Development, UNCTAD has focused its research, policy analysis, and technical assistance on activities that make the IIA regime more sustainable and development friendly. While providing policy options for treaty elements, UNCTAD draws attention to the strategic decisions policy-makers need to make when designing a “new generation” of investment policies, such as embedding investment policies into national development strategies, considering the pros and cons of signing IIAs, and options for terminating treaties that are no longer serving development objectives.

UNCTAD provides technical assistance in the form of model treaty and IIA reviews for states as well as for regional economic integration organizations.⁹⁷

Box 1 Government-funded, think-tank/civil society/academically delivered, support for climate negotiators

The European Capacity Building Initiative (ecbi), launched in 2005, aims to support the UN Framework Convention on Climate Change (UNFCCC) negotiations by building and sustaining capacity among developing country negotiators, and by fostering trust and understanding between industrialized and developing countries.

The ecbi has three main areas of work. One is a Training and Support Programme (TSP), which is led by the International Institute for Environment and Development. The TSP has three main elements: “capacity building of junior negotiators to the UNFCCC through regional and pre-Conference of the Parties (COP) training workshops; capacity provision to the Group of Least Developed Countries (LDC Group); and bursaries for negotiators from LDCs, to ensure their continued participation and capacity development in UNFCCC processes.”

The second area of work is an annual week-long trust-building initiative, the Oxford Seminar & Fellows Colloquium. The first half of the week brings senior developing country negotiators together to discuss controversial and timely issues in preparation for annual COP negotiations. During the second half of the week, European negotiators join for the Oxford Seminar, where all officials have the opportunity to exchange views on key negotiation topics in an informal setting.

The third area of work is a Publications and Policy Analysis Unit (PPAU), which produces papers aimed to be “relevant to ongoing negotiations under the UNFCCC, timely, and trustworthy.” PPAU collaborates with developing country officials to identify relevant topics and to produce the publications. PPAU also produces background papers and guides geared to help more junior negotiators become familiar with the process and issues.⁷⁵⁴

Box 2 Government-funded, WTO administered, support for broader LDC participation in fisheries negotiations

On 3 May 2019, WTO Director-General Roberto Azevêdo announced the establishment of a new trust fund designed to enable capital-based delegations from LDCs to attend and participate in WTO negotiations on fisheries subsidies.⁷⁵⁵

Box 3 CONNEX Support Unit – government funded, government/private-sector supported, support on investor-state contract negotiations

The CONNEX Support Unit⁷⁵⁶ assists developing countries and economies in transition in the preparation and implementation of (re)negotiations of large-scale investment contracts with foreign investors. It provides requesting governments with “rapid, independent, high-quality and multidisciplinary support.” CONNEX support is meant to establish a level playing field, which results in mutually beneficial deals and a durable Government-investor relationship.

The CONNEX mandate to directly support negotiations reflects the articulated need and demand of beneficiary countries for assistance in negotiating contracts for large-scale, complex projects (such as those in the extractive sector) to overcome existing asymmetries in access to information, resources, and experience.

CONNEX exclusively advises governmental actors involved in (re)negotiations. The international and regional experts identified by the CONNEX Support Unit are bound by the CONNEX Code of Conduct to ensure their integrity and commit them to confidentiality.

CONNEX has a strong focus on economic development objectives, in particular domestic revenue generation, and further promotes social and environmental development. It is continually monitoring and evaluating the developmental impact of its work, to ensure the satisfaction of the beneficiary governments.

Germany is the founding and first member of the CONNEX Governing Board, the main governing body of the CONNEX Support Unit. Germany also hosts the Secretariat of the CONNEX Support Unit. The Governance Structure is complemented by an Advisory Committee, comprised of nine highly experienced individuals with different backgrounds, who provide strategic advice to the Secretariat and the Governing Board. The German government currently funds CONNEX but additional funding partners are expected to join soon.⁷⁵⁷

2.2.2.1.2 UNCITRAL Working Group III

In the context of UNCITRAL's Working Group III on ISDS reform, which is not a specific treaty negotiation but may result in outcomes that substantively impact existing and future treaties and, in particular, the ISDS mechanism contained therein, the UNCITRAL Trust Fund is available for certain countries for travel and accommodation to and during Working Group III Sessions.

Also related to the Working Group III process, CCSI, in collaboration with the UNCITRAL Secretariat and Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) convened preparatory sessions in the days preceding the 36th, 37th and 38th Sessions that were intended to (1) orient new delegates to the UNCITRAL process and update them on the previous WGIII and Commission sessions; and (2) enable delegates to effectively participate in the forthcoming Session.

2.2.2.1.3 Similar ad hoc support

One academic interviewed provides certain governments with specific, on-call support during certain ongoing negotiations. The International Institute for Sustainable Development also offers this kind of "hotline" support during certain negotiations. Other service providers that respond to government requests on a broad range of investment-related topics, such as IISD, IDLO, TradeLab, and several other international organizations, academic or private sector providers may similarly be available for ad hoc trainings, research or support with respect to specific negotiations.

2.2.3 Domestic implementation of IIA obligations

After an IIA is concluded, countries may encounter challenging and resource-intensive tasks in understanding the scope and nature of their obligations under those agreements, and in ensuring optimal and effective domestic implementation. These tasks also may be becoming increasingly demanding over time as states face a more complex web of treaty obligations.⁹⁸ For developing states, this web can be particularly complicated due to the fact that the substantive elements of their treaties may be varied or inconsistent, whether due to the

state not having a model provision, not effectively negotiating to remain consistent with its model, or for other reasons.⁹⁹ In many cases, states may have a set of overlapping but inconsistent obligations vis-à-vis a single treaty-partner.

A number of state interviewees indicated interest in further understanding and exploring policies and practices for treaty implementation and dispute prevention (discussed below in Sections 2.2.3 and 2.3.3). The discussion below considers some of the issues that arise in the context of implementation and efforts undertaken to understand and address these issues.

2.2.3.1 Compliance with core, post-establishment investment protection standards

Most IIAs in force contain a set of core provisions on direct and indirect expropriation, fair and equitable treatment (FET), post-establishment non-discrimination, and requirements regarding free transfers of capital. One broad strategy for minimizing or avoiding costs of ISDS disputes is for governments to take ex ante steps to prevent investor complaints that these treaty obligations have been breached. Such dispute prevention activities, however, are difficult to implement for a number of reasons.

For one, as is widely and often stated, these standards are usually vaguely worded, and have been subject to varied and even conflicting interpretations. The inchoate nature of the obligations and uncertainty regarding their meaning in practice can make it difficult for governments to know what conduct could trigger a claim, and what might result in liability. Moreover, cross-ministerial guidance or instructions to relevant officials/agencies/branches to ensure that such persons and entities carefully follow relevant domestic law and procedure may be of little use, as compliance with domestic law is generally not a defense to an international law claim.

Additionally, assuming that one could identify factors:

- beyond compliance with domestic law and
- within the control of government actors

that make claims and/or liability more or less likely, the breadth and depth of IIA coverage makes it difficult if not impossible to actually communicate those factors to the range of government actors whose conduct could trigger claims. The obligations contained in

IAs generally govern all government actors, from local to national levels, from low- to senior-levels, and across all branches of government. IAs also can cover the conduct of other actors such as state-owned enterprises. Further, IIA obligations generally apply in all sectors of economic activity, and to all areas of government law and policy.¹⁰⁰ High levels of bureaucratic and organizational capacity may be required to effectively implement cross-ministerial and cross-jurisdictional investment law sensitivity, a challenging task even in high-income economies with highly rated bureaucratic processes.¹⁰¹ Further, ad hoc training of specific officials may be ineffective or inefficient in contexts in which turnover of officials is high and institutions are not able to capture and internalize learning over time.

In light of these factors 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 stating with adequate precision what investment law requires, such nationwide training and awareness raising may not even provide domestic actors sufficient guidance to avoid triggering claims.¹⁰²

Moreover, even if dispute prevention policies and practices resulted in no formal ISDS claims, that does not necessarily mean that they should be judged a success. When claims arise out of the decisions of domestic courts, advance guidance may, in certain circumstances, raise greater concerns about 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.¹⁰³ Cautionary education regarding IIA-mandates may exacerbate incidences of undue regulatory chill, and could distort government policy and practice in favor of certain economic interests to the detriment of other economic and non-economic interests.¹⁰⁴ Thus, care must be taken not only to ensure that dispute prevention policies and practices warrant the resources they use, but also that they send the “appropriate” messages – a term that may be difficult to define – regarding the constraints imposed by IAs.

There is a growing body of research looking at these issues, such as the depth and impact of IIA-internalization in different jurisdictions.¹⁰⁵ There are also opportunities to learn from prior and existing initiatives to support states in understanding and implementing their IIA obligations.

2.2.3.2 Compliance with liberalization provisions and other elements of modern IAs

Modern investment treaties often contain obligations not found in older-generation treaties. Liberalization commitments, including commitments on pre-establishment national and most-favored nation treatment, and restrictions on performance requirements, are increasingly common. These types of provisions raise somewhat distinct challenges for implementation from those “core” obligations noted above.

Various questions arise regarding the meaning and practical implications of these newer provisions.¹⁰⁶ Liberalization commitments adopted in a treaty may have immediate effects on and consequences for a range of policy areas including government procurement, government incentives schemes, socio-economic development programs, land ownership rules, and public benefit schemes.¹⁰⁷ Treaty parties and their domestic constituents must understand what compliance with these obligations means, and what policy space remains due to negotiated flexibilities, exceptions, and carve-outs. Government officials interviewed for this scoping study noted a lack of capacity in coordinating across ministries and beyond, and a lack of ex ante analysis, understanding and internalization of impacts of these kinds of IIA provisions.

States also identified intra-state organizational capacity challenges that prevent them from effectively advancing a coherent policy on specific elements of IAs, noting, for example, that treaty negotiators and officials managing disputes do not effectively communicate and learn from one another, thus minimizing even the ability of the state to effectively internalize and implement its own experience and learning.¹⁰⁸

2.2.3.3 Existing initiatives

Many of the initiatives discussed under Section 2.2.1 (Investment policy-making and 4.7.5 (Efforts to democratize the law) are also relevant to these issues of internal implementation. Some additional relevant work is noted below.

2.2.3.3.1 UNCTAD – Work on Treaty Implementation and Dispute Prevention

UNCTAD has worked with governments and other stakeholders relating to treaty implementation and associated dispute prevention policies and practices.¹⁰⁹ It has researched and documented government initiatives, facilitated the sharing of experiences and exchange of knowledge, and deepened understanding of challenges and opportunities for governments seeking to understand and internalize treaty obligations. More broadly, its “pink series” on particular treaty provisions, and other publications on ISDS outcomes have contributed to helping states understand the practical implications of IIA obligations.¹¹⁰

UNCTAD’s annual review of ISDS decisions summarizes tribunals’ (at times inconsistent findings on core issues in international investment agreement provisions (e.g. on legitimate expectations under the fair and equitable treatment standard, or reliance on the most-favored nations clause to expand tribunals’ jurisdiction).¹¹¹

2.2.3.3.2 Ad Hoc initiatives

Certain Assistance Mechanisms, such as TradeLab, provide tailored research to respond to specific questions and circumstances of requesting governments and other parties.¹¹² Analysis on specific topics is typically context specific and nuanced with respect to any state, and indeed, sub-sections and demographics within states. Analysis conducted by TradeLab involves economic, legal, and other expertise.

Other relevant work includes a 2019 *Handbook on Obligations in International Investment Treaties*, produced for the Australian Government Department of Foreign Affairs and Trade, written by Jansen Calamita and published by the Asia-Pacific Economic Cooperation (APEC).

2.2.4 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.

Crucially, states have a continuing role as “masters of their treaties” to guide interpretation of their IIAs. The Vienna Convention on the Law of Treaties (VCLT) makes clear that states’ post-treaty-conclusion activities have an important role to play in continuing to clarify and shape the meaning of those international agreements. The VCLT expressly directs tribunals to take into account states’ subsequent practice and agreement in interpretation and application of treaty texts;¹¹³ and there is much that states can do, even unilaterally, to evidence their practice and seek to establish and demonstrate agreement. This includes ensuring consistency and coherence in their own pleadings; following disputes their investors file and submitting non-disputing party briefs;¹¹⁴ reacting to tribunal decisions;¹¹⁵ intervening in annulment or set-aside proceedings; and issuing interpretations clarifying their understandings of treaty provisions.¹¹⁶ The treaty parties can also take joint action to more clearly formulate relevant agreements on interpretive questions.¹¹⁷ Some treaties contain provisions specifying that treaty parties’ joint interpretations of treaty provisions – which may be crafted in committees established by the relevant treaty -- are binding on tribunals.¹¹⁸

To date, these tasks of ongoing treaty monitoring, engagement, and clarification do not appear to be widely performed. This may be because the potential value and impact of such actions under the VCLT or specific treaty provisions is not widely known; the bodies negotiating the treaties are not closely following the disputes and how the treaties are being interpreted and applied; the lack of awareness, due to gaps in transparency, of when treaties are being invoked by an investor; and/or a lack of state resources available to follow disputes and decisions, and to give these issues the dedicated and consistent attention they require. 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 incapacity, States may unwittingly forfeit their ability to proactively shape arbitral precedent.¹¹⁹

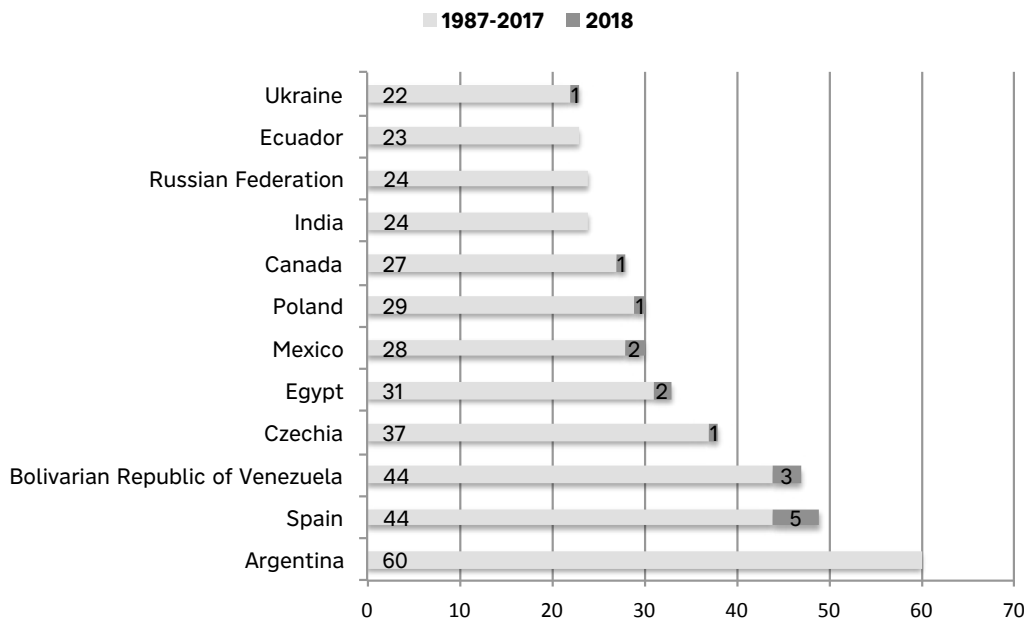
Assistance Mechanisms focused on treaty implementation could, therefore, play a role in supporting these types of activities and capacity within governments.

A second aspect of these “living treaty” tasks arises from the fact that a number of IIAs, particularly newer agreements and those that are part of broader Free

Trade Agreements, establish institutional mechanisms for treaty parties to engage in state-to-state dialogues assessing the implementation and implications of the agreements, tracking progress on agreed areas of cooperation, performing ongoing tasks, identifying future areas of cooperation and negotiation, and resolving issues that have arisen.¹²⁰ Maximizing the opportunities presented by these institutional structures will require dedicated resources and attention.

A third dimension relates to operational- and implementation-related tasks required or expected of individual treaty parties. For instance, some treaties call for states to conduct consultations with, or establish advisory groups of, stakeholders to advise on and support treaty implementation;¹²¹ some treaties also anticipate ongoing evaluation of the agreements’ effects on sustainable development within the country.¹²² Creating and effectively using these stakeholder engagement systems, as well as designing and implementing meaningful assessments of treaty impacts, are complex initiatives that can

Figure 2 Most Frequent Respondent States, 1987-2018



Source: UNCTAD, ISDS Navigator.

benefit from peer learning, technical assistance, and financial support.

These three types of post-signature IIA activities are not an exclusive list of the ways in which international law and specific IIA provisions provide space for, encourage, or even require ongoing engagement within domestic fora and between or among treaty parties regarding concluded treaties. The catalogue of relevant activities and initiatives likely stretches much longer. Nevertheless, it is an area that does not seem to have received much attention to date in international investment law but could have significant implications for the practical content and effects of treaty obligations, implementation of treaty commitments, effectiveness of treaty institutions, and exposure to and resolution of disputes.

2.2.4.1 Existing initiatives

The OECD has analyzed and published papers on state control over treaty interpretation;¹²³ and CCSI has also organized informal meetings on the topic among government officials. Research conducted for this Scoping Study did not, however, identify other initiatives focused on supporting ongoing engagement and treaty management as a general matter.¹²⁴

2.3 Stocktaking: Challenges in managing ISDS proceedings, and existing mechanisms to overcome those challenges

To date, approximately 1000 investment disputes have been filed against nearly 120 respondent states.¹²⁵ Some states have faced dozens of claims.

Other states have faced few or no claims in the decades since they first signed an investment treaty. However, publicly available statistics on claims do not necessarily reflect all claims that have been pursued and decided. Nor do they reflect those in which an investor submitted a notice of intent or notice of arbitration, but the matter was settled early and/or non-publicly. Thus, they underrepresent the extent to which individual states are facing ISDS-related challenges. This section 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. As discussed below, these issues have implications for costs and outcomes. Some are, or have been, targets of support initiatives, and some could potentially be addressed through reform discussions. All could also be considered in connection with development of any future Assistance Mechanism.

2.3.1 Case staffing

The frequency of ISDS claims and cases are relevant to the question of whether and to what extent states want to internally staff for those disputes. If cases are few and far between, governments may opt not to spend resources on hiring, training, and providing continued professional development for staff in case of disputes. This may be particularly true for states with high turnover of staff and/or for states who are not organized to be able to easily allocate IIA/ISDS staff to other subject areas when they are not fully utilized on IIA/ISDS work. States may also be reluctant to risk handling disputes in-house, especially given the high stakes presented by large damages claims, and risk of creating damaging precedent if the state loses the claim.

There are three general models that states employ to handle their legal defense, each of which is described further below. According to Franck, the most common appears to be a hybrid system; the second most common is to use exclusively in-house counsel; and the third most common is to use exclusively external counsel.¹²⁶

Irrespective of the model chosen, in all cases and in advance, it is important to identify who, internally, has responsibility for and rights to do what, and to clearly set out those roles in laws or policies as appropriate. Then, when and if a dispute arises, governments will be in a better place to coordinate defense; choose whether or not to hire external counsel and, if so, on what terms; manage any outside counsel selected; control litigation strategy; engage with other relevant domestic actors; gather evidence; assess facts; and/or handle communications with the investor and others. Sharpe has set forth in detail the critical role that a designated agent within the government can play in advancing a government-led investment treaty policy.¹²⁷ The

importance of developing and implementing these types of internal coordination plans before disputes arise was stressed by interviewees from government,¹²⁸ private practice,¹²⁹ arbitration institutions,¹³⁰ and existing support mechanisms. India, for its part, is an example of how the role of an agent can be implemented more fully into a country's investment policy and practice.¹³¹ UNCTAD,¹³² ICSID,¹³³ and private law firms¹³⁴ have provided or are providing support on relevant structures and strategies.

Yet it seems that there remains important work left to do. Joubin-Bret conducted a systemic review of the 50 respondent states (as of 2015) that had faced more than three ISDS claims, finding that a minority had dedicated in-house teams, even when considering a task limited to managing the cases and interacting with outside counsel.¹³⁵ Additionally, few countries had an identified, dedicated and structured lead agency or management team, and as a result, these cases were often dealt with on an ad hoc basis with various ministries or agencies leading the defense.¹³⁶ Consistent with those findings, one frequent comment by government representatives in interviews conducted for this scoping study was that they would like to know more about different countries' approaches to these issues, and the advantages, disadvantages, and lessons learned from the different systems they put in place.

Regardless of the approach to internal defense organization that a state is taking, once a dispute has been officially commenced, states may choose to settle the claim, or to proceed through the arbitration proceeding.

With respect to the extremely high cost of top outside counsel, many states feel they have no choice but to pay. These expenditures, particularly for cash-strapped governments, mean less to spend on other government functions, and this trade-off can have meaningful consequences, especially for developing countries. In some cases, however, governments may simply not have the liquid funds, or may not be willing or able to allocate the amount of funds necessary to hire outside counsel.

These issues can affect case strategy and outcomes. For instance, some important research suggests that developing countries are more willing to settle ISDS cases than developed countries.¹³⁷ In a 2017 paper,

Strezhnev found that while high-income countries tend to win about 20% more investment disputes than low- or middle-income countries, this disparity can be explained by differences in early rates of settlement among countries. Specifically, developing country governments facing high arbitration costs are about 22% more likely to settle a given dispute. Unpacking these findings, Strezhnev finds that even when the claim is poor, developing countries concerned by likely arbitration costs and potential damage awards choose to settle in order to avoid the risks of significant losses.¹³⁸ In contrast, developed countries are more willing to bear the defense costs and risk of an adverse award. Developing countries may therefore particularly benefit from greater capacity in early case assessment that can signal whether they should in fact be settling or defending cases. This study also suggests that the high costs of defending claims and/or the risk of a high adverse award have systemic effects that encourage risk-averse states to settle rather than defend claims. This raises serious questions about how and to what extent the high costs of defense and possible awards intersects with decisions to settle ISDS claims or actually pursue a defense. The reasons for this pattern, the systemic and individual impacts that these decisions to settle may have on developing countries, and how to address these issues, deserves further exploration in the context of an Assistance Mechanism focused on legal defense.

On the flip side of the coin, when states do have the financial ability to pay (or can obtain financial assistance from elsewhere to do so),¹³⁹ and have decided not to settle but to pursue a claim, these states are often "lawyering up, and lawyering up with quality counsel and with great experts."¹⁴⁰ While many government interviewees stated that there is a certain level of sticker shock when other branches of government see how much is being spent on ISDS defense, and all governments would like to see that cost decrease, once a claim has hit and the government decides to pursue a defense rather than settle, cost becomes a lesser priority than winning the case. For this countries that are financially able to do so are willing to hire the best lawyers.¹⁴¹ One individual with experience with an existing assistance mechanism stated "Developing countries don't have a lot of money, but when it comes to defending cases, trust me, they will spend what they need to spend."¹⁴² For many governments this involves difficult decisions on how and where to allocate scarce resources.

However, while retaining experienced and high-quality counsel was prioritized by many interviewees, some suggested that the perceived benefits of using major top-tier international law firms may be overestimated. One interviewee with experience working for an arbitral institution, for example, stated that while there are plenty of examples of small firms that cannot adequately manage a complex ISDS claim, large international law firms are not always necessary for states to achieve “adequate” legal defense: “We have seen very competent legal advice provided at much lower rates from regional firms, who have a strong arbitration practice and have branched out into investment arbitration. Moreover, we have seen firms established in, for example, Eastern Europe, provide highly competent advice at much lower rates than the international firms.”¹⁴³ One upper-middle income government official expressed some frustration that large international firms are not always responsive and that it is necessary for this official to continuously be on top of case management to ensure that the firm is appropriately prioritizing this official’s work.¹⁴⁴ Some of the concern, therefore, seemed to be on the risk associated with hiring lesser-known and lower-priced firms, as opposed to conviction that such firms are of lower quality.

Moreover, the knee-jerk reaction to hire the best counsel, and spend whatever it takes to defend an award, may also be a result of not having a full understanding of where costs can be cut. As Sharpe has argued:

*[A] standing agent can help control costs through better allocation of government personnel and resources. Counsel fees generally constitute the bulk of arbitration costs. State lawyers invariably cost less than experienced outside counsel. Much arbitration work can be performed even within those governments that lack significant experience in international investment arbitration. Government lawyers, for instance, may retrieve and review documents; identify and interview potential witnesses; prepare timelines and memoranda on key issues; and research local law. Performing such time-consuming work internally can substantially reduce the State’s litigation costs.*¹⁴⁵

When compared to the WTO context, the motivation to spend money on defense and hire top counsel is even higher in investment because in addition to costs, losing an ISDS case also results in a monetary award. One upper middle-income government official explained the pressure on governments:

*These cases are very public, and you have to answer questions to parliament, to the media, to the public, to everyone. Having a firm that has done 100 cases will be justifiable, whereas having a lesser-known firm that has only done 20 cases at a lower rate might be riskier. That’s the problem when governments face these claims – the responsibility is yours, but the money isn’t. Public funds are at risk. It’s very difficult, and these ISDS cases, where the state is being sued, raise questions in laymen’s eyes about why the “best” firm wasn’t chosen when the state is on the defense.*¹⁴⁶

In addition to the mainly financial hurdles governments experience in hiring legal counsel, distinct hurdles regarding a state’s engagement with outside counsel were described. One challenge noted in consultations was the timing of the engagement, and a procedural inability to bring outside counsel in at an earlier stage of the defense process. In the words of one private sector interviewee who also has experience with an existing Assistance Mechanism, “[i]t’s never really a budgetary constraint that prevents counsel from being brought in at an early stage, it is how governments operate.”¹⁴⁷ There are various reasons that governments may engage at too late a phase. Some reasons may stem from internal coordination challenges in managing the notice. For example, as Sharpe explains: many governments have not implemented standard operating procedures in managing claims; many states do not have laws, regulations, decrees or directives to ensure that the responsible government official has authority to take all steps necessary to represent the State effectively; and procedural hurdles may inhibit a government authority from properly coordinating the defense of claims, both internally and externally.¹⁴⁸ When clear authorities and procedures are not in place, any one agency or individual may be a hesitant to take ownership over the claim and internal management and coordination gaps may thus be exacerbated.¹⁴⁹ The inability to conduct 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.¹⁵⁰

Rules on government procurement can also make timely case staffing particularly difficult when external counsel are used. However, those procurement rules and processes are often designed to serve important policy purposes (e.g., to ensure value-for-money and avoid corruption). It may be challenging to speed up processes while maintaining adequate oversight of government contracting and expenditures.¹⁵¹

Another challenge may be much more closely related to the in-house capacity and experience of government lawyers, regardless of whether the claim is managed in-house or if outside counsel is hired. Interviewees with experience working for arbitration centers highlighted in-house experiences as absolutely critical to claim management. In the words of one:

In our experience [obtaining high quality representation] doesn't have anything to do with how poor the country is or what mechanism they use (write a check, hybrid, in-house). In my view, good representation of states doesn't seem to depend on how financially resourced the state is; experience is the important element. Countries who can afford good lawyers but have no experience in-house are the ones that make the most mistakes.”¹⁵²

Another interviewee with experience working for an arbitration center stated that s/he had initially thought that the economic development status of a respondent state would be the clearest indicator of how responsive and effective a state will be in an ISDS claim, but that s/he has been proven wrong as it seems to be prior experience in managing claims that is most important.¹⁵³

Thus, the challenges that were highlighted during CCSI's consultations and research were that the high cost of outside counsel may lead the state to settle claims that may be of low quality. When states do decide to pursue claims, some states do not have the liquidity, or choose not, to pay for top counsel and may settle, or hire lower-cost counsel. However, in large part the concerns were not that states are not getting top outside counsel, but that in many cases when a state decides to hire top international legal counsel the state has serious concerns about foregoing other domestic spending priorities to pay for such counsel, is constrained in terms of its ability to timely retain external advisors, and faces hurdles engaging with and managing those service providers. As with other

areas of IIA and ISDS engagement and management discussed during consultations, several interviewees noted that a certain level of capacity to engage with outside counsel, make decisions, and effectively manage those legal advisors is of critical importance to ensuring an effective defense.

This study now turns to discussing how these issues interact with the three general models that states employ to handle their legal defense: in-house, hybrid, or fully out-sourced representation.

2.3.1.1 In-house counsel

This section considers specific issues that arise for states with respect to an in-house model of staffing the defense of claims.

In a recent study of states' staffing of ISDS claims, Franck found that in roughly a quarter of disputes, states relied completely on in-house teams.¹⁵⁴ States using this model include Argentina and the United States, as well as Canada for most, but not all, of its cases.

In-house teams can have several advantages for states, including that they are lower cost, have a clearer and more consistent alignment of interests between attorney and client, are more accountable to the client government, have a deeper understanding of the state's legal and policy positions, and have a better and more effective relationship with sub-national jurisdictions and other agencies. An in-house counsel may also be in a position to elevate standards of conduct in international investment arbitration through training, experience, and professional socialization.¹⁵⁵

Several interviewees from states that have faced three or more claims indicated that they are interested in conducting more (or all) of the state's defense in-house. Many in-house teams were seeking to take more control over strategy and decision-making, and to retain greater control over information gathered.¹⁵⁶ Interviews underscored that in-house teams were also better suited than external counsel to engage with, and gather evidence from, other relevant domestic government actors relating to the case, and to handle issues of domestic law.¹⁵⁷

Perceived barriers to adopting a fully in-house strategy included concerns about staffing, including balancing the frequency of claims with the expense and time it takes to build up in-house expertise, and doubts about the ability to successfully litigate against highly experienced investor-side counsel. Interviews and research, however, suggest that in some cases states have successfully managed these hurdles.

First, in order to accommodate for staffing needs that ebb and flow, a few countries have hired people that move across to other activities depending on needs. For instance, in some countries with in-house teams, staff participating in ISDS defense can and do work in other types of international legal disputes (e.g., international human rights cases, WTO litigation, and specialized mechanisms such as the Iran-United States Claims Tribunal). They may also engage in other investment law-related activities, such as supporting treaty negotiations, engaging in investment-related dialogues in international forums, monitoring cases filed by their investors and submitting non-disputing state party briefs on issues of treaty interpretation, and engaging in state-to-state or multi-stakeholder consultations under specialized bodies or mechanisms established under their treaties. Of course, specialization in investment law in addition to other substantive areas requires exceptional technical skill that must be built over time. To the extent staff are frequently rotated out of positions, or for offices with high turnover rates, it may be difficult for an in-house team to maintain relevant expertise.

For states seeking to build in-house capacity, the various options include hiring new staff with relevant expertise, hiring external counsel but working closely with them with a view to eventually transition work entirely in-house,¹⁵⁸ arranging formal secondment programs (including with other governments),¹⁵⁹ and attending training programs. Because treaty-based ISDS is still a relatively young field with few causes of action and a limited amount of “case law” it is an area where new practitioners likely face low barriers to entry and effectiveness.¹⁶⁰ Major challenges to diffusion of knowledge about the law and practice are, confidentiality of awards, and as noted above, the concentration of sources behind paywalls and in English.

Second, there remains some fear that respondent states seeking to rely exclusively or largely on in-house teams will be at a disadvantage as compared with investors hiring experienced private counsel. Some data, however, suggests that the average investor team will not have much of an advantage over even relatively new in-house state counsel teams. Using a dataset of 202 cases generating 272 awards made public through 2012, Franck finds that “each legal entity represented a client [state or investor] in an average of two cases,” and that “the median number of cases was one.”¹⁶¹ She also found that “[r]oughly 75% of the known legal entities involved in [investment treaty arbitration] who arbitrated a single case had had no further demonstrated participation in [investment treaty arbitration].”¹⁶² These figures suggest that the experience gap between a relatively newly established respondent team and investor counsel is not necessarily great. Were an Assistance Mechanism to support filling gaps in experience or access to certain information, that may help to level playing fields between the parties.

Of course, these figures have likely shifted since Frank’s study. The rise of third-party funders as upstream repeat players capable of injecting additional substantive knowledge into the disputes and enabling (or requiring) use of certain quality legal teams might, for instance, have had an impact on market concentration and repeat play. Yet, when considering state needs, and taking into account the apparent interest among states to take more control over their ISDS defense activities, it is useful to both question the assumption that states committing to in-house structures will be outmatched by more knowledgeable private firms, and to understand the variables that make that assumption more or less likely to be true.

Overall, the frequency of ISDS threats and claims may be a key determinant in whether and what types of external versus in-house support states seek. If a state has not yet faced a case, faces them infrequently, or has not faced one for years, it may be more interested in extensive assistance by outside counsel, which can inform how an Assistance Mechanism may fill certain needs. As those states become more experienced in handling cases and staffing teams, however, or to the extent a larger number of claims or potential claims materializes, states may want and be able to do more on their own.

In consultations, 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 for discrete questions in tight timeframes, assistance with adjudicator appointment, 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.

2.3.1.2 External counsel - hybrid and exclusive external models

This section considers hurdles states face in hiring and engaging with outside counsel.

In her study, Franck found that approximately 70 percent of cases involved states using external counsel.¹⁶³ In most, the states also relied to some extent on in-house lawyers. In a minority, the government appears to have been solely represented by outside counsel. These tended to be countries with only one ISDS dispute.¹⁶⁴

When states do use external counsel, several government representatives from developed and developing countries noted the importance of ensuring that in-house teams still have sufficient capacity to effectively manage outside counsel and the claim. The in-house team must have the ability to exercise desired control over decisions regarding the claim and the confidence to “stand up” to outside counsel in the event of disagreement.¹⁶⁵ Thus, even if external support is used, a certain, relatively sophisticated, level of internal competence is crucial.

To the extent that a state’s model involves the use of outside counsel, it is viewed as important to appoint that counsel at an early phase in the dispute. However, as noted above, this objective may be hindered by the fact that the government may need to take a series of potentially time-consuming steps to appoint and hire counsel. These include following the relevant government procurement processes; identifying the desired criteria for service providers to be used in any tender process; doing due diligence on potential firms and lawyers; and contracting with the service providers regarding their fees and responsibilities.

At the same time, certain decisions regarding the claim that must be made in this phase can potentially

influence the outcome of the case (for example, decisions regarding selection of arbitrators, or decisions as to certain procedural matters), and must be made in as timely a fashion as possible. States noted various organizational capacity challenges that exist and prolong the amount of time necessary for the state to finalize these tasks.

Some states expressed 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 fees charged by the firms employed.¹⁶⁶ Several interviewees expressed concern about the high costs of external counsel, and perceptions that law firms lacked a sense of accountability to public taxpayers. Indeed, the issue of fees has been identified by delegations in UNCITRAL Working Group III as an issue of concern meriting multilateral reform. One 2017 study found that average costs for respondent states to defend ISDS cases are nearly \$5 million,¹⁶⁷ and average costs for states in annulment proceedings are nearly \$1.5 million.¹⁶⁸ Table 2 below presents the findings from other studies on the costs of ISDS disputes.

While the fees being paid to external counsel may not vary much by respondent country, the difference in relative impact depending on countries’ respective revenue and budget, can be enormous. As noted by one lower middle-income government official that incurred roughly US\$ 6 million in legal fees for services provided by London-based counsel, the fees constituted the “budget for a whole ministry, or two or three critical hospitals.”¹⁶⁹ Another upper-middle income government official noted that the budget this official was requesting for outside counsel in ISDS cases for the coming fiscal year exceeded the amount that would be otherwise budgeted for the entire ministry.¹⁷⁰

Notably, there are some initiatives on investment and trade issues that seek to support states in identifying and contracting/negotiating fees with external counsel. For example, IDLO’s ISP/LDCs program (discussed in Section 4.1.3) will assist states in obtaining no-cost legal services with respect to investment law matters. The Permanent Court of Arbitration’s Trust Fund (discussed in Section 4.3.1.1) assists certain states with costs related to participation in disputes at the PCA.

Table 2 Legal Costs of ISDS Proceedings (\$)

Study	Period	Arbitral Rules	Sample (# of awards)	Average claimant costs	Sample (# of awards)	Average respondent costs	Inflation-adjusted year
Commission and Moloo (2018) ⁷⁵⁸	2011-2017	ICSID	90	6,043,915	88	5,217,247	2017
Commission and Moloo (2018) ⁷⁵⁹	2010-2017	UNCI-TRAL	36	6,077,585	41	4,596,807	2017
Behn and Daza (2019) ⁷⁶⁰	1987-2019	ICSID and UNCI-TRAL	169	6,067,184	177	5,223,974	2018

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

Outside of IDLO's 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.

2.3.2 Staffing of defense claims: Issues of cost, quality and control

From research and interviews conducted for this Scoping Study, some important takeaways regarding staffing and defense of ISDS cases are that:

- In some cases, states are unable to allocate funds necessary to hire international legal counsel and may choose to either settle rather than fully defend a claim, or to hire less expensive outside counsel.
- When states decide to hire international legal counsel, states did not widely report concerns about the quality of defense they were receiving or their ability to access law firms to provide them with quality defense.
- Concerns that states expressed about hiring outside counsel include:
 - the high costs of external representation;
 - misalignment of interests and cost sensitivities between in-house and outside counsel;¹⁷¹
 - challenges effectively supervising and controlling the management of the case when outside counsel were engaged;
 - difficulties in the timely procurement of outside counsel; and
 - the ability to secure external input and advice on discrete issues and questions when a claim is handled in-house or before outside counsel has been procured.¹⁷²
- Some states do not currently see a cost-benefit advantage to moving to an in-house model and will continue to rely on outside legal representation.
- Some states were interested in taking greater control, and moving more defense activities in-house, although:
 - Some states were interested in ideas for ongoing discrete assistance from outside counsel (e.g., hotlines and second opinions) to complement an in-house model; and
 - recognized that this would necessitate access to information currently held by firms.

These issues, in turn, raise questions of how to decrease costs of external counsel, and/or increase the ability of states to take a greater share of control (in a broad sense, including managing the claim in coordination with external counsel up through moving more of the actual defense in-house), while also retaining or

improving perceptions of quality. The answers to these questions should be considered in the development or expansion of an Assistance Mechanism. Even if it is ultimately decided that an Assistance Mechanism should not play an active role in advancing these objectives, it should also not undermine them, and would ideally complement steps that states take in reforming these areas, including beyond an Assistance Mechanism and into broader reform efforts.

2.3.3. 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 challenge for states. Section 2.2.3 above discussed some initiatives to help states understand and implement treaty commitments. This Section focuses more specifically on actions relating to anticipating, and trying to resolve, potential or actual ISDS cases at an early phase.

2.3.3.1 Anticipating disputes

The inability to anticipate a dispute has implications for states. States, of any economic development level, that have not implemented standard operating procedures upon notice of intent may struggle to organize and take control of the defense of the claim and other decisions that must be made early on. States may also feel at a disadvantage when compared to a claimant that has, in many cases, had a greater amount of time to organize and prepare a claim.

While states do have some ability to anticipate certain disputes, the anticipation of a large number of disputes can be difficult for many reasons. One issue relates to a claimant's use, or failure to use, the domestic court system. The requirement to exhaust local remedies is generally not expressly required by treaties (and in some treaties has been expressly waived). When claimants are required to exhaust domestic remedies (including for a specific period of time), states have an opportunity to identify a dispute bubbling up through the legal system, and their officials and institutions have a built-in opportunity to correct mistakes and prevent ISDS cases.

Relatedly, when contract claims arise under a treaty, treaty provisions (namely the umbrella clause)

and arbitral decisions appear relatively flexible in permitting investors to frame disputes as treaty claims and pursue them directly via ISDS alongside or instead of dispute resolution proceedings in contractually specified fora.

Moreover, there is no doctrine of "ripeness" that has stepped in to uniformly control the flow of claims. States may be taken by surprise when they receive a notice of intent and learn that a lower level official has taken a relevant action, that an administrative agency has made a certain (appealable) decision, or that a lower- or mid-level court has issued a certain ruling. In short, the investor has significant flexibility to frame when a dispute has crystallized and a claim is ripe. While this benefits the investor, as it can determine whether and when to opt out of domestic or other proceedings, it can make it nearly impossible for a state to anticipate when a claim will arise, much less prevent it.

These issues are among those that could potentially be resolved through other reform discussions, for instance to excise umbrella clauses, introduce requirements for exhaustion for all or some causes of action, and/or clarify the relevance of doctrines such as ripeness.

Another problem that makes the task of anticipating and avoiding claims difficult is that treaties may grant many investors, including indirect shareholders, in a particular investment the ability to pursue an ISDS claim. Governments may be unaware, before a notice of intent has been filed, that a foreign investor is involved in a particular investment, that such foreign investor's interests are protected by a treaty, and if so, which treaty. The issue of shareholder and reflective loss claims is also an issue that could potentially be addressed through broader reform discussions.

An additional issue is that makes the anticipation of claims challenging for states is that even if a state sees a dispute on the horizon, the relevant agency in charge of investment policy and dispute resolution may have no power to resolve the emerging dispute. If, for instance, the potentially brewing ISDS case relates to a court dispute between private parties over ownership of or rights to use land, the validity of intellectual property rights, or the existence and extent of tort liability, the executive branch of the

government may have no legal ability to override any subsequent judicial decision and likely has important policy reasons to avoid trying to interfere.

Dispute prevention was indeed identified as a “hot topic” and of great interest to states during consultations for this Scoping Study.

Early assessment and resolution of disputes

In CCSI’s consultations many interviewees felt that the early stages of a dispute were an incredibly critical period during which little outside support for states is available. Two general issues were highlighted: (1) effectively managing the early periods of claims, organizing internally, and taking advantage of “cooling off” periods, and (2) assessing the strength of the claim.

With respect to the first point, a potentially important opportunity that was identified arises with the so-called “cooling off” period. Many treaties contain clauses requiring investors to give states notice of their intent to file arbitration claims before formally initiating the arbitration. A common challenge for states, however, is effectively managing these periods. One government official asked if a “best practices” handbook exists for the “cooling off” period, and to CCSI’s knowledge a generalized set of advice is not available.

A number of interviewees from governments and private practice was that many states lack certain capacities in receiving and effectively managing claims. Sharpe has also articulated some of these issues, and solutions to them.¹⁷³ For example, many states have not developed clear or comprehensive procedures dictating who should receive the notice and what they should do once they have it. Many do not have media guidelines or effective communication channels established with other ministries to provide cross-governmental updates on pending disputes. This can result in valuable time and evidence being wasted and may even escalate the dispute based on statements or conduct (including inaction) over that time period. There are some existing resources and initiatives to help address these issues. These include ICSID’s “Practice Notes for Respondents in ICSID Arbitration,”¹⁷⁴ pro bono assistance provided by counsel,¹⁷⁵ and opportunities for sharing experiences at workshops

and trainings.¹⁷⁶

For states seeking to manage more of a claim in-house, the ability to turn to outside support regarding key questions (e.g. a “hotline” type approach) could be important during the defense-organizational phase. For states who plan to hire outside counsel, the time that procurement processes take can result in valuable lost time early in the process with respect to both procedural and substantive matters. On the procedural side, appointment of arbitrators and other early decisions impacting the procedural elements of the case can have lasting impacts on the ultimate outcome of disputes. On the substantive side, more attention to and better guidance during the “cooling off” period may assist states in early resolution of disputes. 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.”

While there was general agreement that this phase is both critical and also one of the most difficult for states to take advantage of, some caution was urged. For example, to the extent one Assistance Mechanism were to become involved in advising many different client states about arbitrator appointments or other procedural elements of a defense at early phases there may be various concerns that one institution was the dominant player in an advisory role, and unintended systemic impacts could result.¹⁷⁷

With respect to the second broad issue, governments may face challenges reviewing, understanding the strength of the case asserted in the Notice of Intent or subsequent Notice of Arbitration, and then taking appropriate action. Some of these challenges again arise from the structure and procedures of the current ISDS system. Rules regarding the contents of notices are relatively relaxed, and there are no general requirements to require filers to conduct due diligence and certify the veracity of their assertions, nor are there clear sanctions for non-compliance. The door to initiate a claim is relatively wide open, and arguably open to abuse, as the mere filing of an ISDS claim can trigger significant dispute-related expenditures and raises the threat of potential future losses.

In other non-ISDS dispute settlement contexts, procedural tools are often used to avoid dragging defendants/respondents into high-stakes, high-cost

proceedings absent a sufficient showing of a plausible claim. The ISDS system could likewise employ some type of pleading standard to filter out frivolous and abusive claims, and provide respondents greater notice of the claims against them.¹⁷⁸ One could, for instance, envision rules of procedure whereby investors had to assert facts at the time of submitting their notice of intent and/or arbitration on:

- the relevant treaty or treaties;
- the identity of the investor, including its corporate structure if a legal person;
- the investment and relevant treaty provision protecting that investment;
- whether or not any additional proceedings had been or were being pursued relevant to a fork-in-the-road or similar provision;
- the measure(s) alleged to have given rise to the breach and the date(s) of the measure(s);
- the breaches alleged and the facts that support those allegations; and
- damages claimed.¹⁷⁹

Detailed factual and legal allegations in Notices of Intent and Notices of Arbitration, particularly of information that is within the custody and/or control of the investor claimant, can be crucial for enabling governments to conduct useful case assessments and decide whether and how to proceed (e.g., by suggesting mediation, settlement of all or some claims, or deciding to defend against the case).¹⁸⁰ Increased pleading requirements would likely result in some added costs for the investor. Those costs, however, would presumably be relatively minimal if the required disclosures called for information within the investor claimant's custody or control, and would arguably be outweighed by the systemic contributions that these disclosures could make toward improving early case assessment.

While several interviewees suggested that an Assistance Mechanism may assist in early assessments of the strength of a claim, absent a sufficiently robust factual matrix on which to base their analysis, legal opinions on the strength of the investor's claims and/or state's defense may be too vague and general to be of much use.

Effective early case assessment depends on at least two things: one is having enough information to evaluate the case, at least on a preliminary basis; the

other is having access to a legal team that can do that analysis. If a team is not in-house, then timely external support will need to be found.

Some existing efforts described below are attempting to assist states with early identification and/or prevention of disputes and assessment of claims.

2.3.3.1.1 World Bank Systemic Response Mechanism

The WBG's Systemic Investor Response Mechanism (SIRM) 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.¹⁸¹ The SIRM works by collecting certain data points and identifying patterns of political risks that impact investments and quantifies investment lost or gained as a result, thereby providing evidence of impacts and a basis for reform or steps to minimize the recurrence of investment-related problems.¹⁸²

SIRM is not a one-size fits all solution, but is adapted to the political economy circumstances of every country.¹⁸³ Common elements, however, include: (1) empowerment of a lead agency that implements and coordinates SIRM, (2) an early alert mechanism and tracking tool to identify problems to the lead agency, (3) problem solving methods available to the lead agency and other agencies to find a solution, including through exchanges of information, consultations, peer pressure, or legal opinions, (4) political decision making at higher levels when the lead agency is unable to recommend a solution or discipline a peer agency.¹⁸⁴

The SIRM has been piloted in Bosnia & Herzegovina, Dominican Republic, Georgia, Albania, Colombia, Kyrgyz Republic, and Mongolia.¹⁸⁵

2.3.3.1.2 Similar state led ISDS prevention initiatives

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.¹⁸⁶ The OFIO is intended to improve the investment environment in Korea and help to resolve investor grievances at an early phase. The OFIO provides an

online application for investors to seek to resolve grievances in a wide variety of industries.¹⁸⁷ The OFIO also can help investors navigate legal and legislative processes related to their grievances. Similarly, Brazil's Cooperation and Facilitation Investment Agreement (CFIA) model is based on dispute prevention.¹⁸⁸ The CFIA sets forth institutional mechanisms to assist in dispute avoidance and to achieve early settlement of potential investor grievances.¹⁸⁹ The objective is to assist host countries in anticipating possible origins of disputes and taking earlier preventative action.¹⁹⁰ The inspiration for a focus on investor support was found in the Korean OFIO.¹⁹¹

Both the OFIO and the CFIA models present a rethink of the areas in which states might allocate scarce resources to address investor grievances, looking to a greater extent to address concerns before they rise to the level of a full-blown dispute. In many cases earlier attention to concerns and disputes may benefit both the investor and the host state.

2.3.4 Appointing arbitrators

A potentially outcome-determinate, time-sensitive, and early-phase task (briefly discussed in the preceding section) is the appointment of arbitrators. An ongoing OECD project is addressing the various policy issues and challenges that arise with respect to arbitrator appointment, appointing authorities and adjudicator compensation in ISDS cases.¹⁹² The preliminary findings of this project indicate that the system for the selection of arbitrators in ISDS cases is very complex, involves limited levels of public disclosure on arbitrator appointments and may be affected by significant competition between arbitration institutions competing for ISDS cases.

Notwithstanding the increased transparency of arbitral awards in recent years, a significant share are not yet publicly available, nor are the bulk of other materials produced in connection with ISDS proceedings such as pleadings submitted to tribunals and transcripts of hearings. These materials can provide insights into arguments that arbitrators may have raised when acting as counsel, and also into what resonates, or does not, with them when sitting on a tribunal.

Due to confidentiality of these documents, however, there are asymmetries in who can access and benefit from these insights. 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. Others, including states that are infrequent respondents, may be forced to choose between going without a similar depth of crucial information or paying to access it.

There are some ongoing efforts to gather and disseminate information about arbitrators, including by IARporter,¹⁹³ Arbitrator Intelligence¹⁹⁴ (both behind a paywall), and Pluricourt's Investment Treaty Arbitration Database (PITAD).¹⁹⁵ Free or reduced-price access to subscription databases, free or low-cost access to expert advice on arbitrator section, and virtual or in-person platforms for sharing experiences about arbitrators are all ways of closing existing "gap[s] on access to information" that contribute to states' current "reliance on outside counsel."¹⁹⁶

These issues are further linked to ongoing reform discussions. Initiatives for a court-like mechanism that would move ISDS away from its use of party-appointed arbitrators could, for adherents to such a new mechanism, reduce the need for case-by-case due diligence on, appointment, and possible challenge of arbitrators.

2.3.5 Handling cases - dealing with inconsistency, uncertainty and incorrectness

As recognized in the context of UNCITRAL's Working Group III, states have concerns about inconsistency, uncertainty, and incorrectness of arbitral decisions. These are all features of investment law that complicate domestic officials' abilities to predict whether a claim will succeed or fail. However, irrespective of the outcome of a claim, states incur significant costs to defend against claims and are not likely to recover those costs.¹⁹⁷ Some efforts to address these issues of inconsistency, uncertainty, and incorrectness include drafting new language for future agreements; renegotiating existing treaties; using tools available under the VCLT to clarify for 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 at UNCITRAL to craft reform solutions, including the potential establishment of a more permanent adjudicatory body

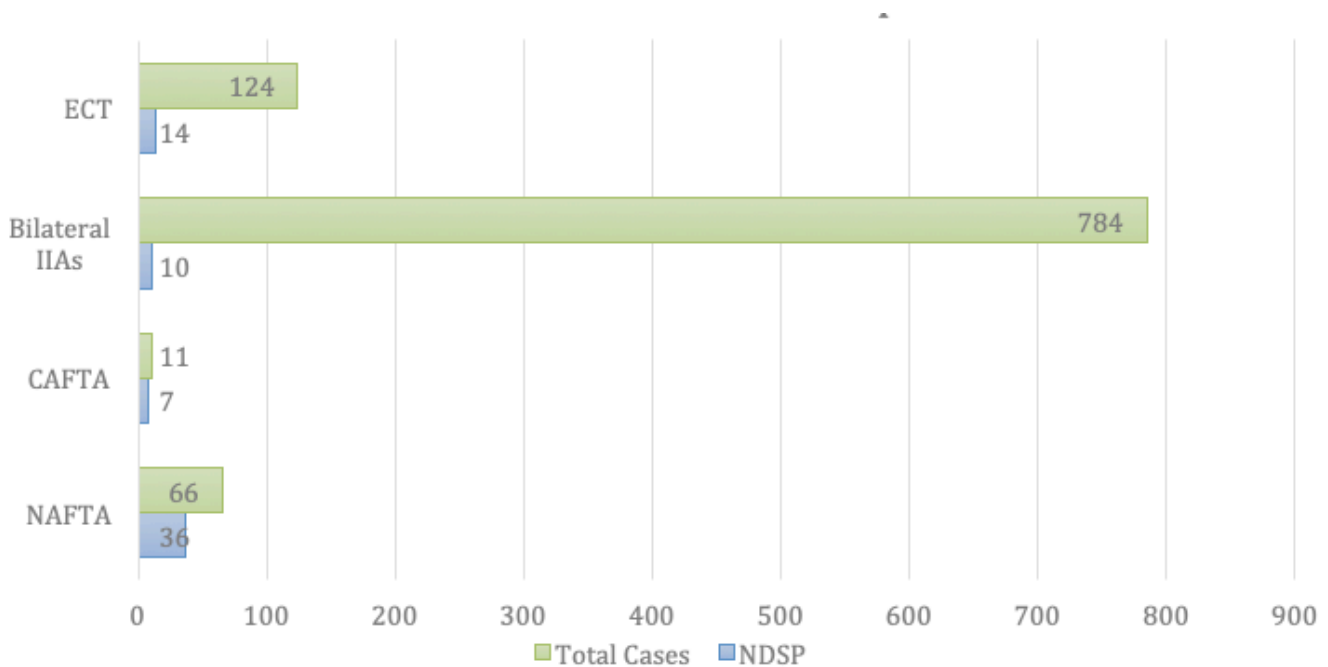
and appellate system to bring more clarity to the content of the law. Assistance Mechanisms could be used to better support states in each of these areas of work.

A related solution (one which is particularly relevant in the event that developed country donor funds may be financing an Assistance Mechanism) is for countries to explore steps to work with treaty counterparties to minimize the uncertainty surrounding treaty language or treaty interpretation, such as through joint interpretative statements or other clarifications. This step could help to avoid or reduce disputes over the content of relevant treaty standards.

Data indicates that, should (particularly developed) home country governments wish 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, their actions could potentially impact the conduct of a large number of proceedings. In

practice, capital importing states are less frequently non-disputing state parties and more frequently the respondent, and opportunities to act as a non-disputing state party are thus more infrequent. Steps to clarify treaty party intent, particularly on the part of the non-disputing parties, could potentially reduce claims that attempt to stretch the bounds of treaty language and make it clearer to tribunals when a claim is without merit and worthy of early dismissal: “The United States, the Netherlands, the United Kingdom, Germany, Canada, and Spain are ‘strongly represented’ as home states of investor claimants”¹⁹⁸ and consequently have important opportunities to play a more active gatekeeping or management role regarding the way their treaties are used.¹⁹⁹ Greater certainty on the bounds of treaty language could, in turn, potentially narrow the jurisdictional window for claims and issues that respondent states are currently spending valuable resources disputing before arbitral tribunals.

Table 3 Non-disputing State Party Submissions Made Under Different Types of IIAs



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).

Table 3 sets forth the frequency of non-disputing state party briefs under various treaties.

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

2.3.6 Handling cases - working with experts

Included within data for legal fees are often fees for expert witnesses on valuation and other topics. While studies on party costs do not tend to systematically distinguish between legal counsel and other fees, having a better sense of the expenditures on each – and their relative importance in ISDS proceedings – is necessary as an Assistance Mechanism could focus on enabling access to one of the two, or both. Information available from costs submissions that are publicly available indicates that expert fees can approximate legal counsel fees in amount.²⁰⁰ And if 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.

2.3.7 Handling cases - engaging in discovery, managing information

A final set of issues identified in this Scoping Paper 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.

Section 2 of this Scoping Study has set forth the various phases of a state's engagement with international investment law. With respect to each, capacity challenges in the ability of a state to effectively achieve its objectives has been set forth, along with a discussion of what resources are available to states in these areas. We now turn to considering previous attempts to establish an investment law advisory center, followed by a discussion of potential models for an Assistance Mechanism in investment law.

Section 3. Previous Attempts to Establish an “Advisory Center” on International Investment Law

3.1 UNCTAD-IADB-OAS-VCC	45
3.2 UNASUR	46
3.3 ANZ-ASEAN Forum	46

As states began, in the early 2000s, to grapple with the significant increases in ISDS cases, several attempts were made to establish regional advisory centers.⁷⁶¹ These efforts are described here in order to assess these efforts and any lessons learned.

3.1 UNCTAD-IADB-OAS-VCC

In the 2000s, several Latin American states, with the support of UNCTAD, the Inter-American Development Bank (IADB), the Organization of American States (OAS), and the Vale Columbia Center on Sustainable International Investment (VCC)²⁰¹ proceeded extremely far along the process of establishing a regional investment advisory center. In 2006, Colombia, the Dominican Republic, and other Central American countries requested a feasibility study of an advisory center to assist countries in the handling and defending of investor-state disputes.²⁰² A detailed set of consultation guidelines and a consultation report were prepared to review what services an advisory center could provide as well as the possible institutional options for such an initiative.²⁰³ In 2009, a steering committee meeting of interested countries took place to come up with a consolidated vision and develop terms of reference for an advisory center.²⁰⁴ It was agreed that: the center would be an intergovernmental organization, established by states and run by states; the model would be the ACWL; it would ultimately be financially self-sufficient; and the center would carry out two core functions of advisory²⁰⁵ and defense²⁰⁶ services.

The initiative resulted in a draft treaty and a consolidated budget that was submitted to interested countries and discussed at a steering group meeting in Colombia in May 2009. February 2010 had been set for the ministerial signature of the treaty that would establish this center, however efforts failed at the last minute.

Based on interviews with individuals involved in this effort (both conducted by CCSI and reviewed in the context of desk research), certain lessons can be learned. As a general matter, technical issues (even those that were eventually overcome), questions surrounding funding of the center, and last-minute changes to several countries’ negotiators are viewed as having significantly contributed to, if not caused, its failure.²⁰⁷

Certain technical issues proved to be high hurdles in negotiations. One interviewee understood differing country positions as stemming from divergences in country needs in disputes (e.g. how much each country wished to perform in-house versus outsource), which resulted in each country ultimately taking a different approach and having a different perspective on what each viewed as the appropriate and desirable role for an advisory center, particularly with respect to the desired level of involvement in the defense of claims, and how much responsibility should be given to a center.

A second, not unrelated, technical issue surrounded the ideal structure of a center, including what its staffing would look like, what the nationality of its officials would be, and where it would be located. With respect to its location, it was agreed that it would initially be located in Washington D.C., a location favored by certain negotiators, and then moved to Panama, although even with respect to South American locations, there were several competing proposals.²⁰⁸ Each of these discussions was highly political, and one interviewee involved in this process noted that the ability to resolve these seemingly small and last-minute questions about an advisory center should not be underestimated.²⁰⁹

Ultimately, one of the most difficult issues was the funding of the center, and “when it came to funding, the whole thing blew up at that point.”²¹⁰ The agreement that the center would be self-sufficient, combined with difficulty in estimating ISDS dispute costs, persisted and made difficult finalization of the scope of services and member contributions (and whether these would be differentiated based on economic development levels) and how contributions from other organizations or development banks with interests in the IIA/ISDS system would be handled.²¹¹

Finalization of financial details coincided with last-minute changes to several key negotiators and the loss of certain influential diplomats in the effort was ultimately the final blow.²¹²

The final steps of the UNCTAD-IADB-OAS-VCC project also coincided with the introduction of a competing UNASUR advisory center initiative, described below. These proposals were similar but were supported by different members of the region, which resulted in neither center gaining comprehensive regional backing.²¹³

3.2 UNASUR

In May 2008, the Heads of States of the Union of South American Nations (UNASUR) set forth a plan of action that included an investment court, investment arbitration rules, and an advisory center on investment law and ISDS for UNASUR member states.²¹⁴ UNCTAD had been invited to assist the working group on ISDS with technical assistance and input as far as technical options, budgetary issues, and institutional options.²¹⁵

The idea for a Southern Observatory on Investment and Transnational Corporations arose in the early 2010s around the time that the UNCTAD-IADB-OAS-VCC project was abandoned.²¹⁶ While it was not based directly on the ACWL model, it was intended to provide a collective repository for the region’s ISDS-related knowledge and experience to assist in strategic defense of UNASUR member states in order to more systematically influence regional and international investment rules.²¹⁷

While the status of the UNASUR project is unclear, and no public announcement has been issued to indicate significant progress, it appears that an Executive Committee has continued to advance specific proposals, and that a proposed legal framework and agreements establishing a center are proceeding.²¹⁸

3.3 ANZ-ASEAN Forum

Outside of the Latin American region, in 2012 Vietnam proposed to the Australia-New Zealand and the Association of Southeast Asian Nations (ANZ-ASEAN) Forum that a regional advisory center be established similar to that envisioned by the UNCTAD-IADB-OAS-VCC initiative.²¹⁹

This proposal focused on the cost burden of and technical expertise needed for ISDS disputes and the need to share expertise and experience among the ASEAN region, and called upon states to move this onto the ANZ-ASEAN agenda.²²⁰ This proposal did not ultimately gain sufficient political support.²²¹

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An Assistance Mechanism (or Mechanisms) to provide investment law-related support could take a wide variety of forms. Several are described below. This list is illustrative and not exhaustive. Moreover, while this study has, in the interest of conceptual coherence and clarity, attempted to place existing Assistance Mechanisms into the general categories set forth below, given the myriad services and models, neat divisions proved challenging and overlap between categories occurs. Some of the mechanisms described below already support investment law-related activities and some focus on other substantive areas or forums, but all are helpful to consider as a model for how an investment-law focused mechanism could work, as well as to benefit from lessons learned in other contexts. Of course, any Assistance Mechanism should be designed to most efficiently and effectively respond to the identified concerns and capacity challenges that it is intended to address.

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 any of a menu of services (e.g. capacity building, negotiation support, policy advice, legal opinions, and/or defense).

This section addresses a range of models of multi-service Assistance Mechanisms, each of which varies in its focus and services offered.

First, an Assistance Mechanism may be conceptually similar to the Advisory Center on WTO Law (ACWL). Indeed, the ACWL model is often raised in the context of an Assistance Mechanism in international investment law and is thus described in some depth below as a potential model for an Assistance Mechanism in investment law.²²² The ACWL can be distinguished from other mechanisms as it is the only mechanism that provides a significant level of direct legal services in-house, by its own ACWL lawyers. The ACWL also has a “clearinghouse” element, whereby some services are provided through the ACWL but by private practitioners in specific circumstances.

The African Legal Support Facility (ALSF), also described below, provides an extensive range of services, but, compared to the ACWL, operates to a greater extent on the “clearinghouse model”, facilitating legal relationships between private practitioners and government clients. However, the ALSF compares itself, to some extent, to an office of “general counsel” in that its in-house lawyers are able to, and do, provide many legal services and advice in-house, and help countries manage relationships with, and advice received from, outside counsel.

The International Development Law Organization’s (IDLO) Investment Support Programme for Least Developed Countries (ISP/LDCs), described below, facilitates a wide range of investment-related services, but currently has a more limited “in-house” advisory role. The ISP/LDCs program is active in cultivating relationships with outside service providers (which include economists and development policy specialists in addition to private practitioners) and remaining engaged with the beneficiary throughout the matter. Unlike the ACWL (limited to WTO law) and ALSF (focused to a greater extent on investment contracts), the ISP/LDCs program is an existing Assistance Mechanism that is specific to investment law-related support.²²³

Finally, suggestions for an investment law “hotline” are briefly described in this section, as this notion arose in CCSI’s consultations and could form an element of any broader institutionalized mechanism.

Each of these existing Assistance Mechanisms - ACWL, ALSF, and ISP/LDCs – are now described in depth.

4.1.1 Advisory Center on WTO Law

4.1.1.1 Overview

The ACWL was established in 2001 pursuant to an agreement between a coalition of developed and developing members of the WTO.²²⁴ As an intergovernmental organization it “enjoys a legal status on par with the UN and the WTO.”²²⁵ While the ACWL was founded as, and functions as, an intergovernmental organization independent of the WTO, its explicit mission is to “provide developing countries and LDCs with the legal capacity necessary to enable them to take full advantage of the opportunities offered by the WTO.”²²⁶ To that end, it provides developing country

Members and LDCs with direct institutional support for defense and prosecution of claims at pre-set prices, technical support and capacity building, and free legal opinions concerning WTO law. The ACWL has been broadly credited, both by recipients of its aid and observers in academic and civil society organizations, with substantially supporting access to the WTO's dispute resolution mechanisms by developing countries and LDCs and increasing access to justice within the existing institutional frameworks of WTO law.

4.1.1.2 Organizational governance

The ACWL's governance structure was designed with the goal of isolating the day-to-day work of the center's professionals from direct "control or influence by any Member [(of the ACWL)] or group of Members."²²⁷ The ACWL is independent of the WTO and is governed at the highest level by a General Assembly, which consists of representatives from each member country (developed and developing), as well as representatives from any LDC entitled to the ACWL's services.²²⁸ The General Assembly meets biannually and performs three functions: (1) monitoring the performance of the ACWL, (2) electing the Management Board of the ACWL, and (3) adopting budgets and regulations proposed by the Management Board.²²⁹

The Management Board has a more direct role in the management and financial control of the ACWL. The Management Board performs four key functions: (1) appointing the Executive Director in consultation with Member countries, (2) preparing annual budgets for approval and adoption by the ACWL General Assembly, (3) supervising the administration of the Endowment Fund, and (4) proposing rules and regulations (for consideration and adoption by the ACWL General Assembly).²³⁰ The Management Board will also decide on any appeals by Members to whom legal support in a dispute settlement proceeding has been denied.²³¹

The Management Board consists of six individuals who serve "in their personal capacities and independent of their national affiliations."²³² These individuals serve two-year terms, and national affiliations are considered in their appointment: three of the Management Board members are nominated by developing country Members of the ACWL, two by developed country Members of the ACWL, and one by LDC beneficiaries

of the ACWL. In addition, the Executive Director of the ACWL serves as an *ex officio* member of the Management Board. Lawyers familiar with the Centre's decision-making bodies noted that representatives nominated by developed country members tend to be retired ambassadors or civil servants, while other Management Board members often had active professional relationships with developing countries or LDCs. These lawyers speculated that by turning to retired experts, the ACWL has the advantage of incorporating a developed country perspective while avoiding some of the perceived conflicts that would arise if Managing Board members had ongoing formal relationships with developed countries who could not use the Centre themselves.

Finally, the day-to-day operations of the ACWL are managed by an Executive Director, who represents the ACWL externally and reports directly to the Management Board.²³³ Throughout CCSI's consultations, representatives from academia, civil society organizations, private sector law firms, and developing and developed country governments all independently credited Frieder Roessler, the first Executive Director of the ACWL, for contributing significantly to its early reputation and its current track record of success. Additionally, a number of interviewees suggested that Roessler's personal reputation was a crucial element in convincing developed countries to "buy-in" to the idea of the ACWL and provide financial and political support to its establishment.

Table 4 illustrates the governance structure of the ACWL.

According to a note by the Management Board, this governance structure aimed to put in place a system of “checks and balances ... to ensure that when a developing country Member or least-developed country seeks legal advice from the ACWL ...the ACWL’s advice will be based solely on the professional expertise of the Executive Director and staff of the ACWL, operating entirely independently of any influence, control or fear of consequences from any of the ACWL’s Members, especially its donor Members.”²³⁴ This note placed significant

Table 4 Governance structure of the ACWL

The General Assembly shall ...	The Management Board shall ...	The Executive Director shall ...
<ul style="list-style-type: none"> • Evaluate the performance of the ACWL; • Elect the Management Board; • Adopt regulations proposed by the Management Board; • Adopt the annual budget proposed by the Management Board; • Perform the functions assigned to it under other provisions of the Agreement Establishing the ACWL. 	<ul style="list-style-type: none"> • Report to the GA; • Take decisions necessary to ensure the efficient and effective operation of the ACWL in accordance with the agreement establishing the ACWL; • Prepare the annual budget for the GA’s approval; • Decide on appeals by Members to whom legal support in a dispute settlement proceeding has been denied; • Supervise the administration of the Endowment Fund; • Appoint an external auditor; • Appoint the Executive Director in consultation with Members; • Propose for adoption by the GA regulations on <ul style="list-style-type: none"> ○ Management Board procedures, ○ duties and conditions of the Executive Director, staff, and consultants, and ○ the administration and investment policy of the Endowment Fund; and • Perform the functions assigned to it under other provisions of the Agreement Establishing the ACWL. 	<ul style="list-style-type: none"> • Report to the Management Board; • Manage the ACWL’s day-to-day operations; • Hire, direct, and dismiss the staff of the ACWL in accordance with the staff regulations adopted by the General Assembly; • Contract and supervise consultants; • Submit to the Management Board and the General Assembly an independently audited statement of receipts and expenditures relating to the budget during the preceding fiscal year; and • Represent the ACWL externally.

Source: adapted from ACWL, *The Governance of the ACWL: A Note by the Management Board* (22 October 2015), ACWL/MB/W/2015/20, 7 (internal citations omitted).

weight on the limited nature of the General Assembly's powers to manage the operations of the ACWL, and on the important role of the Management Board in acting as a "buffer" between the management of the ACWL's day-to-day operations, and 'the policies of donor countries ... and user developing countries...'. In other words," the Management Board's note continues, "the Management Board exists to ensure that the operations of the ACWL are managed, not by the ACWL's Members themselves through the General Assembly, but by an independent body of highly-qualified individuals that are not answerable to the political goals of the ACWL's Members either individually or acting in blocs."²³⁵ The note also highlights the importance of the fact that the Executive Director is not appointed by the ACWL Members through the General Assembly, but by the Management Board in consultation with the ACWL Members. It emphasizes that this was done in order to avoid politicizing the appointment process, "ensur[ing] that the Executive Director and staff of the ACWL would provide professional advice based on their technical expertise and independently of any political considerations."²³⁶

Overall, this text emphasizes the Management Board's powers vis-à-vis the ACWL General Assembly. It highlights the Management Board's powers to take decisions and the ACWL General Assembly's limited power to approve but not "review, amend, or appeal" those decisions.²³⁷ Nevertheless, it is not certain that the members of the ACWL General Assembly would agree with that characterization; and it is unclear what would happen in the event that the ACWL General Assembly declined to approve decisions or recommendations by the Management Board.

4.1.1.3 Scope of services

The legal services offered by the ACWL can be generally divided into three categories: (1) assistance in WTO dispute proceedings,²³⁸ (2) legal advice on issues of WTO law,²³⁹ and (3) "training on WTO law," or what is more commonly described as "capacity building,"²⁴⁰ although this Scoping Study, in defining and conceptualizing "capacity" more broadly, would characterize all services provided by the ACWL as meeting some element of "capacity" challenges experienced by states.

An overview of ACWL activities from 2008-2018 is shown in Table 5.

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).²⁴¹

As this subsection will discuss, these services are inextricably interlinked and imbricated; legal opinions support the pursuit or defense of dispute proceedings, which provide substantive capacity building within litigant governments that help identify new trade law issues and support their participation in future WTO litigation.

4.1.1.3.1 Litigation support

Direct assistance

The ACWL, uniquely among the Assistance Mechanisms discussed in this Scoping Study, provides direct legal support for developing countries and LDCs in WTO litigation. The ACWL's mandate allows it to provide support to litigants and third-party participants engaging in or considering WTO dispute settlement proceedings at any and all stages of the dispute, from preliminary dispute evaluation through Appellate Body procedures, and compliance and implementation.²⁴² ACWL Members and LDCs are charged specified hourly rates (Table 6), while non-Member developing countries must pay a higher hourly rate for ACWL services. One of 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 like the United States or the European Union.²⁴³ Although developing countries and LDCs individually are infrequent users of the WTO's dispute settlement forums, the ACWL itself is one of the most frequent participants in WTO litigation. Since its establishment in 2001, the ACWL has provided direct legal support (either through its own lawyers or through external counsel) in approximately 20% of all WTO disputes – more than 60 proceedings.²⁴⁴ This broad portfolio of cases allows the ACWL to perform the function of "pool[ing] the legal experience of developing countries and LDCs in WTO legal matters and enabl[ing] each of them to draw on this collective experience to defend their individual interests in dispute settlement proceedings."²⁴⁵

While in theory the ACWL has the ability (with the permission of the Management Board) to refuse to litigate truly frivolous cases, CCSI's consultations suggest that this option has never been exercised and that non-meritorious cases brought to the ACWL have historically been diverted prior to litigation, during the diligence phase or otherwise. It is important to note also that governments are not *required* to use the ACWL, and "it is therefore not uncommon to see a government use the ACWL in one dispute and a commercial law firm in another."²⁴⁶

Additionally, the ACWL will at times work alongside private counsel also engaged by the government, on terms set by the client government. CCSI's consultations suggest that the Centre has historically been quite accommodating of alternate case management structures when client governments request them. Consultations also suggest that the ACWL is able to effectively do this because it has a good reputation and private sector firms are therefore willing to work as co-counsel with the ACWL on matters.

A number of government officials from low and middle-income countries noted in Scoping Study consultations that while strict public sector procurement processes present hurdles to benefiting from private sector advice in early-stage ISDS disputes, the ACWL's status as a trusted and well-established treaty-based organization means that it is easier to both seek and to justify seeking the ACWL's help at the earliest stages of disputes, or even when disputes are being considered. There is some empirical evidence to support the idea that the ACWL has helped secure more thorough representation for developing countries and LDCs – a 2010 study of the ACWL's impact noted that the Centre seems to have allowed developing countries "to pursue disputes undertaken more fully."²⁴⁷ However, it does not appear that the ACWL's existence has brought many "new users" into the WTO system – the overwhelming majority of clients of the ACWL had participated in WTO disputes prior to working with the Centre.²⁴⁸

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

Rosters of external counsel and pre-set fees

In the event of conflicts of interest (usually, when two adverse countries entitled to the ACWL's services both request the Centre'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.²⁴⁹ As of 2017, 36 firms and individuals, including a number of prominent international law firms, had joined the ACWL's roster of external counsel.²⁵⁰

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.

Technical Assistance Trust Fund

In 2002, the ACWL decided to establish a Technical Expertise Trust Fund to be able to finance the preparation of the underlying technical dossiers required in complex dispute settlement proceedings. Through experience, it became clear that in certain kinds of technical disputes, particularly those pertaining to the WTO Agreements on Technical Barriers to Trade and Sanitary and Phyto-Sanitary Measures, the highly-specialized expertise that is necessary during the course of litigation was a barrier for many developing countries who do not have this expertise in-house, and cannot afford to hire experts on an ad hoc basis. The ACWL budget was also not large enough to pay the costs necessary to prepare these kinds of technical cases. Developing countries and countries in transition that are ACWL Members as well as LDCs, can request disbursements from this trust fund up to CHF100,000. The amount of the subsidy varies, from 20% to 90% of costs, by the category of membership of the ACWL (Categories A, B, C and LDCs, discussed below). The Netherlands Ministry of Foreign Affairs has contributed CHF250,000 (EUR171,500) to the Trust Fund for a period of three years. The balance as of 31 December 2018 was roughly CHF550,000.

4.1.1.3.2 Legal advice

In addition to direct representation and dispute support, the ACWL provides on average 200 legal opinions per year on issues of WTO law. The legal opinions are entirely free of charge for Members and can also be obtained at set fees by non-Member developing countries.²⁵¹ These opinions, granted on a strictly confidential basis, take forms ranging from extensive meetings to lengthy written opinions.²⁵² The opinions fall into three general categories:

- **Systemic:** General or systemic issues arising in connection with negotiations and WTO decision-making. They include legal issues raised by negotiating proposals, arising in trade policy reviews, and connected to the work of various WTO Committees;
- **Internal compliance:** States seeking advice regarding the consistency of their own measures and other international treaties (e.g., subsidies, trade remedies, intellectual property protections) with WTO law. The ACWL notes that these are sometimes used by ACWL Members and LDCs to help resolve internal disagreements within the government about the WTO-consistency of proposed measures; and
- **External compliance:** States seeking advice regarding the WTO-consistency of measures taken by other WTO Members and legal options for addressing those inconsistencies.²⁵³

In the period from 2014-2018, 35% of legal opinions related to systemic issues, 36% to issues of internal compliance, and 29% to external compliance.²⁵⁴

In 2015, the ACWL General Assembly approved a proposal enabling the ACWL to use its Roster of External Counsel to provide these legal opinions when conflicts of interests prevented the ACWL from doing so. (Previously, the Roster of External Counsel had only been used in the context of dispute settlement proceedings). Under this approach, when the ACWL has a conflict of interest, LDCs and developing country Members can obtain a free legal opinion from a lawyer/law firm of their choosing that is on the Roster. The ACWL will pay the fees of the lawyer/law firm.²⁵⁵

Several developing country representatives in consultations for this Scoping Study noted that in the context of ISDS disputes, budget constraints, strict procurement laws, and anti-corruption regimes make it difficult to quickly secure the advice of private-sector counsel in the earliest stages of a dispute or before taking actions that could trigger disputes. These representatives frequently pointed to the ACWL's free provision of legal advice and opinions as a crucial resource that circumvented these restrictions and allowed them to quickly take informed action. Bohanes and Vidal-Leon note that the terms of these opinions, especially when unrelated to imminent disputes, would be "difficult to match for a private sector provider," and that the expertise, informality, and accommodation offered by the ACWL's legal opinions uniquely positioned the ACWL among institutions.²⁵⁶ However, CCSI's consultations revealed that at least one upper-middle-income government has structured a standing retainer agreement with a private sector firm that allows for similar access to on-demand legal opinions in the investment law context, albeit at a (relatively inexpensive) fixed cost.²⁵⁷

However, it is important to realize that ACWL opinions are not without restrictions. First, "the limitations of the ACWL's mandate necessarily limit" the benefits of the ACWL's opinions, as the ACWL cannot advise on non-legal issues "such as economic policy or negotiating strategy or negotiating objectives."²⁵⁸ These kinds of non-legal issues may prove to be more pervasive to questions of investment law than with respect to WTO law. Second, the inability of the ACWL to volunteer its services means that governments are unable to seek help with "unknown unknowns" – issues that might present serious future challenges but have not been identified in a particularized way by the client government.²⁵⁹

4.1.1.3.3 Capacity building

Finally, the ACWL engages in significant capacity building for developing countries and LDCs who access its services. This capacity building was integral to its design, 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. Claudia Orozco Jaramillo, then-Minister Counsellor with the Permanent Mission of Colombia to the WTO who is broadly credited with originating the idea of the ACWL,²⁶⁰ described the philosophy of the ACWL's representation quite clearly.

"[T]he essence of the ACWL is not to be a law firm but to contribute to development by helping developing countries learn by doing. For this to happen, both the ACWL and the user countries need to permanently bear in mind this goal. Whenever a user country decides to participate in a case it should appoint a team of Government officials to represent the country and request that such team be coached to perform as much and as far as possible. The essence of the ACWL is to help developing countries to move forward on the path to development through enhancement of their human resources and institutional organization and by acting with the conviction that all, even marginal contributions, are significant to this overall purpose."²⁶¹

With respect to more traditional capacity building, the ACWL's main training and seminar program is a 9-month training course that meets weekly and is offered to WTO delegates from developing countries and LDCs. Additionally, the ACWL offers a number of *ad hoc* trainings, which can be set up at the request of governments.²⁶² These trainings are open to invitees of any developing country Members and LDCs, and so occasionally include private sector representatives invited by governments. Users of these training services who were consulted by CCSI (mostly, but not entirely developing country governments) describe these trainings as substantially similar to those provided by other nonprofit organizations, governments, and private sector firms. However, the ACWL's annual training course has the advantage of being located in Geneva, and so is easily accessible for countries' representatives to the WTO.

The ACWL also operates an intensive 9-month secondment for trade lawyers from developing country Members and LDCs, which functions as a paid training program that places these lawyers directly alongside ACWL staff. Although this project was not initiated until 2005, its presence was part of the early plans for the ACWL.²⁶³ This program has other parallels; in the process of compiling this paper CCSI spoke to private sector lawyers who had negotiated contracts that

had involved placing government lawyers in similar secondments inside their firms. Nevertheless, the ACWL's secondment program allows trade lawyers from developing countries and LDCs to gain substantial experience with hands-on WTO litigation that would be difficult for these governments (who, individually, are not frequent WTO litigants) to duplicate in other contexts, including within their own government or perhaps, even, in a private firm.²⁶⁴

Perhaps most significantly, the ACWL contributes to developing legal capacity in its users by permitting, indeed requiring, client governments to work closely with the Centre's staff during the course of direct representation through the ACWL.²⁶⁵ Although this feature is often overlooked, lawyers who had worked for the ACWL directly, interfaced with ACWL services from within developing country governments, or coordinated with the ACWL from the private sector all credited the ACWL's lean staffing model with substantially increasing the capacity of developing country governments. Although a number of government representatives noted that the ACWL's resources and work model made it slightly less responsive to short-term demands than a private sector firm would be, they also pointed out that the ACWL's staffing model meant that the Centre, by design and necessity, worked closely with in-house government lawyers and provided intense hands-on training opportunities that were rarely available from other sources. As Claudia Orozco Jaramillo's comments above indicate, this training-by-collaboration was always intended to be a benefit of the ACWL's service provision structure. Although this is not unique to the ACWL, and many governments operate "mixed" models of representation that involve collaboration between private sector counsel and government lawyers, a number of government attorneys were of the opinion that the ACWL's collaborative representation process provided a vastly more valuable capacity building opportunity than any private-sector partnership they had experienced.

The ACWL has been highly praised for its contribution to enhancing the legal capacity of the states who access its services. It is important to note, however, that the ACWL's capacity building programs focus on developing technical competence and expertise within the specific framework of WTO litigation rather than on building more broadly governments' capacity to advocate for their national economic interests.²⁶⁶

As such, the ACWL's model is well suited to a more narrow-conception of capacity building but is not well-suited to address organizational, institutional or systemic problems that might substantially hinder states' ability to effectively participate in the WTO system and advance their economic interests. These systemic barriers could take a variety of forms, from breakdowns in inter-governmental decision-making processes to failures to communicate effectively with the private sector to fear of economic retaliation from trading partners.²⁶⁷ Without the ability to provide aid in these areas, the ACWL's interventions are limited to building technical competence and "equality of arms" within existing international legal frameworks rather than supporting the development of more effective and equal institutional forms. Still, the narrow focus of the ACWL's capacity building effort may have significantly eased the ACWL's acceptance by the global community.

In CCSI's consultations the ACWL's success was also, in part, attributed to its ability to focus on legal rather than policy issues, and thus retain an aura of neutrality. The ACWL's 2017 Annual Report, in response to the frequently asked question, "How does the ACWL ensure the neutrality and impartiality of its advice?" frames this narrow approach as a key feature of its neutrality. As a matter of policy, "[t]he ACWL provides only legal, not political, advice."²⁶⁸ Similarly, lawyers involved in the formation of the ACWL noted in consultations with CCSI that perceptions of the Centre as "apolitical" were crucial to its acceptance by both developed and developing WTO members. It is also important to note that the use of the term "narrow" in this context reflects the scope of ACWL interventions rather than their quality or intensity. In fact, multiple civil society and developing country observers consulted by CCSI believe that the ACWL's capacity building programs are quite effective in helping government officials acquire and maintain technical legal expertise in the narrow sense.

4.1.1.4 Funding

From its initial formation, the ACWL's funding structure was central to its mission. Claudia Orozco Jaramillo was very explicit in her belief that the Centre's funding structures were essential to its effective governance, long-term viability, and immediate legitimacy in the eyes of the international community:

[The ACWL] needed to be economically independent to ensure stability and credibility. Additionally, the need for economic stability had to be balanced with the need to ensure that the long-term viability of the facility would result from the quality of its services. For that reason, an economic model was developed based on a trust fund that provided certain stability combined with payable services. Even though some developing countries lack resources required to pay legal fees at market rates, services should not be offered free of charge. Free of charge services affect the quality of the services and the dynamics between the provider and the user. The model had to empower developing country users as owners and clients of the facility.²⁶⁹

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.²⁷⁰ The ACWL also has some ability to accept contributions from other sources for "specific purposes that are not related to dispute settlement cases,"²⁷¹ but segregates those funds from its core functions. This mixed funding model has been described by those close to the Centre as "co-ownership" between developing and developed states, and a number of lawyers familiar with the work of the ACWL have credited this built-in reliance on developing country funds for the Centre's perceived institutional independence from developed country donors.

With respect to the Endowment Fund, it 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). A "majority of the ACWL's funding originates from development agencies or development directorates within a Ministry of Foreign Affairs. ... These contributions are normally considered as part of each Member's Aid for Trade effort and can be categorized as [official development assistance]."²⁷² Each developed country member has contributed at least \$1,000,000 to

Table 6 Hourly and maximum total charge to complainants and respondents in WTO panel proceedings⁷⁶²

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

the operation of the ACWL through either endowment fund contributions or direct contributions to the annual budget.²⁷³

In terms of voluntary contributions from non-governmental sources, while those are permitted under the ACWL's financial regulations, they have been discouraged on the ground that they create tensions with the "ACWL's impartial and non-issue driven nature."²⁷⁴ On at least one occasion, for instance, "a private foundation decided not to provide funding when the ACWL could not guarantee that it would take certain legal positions."²⁷⁵

With respect to service fees charged to users, contemporary observers of the ACWL's formation noted that this charging model was rooted in "four elements: the ability to pay, the user pays principle, the need to create incentives to become [a founding funder of the Centre], and the need to avoid frivolous cases."²⁷⁶ "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). Category A countries, which are charged the highest amount, are those whose economic activity makes up >1.5% of World Trade Share (WTS) or those who are identified as High-Income Countries based on GNP per capita. Category B countries are defined as countries whose economic activity makes up between 0.15% and 1.5% of WTS or those who are identified as Upper Middle-Income Countries based on GNP per capita. Category C countries are those whose economies represent <0.15% of WTS, and the lowest fees are charged to countries identified as LDCs.²⁷⁷ Services other than direct representation (i.e., legal advice and training/capacity building) are provided free of charge to developing country members and LDCs. Table 6 illustrates the hourly rates and the maximum fees that the ACWL will charge different Members and LDCs for support as a complainant or respondent in WTO panel proceedings. It sets additional maximum charges for other phases of dispute settlement (e.g., consultations, Appellate Body proceedings, participation in different phases as a third-party).²⁷⁸

As indicated in Table 6, countries at each payment tier are charged a different per-hour rate for the work of the ACWL's staff, ranging from CHF324 Swiss francs per hour for Category A countries to CHF40 per hour for LDCs. In the event of a dispute between two Members or LDCs who both seek the services of the ACWL, these fees are raised by 20% to match fees provided to private sector counsel.²⁷⁹ Outside counsel is then engaged for the party who is not represented by the ACWL,²⁸⁰ and will have agreed to charge fees commensurate with those charged by the ACWL. Any payment required by outside counsel beyond the ACWL's established fee structure is paid by the Centre.²⁸¹

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.²⁸² The costs estimated by these time budgets represent a firm cap on the amount the ACWL will charge for the described services, although all parties consulted on the topic acknowledged that the actual work done by ACWL lawyers frequently exceeded (in some cases, significantly) the time budgets provided on an uncompensated basis, although no one felt that the quality of service, or the ACWL's dedication to the client, diminished after the time budget had expired. Government officials who worked directly with the ACWL cited this as a key feature of the ACWL's appeal, as it allows states to predictably budget for the Centre's services without noticeably restricting the availability of resources to deal with unexpected complications. A number of developing country officials told CCSI that the ACWL's fee structure and transparency provided a public good beyond their role in the ACWL's representation; these time budgets (and maximum fees charged) have occasionally been used as a negotiating tool for developing country governments securing representation from private sector law firms, and the ACWL's existence as a "best alternative to a negotiated agreement" has allowed some countries to secure substantially lower rates for private sector representation. One noted that although his government had *not* engaged in active negotiation with private law firms to substantially lower fees, this interviewee had seen bids decrease by 20 to 30 percent as the legal market adjusted to the presence of a low-cost competitor (the ACWL). However, Bohanes and Vidal-Leon point out that the ACWL's

rise to prominence coincided with broader shifts in international legal markets and the expanding role of firms in developing country markets like China, India, and Latin America, and so might not be the sole or direct cause of price changes.²⁸³

Despite the original vision for the Centre, the ACWL has never achieved financial self-sustainability. After its first transitional phase, at the end of 2005, the Endowment Fund stood at CHF18.0 million, with projected yields of roughly CHF0.8 million per year. Fees for services rendered were estimated at CHF0.3 million per year. Together, those amounts were less than one half of the annual cost of ACWL operations (CHF2.3 at the time). A 2006 Task Force report concluded that, given the growth and success of the ACWL, and the size of and returns to the Endowment Fund to that point, it was doubtful that the Endowment Fund would ever reach a size necessary to ensure the ACWL's self-sufficiency.²⁸⁴

Additionally, 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. For 2016, it was roughly CHF4.3 million;²⁸⁵ and for 2019, it was estimated at roughly CHF4.7 million.²⁸⁶ In contrast income from legal fees averaged only CHF161,000 per year from 2002-2014; stated differently, legal fees have constituted on average roughly 4 percent of the ACWL's annual revenues.²⁸⁷ Notwithstanding that gap, at least one external audit of the ACWL commissioned by a developed country ACWL Member recommended against any increase in fees on the ground that it would have limited impact for financial sustainability but "would likely discourage Category B and Category C Developing Countries from reaching out for ACWL assistance."²⁸⁸

To date, ACWL governance has used five year-periods to conduct major evaluations of the need for and role of ACWL services, examine funding needs, and plan for whether and how to meet those funding needs. The budget for the 2017-2021 period is estimated at CHF23.548 million. Taking into account revenue from the Endowment Fund (which, by the end of 2015, had reached roughly CHF26 million)

that could be withdrawn to fund the Centre over the five-year window, CHF20 million in additional voluntary contributions was determined necessary to cover the ACWL's financial needs through 2021.²⁸⁹ It is expected that these funds will need to come from voluntary contributions of developed country Members. Funding appears to be an ongoing challenge for the ACWL. While users, donors, past and current employees, external auditors, academics, and others, widely give it high praise, experience shows that it continues to need to raise significant sums to support its five-year budgets.

4.1.1.5 Scalability

As of 31 December 2018, there were eleven developed country Members, one developed country associate Member, thirty-six developing country Members of the ACWL, and forty-four LDCs entitled to its services without a membership requirement.²⁹⁰ This represents just over forty percent of WTO Members. Also, as of 31 December 2018 there were fifteen members of staff (twelve lawyers, including the Executive Director, and three administrative staff), and four attorneys with the ACWL under its secondment program.

Given the resources required to hire and retain quality staff, and to devote the time necessary to provide quality legal support, the ACWL would not be able to increase its activities absent additional funding and could face challenges meeting needs if there were any dramatic increases in demand for ACWL services.²⁹¹

4.1.2 African Legal Support Facility

4.1.2.1 Overview

The ALSF, based in Abidjan, Côte D'Ivoire, is a public international, treaty-based organization hosted by the African Development Bank (AfDB) Group.²⁹² The ALSF provides legal advice and technical assistance to African countries with respect to the negotiation of complex commercial transactions, creditor litigation, and other related sovereign transactions or disputes, including with respect to international investment law. Its mission is "[a]chieving sustainable legal capacity for Africa,"²⁹³ to be met through its goal of removing asymmetric technical capacities and to level the playing field of legal expertise among parties to litigation and negotiations. All of its activities aim to build additional legal capacity.²⁹⁴

The ALSF was established by African finance ministers

following a call, in June 2003, for the creation of a legal technical assistance facility to help Highly Indebted Poor Countries (HIPCs) address the growing problem of vulture funds (legal claims based on distressed debt). The Commission for Africa again reiterated the need for such a facility in March 2005. The G8 recognized that lawsuits instituted by vulture funds against African countries were an obstacle to debt relief arrangements that had been agreed in 2005. The ALSF was created by a treaty that came into force in December 2008 and per its founding treaty, will terminate in 2022.²⁹⁵

4.1.2.2 Organizational governance

The governance structure of ALSF consists of a Governing Council representing twelve members of participating states and institutions, consisting of: a Management Board composed of five regional member countries of the AfDB (each serving in his or her personal capacity),²⁹⁶ four OECD member-states,²⁹⁷ one non-OECD member-state,²⁹⁸ a permanent seat for a representative of the AfDB, and a seat for an international non-governmental organization. The technical staff is headed by a Director.

According to one interviewee who is familiar with the founding and operation of the ALSF, key traits that contributed to its success were that it was a regional initiative, and not something that came from the G20, G7, or other organizations outside of the region, and that it started with African institutional support (the AfDB), and thus benefitted from trust relationships that were already established.²⁹⁹

4.1.2.3 Scope of Services

ALSF is a “broker-plus” model. ALSF helps countries to engage outside counsel, but ALSF in-house counsel also give advice and guide governments on what that outside counsel is saying and in managing this relationship.³⁰⁰ 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.³⁰¹

While ALSF was primarily founded with the idea of helping to combat issues related to vulture funds, in the early days of the ALSF it became clear that the

problem that HIPCs were experiencing went beyond, and was more profound than, issues surrounding the lawsuits initiated by vulture funds, and that there was a need for broader advisory services with respect to foreign investment, particularly with respect to natural resources and infrastructure contracts, and related capacity building.³⁰² ALSF now engages in a much wider 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.³⁰³

ALSF conducts diligence around every requested service, and while it has no formal policy surrounding requests that should be rejected, some may be rejected during the course of ALSF’s internal diligence policy.

4.1.2.3.1 Engaging ALSF and Outside Counsel

ALSF operates upon request of governments. A government must submit a formal written request for assistance to the ALSF. This requirement is based on a desire, by the ALSF, to ensure that there is sufficient political buy-in to ALSF assistance before ALSF will engage.³⁰⁴ As such, it has been the experience of ALSF that when governments agree to formally submit a request, there is broader agreement that they need or desire specific assistance and are willing to request it from the ALSF.³⁰⁵

In all cases, while ALSF will facilitate access to outside counsel, governments make the final call on which counsel they hire. The objective is to ensure that governments trust outside counsel to the greatest extent possible.³⁰⁶

In the past ALSF used a procurement process and provided a roster of firms that were available for engagement by governments. This system was in many ways difficult to manage, not least because it meant ALSF was constantly negotiating counsel fees (in its “broker” capacity).³⁰⁷ It is understood that ALSF has now moved to a panel system, which is easier to manage, but which also means that rates are locked in for a longer period of time, which is a trade-off.³⁰⁸ Under a panel approach, ALSF enters into framework contracts with firms. When a request for assistance has been received, ALSF then brokers with 4-6 firms to enter into a procurement (including bids and financial

proposals), which can be done relatively quickly under existing framework agreements.³⁰⁹ ALSF does maintain terms of reference for flat-fee arrangements but has found that this kind of financial arrangement is very difficult for litigation, so has generally focused on other options of reduced fee arrangements, which all vary by the kind of assistance required and by firm.³¹⁰ Some firms do work on a pro bono basis, some do one hour of pro bono for each hour of paid time, others commit to pro bono capacity building with paid advice. Success fees in litigation are also possible, however, ALSF did not prefer this remuneration method.³¹¹ A key to ALSF's success is "demanding heavily discounted rates and brutal negotiation" with service providers.³¹²

In some cases, ALSF encountered political sensitivity among client governments during the process of hiring outside international counsel.³¹³ In order to ease political tensions in the client country, ALSF began a practice of first coordinating the hiring of a domestic firm in the client country to act as local counsel, and then asked that this firm hire international counsel in coordination with ALSF.³¹⁴ This small change in practice made political issues much easier to navigate because local counsel typically knew the decision-makers in the client country, and the government decision-makers knew and trusted local counsel to help lead them through the process of hiring and engaging with international counsel.³¹⁵

However, allowing client-countries to select their own firms and go through their own procurement processes did result in some tensions with some ALSF donors.³¹⁶ As a general matter, donors were interested in clear and transparent procurement processes, which was not always the case in every client country.³¹⁷ While this was a difficult tension for ALSF to navigate, they generally leave this kind of process and decision-making up to the client country, as long as certain general minimum requirements of both the process and the selected firm are met.³¹⁸

ALSF also facilitates grants and loans to client countries. With respect to litigation services, ALSF uses grants and loans to offset the cost of outside counsel.³¹⁹ In order to streamline this approach and make it more consistent, ALSF created a country list that helped to qualify what the default position would be on each project.³²⁰ This list was based on

various country-based sustainability analyses (such as the IMF's) and then also on the specifics of the sector and project.³²¹

ALSF has also started doing "reimbursable advances" for services, with respect to which repayment is contingent on success.³²² The World Bank Group uses similar structures, called "reimbursable advisory services." While this project was difficult to start, it is envisioned that these kinds of financial advances will form the bulk of ALSF's financial arrangements for legal support in the coming years.³²³ While these advances, can be a source of financial risk to the institution, the ALSF decided that the value of governments being able to get advice through this kind of financing, and, critically, governments feeling like they could take independent advice, outweighed the institutional risk.³²⁴

Under a "reimbursable advance, ALSF directly funds the lawyers selected by the government to complete a specific project, and then requires the government to reimburse the ALSF if the project is successful.³²⁵ What defines "success" in each context is pre-determined and agreed between ALSF and the client government, and is entirely context-dependent (e.g. the negotiation achieves financial close).³²⁶ A "reimbursable advance" effectively amounts to an interest-free loan to the government where ALSF (and by extension, a donor institution) has agreed to take the first loss in case of failure.³²⁷ The rationale for this type of financial structure is based on the ultimate objective of development and ALSF being a development institution.³²⁸ While this kind of financial arrangement was technically available from ALSF for years, it did not gain any interest until recently. One interviewee attributed this delayed take-up to ALSF needing to first gain the necessary trust among its users.³²⁹

4.1.2.3.2 Capacity building

ALSF engages in capacity building on a project/client-specific basis as well as through the ALSF Academy.

Project-specific capacity building and trainings

Each of ALSF's projects blends capacity building with advisory services, the precise nature of which depends on the project at hand. This combination is considered highly effective, particularly when compared with capacity building that only takes place in classroom settings outside of specific negotiations or litigation.³³⁰

While ALSF used to do more of this kind of general training, it found that one-off classroom sessions divorced from specific projects had little impact and were not useful from a cost-benefit perspective.³³¹ Now, for example, if a country has requested negotiation assistance, capacity building related to that project may involve analyzing and critiquing actual contracts that have previously been negotiated by the client country and examining the contracts against market practice and what other countries are doing in similar circumstances.³³² This kind of capacity building has been viewed as being far more impactful, although it is much more difficult, specific, and time-consuming to build into projects than generic training.³³³

In one interviewee's experience, it is critically important to lead a project with this kind of relevant training (the above example would be relevant, for example, prior to a contract negotiation).³³⁴ It not only helps to give government officials an overview of the process that will occur and to build specific knowledge, but it also provides an opportunity for the government officials to get to know, and ideally have more trust in, outside counsel, which is viewed by the ALSF as critical to the success of any project.³³⁵ One low-income government official felt that this kind of capacity building may be useful to a certain extent, but that because much of any actual negotiation is still managed by a private firm (through coordination with ALSF) the kind of capacity building that is necessary to actually transfer knowledge is lacking in the ALSF model.³³⁶

ALSF Academy Project

Through the ALSF Academy Project, the ALSF is now launching a three-level capacity building and certification program in negotiating commercial agreements for African lawyers and experts.³³⁷ Firms can pay a minimal sum and their lawyers can access the Academy. The first cohort is still proceeding through this one-year course, which began at the end of 2018.

ALSF started the ALSF Academy Project based on the recognition that equitable and durable agreements surrounding investment projects and ensuring that they are negotiated to stand the test of time, are key components of attracting and retaining FDI. However, some countries may face challenges in negotiating these deals because some topics, requiring specific expertise, are often not taught at African institutions.³³⁸ The ALSF Academy Project aims

to remove the asymmetrical technical capacities and level the field of expertise among parties to litigation and negotiation.³³⁹

4.1.2.3 Knowledge sharing

ALSF has attempted to do formal and informal "information sharing" among governments, but one interviewee notes that this is fraught with challenges.³⁴⁰ One of the challenges is antitrust – especially if there is any collusion about pricing. ALSF found that the best way to promote information sharing was by organizing peer-to-peer regional events on certain topics, with a requirement that whomever attends has to present on what his or her government is doing with respect to a given topic.³⁴¹ In so doing, ALSF found that government officials also speak to each other during breaks, or at dinner or lunch, and that other, more informal information-sharing often happens in this context.³⁴²

4.1.2.4 Funding

ALSF has a variety of donors including AfDB, the African Development Fund, the Netherlands, the United Kingdom, other regional and national development agencies and institutions, and states.³⁴³ Since becoming operational in 2010 through 2018, it has received \$81.51 million in contributions.³⁴⁴

As a general matter, in order to minimize conflicts between these donors and ALSF and its grantees, ALSF has made efforts to build a wall around its governance structures and to require donors give into a multi-donor fund while prohibiting donations to any specific project or case.³⁴⁵ This was viewed as particularly critical in cases in which ALSF was supporting litigation services.

When it comes to potential conflicts of interest between the ALSF and its donors, ALSF also emphasizes the role of client-country representatives (acting in their individual capacity) in ALSF's management and decision-making structure.

4.1.3 International Development Law Organization, Investment Support Programme for Least Developed Countries

4.1.3.1 Overview

The ISP/LDCs program was designed in collaboration with the UN Office of the High Representative for the Least Developed Countries, Landlocked Developing Countries and Small Island Developing States and was launched in September 2017.³⁴⁶ The ISP/LDCs program provides on-demand legal and professional assistance to LDC governments³⁴⁷ and eligible state-owned (SOEs) or private sector small and medium-sized entities for investment-related negotiations, dispute settlement, and other investment-related matters by matching beneficiaries with support providers.³⁴⁸ The ISP/LDCs program also supports training and capacity building activities.³⁴⁹ The ISP/LDCs program 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.

The objectives of the ISP/LDCs program are to ensure that LDCs derive maximum benefit from existing investment opportunities, to increase sustainable investment flows, and to promote greater economic diversification. In order to accomplish these objectives, ISP/LDCs seeks to address the capacity constraints that LDC governments, SOEs, and small and medium-sized private sector entities may face in investment relationships and with foreign investors by providing pro-bono assistance from lawyers and other expert partners.³⁵⁰ All operational expenses are provided through donor funds.

The ISP/LDCs program envisions that all costs, such as logistical costs, expert fees (where pro bono services are unavailable), and travel expenses for experts, will be covered, but the budget is not unlimited.³⁵¹ Expenses for a typical ISDS dispute, for example, are currently beyond the means of the program.³⁵²

4.1.3.2 Scope of services

The ISP/LDC program is demand-driven, and can be used to facilitate anything in the broad category of

“investment-related” services, including negotiations, dispute settlement, and improving skill and capacity.³⁵³ With respect to investment-related negotiations (which can include investment agreements or contracts) and disputes, including investor-state dispute settlement procedures, support may, for example, include: reviewing the feasibility of an investment, drafting contract provisions, assisting with treaty drafting, review or negotiations, implementing treaty provisions, mediation or alternative dispute settlement, or preparing for and engaging in dispute settlement/ISDS.³⁵⁴

ISP/LDCs offers matching services for experts and beneficiaries. It does not provide direct advisory services in-house. However, as the program scales up and as funding becomes available, it may hire individuals to conduct relevant training and capacity building activities, oversee service provision, and provide short-term technical assistance to beneficiaries.³⁵⁵

Assistance that can be provided by the ISP/LDCs program is wide-ranging and limited only by the requests on investment-related services that may come from beneficiaries, and the experts that the ISP/LDCs program is able to facilitate (within the context of its budget and available pro bono services). 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 (any residual costs would be made up by the ISP/LDCs program, not the beneficiary).³⁵⁶ The role of the ISP/LDCs program is to match the needs of the beneficiary to the skills and availability of partners, and ensure that decision-making on expert engagement remains with the beneficiary.³⁵⁷ Once this relationship has been established, ISP/LDCs remains available and receives regular reports, assists as needed in paperwork, pays expenses and disburses funds against deliverables (where applicable). The primary relationship remains between the beneficiary and the expert.

Currently, the ISP/LDC roster consists of about thirty trusted law firms and other organizations. While more were interested in joining, ISP/LDCs found that including more, at this preliminary stage, was unnecessary.³⁵⁸ However, the program has fielded some requests that may require a broader range of expertise in the future (for example, with respect to damage experts or other technical issues).³⁵⁹ One interviewee noted that even though the roster is limited, it includes large firms that have a wealth of expertise in a wide range of topics, so

the program already includes expertise to cover much more than just arbitration services.³⁶⁰

The range of ISP/LDCs roster could be a benefit as it can draw on a broader range of expertise for certain kinds of assistance. For example, with respect to treaty negotiation services, several interviewees familiar with treaty negotiations and Assistance Mechanisms stated that law firms are not well placed to advise on treaty negotiations, but ISP/LDCs broader roster may permit beneficiaries to draw on expertise outside of law firms.³⁶¹

Eligible participants in the ISP/LDCs program can submit a request directly from the ISP/LDCs website, which is available in English and French, and will soon be available in Portuguese.³⁶² The request is evaluated, and program staff will then reach out to facilitate engagement with the beneficiary.

ISP/LSCs has experienced some expected growing pains in convincing both governments and lawyers that this kind of organization and the services it provides are a plausible avenue to pursue.³⁶³ The ISP/LDCs program sees trustworthiness as the main issue that it will need to overcome, just as the ACWL, the ALSF, and other established programs have, and this is something that must be developed over time.³⁶⁴ One interviewee noted that the reputation of the IDLO Director-General, Irene Khan, has helped in establishing a certain level of trust from the beginning.³⁶⁵ Other factors that this interviewee believes will establish a certain level of comfort that will at least lead to initial conversations with clients include: “(1) a good reputation in rule of law and independence, (2) some funding to support the intervention, (3) a respectable list of partners.”³⁶⁶ These factors are absolutely critical given the sensitive and confidential relationships that will need to be established between ISP/LDCs’ beneficiaries and service providers.

4.1.3.3 Funding

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,³⁶⁷ 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.³⁶⁸ The program finally received those funds in December 2019.³⁶⁹

With a fully-funded €2 million in donations, ISP/LDCs envisions that it would be able to make about twelve interventions of medium size, which could take the form of arbitrations or large-scale trainings, but, of course, the program is in a nascent stage and plans to internalize lessons learned as it evolves.³⁷⁰

One interviewee familiar with IDLO’s operations noted that one inevitable challenge with any Assistance Mechanism, including the ISP/LDCs program, is ensuring that there is a secure source of funding. For ISP/LDCs, it can, with respect to some projects, benefit from the “corporate social responsibility” attitude of some firms who are willing to provide pro bono or low-cost services. However, this interviewee noted that “when it comes to a contentious and hot issue like ISDS, you have the added challenge of eating someone else’s lunch.”³⁷¹ In other words, the program will be directly competing with profit-making firms in this area and recognizes that this is a potential conflict for those firms.³⁷² The extent to which this is a hurdle, and if so, whether this hurdle can be surmounted, remains to be seen.

4.1.3.4 Scalability

One interviewee familiar with ISP/LDCs’ operations views the program as very well-designed to be scalable.³⁷³ 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.³⁷⁴ Of course, for any given project this could mean hundreds or even thousands of hours over the course of a year or two. Scalability will thus depend, to a large extent, on the dedication and extent of the program’s strategic partners.

It remains to be seen whether certain services may be more scalable than others. For example, several interviewees raised concerns that even the largest private firms would not do an entire ISDS claim pro-bono, and also stated that in any event, such services would not qualify as “pro bono” eligible in some jurisdictions.³⁷⁵ One private practitioner stated that “[t]he ability of a firm to represent a state with any

amount of competency from a pro bono perspective with that amount of money on the [claimant] side is unimaginable.”³⁷⁶ Noting that some firms do represent states at a loss, often for tactical/marketing reasons, “there is no capacity for taking on a pro bono client at a \$4-\$6 million loss for your firm,” particularly when the state has paid in other cases, or could conceivably pay, this fee.³⁷⁷ One interviewee noted that this kind of pro bono is not ethically within the scope of what such interviewee’s jurisdiction would define as a pro bono client.³⁷⁸

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.³⁷⁹ Specific fund-raising or other efforts may require an additional staff member.³⁸⁰

4.1.3.5 Beneficiaries

Beneficiaries of the ISP/LDC program include governments, as well as state-owned enterprises and small and medium private sector entities, listed as (or originating from) one of the 47 Least Developed Countries, as defined by the UN Committee for Development Policy.

One interviewee familiar with this boundary recognized that even in countries that are wealthier than the 47 Least Developed Countries, there are pockets of need that could benefit from the ISP/LDCs program, and acknowledged that how program boundaries are drawn has impacts on a mechanism’s ability to be of service when some entities fall outside of the line but otherwise fit the model.

Thus far, no SOEs or private sector entities have applied for assistance.³⁸¹ The ISP/LDCs program focuses, in particular, on supporting businesses owned by women and individuals from marginalized and excluded groups and promoting their access to economic opportunities.³⁸²

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). There is, certain officials stated, a need in the investment law sphere for ad hoc, trusted, state-oriented, expert advice that is similar to that which the ACWL provides in the trade arena, and which is not always available in-house. It was stated that this is one of the most valuable aspects of ACWL membership.

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.³⁸³

Regarding dispute settlement, one government official noted that part of the value-add of outside counsel is the wealth of knowledge accumulation gained by handling disputes for government-clients, and a state-oriented center that could provide this kind of knowledge service would be valuable.³⁸⁴ A government that is focused on moving a larger component of active dispute management in-house stated that it would be valuable to call upon a “hotline” to ask specific questions related to its own management of the claim.³⁸⁵ One government stated that it is not always confident that advice received from paid outside-counsel is necessarily in its best interest and would value the opportunity to “get a second opinion.”³⁸⁶

With respect to the value of this service in the policy-making (in contrast to the dispute) arena (e.g. does a certain regulatory action violate an investment treaty), its value may be more limited or nuanced, in the context of investment law. For example, as one government official interviewee pointed out, unlike WTO-law, which is the focus of the ACWL’s advice, investment law is not based on a common set of treaties and is also a heavily standard, as opposed to rule-based, legal system.³⁸⁷ However, several governments noted that certain idiosyncratic issues that arise during the course of policy-making or dispute prevention can easily strain government capacity, and the answers to

these discrete questions can be critical.³⁸⁸ Another stated that it is “usually not a question of whether or not the government can do something but how the government can do something.” In certain cases, a “hotline” may be able to assist governments in advancing their policy objectives in this way. It may be able to focus on procedural matters and thus navigate to a greater extent the policy-heavy matters that may be the focus on investment-law related questions.

A related issue that may increase the difficulty of more abstract legal questions or opinions in the investment as opposed to WTO context is that *ex ante*, it may be difficult to anticipate and understand the world of possible “covered” investors, as well as the treaties pursuant to which they may select to advance claims. As every treaty would include its own provisions definitive legal guidance may prove somewhat elusive.

Finally, to the extent that a center was to give states policy-oriented (as opposed to dispute management) advice, concerns regarding regulatory chill or overdeterrence may arise (see Section 2.2.3) and such issues should thus be considered in determining the role of and scope for this kind of assistance, including how to mitigate undesirable impacts.

4.1.5 Clearinghouse models of negotiation and litigation support

In addition to ALSF and ISP/LDCs discussed in more depth in the subsections above, various other clearinghouse models of legal support exist. For example, CONNEX³⁸⁹ and the International Senior Lawyers Project,³⁹⁰ among others, connect beneficiaries with external support providers at no cost to the beneficiary, although funding models between clearinghouse support providers can differ. For example, while many existing Assistance Mechanisms offer support to the beneficiary at a no-cost basis, some Assistance Mechanisms pay the support provider for the service, while some rely on pro-bono provision of services.

One interviewee advised that if an Assistance Mechanism for investment law engaged in matching outside counsel to client countries there would need to be a database of lawyers who are considered both state-friendly and credible.³⁹¹ This interviewee recommended the same for arbitrators but noted that in that case “politics” is more of an issue.

4.2 Institutionalized, multi-service support (not including direct legal representation of client governments)

There are a wide variety of Assistance Mechanisms that offer multiple services to governments. Unlike those described above, the existing Assistance Mechanisms described in this section do not provide or facilitate legal representation. Many are not described in depth here as they receive more robust treatment and description in other sections of this Scoping Study.

4.2.1 International organizations

The extensive work of UNCTAD, the OECD, and the World Bank Group, and the various areas of support that they offer to governments, particularly in the policy-making arena, are described in various places throughout this Scoping Study (particular in Section 2.2).

4.2.2 Arbitration centers

While many arbitration centers provide quality training and other support services to governments and other beneficiaries, International Centre for Settlement of Investment Disputes (ICSID), the Permanent Court of Arbitration (PCA) and the Stockholm Chamber of Commerce (SCC) are specifically highlighted here.

4.2.2.1 ICSID

ICSID staff members host events and provide training on arbitration-related issues around the world.³⁹² ICSID also offers a half and full-day course on ICSID practice and procedure in English, French and Spanish.

ICSID’s Practice Notes for Respondents in ICSID Arbitration³⁹³ addresses questions frequently asked by ICSID member states or investors. It highlights issues of interest to respondent states related to prevention of disputes, contract and treaty drafting, the pre-arbitration phase, managing claims, critical issues for consideration (including case strategy and budgeting), an outline of the steps of an ICSID arbitration, specifics regarding ICSID hearings, and post-award processes, among other topics. This document provides general organizational suggestions and questions that states should be considering before and during an arbitration. However, this publication

does not provide legal advice or policy guidance and is not an exhaustive guide to the arbitration process. While it is thus extremely useful for all ICSID respondents as a reference that flags certain issues and promotes a greater understanding of the ICSID process, respondents that have little experience in investment disputes will likely require further, more specific, guidance as to implementation and strategy surrounding a claim. Moreover, while certain aspects of this guidance are more general, some are specific to ICSID, so to the extent a claim is proceeding at another arbitral center, some of the guidance would not apply.

4.2.2.2 The Permanent Court of Arbitration

The PCA maintains a Trust Fund (described in greater detail in the following Section 4.3.1.1) to provide financial assistance to certain qualifying states to enable them in whole or part to meet certain defined expenses.³⁹⁴ Qualifying states include 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.³⁹⁵

In addition to the PCA Trust Fund, the PCA also conducts training for its member states upon request.³⁹⁶ The PCA's trainings are tailored to the specific request.³⁹⁷ Each training is conducted by a PCA lawyer who has experience with PCA cases.³⁹⁸ The PCA's trainings typically focus on states of the arbitration process and seek to value in terms of the experience that the PCA lawyers can share.³⁹⁹ The PCA benefits in this regard from its permanent regional offices in Singapore, Mauritius, and Buenos Aires that have a mandate to raise awareness of and teach on international dispute settlement in these regions.⁴⁰⁰ Regional offices permit greater exchange and engagement with member states and discussions with a broader range of audiences (e.g. political and technical actors).⁴⁰¹

4.2.2.3 The Stockholm Chamber of Commerce

The Stockholm Chamber of Commerce, like ICSID and the PCA, hosts events and provides regular trainings in investment arbitration for counsel, state officials, and students.

The SCC (along with ICSID, the Energy Charter Secretariat, and the PCA) co-hosts the Energy Charter

Treaty Forums. In co-operation with the ECT Secretariat, SCC staff organizes and contributes at annual workshops in Brussels, including a mock investment arbitration under the SCC Rules. The workshop's program is designed primarily for state officials and deals with substantive and procedural law issues commonly raised in ISDS cases but has also raised for example issues of mediation.

The SCC supports the annual Frankfurt investment moot and usually organizes a side event during the moot for the purpose of knowledge-building and development of advocacy skills among the students attending the moot. A pre-moot event has been hosted for a number of years as well, addressing specifically investment arbitration procedure under the SCC Rules.

4.2.3 Academic institutions

Academic centers offer a range of services to governments including trainings, forums for information sharing, technical legal assistance, and tools to facilitate policy development. CCSI, for example, offers a wide-range of these services, and other academic centers offer support ranging from ad hoc to broader programmatic support.

4.2.4 Non-profit centers

Various non-profit centers, such as IISD, offer multiple services to governments, including trainings, forums for information sharing, technical legal assistance, and tools to facilitate policy development.

4.3 Financial or in-kind inputs directly to client governments

In addition to models that focus, more directly, on facilitating legal advice to client governments by providing or connecting the beneficiary directly with a support provider, as described in Section 4.1, an Assistance Mechanism may also focus, to a greater extent, on financial transfers being made to client governments to offset the financial obligations of services that the client itself procures.

It must be noted, however, that some of the models described below, in addition to a focus on a financial or in-kind transfer, also help facilitate procurement of services, more in line with the models in Section 4.1 and those in this section represent a spectrum of services

offered to beneficiaries rather than being categorically separate as only financing mechanisms, although we have attempted to focus on certain primary elements of the models and distinguish them for the purposes of this Scoping Study. Each of the models below, litigation/arbitration trust funds, third-party funding for respondent states, contingent fee representation, and insurance products and loans, emphasize financial assistance to facilitate representation.

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.⁴⁰² As a general matter, these funds provide some financial assistance for parties to hire outside counsel. In some cases, the funds are more institutionalized and also provide matching services with counsel (and could thus be categorized as a more multi-service Assistance Mechanism discussed Section 4.1).

The examples below provide insight into how funds are currently used and are being, or could more robustly be, applied in the investment law context.

In CCSI's consultations, reactions to a trust fund in the context of investment law were mixed, and depended a great deal on what the particular interviewee deemed to be the objective of an investment law Assistance Mechanism as well as whether or not 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. For example, 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.⁴⁰³

Other issues were identified in connection with a trust fund. For example, one lower middle-income government official stated that grants and loans may provide value in efforts to obtain outside support, but more money does not change the level of trust that this official could have in the quality of advice received, or the internal capacity necessary to assess whether that advice is in the state's interest.⁴⁰⁴ It addresses only the issue of high costs of disputes without addressing any of the other challenges that countries experience with the IIA/ISDS system.

One high-income government official stated that from that country's perspective, a litigation fund would not be something it would support for a couple of reasons.⁴⁰⁵ First was that this approach has too narrow of a focus on litigation, whereas in this country's experience with its treaty counterparties, there needs to be broader attention given to resources available to governments to manage and prevent disputes, including capacity building.⁴⁰⁶ This official also noted that it would be politically challenging for it to support a fund that would ultimately be used by governments to defend against claims brought by this country's outward investors.⁴⁰⁷ This official stated that unlike direct financial support directed at litigation/arbitration, support of capacity building efforts have a less-direct link to, and conflict with, the country's outward investors' interests.

One member of a non-governmental organization that works with governments stated that a fund may make accountability easier - there is a direct link between the services provided and the government to whom they are to be provided, but that audits would need to be carefully conducted as money can easily be misused or abused.⁴⁰⁸ Indeed, the International Criminal Tribunal for Rwanda's diligence in this area (discussed below in this section) brought to light certain economic abuses of funds.⁴⁰⁹ Moreover, this NGO interviewee noted that each government and each government's needs are unique, and some governments may benefit from more money to strengthen in-house capacity rather than more money to spend on hiring outside counsel, which may be a better long-term outcome.

4.3.1.1 Permanent Court of Arbitration Financial Assistance Fund

The Hague-based PCA, an intergovernmental organization established by the Hague Conventions for the Pacific Settlement of International Disputes of 1899 and 1907 (PCA Conventions), is the oldest existing system for the peaceful settlement of international disputes.⁴¹⁰ Recognizing that there may be instances when states are deterred from recourse to international arbitration (or other means) offered by the PCA Conventions because they find it difficult to allocate the necessary funds (including fees and expenses of tribunal members; expenses of implementing an award; payments to agents, counsel, experts, and witnesses; and operational and administrative expenses connected with oral and written proceedings), the PCA established in 1994 a Financial Assistance Fund for the Settlement of International Disputes (PCA Fund) to provide financial assistance to certain qualifying states to enable them in whole or part to meet certain defined expenses.⁴¹¹ Qualifying states include 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.⁴¹²

The PCA Fund is financed through voluntary financial contributions of states, intergovernmental organizations, national institutions, and natural and legal persons, although in practice states are the primary donors.⁴¹³ Qualifying states may submit written requests for financial assistance to the PCA Secretary-General, along with, among other items, an itemized list of estimated costs for which assistance is requested, and an undertaking to provide an audited list of actual expenditures.⁴¹⁴

While the PCA's International Bureau implements the fund,⁴¹⁵ disbursement decisions are made by a Board of Trustees composed of seven members with experience in international dispute resolution.⁴¹⁶ Members are appointed by the PCA's Secretary-General and serve a renewable term of four years.⁴¹⁷ In practice Members that are appointed are of the highest moral character with deep knowledge of public international law (e.g. individuals who have served as ICJ judges) but are not those whose primary income or financial interests derive from investment law-related work (which may also simply be reflective of the PCA also handling disputes

outside of investment-law).⁴¹⁸ While the PCA Secretary-General chairs the Board of Trustees and participates in meetings, he or she does not vote on funding decisions.⁴¹⁹ In deciding to allocate funds, the board is to be guided by the financial needs of the requesting State and the availability of funds,⁴²⁰ and will determine the amount of financial assistance to be given, for what costs it is to be allocated, as well as any terms and conditions deemed appropriate.⁴²¹

Donations to the PCA Trust Fund ebb and flow. Every year the PCA Secretary General calls upon member states to donate to the PCA Trust Fund, with varying levels of success. On the one hand, donations have been more forthcoming when high profile cases (thus far, of the public international law, state-to-state nature) are being administered by the PCA and governments have a more concrete understanding of where their pledged funds will go.⁴²² As a general matter, however, the PCA Trust Fund has found difficulty in soliciting funds when there is not a specific case where the need, and public international law benefit, is clear. Of note, one individual familiar with the PCA Trust Fund has characterized this reality not as an unwillingness of governments to financially support other states with respect to their needs, but one of governments being less (or in some cases not at all) willing to make general budgetary contributions for the broader "rule of law" objectives of the PCA Trust Fund, such as general equality of arms, that are not (implicitly) tied to a specific case.⁴²³

Since 1995 when the Fund was established, ten grants have been made in eight separate cases (with at least one case having more than one grant) and two of these grants have been with respect to investment law cases.⁴²⁴ In the experience of one person familiar with the PCA Trust Fund, no requests for assistance have been rejected and at least a portion of the requested funds have been granted in all cases in which requests have been submitted.⁴²⁵ Notably, the amount granted has never been at the level that would be required to pay the fees of, for example, a commercial law firm representing a party to a dispute.⁴²⁶ Rather, grants tend to be sufficient to cover institutional and arbitrator costs. Notably, in at least a few ISDS cases being administered by the PCA, the PCA Secretariat has notified the respondent state of the existence of the fund and the eligibility of the state to apply for financial assistance and the state has not applied.⁴²⁷ Reasons for the failure of eligible states to apply for financial assistance in the context of ISDS disputes remain unclear.

4.3.1.2 The International Court of Justice Trust Fund

In 1989 the United Nations Secretary-General Javier Perez de Cuellar established a trust fund to financially assist developing states litigating before the International Court of Justice (ICJ), or with the execution of a judgment of the ICJ (ICJ Trust Fund).⁴²⁸

The International Court of Justice is the principal judicial organ of the United Nations established in 1945 and seated at the Peace Palace in The Hague.⁴²⁹ The ICJ's role is to settle, in accordance with international law, legal disputes submitted to it by states and to give advisory opinions on legal questions referred to it by authorized UN organs and specialized agencies. Between 22 May 1947 and 1 July 2019, 177 cases were entered in the General List.⁴³⁰

Recognizing that the costs of appearing before the ICJ are considerable, and that such costs can be a factor in deciding whether a case is referred to the ICJ by a state, the ICJ Trust Fund was viewed as financial assistance helpful to states that lack the necessary funds to appear before it or to execute judgments.⁴³¹

States, inter-governmental organizations, national institutions, non-governmental organizations, and natural and juridical persons may all voluntarily contribute to the ICJ Trust Fund,⁴³² which is implemented through the UN Office of Legal Affairs⁴³³ and an annual report is intended to be made available to the General Assembly,⁴³⁴ although an annual report has apparently not been made since 2012. Available funds in years preceding 2012 were in the high \$2 millions.⁴³⁵

States may request financial assistance by submitting an application to the ICJ, which should include an itemized statement of estimated costs for which assistance is requested and an undertaking to provide a final, audited accounting of actual expenses.⁴³⁶ A panel of experts, "composed of three persons of the highest judicial and moral standing" is then convened by the Secretary-General to evaluate each request for assistance to examine the request and recommend to the Secretary-General the amount of assistance to be given and the types of expenses for which the assistance may be used.⁴³⁷ The experts work is to be confidential,⁴³⁸ and recommendation guided solely on the financial need of the requesting state and

the availability of money in the ICJ Trust Fund.⁴³⁹ The Secretary-General will then provide assistance based on the evaluation and recommendation of the expert panel.⁴⁴⁰

4.3.1.3 International Tribunal for the Law of the Sea Trust Fund

In 2000 the United Nations Secretary-General established a trust fund (ITLOS Trust Fund) to financially assist developing states litigating before the International Tribunal for the Law of the Sea (ITLOS), located in Hamburg, Germany.⁴⁴¹

The ITLOS is an independent judicial body, composed of 21 independent members, that was established by the UN Convention on the Law of the Sea (UNCLOS), which entered into force in 1994.⁴⁴² UNCLOS establishes a comprehensive legal framework to regulate all ocean space, its uses and resources. ITLOS adjudicates disputes arising out of the interpretation and application of UNCLOS.

As the costs of legal fees and travel to Hamburg can be considerable, the ITLOS Trust Fund was established with the intention that the burden of costs would not need to be a factor in a state's decision to bring a dispute before the ITLOS or to respond to an application to ITLOS made by others.⁴⁴³ There is no cost to states party to the UNCLOS for submitting a case to ITLOS, but non-state parties pay a fee fixed by ITLOS.⁴⁴⁴ Developing states that are parties to a dispute before ITLOS may request financial assistance from the ITLOS Trust Fund to help them to cover the costs related to lawyers' fees or travel and accommodation of their delegation during the oral proceedings in Hamburg.⁴⁴⁵ The ITLOS Trust Fund is maintained by the UN Office of Legal Affairs, Division for Ocean Affairs and the Law of the Sea.

States may apply to ITLOS for funds, and a panel of independent experts is convened to review applications and make recommendations to the Secretary-General on the amount of financial assistance to be given.⁴⁴⁶ States, international organizations, non-governmental organizations, as well as natural and juridical persons are invited to make financial contributions to the ITLOS Trust Fund.⁴⁴⁷ Donor contributions to the ITLOS Trust Fund are slow, despite repeated General Assembly entreaties, and are considered insufficient in light of the mandate and need.⁴⁴⁸ The balance of the fund at

the end of 2006 was \$70,621.17.⁴⁴⁹

The ITLOS Secretariat also maintains a list, available upon request of a member state, of offers of professional assistance, which will be provided on a reduced fee basis by suitably qualified persons or bodies.⁴⁵⁰

4.3.1.4 Trust Funds Maintained by International Criminal Courts

International criminal courts maintain funds that, among other activities, serve to provide for the costs of defense counsel appointed in the case of indigent defendants. Some of these institutions maintain lists of counsel that can be appointed in such circumstances or even will appoint appropriate counsel under certain circumstances.

4.3.1.4.1 The International Criminal Court

The International Criminal Court (ICC), based in The Hague and established by the Rome Statute,⁴⁵¹ began operations in 2002. It investigates and, where warranted, tries individuals charged with the gravest crimes of concern to the international community: genocide, war crimes, crimes against humanity and the crime of aggression.⁴⁵² The ICC seeks to hold criminals accountable and prevent crimes from happening again.⁴⁵³ In order to achieve this goal it acts as a court of last resort and thus complements and does not replace national judicial systems.⁴⁵⁴

The ICC maintains both a Legal Aid System for accused as well as a Trust Fund for Victims.

With respect to the Legal Aid System, the Rome Statute provides that accused individuals have certain rights, including legal assistance of the defendant's choosing, or to have legal assistance assigned by the court if justice so requires and without payment if the accused lacks the means to pay for it.⁴⁵⁵ Legal aid is thus mandatory for indigent defendants. (In contrast, provision of legal aid for indigent victims is discretionary).⁴⁵⁶

A List of Counsel is maintained by the ICC's Counsel Support Section.⁴⁵⁷ Legal support providers that meet certain criteria are able to apply to be included in this list; and defendants seeking legal aid are to choose their counsel from the list.⁴⁵⁸

The Legal Aid System caps its payments to the defense team. (Table 7).

The ICC's Legal Aid System covers the costs of legal representation of indigent defendants by seeking to ensure that they receive adequate resources to cover all costs reasonably necessary, as determined by the ICC Registry, for an effective and efficient legal representation. The Registry assesses both the likely costs of the defense case, and the financial status of the defendant, and applies a formula to determine what contribution the person should make, if any. The ICC also provides some funding for investigation and experts. Specific operative and objective principles are used to determine the need for aid, including obligations to dependents, flexibility, and simplicity.⁴⁵⁹

Table 7 Maximum Total Monthly Payments (as of 2016)

Category	Maximum Total Monthly Payments
Counsel	€11,687 ⁷⁶³
Associate Counsel	€9,043
Legal Assistant	€5,622
Case Manager	€4,570

Source: Richard J. Rogers, 'Assessment of the ICC's Legal Aid System' (2007), 5 January 2017, 17.

On average, the Legal Aid System's annual cost per case through 2016 was estimated to be €286,548 for pre-trial phases, €395,064 for trial phases, and €386,548 for appeals.⁴⁶⁰ This is reported to be lower than the per-case legal aid expenditures of other international criminal courts.⁴⁶¹

The Legal Aid System struggles with budgetary constraints, which, among other concerns, have resulted in pressure from civil society to reevaluate the legal aid budget along with a more holistic reform of indigent representation at the ICC.⁴⁶² The budget for legal aid in 2016 was €4,521,000.30 (up from €2,355,600 and €2,866,400 in 2015 and 2014 respectively), representing 3.25% of the total ICC budget.⁴⁶³ This is less than 10% of the budget allocated to the Office of the Prosecutor.⁴⁶⁴ The legal aid budget is a part of the ICC's overall budget, which is funded by ICC member states. The contribution of each state is determined in the same way that its UN dues are determined, which is roughly based on income, population, and debt burden. Additional funding is provided by voluntary contributions from organizations, corporations, or other entities.

The ICC also maintains a Trust Fund for Victims (TFV), which was created in 2004 by the Assembly of State Parties.⁴⁶⁵ The TFV's mission is to support and implement programs that address harms resulting from genocide, crimes of humanity, war crimes, and aggression. To achieve this mission, the TFV has a two-fold mandate: (i) to implement Court-Ordered reparations and (ii) to provide physical, psychological, and material support to victims and their families.

Victims can apply to the ICC to be granted the right to participate in all phases of an ICC proceeding.⁴⁶⁶ Victims are those who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court.⁴⁶⁷ They are permitted to put their views before the judges and if the accused is convicted, may ask the court to order reparations, which may be individual or collective, depending on what is most appropriate from the perspective of the victims in the case.⁴⁶⁸ Reparations may include monetary compensation, return of property, rehabilitation, medical support, victims' services centers, or symbolic measures such as apologies or memorials.⁴⁶⁹ The ICC may order reparations be made through the TFV.

4.3.1.4.2 The International Criminal

Tribunal for the Former Yugoslavia

The International Criminal Tribunal for the former Yugoslavia (ICTY) was a UN court that dealt with war crimes that took place during the conflicts in the Balkans in the 1990s.⁴⁷⁰ Its mandate lasted from 1993 - 2017.

All persons indicted by and appearing before the ICTY had the right to be represented by defense counsel. This and other rights of the accused are based in international human rights instruments and were enshrined in the ICTY's Statute and further regulated by the Rules of Procedure and Evidence.⁴⁷¹ If the accused wished to have defense counsel, he or she could either choose his or her own or be assigned one by the Registrar.⁴⁷²

Accused persons who could not afford to pay for counsel were entitled to the assignment of counsel, paid for by the Tribunal.⁴⁷³ If the accused had means to remunerate counsel partially, the Tribunal only covered the balance of the costs.⁴⁷⁴ The Office for Legal Aid and Defense Matters within the Registry dealt with all matters related to the issues of defense and detention at the ICTY.⁴⁷⁵ Legal aid at the ICTY was allocated from the general ICTY budget, which in turn was approved by the UN and was \$286,012,600 in 2010-11, \$250,814,000 in 2012-13, and \$179,998,600 in 2014-15.⁴⁷⁶

Accused requesting legal aid from the ICTY had to make full financial disclosures of assets (including those of all members of his or her household).⁴⁷⁷ Accused who request ICTY-paid counsel were then appointed counsel from the list maintained by the Registrar, known as the "Rule 45 List."⁴⁷⁸ An accused could also propose another counsel that met the criteria set forth in Rule 45 of the Rules of Procedure and Evidence of the ICTY.

The Registry maintained a publicly available and transparent system of remuneration for defense counsel.⁴⁷⁹ Rates were viewed as sufficient to attract counsel on par with the prosecution's senior trial attorneys.⁴⁸⁰ Payment for defense was intended to cover all aspects of the trial as well as preparation of the case (evidence gathering, interpretation, investigation, research, witness interviews and preparation, and arguing in court).⁴⁸¹

Payment to defense counsel varied depending on the complexity of the case as well as the phase of proceedings and whether the accused selected counsel from the Rule 45 List or choose non-Rule 45 List counsel.⁴⁸² Complexity of the case was determined by the Registry and was based on various factors, including: "the accused's position within the political or military hierarchy; the number and nature of counts in the indictment; the number and type of witnesses and documents involved; whether the case involves crimes committed in a number of municipalities; and the novelty and complexity of legal and factual arguments the case will deal with."⁴⁸³

With respect to Rule 45 List counsel, the legal aid policy generally consisted of monthly, lump-sum payments to permit the hiring of counsel, and facilitate other payments, all of which remain publicly available.⁴⁸⁴

Table 8 provides an example of ICTY legal aid payments.

Self-appointed counsel outside of the Rule 45 List were subject to a different compensation scheme.⁴⁸⁵ In this case, invoices were required to be submitted to the Registry and payments were made directly to counsel in accordance with the maximum available rates.⁴⁸⁶ According to the ICTY's Remuneration Scheme, for the pre-trial phase there was 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.⁴⁸⁷ 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.⁴⁸⁸

Support staff (legal associates, case managers, investigators, and language assistants) each were subject to a fixed gross hourly rate ranging from €16.80 to €28.40 depending on years of experience.⁴⁸⁹ Some legal associates to self-represented accused, depending on their function, applied to the ICTY and were granted an hourly rate of up to €78.80.⁴⁹⁰

Table 8 ICTY pre-trial lump sum payments (as of January 2013)

	Phase One	Phase Two	Phase Three	Total	Monthly Allotment for Interpretation and Translation
Complexity Level 1	€1,873	€45,163	€104,750	€151,786	€1,109 maximum
Level 2	€1,873	€45,163	€213,858	€260,895	
Level 3	€1,873	€45,163	€377,695	€424,731	
<i>These amounts do not include the costs of Daily Subsistence Allowance ("DSA") and travel which are covered separately in accordance with the applicable registry policies.</i>					

4.3.1.4.3 The International Criminal Tribunal for Rwanda

The International Criminal Tribunal for Rwanda (ICTR) was established by the UN Security Council to “prosecute persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and neighboring States, between 1 January 1994 and 31 December 1994.” The Tribunal was located in Arusha, Tanzania, and had offices in Kigali, Rwanda. Its Appeals Chamber was located in The Hague.⁴⁹¹ Its opened in 1995 and its mandate lasted until 2015.

All ICTR accused had the right to be represented by competent counsel. This and other rights were enshrined in Article 20 of the ICTR’s Statute and are further regulated by its Rules of Procedure and Evidence.⁴⁹² Defense counsel were deemed critical to uphold the principle of equality of arms between the prosecution and defense and to ensure the fairness of the proceedings.

The ICTR’s Defence Counsel & Detention Management Section (DCDMS) assured the provision of competent defense counsel to indigent accused persons.⁴⁹³ Defense counsel at the ICTR were not part of the institutional structure but were paid as independent contractors. The DCDMS was created as part of the Registry that coordinated and facilitated the work of defense counsel.

DCDMS compiled and maintained a list of defense counsel, which, upon the request for assistance and determination of eligibility, was submitted to an indigent detainee or accused to permit the selection of counsel. Over 200 lawyers from a wide variety of countries were included on the DCDMS list.

The budget for the ICTR, through which the Legal Aid Program was funded, was kept by the United Nations Advisory Committee on Administrative and Budgetary Questions.⁴⁹⁴ The defense of most of the accused appearing before the ICTR was funded in this manner.⁴⁹⁵ Funds available for legal aid in the ICTR were very limited, although the ICTR Registry was vigilant in monitoring funds and ensuring that professional and ethical standards were maintained and the funds not abused.⁴⁹⁶

4.3.1.5 Legal aid provided by international and regional human rights courts

The European Court of Human Rights (ECtHR) has, pursuant to Rules 105 through 110 of the Rules of the Court, the ability to grant legal aid to applicants in connection with the presentation of his or her case to the ECtHR.⁴⁹⁷ Legal aid shall be granted to applicants when the President of the Chamber is satisfied (a) that it is necessary for the proper conduct of the case before the Chamber, and (b) that the applicant has insufficient means to meet all or part of the costs entailed.⁴⁹⁸ Applicants must complete a declaration of income, assets, dependents, and financial obligations in order to determine their eligibility.⁴⁹⁹ Legal aid may be granted to cover lawyer fees as well as travel and other expenses of the applicant and counsel to appear before the Chamber. The Registrar fixes the rate of fees, payable in accordance with legal-aid scales in force, as well as the amount of expenses that will be covered.⁵⁰⁰

In practice it has been suggested that the ECtHR is rather frugal in its granting of legal aid, particularly as some years have seen funds unspent, and as the ECtHR’s caseload has increased, the amount of legal aid has not increased in proportion.⁵⁰¹

The Inter-American Commission on Human Rights (OACHR) also maintains a Legal Assistance Fund. The OACHR fund can be used to cover expenses related to: gathering and sending documentary evidence; expenses derived of the appearance of the alleged victim, witnesses and experts in hearings held by the Commission; and other expenses considered pertinent by the Commission for the processing of the case.

Applicants for OACHR Trust Fund benefits must demonstrate that the applicant lacks sufficient means to cover some or all expenses, and must specify which expenses, as well as the relation to the case, intended to be covered by funds of the OACHR Trust Fund.⁵⁰²

4.3.2 Third-Party funding for respondent states

Third-party funders are investment funds that invest in assets with the expectation of a return on their investment. In the context of ISDS, the assets are the potential value of treaty-based legal dispute outcomes. In exchange for investing in the claim and providing

funds that will be used to pay the expenses that a party incurs in pursuing the claim and enforcing an award, the funder takes an interest in an eventual financial award on a non-recourse basis.⁵⁰³

Increasingly, investors suing governments in ISDS are turning to third parties to finance their litigation.⁵⁰⁴ Recent years have seen significant increases in the number of funders as well as the number of funded ISDS cases.⁵⁰⁵ The increased use of third-party funding in ISDS raises various policy issues, many of which stem from the inherent asymmetry of ISDS in which investors sue states, but states, as a general matter, cannot sue investors, but some of which are inherent to the introduction of (currently largely unregulated) for-profit investments into ISDS claims.⁵⁰⁶

4.3.2.1 Scope of potential aid

The most critical impact of the asymmetric nature of ISDS is that, 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 extremely limited. Therefore, states do not have a financial “upside”; the best financial position that a respondent state can usually hope for as an outcome is an award for 100% of its costs, with interest, and recovery for reputational harm (e.g. as a safe destination for FDI).⁵⁰⁷ The profit potential that attracts funders to claimant positions does not currently exist for ISDS respondents except in circumstances when contractual or other counterclaims exist.

With that said, some forms of respondent funding have reportedly been successful in some circumstances. For example, a version of portfolio funding, in which the losses of an ISDS defense could be offset by another portfolio of cases in which the state was pursuing contract-based claims (likely in other fora, such as domestic courts or commercial arbitration) where there was an opportunity for financial recovery.⁵⁰⁸

Respondent funding may also take the form of an insurance product. With an after-the-event insurance arrangement, if a litigable event has occurred and a claim has arisen against a respondent, the

respondent and funder could seek to agree on a valuation of the claim - how will a tribunal apply the law to the facts and what will the claimant’s award be, if anything? And if the claimant prevails, will the tribunal shift costs? If the price of downside risk can be agreed between the respondent and the funder, the respondent could then purchase a “policy” that would protect it against a higher than anticipated award. The respondent would pay a deductible for the expected judgment or settlement, and for amounts that exceed that agreed threshold, the funder would have a contractual obligation to pay. That obligation to pay an award or other amount, such as award for costs, is negotiated and context-specific, so could be an obligation shared between the state and funder based on various thresholds and permutations.

4.3.2.2 Potential beneficiaries

Third-party funding, based on the economic opportunities largely absent from respondent-side ISDS investments, primarily benefits claimants and not respondents. Claimant use of third-party funding is discussed further below in Section 6.

4.3.2.3 Scalability

While the use of third-party funding to support investor claims in ISDS has apparently been on the rise in recent years, there are several hurdles to greater third-party funding for respondent states.

For one, it is plausible third-party funding could be available for/linked to respondents’ counterclaims, but most existing treaties, in their current form, do not clearly permit the possibility of such claims against investors. While in a few, limited cases, counterclaims have been successful, absent a more extensive and robust possibility for treaty-based counterclaims in ISDS, the possibility of respondent-side third-party funding is likely to remain limited.

Additionally, absent greater predictability in awards for fees, third-party funders may be unable to predict with sufficient accuracy in which cases the amount invested can be recovered. To the extent states lack the liquidity to finance a defense, third-party funding could act similar to a loan. It may be that for any such market to become robust greater predictability in fee awards would be required. Uncertainty regarding damages awards may similarly limit the market for after-the-event-type insurance models.

Overall, third party funders are private sector participants in the ISDS field whose relevance for respondent support seems limited under the current system, though it could potentially be used in some cases and even complement other Assistance Mechanisms in some ways. For example, funders, under certain circumstances, may be able to provide necessary liquidity to the respondent state (or its counsel) during the course of a proceeding, which could then be used to pay an Assistance Mechanism or another legal support provider. However, considerable thought would need to be given as to the contractual rights that would be granted to funders interacting with the state as well as any kind of Assistance Mechanism. Some funders require contractual rights to remain involved in, and potentially even control, certain aspects of how the case is managed by the party, including, for example, decisions to settle, or not. Moreover, third-party funders are not subject to fiduciary obligations to the litigating party, nor any ethical or conflict of interest obligations. Additionally, the financial terms third-party funders need in order to provide support may be unpalatable to respondent states (and even investors) and their stakeholders.

A final consideration relevant to scalability is that UNCITRAL's Working Group III has identified third-party funding in ISDS as a concern warranting multilateral reform. Consequently, Assistance Mechanisms involving the use or expansion of third-party funding would likely need to take into account outcomes and outputs from the Working Group in addition to any other treaty-based or institutional reforms.⁵⁰⁹

4.3.3 Contingent fee representation for respondent states

4.3.3.1 Scope of potential aid

Law firms may engage to act on a full or partial contingency fee basis in representing respondents in ISDS disputes. In this case, the law firm bears some or all of the cost of the arbitration proceeding and assumes some or all of the risk of loss. For example, a client (or the law firm) may pay out of pocket expenses and the law firm may forego payment of some or all of its fees in exchange for an interest in any eventual award or settlement. The more risk that the law firm assumes, the greater share in the outcome the firm would likely contract to receive. In this way law firm

contingency arrangements may be viewed as similar to (and by some definitions a form of) third-party financing of claims. One difference between third-party funding (as the term is used in this Scoping Study) and contingency fee arrangements, however, is that law firms have fiduciary and other ethical obligations to their clients (respondents or investor claimants). Third-party funders' duties do not run to their client litigants. Instead, their obligations are owed to their shareholders.

Law firm contingency financing will often be provided in combination with other outside financing, such as third-party funding or other loan services, either to the law firm, the client, or both.

4.3.3.2 Potential beneficiaries

The largest hurdle to contingency arrangements in ISDS respondent representation is, as with third-party funding, the lack of a financial upside for respondent states. There is not a contingent outcome (other than fee awards) in which to take a financial interest.

Contingency funding is likely more readily available for investors. Not only are investors potentially able to enjoy an upside recovery, but studies indicate that they are also, at present, more likely to be awarded recovery of the legal fees and expenses incurred in pursuing their claims.⁵¹⁰ Investors as beneficiaries are discussed further in Section 6.

4.3.3.3 Scalability

An increase in their ability to offset the funds necessary for the defense (or pursuit) of a claim could address liquidity problems experienced by some governments (or claimants) in the context of ISDS cases.

To the extent counterclaims or other predictable fee-shifting practices were introduced more systematically in ISDS, respondent-side contingency arrangements may become more attractive and available. 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 that have thus far characterized ISDS disputes.⁵¹¹ 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.⁵¹²

4.4 Pro bono, ad hoc legal and expert assistance 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. CCSI's consultations made clear that pro bono legal support can be valuable and important to respondent states in many contexts and circumstances. Many pro bono-based Assistance Mechanisms exist with varying degrees of focus on investment law matters, and consideration could be given to expanding existing services. However, several concerns about reliance on more robust provision of pro bono services were raised.

First, CCSI's consultations revealed concerns on the part of government officials that firms may not treat pro bono clients in the same way as paying clients when there are competing interests and demands on time. For example, on a pro bono basis it would be difficult for a law firm to take on a client for a dispute that could last several years if that meant that the firm would then be conflicted from accepting certain paid investor-side work during or after the dispute.⁵¹³ These kinds of concerns were ultimately about quality and responsiveness of counsel working on a pro-bono basis.

Second, while many lawyers and law firms contribute vast numbers of pro bono hours to respondent states (and many firms have internal guidelines encouraging lawyers to engage in at least a specified minimum number of hours of annual pro bono service), the scale at which pro bono services could be offered was noted as being limited as compared to the commitments required for handling ISDS cases. It was questioned whether firms would ever be willing to handle a case on a pro bono basis given the time required and potential revenue forsaken.

In consultations conducted by CCSI, one high-income government official stated that it would be useful to have an Assistance Mechanism that could build up and draw upon pro bono relationships to lessen the amount of support that may need to be

provided directly by center staff and, not unrelated, to alleviate funding requirements that may be required by an Assistance Mechanism with more robust in-house expertise and projects.⁵¹⁴ However, another high-income government official noted that pro bono assistance can be provided in ad hoc situations, but is not a scalable model to address asymmetric outcomes and lack of capacity experienced by many countries.

This section describes certain pro-bono models of legal support.

4.4.1 The International Development Law Organization's (IDLO) Investment Support Programme for Least Developed Countries (ISP/LDCs)

Of all pro bono mechanisms analyzed for this Scoping Study, the ISP/LDCs program, although in its early phases, is the most specific with respect to investment law matters. This existing Assistance Mechanism is described in great detail in Section 4.1.3 and a description is thus not repeated here.

4.4.2 TradeLab

4.4.2.1 Overview and scope of services

TradeLab is a global network of universities and training centers that conduct pro bono projects for developing countries, SMEs, civil society organizations, or other stakeholders.⁵¹⁵ TradeLab aims to "empower countries and smaller stakeholders to reap the full development benefits of institutions and rules that govern our global economy,"⁵¹⁶ including international investment agreements and international investment law.

TradeLab is based on a system of legal clinics. Students are paired with experts, who are then connected with client beneficiaries on a given, typically semester-long, project. Tradelab posts research memoranda and other non-confidential output on its website,⁵¹⁷ thereby seeking to achieve three objectives: (i) help beneficiaries build capacity; (ii) train students; and (iii) inform and create awareness for the wider public.⁵¹⁸ TradeLab sees potential to democratize legal education and the legal profession in the field of international economic law by spreading learning and expertise beyond a handful of highly specialized universities and large law firms.⁵¹⁹

TradeLab seeks to move beyond litigation, recognizing

that stakeholders need help in negotiation, implementation and compliance with international legal issues and agreements, which often must be complemented by economic research, policy analysis and translation support. There is a large emphasis placed on capacity building, with TradeLab noting that any law firm could answer a question, but often what is lacking is a more in-depth analysis of what, exactly the problem or question is, which requires a deeper understanding of the rules and institutions and how they affect the entity or organization, and thus the ultimate interest and questions that should be considered.⁵²⁰ Thus, TradeLab clinics hold exploratory discussions to identify and define interests and needs of beneficiaries, and then help to frame projects around public interest objectives.⁵²¹

TradeLab advertises its ability to assist client beneficiaries with discrete questions relating to:

- research and analysis for treaty negotiations;
- compliance assessment of domestic or foreign laws;
- compliance assessment of proposed or existing legislation;
- drafting model legislation;
- drafting advocacy positions in the context of existing agreements on trade and investment;
- assessment of legal claims or defense strategies;
- writing of party, third party submissions and legal memoranda;
- preparation of amicus curiae briefs; and
- legal and economic research on cutting-edge trade or investment law questions.⁵²²

Beneficiaries anywhere in the world can submit projects directly via TradeLab's online platform, or directly to a TradeLab clinic or the TradeLab Coordinator.

One of the benefits of this kind of Assistance Mechanism is that it can fill gaps where stakeholders lack the resources to conduct research and answer policy or other questions in-house or retain outside counsel to do it for them.⁵²³ To the extent a state or other stakeholder has general questions, issues, or concerns, and has a several month window in which to receive a memorandum, this kind of assistance could help to overcome resource constraints. It is most suited for in-depth questions that can be answered in a several months' time-frame.

TradeLab has an extremely lean staff and expenses limited to one paid coordinator, who facilitates the network and provides institutional, administrative and legal/substantive support, including outreach to beneficiaries and alumni, and the expenses necessary for running the TradeLab website.⁵²⁴ It has received several grants, and benefits from the in-kind, voluntary service of students and their expert mentors, and, by extension, the universities that pay professor salaries and facilitate the clinical teaching experience necessary for each TradeLab project.⁵²⁵

4.4.2.1.1 Beneficiaries

TradeLab assists on a no-cost basis developing countries, SMEs, civil society organizations, or other smaller stakeholders.⁵²⁶

4.4.3 Other pro bono networks

Various other pro bono networks exist that are able to field requests from states and other stakeholders for discrete pro bono assistance, typically pairing the requestor with an appropriate lawyer/law firm who will engage directly with the client in representation for the matter. Examples include the International Senior Lawyers Project⁵²⁷ and the Thompson Reuters Foundation's TrustLaw.⁵²⁸ Resources available for assistance, and eligible beneficiaries and projects vary based on the specific partner engaged.

4.5 Intergovernmental knowledge-sharing hubs

Many of CCSI's 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" and learn from one another. 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, there is more that could be done from an organizational perspective to facilitate engagement, and that certain existing efforts could be better funded or more institutionalized. Certain existing knowledge-sharing opportunities that were highlighted during CCSI's

consultations are described below.

4.5.1 Informal “sideline” knowledge-sharing

On the sidelines of organized events at which government officials are otherwise gathering - UNCTAD’s World Investment Forum or other UNCTAD events; the OECD’s Freedom of Investment Roundtable, Investment Treaty Dialogues, and annual conferences on investment treaties; or other trainings or meetings (such as those hosted by ICSID,⁵²⁹ CCSI, or IISD, for example) - officials get to know one another and find the time to ask questions and share knowledge. One lower middle-income government official noted that “while organized trainings are useful, a lot of the value comes from the unplanned interactions, not from the slides.”⁵³⁰

4.5.2 Formal knowledge-sharing opportunities

Some existing Assistance Mechanisms as well as other organizations, recognizing the value of knowledge-sharing among government officials, have planned and established more formal opportunities to allow this to occur.

For example, IISD has organized an Annual Forum of Developing Country Investment Negotiators in partnership with various international and regional organizations that are regularly represented.⁵³¹ The Annual Forum is hosted on a rotation-basis by developing country governments in Africa, Asia, and Latin America. The 13th Annual Forum will take place in early 2020 in Thailand. The meeting aims to ensure that developing countries are able to attract responsible investment that advances sustainable development while safeguarding their legitimate policy space. More than just a meeting, the Annual Forum has evolved into a community of government officials from developing countries who are determined to work towards a systemic reform of the international investment agreements (IIA) regime so that it better serves their countries’ interests. Around 100 officials from more than 50 countries and regional organizations attend annually, giving participants an opportunity to listen to international investment law experts; discuss emerging issues, trends, and legal developments in the field; and engage in peer learning with fellow negotiators. Forum participants remain engaged in

the community through an online mailing list, regional meetings, and peer-to-peer exchanges.

As an example of a regional knowledge-sharing effort, the Center for the Advancement of the Rule of Law in the Americas (CAROLA) at Georgetown Law hosted a workshop on ISDS Reform in Latin America, which brought together delegates from Latin American countries to share their experiences surrounding the negotiation, administration, and arbitration of investment treaties and identify areas of concern and potential reform.⁵³² This workshop is part of a broader effort by CAROLA to provide a permanent platform for regional cooperation focused on investment law reform. This kind of regional platform, largely conducted in Spanish, permits informal knowledge sharing and relationship-building that can be beneficial to long-term government objectives.

As noted in Section 4.1.2, the ALSF has attempted to do formal and informal “information sharing” among governments. One interviewee familiar with the ALSF’s efforts in this area stressed that formal networks with the purpose of information sharing can bring challenges (e.g. anti-trust concerns if there is collusion around pricing).⁵³³ Through experience, ALSF found that the best way to promote information sharing was by organizing peer-to-peer regional events on certain topics, with a requirement that whomever attended had to present on what his or her government was doing to address certain issues.⁵³⁴ In so doing, ALSF found that governments naturally will also speak to each other during breaks, or at dinner or lunch, and that other, more informal information-sharing often happens in this context.⁵³⁵

4.5.3 Informal or treaty-based knowledge-sharing networks

Government officials often reach out to other government officials with general or specific questions through informal or treaty-based networks. For example, in CCSI’s consultations one high-income government official stated that many countries (pointing to both developing and developed states) have an enormous amount of expertise in specific areas and other states could greatly benefit from learning how other governments have achieved certain objectives, or managed certain obstacles.⁵³⁶

This official's government has engaged both formally (through workshops) and informally with many different governments over the past several years.⁵³⁷ The official noted that it often happens that a treaty partner will approach with specific questions about, for example, dispute avoidance or management, and would like to understand in greater detail how the government has internally organized around these issues, and what steps it takes when it is gearing up for an actual dispute.⁵³⁸ This official's government has also fielded very specific questions from other countries, such as how it finances its defense, how it selects and contracts with outside experts, how it manages the discovery process, what considerations it gives to arbitrator selection, among others.⁵³⁹

Relatedly, this developed country official stated that it has a more general interest, and sees great value, in engaging with treaty partners on a technical level to ensure the coherence of the investment law system generally, and specific treaties, in particular.⁵⁴⁰ Such engagement could involve discussions around treaty use or interpretation, the role for joint interpretations, or the use and value of non-disputing party submissions.

Based on these experiences, this developed country official suggested that a promising path forward for an Assistance Mechanism would be to build upon and perhaps make more robust the existing networks and information sharing that is already occurring, and clearly valued, among government officials.⁵⁴¹ This kind of knowledge-sharing would then permit states to approach with, and take away, information relevant to the state's own approach to defense and to build expertise at various stages of its own internal process.⁵⁴² Another high-income government official reiterated similar ideas, and also suggested that regional and language-based networks could also be useful for certain topics.⁵⁴³

One high-income government official, and several low and middle-income government officials, suggested that sharing information in this way would greatly facilitate their countries' efforts to gain greater control over defense of ISDS cases, as they would like to have more information on the specific ways in which other governments approach or have moved in-house certain aspects of the defense, including, for example, which aspects may easiest to move in-house, which are more difficult, and specific hurdles that may be encountered along the way.⁵⁴⁴

4.6 Discrete capacity building mechanisms

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. The ways in which this study has conceptualized the meaning of capacity is more broadly addressed in Section 2.1. Certain discrete capacity building mechanisms are discussed below. Assistance Mechanisms could be developed or expanded to address certain discrete capacity challenges.

4.6.1 Capacity building provided by international organizations

As discussed in Section 4.2.1, many international organizations provide investment-law related capacity building services to states. These include UNCTAD, the OECD, UNCITRAL, the WBG, among others.

4.6.2 Investment law trainings

Several organizations conduct investment law training programs aimed specifically at government officials.

Arbitral institutions, including ICSID, the PCA, and the SCC (among other arbitral institutions) offer various kinds of training, often of a procedural nature. These trainings are further described in Section 4.2.

CCSI's annual Executive Training on Investment Treaties and Arbitration for Government Officials takes place at Columbia University, in New York City, over the course of two weeks every summer.⁵⁴⁵ CCSI's training is limited to officials currently employed by their government in order to most appropriately and effectively tailor course content and better equip officials to gain a deeper understanding of investment law and policy and the implications that this complex and ever-evolving field has on host state policy-making and treaty-based liability. The first week of the training focuses on substantive elements of investment law, and the second week on procedural aspects of ISDS disputes. Sessions are taught by CCSI staff as well as a broad network of highly experienced lawyers from the private sector, governments, and international organizations. This training also provides an opportunity for informal discussion, learning, and

network-building among officials that many training alumni have found extremely valuable. This training is offered on an at-cost basis to participants, and scholarships are available for participants from low- and in some cases middle-income countries, depending on the availability of funds. CCSI also conducts in-country trainings upon request, which can be useful if a larger number of officials from one country plan to participate.

The International Institute for Sustainable Development (IISD) designs and carries out in-country training courses for officials from developing country governments and regional organizations.⁵⁴⁶ IISD's training courses are aimed at assisting negotiators and policy-makers in developing investment policies, laws, treaties, and contracts in ways that support the achievement of the Sustainable Development Goals (SDGs), align with their countries' national development priorities, and limit the negative impacts of investment treaties on their governments' right to regulate. Typically, IISD's trainings on international investment law cover substantive and procedural aspects of traditional investment treaties; novel approaches in modern treaties and models; strategies for international negotiations on investment; and national, regional, and multilateral initiatives to reform international investment law and investor-state arbitration. IISD develops the agenda of each training in collaboration with the host government or regional organization in order to tailor the event to the host's needs. These trainings are delivered by teams of highly qualified international lawyers. Typically counting on funding from development aid and philanthropic organizations, IISD's training courses are offered free of charge for developing country governments. In some cases, countries may be requested to contribute toward reasonable expenses. In case of insufficient funds, priority is given to least developed countries.

The ability for non-profit organizations to provide these kinds of trainings, particularly for low-income or middle-income economies, is, for the most part, dependent on availability of grants.

4.6.3 Massive Open Online Courses (MOOCs)

In recent years, Massive Open Online Courses (MOOCs), free online courses that are available to anyone to enroll, have increased in popularity. While organization of a MOOC requires one-time financing for content creation and production,⁵⁴⁷ many MOOCs are offered several times a year, starting on a designated date and lasting several weeks, with lecturers perhaps one time a week and assignments and quizzes in the interim (estimated time per week is typically 5-10 hours). The cohort completing the MOOC can engage in online forums and information exchange. Often, lecturers featured in the MOOC are on-call during these times. Université Catholique de Louvain, with Professor Yannick Radi, offers a 10-week investment law MOOC.⁵⁴⁸

4.6.4 Contractual arrangements or secondments

As described in various sections of this Scoping Study, the ACWL, many law firms, and even some states provide secondments to government officials from developing countries. These secondments are valuable opportunities for government officials to join an experienced legal team and to transfer knowledge back to the official's own ministry or department.

4.6.5 Efforts to "democratize the law" through transparency and knowledge sharing

In recent years there has been broader recognition of the public nature and public interest implications of many ISDS disputes and efforts to bring greater transparency to this field, such as by making public filings and awards.

In many cases, however, related knowledge or easily searchable information is held behind paywalls that may prove too great a luxury for some governments to easily afford. For example, Columbia University's subscriptions to roughly 20 different investment law-related databases and online or print publications cost in the aggregate approximately \$45,000 per year. This cost is after each is negotiated to achieve the lowest possible price, and after benefitting from academic as opposed to commercial rates.

Various existing mechanisms and other organizations have taken steps to make more information about investment law and arbitration publicly available on a no-cost basis, and some of those services are described below.

It is important to stress, however, that several Scoping Study interviewees and many other stakeholders have raised concerns that it is not merely transparency of information, but actual democratization of knowledge that will be required to truly move toward a more level and equal playing field as between developed and developing states, as well as vis-a-vis the rights and interests of other stakeholders in the system. For example, when states outsource legal services to private sector actors, states reduce their own learning and knowledge capture and thus perpetuate a cycle by which more and more knowledge is held in law firms rather than in-house. In many cases, language barriers greatly exacerbate these issues.

4.6.5.1 UNCITRAL

4.6.5.1.1 UNCITRAL's Transparency Registry

UNCITRAL's Transparency Registry is a repository for the publication of information and documents in treaty-based ISDS.⁵⁴⁹ It was established by the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (Rules on Transparency) in 2014.⁵⁵⁰ Subject to certain qualifications, the documents listed in Article 3 of the Rules on Transparency are to be made available to the public, which include, among others, written statements and filings of the parties, non-disputing party submissions, transcripts, and awards. The Rules on Transparency apply in relation to disputes arising out of treaties concluded after April 1, 2014 when the arbitration is initiated under the UNCITRAL Arbitration Rules, unless the parties otherwise agree. The United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (Mauritius Convention) is an instrument by which parties to treaties concluded prior to April 1, 2014 consent to apply the Rules on Transparency.⁵⁵¹ Five states are party to the Mauritius Convention as of the writing of this report.

4.6.5.1.2 UNCITRAL's WGIII website

UNCITRAL's WGIII website has grown to include a wealth of information about its ISDS reform project.⁵⁵² This website includes all submissions from governments made throughout the reform project as well as substantive background notes prepared by the Secretariat to better assist the WGIII in its work. All audio recordings and reports of all sessions are readily available. The page provides links to substantive submissions made by observer organizations and

other non-states (e.g. the G77, United Nations Special Procedures Mandate Holders) to assist the WGIII in its work, as well as to selected research material (e.g. by the OECD) and work produced by the academic forum.⁵⁵³ A bibliography of recent writings related to investor-state dispute settlement is also linked to this page.⁵⁵⁴

4.6.5.2 UNCTAD's Investment Policy Hub

UNCTAD has by far the most comprehensive publicly available resources on investment policy-making and disputes. In addition to UNCTAD's investment-policy resources and services, including the Investment Policy Framework and Investment Policy Review program described in Section 4.2.1, UNCTAD's Investment Policy Hub makes publicly available a wealth of policy tools and resources.⁵⁵⁵

UNCTAD's Investment Policy Monitor includes information that has been collected by UNCTAD on changes in national FDI policies on an annual basis since 1992, and which provides input into UNCTAD's annual World Investment Report, its quarterly Investment Policy Monitor, and the UNCTAD-OECD Reports on G20 Measures.⁵⁵⁶ The Investment Policy Monitor provides country-specific, up-to-date information about the latest developments in national foreign investment policies.⁵⁵⁷

UNCTAD's Investment Laws Navigator is a comprehensive and regularly updated collection of national investment laws that includes tools for searching and filtering.⁵⁵⁸ It is designed to provide information that can contribute to international policy discourse and to help advise and provide technical assistance to countries interested in reviewing or reforming their regulatory frameworks.⁵⁵⁹

UNCTAD's International Investment Agreement Navigator includes all publicly available IIAs.⁵⁶⁰ Users can browse by country, country grouping, recently concluded, or use an advanced-search function to find more specific agreements.⁵⁶¹ Relatedly, the IIA Mapping Project maps the content of IIAs and the database can help to understand trends, approaches, and examples.⁵⁶²

Finally, UNCTAD's Investment Dispute Settlement Navigator contains information and filings of known international arbitration cases initiated under IIAs.⁵⁶³

This site also permits searching by various categories, including respondent state, sector, treaty, breach, among others, and includes an advanced-search function.⁵⁶⁴

4.6.5.3 PluriCourts Investment Treaty Arbitration Database

Outside of intergovernmental efforts at transparency and disclosure of information, the PluriCourts Investment Treaty Arbitration Database (PITAD) is a comprehensive, regularly updated and networked overview of all known international investment arbitration cases.⁵⁶⁵ The database contains more than 1000 ISDS cases, coded with a series of searchable variables, and raw and analyzed data.

4.6.5.4 italaw

italaw is a comprehensive, regularly updated, and completely free database on investment treaties, international investment law, and investor-state arbitration.⁵⁶⁶ It is searchable and contains links to cases and other information.

4.6.5.5 Jus Mundi

Jus Mundi is a search engine that aims to empower lawyers worldwide to conduct comprehensive and efficient research on international legal matters.⁵⁶⁷ While its most comprehensive services are on a paid basis, it also provides open and free access to international law through the light version of its search engine.⁵⁶⁸

4.6.5.6 International Arbitration Case Law

International Arbitration Case Law (IACL) is a not-for-profit project that aims to disseminate at no cost summaries of important ISDS decisions relevant to legal practitioners and scholars.⁵⁶⁹ IACL aims to summarize, edit, and coordinate the publication of awards and decisions in international arbitration. It also seeks to eliminate language barriers and to facilitate the content of decisions in various languages.⁵⁷⁰

4.6.5.7 TradeLab

TradeLab, discussed above in Section 4.4.2 is a global network of universities and training centers that conduct pro bono projects for developing countries, SMEs, civil society organizations, or other stakeholders.⁵⁷¹ Tradelab posts research memoranda and other non-confidential output on its website,⁵⁷² thereby seeking to achieve three objectives: (i) help beneficiaries build capacity; (ii) train students; and (iii) inform and create awareness for the wider public.⁵⁷³ TradeLab sees potential to democratize legal education and the legal profession in the field of international economic law by spreading learning and expertise beyond a handful of highly specialized universities and large law firms.⁵⁷⁴

4.7 Legal assistance and resources clearinghouse

As described in this Scoping Study, there is already a wealth of resources available to states to assist with investment-law related issues. 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.⁵⁷⁵

Section 5.

Thematic, Cross-cutting Issues Applicable Generally to Assistance Mechanisms

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During the course of CCSI's analysis of issues described during interviews and regarding Assistance Mechanisms, several thematic, cross-cutting, substantive areas of consideration emerged that are agnostic to the eventual institutional or ad hoc form that an Assistance Mechanism may take. We set forth thematically these cross-cutting areas for further consideration.

5.1 Quality, reliability, reputation, trust

Multiple interviewees from governments, existing Assistance Mechanisms, academia, and civil society highlighted that key factors determining the success of any Assistance Mechanism would be perceptions regarding its quality, reliability, credibility, and trustworthiness, as well as its actual performance in these areas (which are distinct, but not unrelated).

Quality, reliability, reputation

Government officials stressed that the crucial factors in any decision to use an Assistance Mechanism, particularly in the context of dispute settlement, are the quality, reliability and reputation of the support provider. These factors were of greater importance than cost.⁵⁷⁶

Interviewees familiar with the establishment or operations of existing Assistance Mechanisms stressed that ensuring that a mechanism is able to provide the highest quality of advice to clients, and that it has a stellar reputation, are critical. According to several such interviewees, "public relations" efforts are essential and building trust takes time.⁵⁷⁷ 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 mechanism. Government officials must be confident in the utility, the advice, the quality of the service, and the long-term sustainability of the mechanism.

Quality, reliability and reputation matter to government officials on several different levels. At the broadest level, governments are responsible for, and answerable to, their populations. According to one official,

[i]f we have a WTO dispute and we say, 'we're hiring ACWL,' we can point to their experience, pedigree, and general reputation. They're used by pretty much everybody in the developing world, so we can sell that counsel to policy-makers and the public. If we hire more expensive counsel, we have to be able to point to their accomplishments and reputation to justify their retention. Unfortunately, the well-reputed external counsel is extremely expensive because of their reputation. What developing countries need, I think, is a "rubber stamp" of sorts on the lawyers, so that we can pick them without any worry. I think that's our biggest concern, to be honest.⁵⁷⁸

Similarly, individual officials within governments are subject to immense political pressure in choosing legal counsel.

If you are an agency director and lose a case, there is political pressure and responsibility. You have to hire the best, most well-respected lawyers. The political implications of hiring a small firm can be large. If the case does not go well, people will ask why that firm was hired rather than the most well-known. With an advisory center that was of high quality and trusted, it would make it easier for states to migrate away from large, expensive firms.⁵⁷⁹

In the context of IIAs and ISDS, this means that states will need to be convinced that any Assistance Mechanism operates at the same level as private practitioners – obtaining the best representation will often be prioritized over cost, particularly when public interests are at stake.⁵⁸⁰ 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.

Quality will need to be demonstrated. Leadership and institutional placement can also help. Having strong and well-respected leadership at the beginning can be critical to putting an organization on the map. Such leadership must be viewed as legitimate in the eyes of all stakeholders in any Assistance Mechanism (beneficiaries, donors. One interviewee noted that some attention should be given to the extent to which an Assistance Mechanism will need to “weather political storms,” and how it should be established institutionally to ensure the greatest success in this regard.⁵⁸¹ The ability to benefit from the reputation of an existing institution as, for example, the ALSF benefitted from its affiliation with the AfDB, and the ISP/LDCs program has benefitted from its affiliation with IDLO, and by extension, the United Nations, can be beneficial to an Assistance Mechanism in both of these respects.

Trust

Closely related to issues of quality, reliability, and reputation is the issue of trust. Interviewees stressed that with any legal service, trust is a necessary component.

Trust is essential to be able to provide effective representation. Interviewees stated that a support provider’s credibility and trustworthiness were crucial for government clients to be candid and open with the support provider. Many government and other interviewees stressed that trust must be built over time; 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 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.⁵⁸² If an Assistance Mechanism were constructed to be attuned to the perspective and interest of states and, according to some interviewees, to not have a financial interest in the claim or the ISDS system more broadly, it would be easier for governments to engage such a mechanism for direct representation.⁵⁸³

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.⁵⁸⁴ One government would value a neutral place for a “second opinion” with respect to what had been suggested by outside, private sector legal counsel because this official has in the past had doubts about whether such advice is truly in the legal (and social and political) interest of a state.⁵⁸⁵ Another interviewee stated that it would be helpful for a center to be affiliated with an existing international or other organization that the government already trusts, as this would build on an existing relationship.⁵⁸⁶ One interviewee with experience working for an Assistance Mechanism stressed that for certain tasks, even highly qualified private sector lawyers may not be appropriate because their experience and interest (financial or otherwise) is sometimes not truly and fundamentally aligned with that of a government and its interests.⁵⁸⁷

Some successful Assistance Mechanisms have built up significant levels of trust. With respect to the ACWL there is a generally high level of intimacy between it and its clients.⁵⁸⁸ They are close because they foster relationships that both predate and outlast litigation and are thus less ‘transactional.’⁵⁸⁹ Trust is built through hosting of trainings, other events, and personal relationships. Individuals familiar with the ACWL have found that governments are more willing to be candid and open, and that trust is a huge advantage.⁵⁹⁰

The ALSF has similarly, through years of work, built up trust relationships. As noted earlier, key traits that were noted by one interviewee as contributing to the ALSF’s success were also that it was a regional initiative, and not something that came from the G20, G7, or other organizations outside of the region, and that it started with African institutional support (the AfDB), and thus benefitted from trust relationships that were already established.⁵⁹¹

5.2 Scope of services and funding

The scope of services an Assistance Mechanism can provide will be entirely dependent on and interrelated with available funding – the more money available, the more services can be provided. There will also be tradeoffs in the nature and breadth of services offered and depth in the number of countries to whom those services might be offered. Thus, comparisons in this

section to existing Assistance Mechanisms will attempt to incorporate contextual comparisons to the investment law context. This section primarily discusses comparisons with the ACWL, but also incorporates references to other funding and support mechanisms.

5.2.1 Scope of services

This section first focuses on the most robust form of service provision, that of the ACWL-model, but moves on to discuss more discrete areas.

With respect to the ACWL, this mechanism plays a valuable role in the WTO context, but differences between these two legal systems, and the role that the ACWL plays in one versus what an investment law assistance mechanism could play in the other, should not be underestimated.

One major difference between the ACWL and service provision in ISDS cases is that the time and cost budgeted by the ACWL for any given WTO dispute seem to be dramatically lower per case than is common for ISDS disputes. This issue is addressed in more detail in the following Section 5.1.2.2.

A second difference relates to the nature of WTO law as compared to investment law, where in the former firmer lines may be drawn between legal and policy assistance and advice. Particularly if an investment law assistance mechanism were to engage in negotiation assistance and other training and capacity building work, one issue that might arise is whether it is feasible (and/or desirable to maintain a line between the provision of legal and policy support in the IIA context. As noted routinely by interviewees discussing the ACWL, key to its success is its focus on legal, and not policy, input. While that line is not always clear – and, indeed, some users have reported particularly valuing the ACWL’s services because of a development lens applied to its work⁵⁹² – 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.⁵⁹³ 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. While the ACWL notes its avoidance of

policy issues in the WTO area as key to its legitimacy and acceptance, this distinction may be more difficult to draw in investment arbitration.

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 are in Geneva, IIA negotiations take place around the world and are not tied to any particular existing institution, secretariat, or negotiating framework or agenda. WTO disputes similarly occur in Geneva whereas IIA-based disputes have several hubs. In addition to raising logistical challenges regarding where and how to provide support, it may also be harder for support providers to know, and be known to and trusted by, potential users, and to keep abreast of the relevant developments in the different spheres of activity.

With respect to the issue of litigating position, one commonly cited benefit of the ACWL is that it enables developing countries to better advance and enforce the rules of the multilateral trading system and helps open global markets. With ISDS support, however, this function and role is not present. An Assistance Mechanism that participated in ISDS defense may help states avoid or minimize liability and/or reduce their defense costs, and could potentially increase the legitimacy of the ISDS system; but the overarching aim of supporting client states as rule-enforcers and market-openers, which helps generate buy-in for the ACWL even among developed country funders who may be respondents in cases they financially support,⁵⁹⁴ does not appear to be similarly present for ISDS defense. Rule enforcement arguably exists when states employ legitimate defenses, but proactive action to maintain the integrity of the investment legal system is not typically taken up in a state-state context available under treaties.

Not unrelatedly, one interviewee who had worked at the ACWL noted that much of the ACWL’s early work in dispute settlement had almost exclusively been focused on supporting claimants (with a view toward assisting developing countries help to maintain the integrity of the WTO system), and that the subsequent rise of respondent-side support raised issues as that work “is more difficult in many ways.”⁵⁹⁵

Of course, short of legal representation in disputes, various services could be offered in different combinations that could be explored. For example, some TrustFunds also facilitate matching beneficiaries to lawyers who have agreed to be available at below-market fees. An Assistance Mechanism may be employed to facilitate knowledge-sharing among government officials and may organically expand to fill other roles as time, and trust in and demand from such a mechanism, grew. A mechanism may start by simply acting as a resource for governments to better understand where, from whom, and at what cost, existing mechanisms are available to assist in specific contexts. The various models of existing Assistance Mechanisms described in Section 4 are useful to consider how an Assistance Mechanism may best be the needs of states (and other potential beneficiaries) for the least cost.

5.2.2 Required resources, cost allocation, funding sustainability

5.2.2.1 Person-hours and associated resources

Relating to costs, the expenses associated with any Assistance Mechanism will vary based on the type of service being offered and the nature of the service provider. For example, full support for prosecution or defense of an ISDS arbitration averages \$5 million per case.⁵⁹⁶ While costs could be lower in a given case, they could also be multiples of that sum, reaching into the tens of millions of dollars. Even if low probability events, such exceptional costs are high-impact events that would need to be planned for to help ensure quality and sustainability of defense are not sacrificed due to financial and other resource constraints.

Other services can be provided at lower cost. 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.

For some types of expenditures, there will likely be associated economies of scale enabling services to reach a wider set of potential beneficiaries. Development of training courses could, for instance, be reproduced and replicated at relatively low marginal costs (although this may address a different capacity need than more tailored and unique capacity interventions would); and special rates for or open access to online resources and databases (along with a wider translation of relevant materials) could support a relatively large number of users. Costs of database and other subscriptions can easily reach into the tens of thousands of dollars per year, in aggregate, making it costly for a single government to procure.

In contrast, it is unclear that litigation support in discrete cases will have such economies of scale. If a service provider expends \$5 million in one case, it is uncertain that that will mean the service provider can litigate the next case for another client at a lower cost (though it could potentially litigate another case for the same client at a lower cost, especially if the facts are similar). Even when arbitration involves repeat players, it does not appear that that translates into reduced legal fees, as has apparently been the case with the introduction of the ACWL into the WTO context. Spillovers could be generated, however, if work on individual ISDS cases by an Assistance Mechanism was also used to train lawyers for the respondent state as well as lawyers for other governments, enabling more officials to gain skills and experience necessary for handling disputes. To the extent an Assistance Mechanism set a substantial market bar on pricing or permitted states to credibly use its pricing scale as a point of negotiation, it could also introduce broader spillover impacts.

Of course, the services provided must respond to and address the specific "capacity" gap that is being targeted and must be appropriately narrow, or broad, to fulfill its mandate. These issues of costs - and efficiency - are key for understanding what types of Assistance Mechanisms, if any, are desirable in response to identified concerns and feasible with respect to resources.

Comparisons with the ACWL

As noted above in Section 4.1.1 the ACWL uses time budgets for its cases, estimating the resources necessary and capping the fees that can be charged.⁵⁹⁷ This budget is crucial for estimating staffing needs and associated costs. Table 9 below shows the current time budget for ACWL work.⁵⁹⁸ As noted, interviewees acknowledged that the ACWL often exceeds its budgeted time for any given case, so numbers below are indicative based on the information that the ACWL makes publicly available.

Table 9, for comparison purposes, also illustrates the number of hours required in an ISDS proceeding. 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.⁵⁹⁹

Comparing a WTO panel phase with an ISDS proceeding reveals that the ISDS proceeding may require 40-50 times more hours worked.

Furthermore, over the past ten years, the ACWL has handled between 0 and 5 new requests for dispute settlement assistance each year. Notwithstanding the ways in which an Assistance Mechanism in investment law may craft rules to broaden or narrow

eligible beneficiaries, 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.

Comparisons with other Assistance Mechanisms area also useful. For example, as discussed in more depth in Section 4.3.1.5, under the ICTY’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 were €151,786, for a complexity level 2 case, €260,895, and for a complexity level 3 case, €424,731.⁶⁰⁰

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.⁶⁰¹ 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.⁶⁰²

Depending on whether an investment law Assistance

Table 9 Time budgets - WTO and ISDS

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) ⁷⁶⁴	20,142.71	CAD4,579,260.92
ISDS Case (Mesa Power) ⁷⁶⁵	19,616.00	CAD4,225,547.67

Mechanism also engaged in other activities of the ACWL, such as capacity building or providing opinions (among others that have been discussed in this Scoping Study), the financial and personnel resources required by an investment law Assistance Mechanism may need to be greater by an order of some magnitude when compared to the ACWL (or other Assistance Mechanisms, such as the ICTY's fund) to provide the desired level of support in the investment law context.

Another interesting comparison between the ACWL and investment law is the relative impact of the cases that are supported. The ACWLs work at the pace described has enabled it to be involved in nearly 20 percent of all WTO dispute settlement proceedings to date. In contrast, support at a roughly equivalent pace (assuming three cases per year over the past ten years) in ISDS would, based on the number of claims over the past ten years (615), be closer to 5 percent.⁶⁰³

The value of an Assistance Mechanism to the overall legal system and "rule of law" is also an area for consideration. In the context of WTO law, there may be low-value cases in which developing countries participate that are nevertheless high in systemic importance because WTO law is based on one set of common treaties and, while a system of *stare decisis* is not employed, reports issued by the Appellate Body can be persuasive with respect to later disputes. The ACWL may be especially important in providing support for those types of disputes. In contrast, in ISDS, cases are often high value for the parties to the dispute but low value in terms of systemic effect because of the thousands of different treaties forming the basis of disputes, and the ad hoc nature of dispute settlement (although in practice many arbitrators are persuaded by earlier awards, but not in a predictable nor systemic way). A state win in one ISDS case under the present arbitration system, for instance, will not produce systemic gains. It is possible that state support by an Assistance Mechanism may produce more frequent state "wins" on issues of substance or procedure, and that those decisions may have spillover effects in other ISDS cases arising under the same or other treaties, but systemic impacts are less likely. This is a notable contrast to the WTO, and the potential impact and perceived benefits of the ACWL.

5.2.2.2 Costs of support and who bears them

There are three general models for allocation of costs:

Legal service providers bear the costs of services provided to users: In some cases, service providers facilitated by an Assistance Mechanism bear the costs of their services: Law firms and university-based legal clinics or other non-governmental organizations may provide pro bono support on discrete legal issues relating to IIA policy, treaty negotiation, or dispute management. This support is available at no cost to beneficiaries. While these Assistance Mechanisms are not cost-free, the direct costs of services are often borne by the service providers (e.g., the law firms, universities, or non-profit organizations) and the overhead costs of the mechanism through external donations.⁶⁰⁴ The existing ISP/LDCs program, for example, fits this model.

Service users pay for (all or some of) the costs of services provided to them: In other models the service users may pay for the service provider at market rates (which could be, for instance, based on the market for the particular type of case, or on the market for legal services in the host state), pre-set rates, or negotiated rates. This is currently done, for instance, in connection with the services provided (or, in the case of engagement of external counsel, facilitated) by the ACWL, and in connection with services provided by the ALSF. While Trust Funds engage in varying levels of pairing beneficiaries with actual legal counsel, in some cases Trust Funds do have approved counsel lists and/or specified rates that counsel may charge. Another example in this category is the use of third-party funding (which, for various reasons is in practice largely limited to claimant-funding and is discussed in Section 6.3.2.3.5) or other contingency fee arrangements. Although third-party funding and/or contingency arrangements do not involve the service user paying money up-front to the service provider (or funder of the service provider), the service user, in the case of a financial upside, 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:

Other models may rely more heavily or even exclusively on third-party donors to fund assistance. Those donors can be public (like national government aid agencies), or private (like Bloomberg Philanthropies and the Bill & Melinda Gates Foundation) and can potentially support a range of activities from assistance with reviewing and formulating IIA policy (as organizations such as UNCTAD already do) to defense of particular ISDS disputes. Different approaches can be taken with respect to issues of:

- who can contribute (e.g., just governments, or also philanthropic foundations, private donors, etc.);
- to what can they contribute (e.g., to specific cases, general funds, or only to core funding);
- on what terms (e.g., in exchange for rights to participate in management meetings, to receive reports on work conducted, and/or to also obtain services); and
- with what degree of transparency.

Different rules may apply to different types of donors. Assistance Mechanisms may develop comprehensive ex-ante rules covering all permitted funding sources and arrangements or build in flexibility to develop new funding relationships and terms over time.⁶⁰⁵

Another approach under this category is the use of fee-shifting, whereby the costs of services used by client governments would be paid by their adversaries in the dispute. A fee-shifting model could provide that, if a state were to prevail in its defense of an ISDS case, the investor would pay for those defense costs. This fee-shifting can be limited to certain contexts (e.g., when claims are considered frivolous or abusive), certain amounts (e.g., reasonable fees in a particular market), or certain activities (e.g., for legal fees, but not expert fees). A support provider could potentially be the beneficiary of such fee-shifting awards in the client government's favor, while the client government could potentially retain liability for fee-shifting in an investor's favor. Such an arrangement, however, may raise concerns among client governments that litigating parties would not have incentives to keep costs low.

Another approach involving contributions by investor/claimants and potentially other litigants was suggested by one interviewee. This proposal was for a novel, tax-like financing mechanism that could be explored to fund an Assistance Mechanism.⁶⁰⁶ A fee that would be paid as an element of jurisdictional requirements could be built into treaties. For example, 1% of the amount in controversy of any case could be paid to finance an Assistance Mechanism.⁶⁰⁷ An economic assessment would need to be conducted as to what percentages (and if desirable, for all or a subset of kinds of claims) would be sufficient to cover the expenses, or supplement other financing, of an Assistance Mechanism.

These three general categories of cost-bearers— legal service providers, beneficiary/uses, and third-parties -- are not mutually exclusive: A law firm may, for instance, agree with a respondent state to provide defense at a fee that is lower than it normally charges, and to also build training for government attorneys into its services contract; and a third-party donor may agree to pay a portion of the relevant defense costs, with the respondent state paying the remainder. At least one arbitral institution also is willing to help negotiate arbitrator fees or waive some of its own administration fees for certain governments.

Not all models are desirable or viable for all types of services, service providers, or service users. Several private-sector providers indicated, for instance, that while law firms may be able to provide legal services at discounted or negotiated rates, and may be able to do pro bono work on discrete tasks, they would not be able to commit to fully support ISDS defense on a pro bono basis. The time required and revenue forsaken would be too great, as would the risk that the pro bono work would give rise to conflicts of interests preventing the firm from taking on other, paying, clients. Similarly, it is questionable whether philanthropic foundations or other donors would be able to support defense at a scale desired by potential users.⁶⁰⁸ Likewise, potential service users may not be able -- as a legal or policy matter -- to equally employ those different cost-allocation models. Some potential users noted that entering into pro bono arrangements with private sector law firms may not be possible due to procurement and anti-corruption laws and policies. Others indicated concerns about whether a lack of control over funding would translate into a lack of control over policy or litigation strategy.

5.2.2.3 Funding sustainability – different models, approaches, and considerations

The long-term financial sustainability of an Assistance Mechanism is important to its quality of its work, impact, and reputation (and those factors, in turn, also affect its financial sustainability).

The funding sustainability of an Assistance Mechanism should be a major focus of any real effort to create such a mechanism. Lessons and insights from some existing Assistance Mechanisms may be useful in this consideration. Some comparisons and experiences are highlighted below. While the section above discussed three main potential cost-bearers of support – service providers, user/beneficiaries, and third-party donors – this section focuses primarily the latter two since contributions by service providers alone (e.g., through ad hoc pro bono assistance) seems unlikely, under current circumstances, to meet the demand sought by respondent states.

5.2.2.3.1 Funding sustainability – support by third-party donors

In a model that relies upon support from third-party donors, achieving financial sustainability will require various ingredients, including securing (and maintaining) buy-in from donors, having the trust of beneficiaries and understanding their needs and priorities, achieving desired outcomes, effectively managing relationships and resources, and anticipating and mitigating risks.⁶⁰⁹

Table 10 highlights some data on donor support provided to other relevant initiatives. The text below provides additional detail.

Example: ACWL

As noted in greater depth in Section 4.1.1.4, the ACWL operates on a mix of user fees and donations to its Endowment Fund with a view of becoming financially independent, although a 2006 task force report concluded that it was doubtful that the Endowment Fund would ever reach a size necessary to ensure the ACWL's self-sufficiency.⁶¹⁰ The ACWL's Endowment Fund is funded by developed country Members and contributions count as official development assistance. Each has contributed at least \$1,000,000. At the end of 2005, the Endowment Fund stood at CHF18,000,000, and at the end of 2015 at CHF26,000,000.

While, as discussed further below, the ACWL also charges user fees for support in litigation, those fees have been a relatively minimal source of revenue for the Centre. They amounted to CHF300,000 for 2015, and from 2002-2014 averaged only CHF161,000 per year.⁶¹¹ Legal fees have constituted on average roughly 4 percent of the ACWL's annual revenues.⁶¹²

In 2016 the ACWL's annual budget was roughly CHF4,300,000,⁶¹³ and for 2019, it was estimated at roughly CHF4,700,000.⁶¹⁴ The budget for the 2017-2021 period is estimated at CHF23,548,000 million in total. Taking into account revenue from the Endowment Fund that can be withdrawn to fund the ACWL over this five-year window, CHF20,000,000 million in additional voluntary contributions will be necessary to cover the ACWL's financial needs through 2021.⁶¹⁵ These figures illustrate that although the ACWL is extremely highly regarded by users and commentators, it has not achieved the financial sustainability anticipated and must engage in ongoing quests for additional funding to sustain its work.

Example: IDLO's ISP/LDCs Programme

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.⁶¹⁶ With a fully-funded €2 million in donations, ISP/LDCs envisions that it would be able to cover operational expenses and make about twelve interventions of medium size, which could take the form of arbitrations or large-scale trainings.⁶¹⁷ Unlike the ACWL, the ISP/LDCs program provides all services to beneficiaries free of charge to the beneficiary.

Despite having received pledges of funding, it is unclear to CCSI how much of ISP/LDCs' pledged money has actually been received by the program. 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.⁶¹⁸ The program finally received those funds in December 2019.⁶¹⁹

Example: Various trust funds

While the total amount in the PCA Trust Fund is not known to CCSI, it is not at a scale that would permit it to make grants to cover private sector legal costs.⁶²⁰ Rather, grants tend to be sufficient to cover institutional and arbitrator costs of disputes.⁶²¹

While the PCA Secretary General appeals every year to PCA members, varying levels of fundraising success are realized. When a high profile public international law, state-state arbitration is before

the PCA, the PCA has found that members are willing to donate funds toward legal assistance.⁶²² However, the PCA struggles to a greater extent to maintain a consistent flow of funds to generally upkeep the Trust Fund.⁶²³ 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.⁶²⁴

The ICJ Trust Fund, which helps states to offset expenses of appearing before the ICJ as well as to execute ICJ judgements, has never been known to have funds exceeding \$2 million.⁶²⁵

The ITLOS Trust Fund, despite repeated entreaties to the UN General Assembly, has never reached amounts considered sufficient in light of the mandate and need. The most recent balance CCSI could locate was a 2006 balance of \$70,621.17.⁶²⁶

Table 10 Budgets and Expenditures for Assistance Mechanisms: Select examples

	ACWL	ALSF	ICC Legal Aid for Defense
Annual budget	CHF4.5 million (2018)	\$25 million estimated for 2020	€3.5 million estimated for 2020 ⁷⁶⁶
Select data on resource/time expenditures	This covered: <ul style="list-style-type: none"> - 5 new disputes (17 ongoing or new disputes in total that year) - 237 legal opinions - 39 certificates for training course - 4 participants in a secondment program Support provided by 12 lawyers, 3 administrative staff, and 4 participants in secondment program 40-60 percent of time is on activities other than litigation	The "bulk" of funding for 2020 is estimated for supporting fair commercial negotiations. ⁷⁶⁷ From 2010-2018, \$74.5 million of expenditures approved. Of those funds: <ul style="list-style-type: none"> - 64% for advisory services, 22% for capacity building - 10% for litigation - 4% for knowledge management. As of 2018, there were 33 in-house members of staff	The 2020 budget estimates this will support payment for up to 11 external defense teams at capped rates

With respect to the International Criminal Court, its budget for legal aid in 2016 was €4,521,000.30 (up from €2,355,600 and €2,866,400 in 2015 and 2014 respectively), representing 3.25% of the total ICC budget.⁶²⁷ This is less than 10% of the budget allocated to the Office of the Prosecutor.⁶²⁸ The legal aid budget is a part of the ICC's overall budget, which is funded by ICC member states. The contribution of each state is determined in the same way that its UN dues are determined, which is roughly based on income, population, and debt burden. Additional funding is provided by voluntary contributions from organizations, corporations, or other entities.

5.2.2.3.2 Funding sustainability – user fees

Any Assistance Mechanism providing support in dispute settlement, negotiations, and other training/capacity building could charge some or all users fees for some or all services in order to cover costs and/or discourage users from filing frivolous claims or raising frivolous defenses.

ACWL experience discussed above, however, highlights the trade-offs between charging fees and encouraging/discouraging use of the services provided, as well as the difficulties in charging fees adequate to sustain such an Assistance Mechanism, especially when services provided free of cost constitute the bulk of demand for that Mechanism's time.⁶²⁹

It is uncertain that patterns experienced by other Assistance Mechanisms, and namely the ACWL, will apply in the investment law context – for instance, how the demand for legal opinions (provided free of charge by the ACWL) would relate to the demand for direct representation (provided at staggered rates by the ACWL) in ISDS. Thus, it is difficult to predict the contributions of a user-fee model, but likely realistic to assume that user-fees would represent only a small share of overall funding.

Another distinction from the ACWL is that part of the motivation of charging user fees is to discourage frivolous claims. This rationale does not equally apply in the context of ISDS defense given that states currently do not make the choice to file the dispute.

Other existing Assistance Mechanisms also provide certain services based on a user fee model. For example, as described earlier, the ICTY caps user fees at levels that are based on case complexity. Defendants in cases before the ICTY can benefit from reduced and/or capped fee legal representation. In these criminal defense contexts, notions of frivolous claims do not arise, and the rationale for reduced fee services is one based in international human rights and the right to legal defense.

Overall, considerations regarding the appropriateness of user fees may differ depending upon such factors as whether the user is a state or private investor, respondent or claimant, the policy rationales for providing the assistance and the unintended consequences or incentives that may arise due to the subsidy.

5.2.3 Stakeholder tensions

Another cross-cutting theme relates to the actual, apparent, or possible conflicts of interests that can arise in the 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.

5.2.3.1 Tensions between client governments and donor governments

Various concerns have been raised regarding potential tensions or conflicts, perceived or actual, that could arise between, on the one hand, client governments of an Assistance Mechanism and, on the other, donor governments (funders) of the Assistance Mechanism. The extent of conflicts would in many ways depend on the scope of an Advisory Center. Conflicts may include:

- **General conflict of interest in outcomes:** Funders (and/or their stakeholders) may have an

interest in the content of the law generally,⁶³⁰ in the outcome of negotiations (between states and between investors and states), and/or in the outcome in a particular case (state-to-state or investor-state).⁶³¹ One interviewee familiar with ALSF's work stated that, "[f]or investor-state disputes, I can see [managing conflicts of interest between donors and beneficiary governments] being a large challenge -- I would probably emphasize the independence of the management structure and make sure that developing country governments have a voice in the governance structure" in order to alleviate conflicts and tensions surrounding donors and specific cases.

- **Justifications for providing funding:** Even within donor countries, there may be different perspectives regarding the objectives of the funding and the Assistance Mechanism it supports. Development agencies, for instance, may view funding for Assistance Mechanisms as important for supporting substantive and process-related development objectives;⁶³² and economic or trade ministries may view it as being important for supporting and legitimizing a system of international investment liberalization and protection,⁶³³ and for advancing their interests within that system.⁶³⁴ Those several objectives of donor governments may, but do not necessarily, align. Moreover, client governments may have a different view from each of those donor country perspectives, valuing the funding and Assistance Mechanism based on the ability of such support to empower them to make their own decisions regarding objectives, formulation, use, and application of international investment law.
- **Support in conflict with internal stakeholders:** Funding states may face political difficulties supporting an Assistance Mechanism focused on dispute settlement because the general or specific support of respondent states may be, or perceived to be, at odds with those states' support of their outward investors. If an Assistance Mechanism were supporting a respondent state's defense in a claim brought by a donor-state's investor(s), those tensions may be high.⁶³⁵ Additionally, it may be difficult for states to fund defense

of claims that donor-governments' stakeholders do not believe should be claims at all. Some examples of such claims could be the particularly controversial cases targeting countries' health measures (e.g., the Philip Morris cases) or limits on fossil fuel extraction. Rather than strengthening support for international investment treaties, the involvement of government-supported/taxpayer-funded Assistance Mechanisms may instead generate additional awareness of and critiques regarding the costs of the system.

- **The nature of the respondent government:** Funders may face political or policy difficulties supporting some potential beneficiaries. In the context of support for investor-state disputes, for instance, these issues could arise due to concerns about the conduct or nature of the respondent host government (e.g., if there is evidence of government corruption;⁶³⁶ if the government's leadership is contested;⁶³⁷ or if the government is put on a sanctions list before or during a case⁶³⁸).
- **The nature of the claim:** Funders may face political or policy difficulties supporting the defense some types of cases. If, for instance, the case relates to direct nationalization of an investment by a government, there may be concerns about the use of public funds to support defense of such conduct. These tensions may be exacerbated if the expropriation is of (or has negatively affected) an investment of a private or state-owned investor of a donor country. They might also be triggered if the expropriation is of (or has negatively affected) the contributions of an international financial institution.

Interviewees experienced with existing Assistance Mechanisms stated that in this context, real or perceived conflicts, and even the "optics" of who is financing an Assistance Mechanism and where and under what circumstances support is provided are critical issues that should not be underestimated.

To the extent that funding from development agencies is anticipated, it is important to consider whether and what tensions may arise among, for instance:

- those agencies' needs to be able to monitor and evaluate the use of public funds and ensure funding aligns with their broader policy aims,

- the needs and priorities of client governments, including the client governments' interests in (1) confidentiality and (2) avoiding circumstances of tied aid,⁶³⁹ and
- the needs of an Assistance Mechanism to secure funding while also maintaining its reputation as an independent provider of legal advice free from political sway.

Governance documents relating to the ACWL suggest that these issues can be navigated but are complex. Developed country donors have emphasized in ACWL General Assembly meetings, for instance, that "the majority of the ACWL's funding originates from development agencies of developed country Members that now have come to consider the ACWL as a development organization, rather than a trade organization," and that, consequently, they needed "real" and "results-based reporting" on relevant performance indicators in order to justify their funding decisions.⁶⁴⁰ Developing country governments and ACWL management, however, counseled against reporting requirements that could impair the ACWL's independence, impartiality, and confidentiality.⁶⁴¹ While a number of donor development organizations have determined that their respective missions align with the ACWL's – particularly in supporting developing countries and LDCs to understand, advance, and defend their rights as litigants in a rules-based multilateral trading system – the reluctance of some developed countries to provide support, and the interactions between existing donors and other ACWL members on performance indicators, suggest that it is important to carefully assess whether and to what extent various stakeholders' objectives may diverge and create a governance structure able to manage those issues. Such frictions could potentially arise out of the users of the system, the identity of the parties adverse to the funded litigants,⁶⁴² the types of cases being handled, and the outcomes of the disputes on litigants and beyond.⁶⁴³

It is also useful to bear in mind the challenges the ACWL has reportedly had with securing funds from non-Member sources, including private foundations, due to concerns about the conditions that such funders might seek to place on those funds. It would be important to consider whether and how those types of potential conflicts between funders and funded organizations might be different in relation to work on IIAs/ISDS (including any potential work for

claimants), and how those conflicts can be avoided and/or addressed.

5.2.3.2 Tensions between client governments and support providers

Other concerns raised in interviews and in literature relate to potential tensions between client governments and support providers (e.g. in clearinghouse models where a support provider is an entity other than the Assistance Mechanism's own staff). Support providers may have a financial interest in the contours of the system and, in particular, a continuous flow of cases providing revenue-generating opportunities. It was noted by several interviewees, including existing support providers, that this, in turn, could inform how the providers

- advise on the content of investment policies and issues relating to IIA negotiations (e.g., whether to negotiate investment treaties with ISDS, and whether and how to regulate third-party funding); and
- argue (or not) certain issues of law in the context of disputes.⁶⁴⁴

Any misalignment of perspective and interest between a support provider and the beneficiary, or questions 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.⁶⁴⁵

Relatedly, it was noted that support providers may have a financial interest that informs their case strategy and tactics. If they are paid by hours worked, they may have an incentive to raise even frivolous arguments or engage in other actions that prolong or drive up hours worked in proceedings. If they are paid based on a flat fee, they may be reluctant to incur costs that would result in their running the case at a loss or shrink their profit. If they are paid based on a contingency fee arrangement, they may push for (or against) any pre-award settlement or other outcome that affects their returns. The involvement of third-party funding can further complicate these issues, exacerbated by the fact that such funding and terms thereof are not transparent, making it unclear whose interests are driving decisions made by the disputing party.

Existing Assistance Mechanisms have, and continue to, navigate ethical conflicts. The ALSF, for example,

reports applying the stricter of jurisdictional or support provider ethical obligations when more than one set of rules may apply; but as stated by one interviewee familiar with the ALSF, “ethics conflicts are a huge nightmare.”⁶⁴⁶ In this context, tools such as the use of advance waivers may be important to consider for some Assistance Mechanism models, as would be any treaties or other instruments establishing the legal structure, governance, and liability of the Assistance Mechanism(s). In this context, complex issues arise regarding the appropriate protections to be afforded, respectively, to users of Assistance Mechanisms and to their support providers.

5.2.3.3 Tensions between donors and support providers

Another set of tensions relates to those between donors to any Assistance Mechanism and external support providers, which can arise from mismatches between each actor’s objectives and incentives, and which may change over time. Questions may arise regarding, for instance, the appropriate role of the donor, its ability to control the type and content of services provided by support providers, and proper methods for exercising such control. This control may be direct (e.g., by donors specifying who or what is/is not eligible for support, shaping the contents of training agendas, and/or approving the types of arguments being raised in disputes); or it can be indirect (through decisions to increase or decrease funding for an Assistance Mechanism, to designate certain support providers as eligible or not to provide assistance or due to power over staffing decisions).

5.2.3.4 Internal Assistance Mechanism tensions arising from the scope of its mandate

One interviewee with experience working for an Assistance Mechanism raised the issue of internal conflicts of interest that can arise when an Assistance Mechanism tries to do both policy formulation and legal defense.⁶⁴⁷ While bringing together governmental officials working on these topics makes sense, and the lack of cross-governmental discussion and application of lessons learned was an intra-governmental capacity challenging raised by government officials in interviews, tensions may arise to the extent an Assistance Mechanism tries

to provide substantive guidance in both of these areas. The reasons for this go to the same issues that were raised by a wide variety of government officials during consultations related to issues of trust and alignment of perspectives.

5.2.4 Identifying the client/beneficiary

Another cross-cutting consideration is how to identify relevant beneficiaries of an Assistance Mechanism. Determination of beneficiaries should be closely tied to decisions about what concerns an Assistance Mechanism is intended to address, and how its objectives are framed.

5.2.4.1 Investment policy formulation and implementation – potential beneficiaries

To the extent an Assistance Mechanism is intended to address issues and capacity challenges related to IIA policy formulation and implementation, beneficiaries could be limited to investment treaty negotiators; or they could be a wider set of stakeholders in domestic jurisdictions, including national parliamentarians or ministry/agency officials, state/provincial or local-level government actors, and civil society organizations all engaged in efforts to understand how to attract, retain, and benefit from inward investment, and whether, how, and when to promote outward investment. In CCSI’s consultations one low-income government official stressed that for this official’s government, many concerns arise from the fact that only a handful of individuals within the government have a deep understanding of international investment law. This official sees it as critical that much broader capacity across the government be developed, prioritizing this capacity-building objective over assistance with defense of ISDS claims.⁶⁴⁸

Decisions regarding intended beneficiaries in this context will naturally depend on broader decisions regarding what kind of capacity, if any, an Assistance Mechanism is intended to address (e.g. narrow technical capacity, or broader or longer-term organizational, institutional and cross-sectoral capacities) and the nuanced context of capacity needs and gaps experienced by and within particular states.

5.2.4.2 ISDS disputes – respondent states as clients

5.2.4.2.1 Eligibility, entitlement, and prioritization

In the context of investment treaty disputes, the beneficiary most commonly identified for additional support from Assistance Mechanisms is the respondent host state (investors as beneficiaries are discussed in Section 6). This category of beneficiary could and would likely need to be further defined.

One commonly stated view is that is that services would/ should be provided to LDCs or developing countries more broadly. Eligibility could be based, for instance, on the OECD Development Assistance Committee's list of countries eligible for Official Development Assistance or other economic development indicators.

Eligibility for all or some services (or tiered fees for those services, discussed further below) could also be based on factors such as:

- whether the beneficiary had already received support from the Assistance Mechanism and, if so, how much,
- the conduct of the potential beneficiary (e.g., whether a state would be barred if it had not paid awards rendered against it in other disputes or if it had not paid past amounts due in a membership or fee-for-services based model),
- the nature and implications of the claim (e.g., whether support would be conditioned on the size of the claim relative to the GDP of the country),
- whether the claim arises in particularly complex industries tending to make the cost of litigation high (e.g., whether support would be limited to or focused on energy-related disputes), and
- the merits of potential claims or defenses (and ability of the Assistance Mechanism to recover costs).⁶⁴⁹

Related to eligibility are also important questions about whether all eligible beneficiaries are *entitled* to services provided by the relevant Assistance Mechanisms, or whether service providers (or funders) can decline to provide all or some services requested and, if so, on what grounds, under what circumstances, with what opportunities to challenge

those decisions, and to whom. For example, could the Assistance Mechanism decline a case if a state wished to defend and staff in or management of the Assistance Mechanism perceived the state's defense as unsound or otherwise thought the state should settle? Could it decline to accept a case if it perceived that the case would require too much in terms of time and resources? Would it be required to prioritize requests for assistance based on the time when they were received and/or the development status of the requesting country?

These decisions on eligibility, entitlement, and prioritization likely depend on, or will shape decisions regarding, scope of available services, costs of providing those services, and decisions regarding who will bear the costs of services provided.

If, for instance, an Assistance Mechanism were to handle respondent state defense, the resource-intensive nature of ISDS defense could make it unlikely that such a Mechanism would, at least in its initial years, be able to handle more than one or two new cases per year. This makes decisions on eligibility (and prioritization) extremely important. Only a handful of current respondent states would potentially be able to directly benefit from this type of support.

Not all services, however, are as costly to provide as ISDS defense. Thus, an Assistance Mechanism could adopt a broader approach to eligibility and place less emphasis on prioritization if it were to focus on providing lower-cost services (such as legal opinions or support with adjudicator appointment) or services with a broader reach (such as providing access to resources or a knowledge-sharing platform).

Other issues intertwined with eligibility and prioritization are those related to user fees. An Assistance Mechanism could, for instance, take a broad approach to eligibility but employ tiered fee structures for access to all or some its services. Fees may be up-front membership fees, and/or fees based on the services used. Any fee could further be tailored depending on factors such as the economic development of the host state, or the number of times the respondent state had used the relevant services. (These issues of costs are discussed further in Section 5.1.3). In this context, however, it is important to balance tensions between ensuring the financial sustainability of any Assistance Mechanism dependent

(at least in part) on user fees, and ensuring that such Mechanism is able to serve the needs of those countries that need it most and are least able to pay.

5.2.4.2.2 Identifying the government client

Another set of considerations relating to the beneficiary of any Assistance Mechanism involve the question of who is the actual client. In domestic contexts when the government is party to the dispute, the client of any government lawyer could be viewed in various ways, including as:

(1) the public interest; (2) the government as a whole; (3) the branch of government in which the lawyer is employed (e.g., executive, legislative, or judicial); (4) the particular agency or department in which the lawyer works; and (5) the responsible officers who make decisions for the agency. Another possible answer exists where the lawyer is employed by a different agency from the one that is represented as a party to the litigation; for example, where a lawyer who works for the Department of Justice or a state attorney general's office provides legal representation to another executive branch agency that is a party to a lawsuit. In such circumstances, the client might be viewed as being the employing "legal" agency rather than the agency party to the case. Additionally, it has been suggested that the President might, in fact, appropriately be viewed as the client whenever a federal agency is involved in litigation. ... Indeed, one commentator has effectively argued that the question of who is the client of the government lawyer has obfuscated, rather than clarified, the important issues surrounding attorney representation of government entities.⁶⁵⁰

The answer to the question of who is (are) the government attorney's client(s) can have important implications for process-related issues such as who, ultimately, will be able to make decisions on whether and on what terms to settle a dispute. It also can shape the content of advice and argumentation. If there is a conflict within a respondent government on the relevant positions that should be taken in litigation, which branch or agency will be able to resolve that? What happens if there is an apparent tension between the government's interest in avoiding liability, and the public's interest in not funding pursuit of meritless positions and/or in

ensuring appropriate mechanisms for accountability? Will the lawyer's duty be to vigorously advocate for the interests of its client irrespective of the nature of the client's position, or will there be some limits on the bounds of arguments to be raised?

In the domestic contexts, rules of professional conduct, law, and government policy will likely inform answers to these questions. The questions and answers are likely different in international investment law, and also may vary depending upon whether the relevant lawyer is a member of a firm or is employed by an Assistance Mechanism. The nature of the Assistance Mechanism, and policies and practices of funders, may further seek to inform the answers to these questions regarding who, precisely, is the attorney's client, and to whom and what principles the attorney owes its duties.

5.2.4.3 Other potential beneficiaries

In addition to the respondent host state in ISDS proceedings, other beneficiaries for dispute-settlement related services could be:

- claimant or respondent states in state-to-state proceedings;
- non-disputing state parties seeking to provide input into disputes filed under their treaties (but not against them);⁶⁵¹
- amicus curiae;⁶⁵² and/or
- other potential intervenors.

5.2.5 Location, Staffing, Remuneration

The location and staffing of an Assistance Mechanism can be critical decisions with respect to which finding consensus may be challenging.⁶⁵³

5.2.5.1 Location

The location, or locations, of an Assistance Mechanism could 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 D.C. or Paris.⁶⁵⁴ However, some interviewees noted that this would place the center physically distant from many countries and

government officials that would be expected to use its services: “[I]f the center is in DC, that will mean a lot of hurdles for developing countries; however if you were to establish a center in, for example, Addis Ababa, that is also difficult to access for many countries.”⁶⁵⁵ It was stated during CCSI’s interviews that travel costs are often prohibitive for developing countries, and visas take time to obtain.⁶⁵⁶ If building trust and relationships is a priority, it may prove more difficult and less desirable in a decentralized system (such as the current system of ad hoc arbitration) to have a single location for an Assistance Mechanism.

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 physical proximity to an Assistance Mechanism would be of the highest priority for potential state users. One low-income government official stated that if the objective of an Assistance Mechanism is to help countries, it must be placed in a location where they can fairly easily interact and get advice.⁶⁵⁷ Moreover, this official felt that unless a mechanism is physically located in various areas of, in particular, the developing world, it would be impossible for the staff of such a center to truly understand the perspective of those regions.⁶⁵⁸ This official felt strongly that regional centers are necessary because, while some broad issues are common to many countries, the experiences and needs of, for example, West African countries vary greatly from those of East Asian countries, Latin American countries, or indeed, even East African countries.⁶⁵⁹

It was suggested that an Assistance Mechanism may benefit from being housed within an existing institution, which could help not only with institutional resources but also to build on existing trust and relationships. World Bank Group institutions were suggested, including both ICSID and MIGA, although others felt that any Assistance Mechanism affiliated with the World Bank Group would raise actual or perceived conflicts of interest, particularly with respect to disputes at ICSID. In some consultations regional development organizations were suggested, noting that the ALSF is housed by the African Development Bank.

It was clear in CCSI’s consultations that preferences differ regarding the location(s) of an Assistance Mechanism, and that consideration of these issues will be highly interrelated with questions of funding. Notably, even with respect to the unsuccessful UNCTAD-IADB-OAS-VCC regional effort, the location was a serious negotiation challenge, with an interim location in Washington D.C. agreed, to be followed by a permanent location in Panama City (see Section 3.1).

5.2.5.2 Staffing

It was also 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: “it is important for any [Assistance Mechanism] to understand the perspectives of different systems, or else it is difficult to adequately represent those interests.”⁶⁶⁰ All staff must have a reputation as being high-quality lawyers, equivalent to the top firms in the private sector. This was directly related to perceived reputation and quality that was widely regarded as critical in CCSI’s consultations.

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. The diversity of staff also has budgetary implications.

It was stated during consultations that even an Assistance Mechanism intended only to support disputes should not focus solely on hiring the best investment arbitration lawyers, but that it also requires lawyers and other staff who have a deep understanding of how international investment law impacts the development objectives of states. For one government official this was a critical issue of trust. For this official, there was recognition that procedural and technical expertise will be essential for an assistance mechanism, and that many lawyers who have this expertise are currently from or working in developed countries, but this official stated that any staff of a

mechanism should have experience actually working in and with the countries that such individual is being asked to advise.⁶⁶¹ But on any advisory team, this official also would seek individuals with a broader focus on development impact (specifically naming CCSI and IISD, along with other intergovernmental or development organizations such as UNCTAD) in order to have full trust in what was being advised.⁶⁶²

Great emphasis was placed on the senior staff of the center. With respect to existing mechanisms, such as the ACWL, ISP/LDCs, and ALSF, the original directors and senior staff are widely credited as having been essential to the development and success of the center. In CCSI's consultations, several participants noted that any Assistance Mechanism director would need to be someone who could command and attract the attention of the existing "investment law" community,⁶⁶³ but also someone who is seen to represent the interests of the developing world. It was stated that any Assistance Mechanism will need to have a well-respected "champion" from a developing country who is viewed as able to "get other developing countries" on board, and "imbue the center with legitimacy in the eyes of the developing world."⁶⁶⁴ The issue of trust was widely stressed in this context.

5.2.5.3 Remuneration

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. The ACWL, for example, offers exposure and experience that is typically not available to junior lawyers in law firms – even junior counsel at the ACWL run cases, argue cases and have more control of their own cases, than a comparable private-sector associate.⁶⁶⁵

Existing Assistance Mechanisms pay less than the private sector. ACWL salaries, for example, are on a scale comparable to the WTO Secretariat.⁶⁶⁶ The WTO had historically followed the United Nations Common System of Salaries, Allowances and Benefits, but recently broke away from the UN Common System because it wished to operate more

competitively (from a hiring perspective) against certain international financial institutions (e.g. the IMF and the World Bank Group), which employ markedly higher pay scales than other intergovernmental institutions in order to 'permit recruitment and retention of the highest quality, multinational staff – including personnel from countries with the highest internal pay rates.'⁶⁶⁷

Considerations surrounding payment of staff will depend on whether such staff are largely helping a beneficiary to coordinate with external counsel (i.e. a clearinghouse role), or directly acting as legal counsel. With respect to the latter, it was stated by one interviewee that the kind of people you want to work at an Assistance Mechanism are the kind of people that would be willing to forego some of the salary anyway.⁶⁶⁸ However, another interviewee who had worked at an assistance mechanism and has subsequently joined the private sector stated that his earlier assumptions that highly qualified senior counsel would accept the financial trade-off were "a bit naïve" in some respects, but as long as the salary remains respectable it will still likely attract certain highly qualified senior lawyers.

Options for an Assistance Mechanism 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.

5.2.6 Institutionalized vs. ad hoc mechanisms

The degree of institutionalization of an Assistance Mechanism will, naturally, be dependent on choices regarding the services provided, to whom, ideal governance of the Mechanism, 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 would be quite a challenge and would take years. It was suggested that a preliminary, and more informal, model may be an interim solution.

One interviewee with experience attempting to establish an investment law advisory center noted that the more formal and more political the establishment of a center becomes, the more people become involved, and the more difficult it becomes to achieve consensus.⁶⁶⁹ This interviewee suggested that narrow, technical solutions are easier to accomplish.

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.⁶⁷⁰ Others suggested that regional mechanisms, perhaps building on existing and trusted institutions, may be well-received by states.

5.2.7 “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 IIAs and ISDS, one element of that context is ongoing reform discussions. It was expressed that any Assistance Mechanism should be conceived as a flexible mechanism that could adapt to eventual changes in underlying treaty and dispute settlement mechanisms.

5.2.7.1 ISDS reform discussions

More specifically, the desirability of an advisory center has specifically been included for further consideration on the agenda of UNCITRAL’s Working Group III.⁶⁷¹ Perspectives expressed in consultations on the value of discussing an Assistance Mechanism in the context of the other reform solutions being considered by the Working Group were mixed. On the one hand, it was noted that ideally discussions of an advisory center would not be considered an element of reform discussions because it could easily become integrated into trade-offs, and could become a carrot that is given to developing countries in exchange for support of something else that is not necessarily the most useful to them.⁶⁷² Some noted that this risk could be lessened if reform solutions were all opt-in.⁶⁷³

On the other hand, one low-income country stated that placing an Assistance Mechanism on the UNCITRAL reform agenda is viewed as a win.⁶⁷⁴ This is an immediate need that will (if done correctly) benefit developing countries participating in this system, whereas it is unclear (at this time) to what extent the other reforms being discussed will have actual benefits.⁶⁷⁵

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 advisory center not be pegged to any specific structural reform. This is both because Assistance Mechanisms could be useful immediately, and to peg them to a specific reform solution could mean an extended period of time while such solutions were negotiated, and also because an Assistance Mechanism could be developed in a way that could be entirely independent of any particular institutional form.

5.2.7.2 Private practitioner perspectives

Of course, 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. For example, while some have advised that any Assistance Mechanism should avoid direct competition with the services of private sector law firms,⁶⁷⁶ others did not see private sector opposition as an overwhelming concern. From one private practitioner’s perspective, 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, so the development of an Assistance Mechanism will, in reality, not be real economic competition for these firms.⁶⁷⁷

According to several private practitioner interviewees, with respect to the small number of firms that only represent states, they would expect such firms to attempt to differentiate themselves from any Assistance Mechanism based on value, service, and reputation, but not to be openly opposing any competition from an Assistance Mechanism.⁶⁷⁸ However, it was also stated that “firms can be very jealous about the information that they handle because, in the end, information is power. A process intended to democratize information, and thereby take power from law firms, means less capacity to bill clients.”⁶⁷⁹ Greater transparency and wider available services to government officials are already making information about investment law available to a much greater extent, but “if you put into place an advisory center, that is just another source of competition.”⁶⁸⁰

5.2.7.3 Civil society perspectives

With respect to NGOs, there were mixed perceptions. 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.⁶⁸¹

NGOs interviewed recognize that there are systematic inequalities between and among respondent states in their ability to participate in the IIA/ISDS system, but some want to ensure that the structure, goals, and funding of any mechanism would not simply make a flawed system work more smoothly, permitting more cases to be brought and entrenching asymmetry by making defense less costly, while at the same time not addressing the actual causes of the systemic inequalities experienced by developing states (which NGOs view as not being primarily at the defense phase, but much earlier in the negotiation, implementation, and dispute prevention processes).⁶⁸²

Some NGOs see an Assistance Mechanism as a band-aid, noting that the focus of efforts to assist respondent states should focus on the cause of the wound - the flawed substantive and procedural elements of IIAs and the existing ISDS mechanism.⁶⁸³ NGOs recognize that states need help with respect to current investment policy challenges and defending against existing claims, which will inevitably continue to occur until more fundamental changes are made.

Some NGOs are more supportive of ad hoc mechanisms to assist states in the interim, while broader reforms occur, rather than a fully institutionalized Assistance Mechanism that further legalizes and entrenches the current ISDS mechanism.⁶⁸⁴ As such, they advise separating any Assistance Mechanism from any particular reform solution, and also ensuring that it is flexible to respond to other IIA/ISDS reforms advanced by states.⁶⁸⁵

5.2.8 Intersections 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.

Section 6.

Investors as Assistance Mechanism Beneficiaries

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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. Depending on the services offered, role, and mandate of any Assistance Mechanism, it could provide certain services to states and investors (e.g., capacity building), but certain services only to states (e.g., direct representation in defending claims).⁶⁸⁶

Whether or not, and to what extent, states, as the creators of an Assistance Mechanism, would desire to include investors as beneficiaries will largely depend on the nature and scope of concerns that an Assistance Mechanism is intended to address, and also will likely depend on a state's role as primarily capital-exporting, -importing, or both (particularly vis-à-vis its treaty partners). Overall, there were significant differences of opinion among states and other interviewees regarding whether and under what circumstances additional assistance should be provided to investor claimants.

Some interviewees, for instance, considered beneficiaries to be deserving claimants 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.⁶⁸⁷ The ability for investors who cannot otherwise afford to bring ISDS claims to secure support for such cases was likened, in this context, to ensuring "equality of arms" on both sides of an ISDS dispute. Similarly, a high-income government official indicated openness to the idea of including support for investors in the context of an Assistance Mechanism, stating that "the focus should be on ensuring [IIA] obligations are respected on both sides, so assistance in helping small and medium-sized enterprises determine whether their claims should be brought might be helpful as well."⁶⁸⁸

However, most interviewees either had certain hesitations, or opposed, the provision of Assistance Mechanism services to investors, and did so for varying reasons.

One interviewee with experience working for an arbitration center, for example, expressed caution. The interviewee felt that in theory it is absolutely necessary to provide services to at least SMEs because the inability of SMEs to access ISDS impacts the credibility of the ISDS system as a whole, and lamented a system that only benefits larger MNEs. However, this interviewee went on to say that "there are already complicated conflict of interest problems in the system; an advisory center would have its own and adding in SMEs would complicate it even more."⁶⁸⁹

In consultations with some states, similar sentiments were expressed. One upper middle-income state official supports "justice for all" but felt that "because [an advisory center] is so complex, and there are a number of extremely difficult issues involved, adding SMEs into the equation might overburden any kind of institution. A center for states alone is already extremely difficult, and I don't really foresee any practical benefit of including SMEs."⁶⁹⁰ This official is not opposed to adding services for SMEs at a later date, once an Assistance Mechanism for states is functioning and deemed sustainable.

Other governments were much more categorically opposed to inclusion of investors as Assistance Mechanism beneficiaries. Several reasons were given.

For one, in several consultations it was noted that while SMEs, in particular, may need or benefit from certain services, most primarily capital-importing states would not seek to assist SMEs in bringing more claims against them and thus any Assistance Mechanism that did benefit investors may need to be designed to not increase the absolute number of claims by an order of magnitude.⁶⁹¹ It was questioned whether benefits to investors translated into benefits for governments. In the words of one upper middle-income government official, "we are not very happy with the idea of service provision to SMEs. I think I speak for all developing countries - we don't really have SMEs as international investors around the world, so that would not serve our interests at all."⁶⁹² Even were developing countries' outward investors to expand in number, it was unclear to interviewees whether those investors would benefit from treaty protections in a way that would outweigh the country's position as a capital-importing country vis-à-vis other treaty partners.

Additionally, states expressing opposition to SMEs as beneficiaries of an Assistance Mechanism felt that ISDS should be an extraordinary remedy, and not a default dispute settlement mechanism. It was noted that domestic mechanisms, alternative dispute resolution mechanisms, and commercial arbitration are typically also available to investors, including SMEs, often at much lower cost.⁶⁹³ One official felt that granting easier access to ISDS would make ISDS more of an ordinary recourse, and that such an outcome was a possibility that governments must consider when considering how and under what circumstances to ease access by claimants.⁶⁹⁴

It was also noted that it would be politically difficult for governments – particularly poorer governments – to say that they are funding claims against themselves (for example, by contributing to an Assistance Mechanism through membership fees) from foreign investors. “That would be the headline of every newspaper”⁶⁹⁵ if the state were to be sued by an investor benefitting from the services of an Assistance Mechanism.

Some interviewees also felt that supporting SMEs would potentially be the fatal blow to efforts to establish an Assistance Mechanism for states. In several consultations it was stressed that past experience demonstrates that advancing a comprehensive, defense-oriented Assistance Mechanism is extremely challenging, and questions of how much a center should try to take on, at least in the beginning, should be high on the list of issues to address, as taking on SMEs could sink the project before it floats.⁶⁹⁶ Several interviewees noted that inclusion of SMEs would be highly controversial with some states, with one interviewee stating that however much sense it would make to provide services to SMEs, a center is going to extremely challenging in and of itself, and including SMEs “fractures different support groups”.⁶⁹⁷

A final set of concerns related to the particular needs of SMEs and how an Assistance Mechanism would purport to resolve any capacity challenges experienced by SMEs. For example, some NGOs wished to understand more information about hurdles and issues that SMEs are experiencing and whether there is an actual access to justice issue, and how access to ISDS fits into that broader picture.⁶⁹⁸ As a general matter, representatives of

NGOs interviewed did not support provision of services to SMEs in the current ISDS system, particularly absent greater evidence of disputes evidencing actual access to justice (as opposed to ISDS) needs.

This section reviews in more detail current knowledge of SMEs’ use of ISDS, challenges those entities may be facing, and existing options for addressing those challenges. In light of the many unknowns about SMEs’ actual and potential experiences with ISDS, the following subsections are framed as a series of questions.

6.1 What is an “SME”?

A threshold issue to consider is what is an “SME”. There is no universal definition, and differences among the definitions that are used “can be substantial.”⁶⁹⁹ Those differences, which not only vary between countries and institutions, but also within them, arise from the various objectives of and contexts in which each definition was crafted.⁷⁰⁰

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.”⁷⁰¹ Other criteria, if used, include annual turnover, assets, and/or investments, again with different users commonly employing different quantitative thresholds (see, e.g., Table 11).⁷⁰² 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. Indeed, as one study noted, “Regarding IFC/MIGA standard, ‘The [United Nations development Programme] and World Bank [IFC] definitions would include the manufacturing subsidiaries of both Nestle and Unilever in Ghana, clearly not the intended objects of development interventions.’”⁷⁰³

A deeper examination of these definitional issues would help better identify whether and what types of issues different types of SMEs are facing when seeking remedies for host-government-caused harm. To draw from a World Bank evaluation of its interventions to support SMEs, in order for the term to serve as 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.”⁷⁰⁴ 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.

6.2 What are SMEs’ experiences with ISDS?

6.2.1 Are they using it (more/less than other firms)?

There have been several efforts to look at whether and to what extent SMEs are using ISDS. They illustrate that conclusions regarding SME invocation of ISDS are hard to draw, and that data gaps are significant. Franck finds that the “median claimant was a privately held entity” of unstated size “that might – but also might not – be related to a publicly listed corporate entity.”⁷⁰⁵ Another study, published in 2015, found that two-thirds of 105 cases filed at ICSID by American investors were brought by individuals or SMEs. It does not, however, reveal the breakdown between those two categories of claimants.⁷⁰⁶ Bechky’s examination of ISDS disputes regarding “microinvestments” notes that data on the size of investors and investments is hard to access, and so analysis of cases by small investors may need to use amount of damages claimed as a proxy.⁷⁰⁷ Karl’s research on ISDS claims by SMEs uses UNCTAD data to conclude that those firms accounted for “approximately 15 percent of all disputes from 2008-2013.”⁷⁰⁸ There is no explanation of the dataset of cases used or of the definition of an SME employed for the analysis.⁷⁰⁹ Similarly, Gebert reviewed publicly available information about 70 cases filed in 2015, and found that at least 12 were filed by SMEs (using the EC’s definition) and 4 by individuals or groups of individuals.⁷¹⁰

These figures provide some insights but leave many of the important questions unanswered. Relative to the number of firms investing overseas, are SMEs over- or

under-represented as claimants? And/or are they over- or under-represented in terms of the value of their investments? What are sectoral and country patterns? Once the answers to these and other questions are better known, more accurate answers can be obtained regarding why usage rates are where they are, what problems exist, and what solutions are needed.

6.2.2 Do SMEs need ISDS (more than other firms)?

In addition to the question of whether SMEs are using ISDS, and what their usage patterns are as compared to other firms, it is useful to understand whether they are facing more or fewer challenges in the host government (and whether those challenges are the types that ISDS is meant to address). Do they need ISDS, or improved access to ISDS, more than other foreign firms?

Some have theorized about responses. It is often remarked, for instance, that larger companies may be able to protect themselves vis-à-vis the government, and can secure access to arbitration that can better insulate them from the risks of host-state courts, because they are more likely to have negotiating power and be in sectors and activities where it is possible to negotiate direct investor-state contracts.

Caplan has identified other reasons why larger foreign firms may be less needful of or interested in ISDS:

While larger enterprises sometimes pursue arbitration, they may feel, as a general matter, that it is less necessary or even desirous to do so. Their stronger economic and political influence may bring host state governments to the negotiating table more readily and with better settlement terms ... Because larger enterprises are typically more financially resilient than SMEs, they are likely to be in a better position to pursue a broader dispute settlement strategy that is less reliant on investor-state arbitration.⁷¹¹

Larger foreign firms may also be more likely to get the attention and support of their home governments when trying to resolve disputes with host countries.

Karl has noted, however, how SMEs may be less at risk, and less likely to encounter situations in the host country that might cause them to turn to ISDS:

*[B]eing small can also have some advantages. SMEs investing abroad may be less on the 'radar screen' of host country authorities, for instance in respect of national security concerns or with regard to potential 'crowding out' concerns of local enterprises. SMEs may therefore face less political opposition in host countries. SMEs may also be more flexible than TNCs in their business operations. This may allow them to react to regulatory or political changes in the host country more quickly, including through a possible divestment if the investment climate deteriorates substantially.*⁷¹²

Moreover, while SMEs may find certain aspects of operating in a foreign host country more challenging than larger counterparts – such as navigating foreign legal jurisdictions and identifying suitable business partners – it is unclear that the particular issues they are facing are the same as the challenges the treaties aim to address. This issue goes to the objectives of the treaties, and whether they are intended to be exceptional tools of last resort, or legal options enabling foreign investors to choose more favorable, less risky, and/or less unknown dispute settlement proceedings when they encounter issues in or with the host state.⁷¹³

6.2.3 What hurdles to accessing international arbitration do SMEs face?

During CCSI's consultations, interviewees highlighted several hurdles that companies, and particularly SMEs face when their investments are impacted by host-state action that may violate an investment treaty.

6.2.3.1 Evidentiary and reporting challenges

In the experience of a C-level executive who has been involved in investment law matters and arbitrations in different states on more than one occasion, the early phases of company loss are critical, and many companies are not in a position to take advantage of this time.⁷¹⁴ For example, when a company still has an office, is still operating, and/or when employees are still on the ground, it could be

incredibly helpful to companies to collect evidence that could be validated for subsequent use. From a time and cost perspective, it is extremely time-consuming to track down evidence at a later time, and evidence (physical as well as memories) are often impaired.

Relatedly, smaller, particularly non-public, companies may not have robust analysis and reporting systems in place that can easily assess damages.⁷¹⁵ A mechanism that could help companies to view their records with a view toward understanding whether they have a claim, and if so, what kind, would, according to this interviewee, be extremely valuable.

6.2.3.2 Uncertainty in the law

In this C-level executive's perspective, the uncertain legal standards in investment law create a wide variety of challenges that increase the risk and cost to investor-users of this system. This makes it difficult for them to understand what protections may be due, whether there has been a breach, and whether to pursue a case. SMEs might be less able than other firms to understand this area of law and its implications for them. This uncertainty and lack of awareness may discourage investors from engaging with investment law and invoking it when warranted and appropriate; and it may cause them to waste resources by pursuing losing ISDS cases that ultimately only benefit the legal advisors involved.

According to one interviewee, it can often be difficult to determine what kind of claim a company may have, for example, whether a company is in a total loss situation (from an investment law perspective, indirect expropriation) or one of other damages. In this user's experience, even the company's own counsel may often be unwilling to give a clear answer on this threshold issue, and the company may spend a lot of time and effort to try to determine how to approach and formulate a claim.⁷¹⁶ If a company is really in a total loss context, then pursuing an ISDS claim often makes sense from a cost-benefit perspective.⁷¹⁷ But if lesser damages may be awarded, there may be a greater role for mediated or other alternative dispute resolution outcomes.⁷¹⁸ Clearer law could greatly help in this area.

Second, and relatedly, because of the web of treaties (along with other laws and contracts) and varying definitions of who may benefit under such treaties, it can be difficult for investors to properly identify the claimant and the investment.⁷¹⁹ This can have serious implications

if a non-covered investor appears on a notice or filing, even if another investor in the corporate family may have met the jurisdictional requirements. Investors who do not hire counsel with experience in investment law can make these kinds of mistakes.⁷²⁰

Third, an executive felt that because of the lack of legal certainty in investment law, it is more “bespoke” and thus for any proceeding of consequence it becomes absolutely necessary to hire the best counsel because when compared to other legal areas, the outcome often will depend on the counsel rather than clear-cut law.⁷²¹ If the law were more clear, it may be able to rely on regional or lower-ranked (and priced) firms.

Fourth, it has been suggested that if and when tribunals apply one of the four so-called “*Salini*” criteria used in some ISDS disputes to determine whether a tribunal has jurisdiction over the investment dispute – namely, the criterion occasionally applied that looks at whether the investment has contributed to the economic development of the host state -- SMEs may be less likely than larger firms to pass the jurisdictional test.⁷²² To the extent jurisdictional questions arise, it could discourage SMEs from pursuing claims, and could discourage others (such as third-party funders) from investing in and supporting SME cases.

A number of the Assistance Mechanisms discussed in this Scoping Study as useful for states may aid SMEs here. In particular, efforts to democratize the law (discussed in Section 4.5), and initiatives to support ongoing activities of engagement with IIA policy-makers, negotiators, and implementers in home and host states are among those that can help increase understanding of what IIAs mean, and do not mean, in practice. Additionally, support in ongoing reform processes could help states engage with SMEs (and others) to craft solutions bringing more predictability and certainty regarding issues of treaty coverage and outcomes of adjudicative proceedings.

6.2.3.3 Costs of representation and arbitration

A more widely cited barrier is the costs and fees of arbitration. As discussed above, the costs of ISDS proceedings are well known and appear to be slightly higher on average for claimants (\$6,000,000 according to one 2017 study) than for respondents (\$4,850,000).⁷²³ In addition to the costs of representation are costs of the arbitration. Those costs, which include the

fees and costs of arbitrators and arbitral institutions, have been estimated by the same study as being on average \$920,000 for ICSID disputes and \$1,090,000 for UNCITRAL cases.

The costs incurred in pursuing ISDS claims have been cited as being particularly difficult for SMEs to fund. Some responses to that stated challenge can specifically target issues faced by SMEs (e.g., challenges SMEs face in accessing finance); other responses, such as efforts to reduce the costs of arbitration, are broader but can benefit SMEs (and other claimants). Further, some responses are more market-related, though they could also benefit from policy interventions designed to address market-related difficulties that SMEs may experience especially acutely.⁷²⁴

6.3 Ways forward regarding investor beneficiaries

6.3.1 Which investors should benefit from what services?

To the extent an Assistance Mechanism supports investor claimants, questions may arise as to which investors it should support, and to what extent.

First, the category of beneficiary could be defined by the identity of the claimant. For example, should only investors from certain countries benefit? And if so, how is the “nationality” of a company determined? What is the “nationality” of, for example, a Ghanaian company that is the subsidiary of a multi-billion dollar Delaware corporation with an intermediate holding company in the Netherlands? Does the constitution of the Board of Directors matter? Or percentage of Ghanaian management? Or the extent to which the Ghanaian company sources from local suppliers? Or the extent of profits retained in Ghana? Or where decisions are taken? Or whether the claim is being brought by the Dutch holding company on a reflective loss basis, or directly by the Ghanaian company with respect to its investment in, for example, Liberia?

Alternatively, should only investors of a certain size be eligible? Again, similar issues arise. Section 6.3.1 discusses the various considerations that arise when determining what, exactly, is an “SME”, for example. Should limitations be placed around both size and “nationality”?

The categories of investor beneficiaries could also be defined by the nature or size of the claim.⁷²⁵ For example, if investors are having financial difficulties advancing claims under a certain value threshold, should these smaller claims be eligible for Assistance Mechanism services? Would or should claims based on allegations of direct expropriation, for example, be prioritized over other categories of claims, particularly if resources of an Assistance Mechanism were limited?

Finally, it could be that a limited category or other specific services could be made available to investors, but not others. For example, policy-makers may decide that investors can benefit from certain capacity building support, but not from direct support in advancing specific claims.

6.3.2 Types of Assistance Mechanisms for investors

As with states, consideration of what would be the most appropriate solution to problems experienced by investors will largely depend on the intended beneficiaries, funding available, and prioritization of hurdles experienced.

6.3.2.1 Ombuds-type office

One potential solution to both pre- and post-establishment hurdles experienced by investors could be the creation of an ombuds-type office. As described in Section 2.3.3.1.2, the Korean OFIO and Brazilian CFIA models are intended to prevent disputes by managing investor concerns before a full dispute has matured. They are intended to get the parties to the table and talking, and to attempt to find mutually beneficial outcomes. To the extent any third-parties are impacted by the investment and the concerns of the investor an ombuds-mechanism may also include such parties in its procedures.

One interviewee indicated that in some cases, governments may be politically challenged (e.g. when they have taken an action in response to domestic political pressure) to come to a discussion or negotiating table, so having a treaty or other legal obligation to engage in discussions in appropriate cases could help encourage governments to take these pre-dispute and/or alternative dispute resolution steps.⁷²⁶

6.3.2.2 Pre-dispute assistance

Several interviewees stated that in most cases where they see investors, and particularly small investors, make mistakes it is in the early phases of crafting the details of the claim. Interviewees also noted that in many cases investors may simply not have adequate guidance as to how to participate. For example, if an investor has been dealing with the ministry of mines throughout the investment, it will probably be likely to send a notice of intent to that ministry as well, even if this would not be the most efficient approach. A mechanism that could assist SMEs to frame and engage at the initial phases of disputes was suggested as an area where there could be a lot of impact.

6.3.2.3 Market-based assistance

The discussion below and in Table 12 note different potential market-based options for supporting SMEs in ISDS claims. The attractiveness and viability of these options depend on various factors, including the location of the SME, and its access to experienced counsel; the operational strength of the SME, which is relevant for its ability to secure loans; the strength of a claim, which can impact the ability to secure contingency-based representation and third-party funding; and the size of a claim, which can impact the SME's ability to secure third-party funding.

6.3.2.3.1 Improving the market for counsel

A significant portion of SME costs in ISDS disputes relates to costs for counsel.⁷²⁷ The fees charged by the top tier international firms that often handle ISDS cases drive up those costs.⁷²⁸ Reducing the fees charged by and paid to counsel could, therefore, reduce overall costs and difficulties SMEs experience in financing claims.

One option is for SMEs to rely more on lower-priced options. If, for instance, the dispute relates to actions taken by a developing host country, or is brought by a developing country investor, the investor could use firms in the host and/or home country charging local rates, as opposed to using international firms with rates based on the market in London, New York, Paris, etc. If more than one team is used,⁷²⁹ then the allocation of work and responsibilities between the higher and lower-priced teams could potentially be adjusted. Similar to the issues discussed in connection with the challenges states face in accessing low-cost support, barriers to entry for new

firms may not be high: Franck’s data indicates that the majority of firms in ISDS arbitrations have only handled one case each, another cluster a modest two to five, and there are important players in developing country markets.⁷³⁰

6.3.2.3.2 Contingency fee arrangements

Another option for investors (including SMEs) is to pursue contingency fee arrangements in which attorneys only are paid representation costs (and potentially a premium) upon completion of a successful outcome. The meaning of a successful outcome, like other aspects of the contingency fee arrangement, would be defined on a case-by-case basis subject to applicable law, regulation, and rules of professional conduct. In general, these arrangements can be used to support resource-constrained claimants (which may include SMEs) pursue a case they otherwise may not be able to advance or engage counsel they would otherwise not be able to afford.

Although helpful in principle, contingency fee arrangements may be of limited use in practice if counsel are unwilling to take the risk of loss. Short of a few firms, many firms may not have the financial capacity to provide a contingency arrangement

completely in-house, and thus may also need to supplement this arrangement with outside financing, which may, for example, take the form of “third-party funding” (as described below). With contingency fee arrangements, advisors will incur costs (e.g., staff time, travel costs, discovery-related costs, and opportunity costs) they may ultimately not be able to recover, although in some cases a claimant may pay a portion of these costs, or outside financing may also lessen the burden on both parties. The less risky the case – for instance, the lower the costs of pursuing it, the clearer the law, the more likely the victory – the more attractive it may be to contingency-fee-based service providers.

6.3.2.3.3 Improved access to finance

One issue considered to be more frequently faced by SMEs, especially SMEs from developing countries, is access to finance. A large company without the immediate cash flow to fund litigation may nevertheless be able to rely on the strength of the company’s credit rating and its collateral to secure a loan and then pursue a dispute. SMEs, in contrast, may face a harder time doing so, especially when the value of their business or collateral is low relative to the cost of a claim. One investor interviewed stated that corporate lending is simply not available for these kinds of claims.⁷³¹ Thus, in addition to ISDS-specific interventions, it may be useful to consider

Table 12 Market-strategies and links to characteristics of SMEs and SME claims

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

what types of initiatives are being deployed to support SME access to finance more generally, and whether a concessional finance product (e.g. a first-loss position) could be used to assist investors in accessing liquidity.

6.3.2.3.4 Litigation insurance

To the extent that litigation/arbitration expenses are or are expected to be a significant business cost, firms may secure insurance to help cover those fees. This is distinct from, but can overlap with, other forms of insurance such as political risk insurance. The availability and attractiveness of this option depends on the relevant market and characteristics of the insured.

6.3.2.3.5 Claimant-side third-party funding

Like definitions of SMEs, definitions of third-party funding vary. Broad versions overlap with some of the other options described in this section addressing costs, such as options for loans, insurance, and contingency fee arrangements, discussed above, and other possible Assistance Mechanisms, such as pro bono support, discussed below.⁷³² The narrow version used here is meant to exclude contingency fee arrangements and focus on funding provided to the claimant (or claimant's counsel) on a non-recourse basis in exchange for a success fee or other form of monetary remuneration wholly or partially dependent on the outcome of the proceeding.

This type of funding is currently being used in ISDS cases, but the lack of transparency surrounding it makes it difficult to know how prevalent it is, and whether and to what extent it is supporting SME claims. Reports that claim size must be multiples of expected litigation costs in order for funders to investment in claims seem to mean that it is unlikely, though not impossible, that smaller firms on the SME scale would be attractive candidates. Smaller claims that would otherwise not fit a single-claim third-party funding model, may, however, be more easily funded in the context of a portfolio of claims. Nevertheless, it is the size of the potential award, not the size of the business, that is the key determinant for third-party funders' funding decisions (along with other factors such as the strength of the claim and recoverability of any award).

In CCSI's interviews, the ability of smaller companies to access third-party funding was questioned from a practical matter. According to one interviewee, sophisticated third-party funders tend to (if not almost exclusively) work with "magic circle" or other extremely exclusive law firms.⁷³³

*If you are an investor, how do you even access this well-connected professional advisory circle? This is not your typical law firm in Milwaukee. Wall street or magic circle firms must ply the space. Allen & Overy, Freshfields, they dominate the space for funded claims. You cannot find a lower rate regional firm that has this level of expertise. If you are looking for continuing practice exposure you have to pay these rates. This is where the expertise is residing. Whether there is a pricing model that is more accessible is an open question.*⁷³⁴

However, even if smaller investors are able to access reputable third-party funding sources, it is unclear that this option is going to be a panacea. Third party funders expect sizeable returns on their investment. According to one investor who is cautious of the opportunity cost of this kind of financing, "I have my antenna up for how much value of the potential claim is actually going to be available to the stakeholders of the enterprise from a successful arbitration – and this is real. Bentham and other classic funders take 30 points in their traditional model – hedge funds take an even more onerous position. For an SME this is a real issue that a funder would take 30% or more."⁷³⁵ Other preferred creditors of a claimant may include, for example, employees, local companies, local banks, and shareholders. It is a policy question where the value of financing should fall in this spectrum, and if the current model is inappropriate, how a different model may be crafted to better achieve policy objectives.

6.3.2.4 Institutionalized multi-service center including legal representation of investors

6.3.2.4.1 Political tensions

As discussed in greater depth in Section 5.1.9, interviewees cited hurdles as to the political feasibility of creating (or expanding) an Assistance Mechanism that would benefit both states and investors. The importance of these perspectives should not be underestimated.

6.3.2.4.2 Other stakeholder tensions

In addition to political challenges, certain other conflicts and tensions should be born in mind, including those that may arise as between an investor benefitting from an Assistance Mechanism and (1) donor governments and (2) support providers.

With respect to donor governments, to the extent an Assistance Mechanism also supported claims by investors, there may be additional questions about tensions and conflicts that could arise due to relationships between investors and donor governments, such as circumstances in which:

- investors are investors of donor governments;
- investors are suing donor governments;
- investors are suing client/beneficiary governments;
- investors are pursuing claims that are inconsistent with donor governments' objectives for the dispute settlement system;
- investors are raising arguments of interpretation that are inconsistent with the relevant donor government's interpretation of the treaty; or
- investors are pursuing claims that are inconsistent with donor governments' objectives for providing funding support.

Questions also arise regarding how to ensure proper alignment of interests between support providers (i.e. when not employed directly by an Assistance Mechanism) and client investors. These include the questions of:

- how to ensure support providers do not raise frivolous arguments or engage in other actions that prolong or unnecessarily drive up costs in proceedings in order to increase their bills;
- how to ensure support providers do not underspend or under-deliver (risks of which might be particularly acute if there is little competition for support, if support providers charge a flat fee for services, or if they are providing services for free or at a discount they deem too great);
- how to ensure that the attorney-client relationship is not unduly harmed by relationships the support provider has with its funders or employer (if different from the client investor), and/or its other clients (which may be governments).

6.3.2.5 Other Assistance Mechanism models

Many of the models of Assistance Mechanisms that were described in Section 4 in the context of states could also be considered for investors.

For example, an Assistance Mechanism could focus on capacity building (e.g., for in-house teams or private firms in developing host countries, in order to try to lower costs of counsel). The ALSF, for example, opens its ALSF Academy to private sector lawyers from developing countries such that they may be better able to advise developing country governments. One could imagine similar support for in-house or outside-counsel that advises smaller investors.

It was suggested that an Assistance Mechanism may help states to understand where to turn for available options, and such a mechanism could similarly benefit investors. For example, helping them to navigate mediation or conciliation, available domestic relief, identifying political risk insurance programs (including ones targeting SMEs), and seeking diplomatic support and protection. An SME may be less aware of and face more challenges in pursuing these alternative options than a larger firm. Thus, one set of options could be working with internationalized SMEs to identify, evaluate, and pursue these alternative paths.

Whether and to what extent each option is desirable and feasible, however, depends on a clearer articulation of the challenges facing different investors relating to the costs of ISDS, the evolution of those challenges due to other reforms and market patterns, and the objectives, advantages, disadvantages, costs, and benefits of the different policy interventions.

6.3.3 Interaction with other reform proposals

As with states, other proposed ISDS reforms, particularly in the context of UNCITRAL's WGIII, may have an impact on the hurdles that investors are experiencing, or the way that assistance to such investors may be crafted.

6.3.3.1 Using rules on cost allocation and fee shifting

Rules regarding cost allocation and fee shifting will not enable claimants (or their funders) to avoid incurring expenses when advancing an ISDS claim but can influence the claimant's (and funders') cost-benefit and risk analysis regarding the affordability and desirability of pursuing a case. The law and practice of cost-shifting

Table 11 Illustrative quantitative thresholds for SMEs

Criterion	European Commission	Kenya ⁷⁶⁸	Mexico ⁷⁶⁹	Singapore	Vietnam ⁷⁷⁰	United States ⁷⁷¹
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		< S\$100 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	

in ISDS is presently complex. Treaties are often silent on the approach to be followed and, while some arbitration rules give guidance, that guidance is not a clear directive. Rather, it often provides tribunals significant discretion to determine the proper approach to cost-shifting based on factors such as the circumstances of the case.

The different approaches to cost-shifting can have different implications for SMEs. Under a “pay-your-own-way” approach, each side is able to better control its legal fees and costs. This can be useful for those SMEs that have identified quality, low-cost counsel and enable them to pursue a case. Another approach is the “loser-pays” approach, under which, generally speaking, the losing party pays its own as well as the winning party’s legal fees and costs.⁷³⁶ This increases the risks of pursuing claims. If SMEs are particularly unable to pay those fees and costs, and/or are particularly risk averse, it could disproportionately dissuade them from bringing cases.⁷³⁷ Like contingency funding arrangements, fee shifting may also have the effect of filtering out weaker claims.

One commentator has suggested supporting claimant access to ISDS by using a one-way fee shifting rule. Schill contends that in order to appropriately facilitate and encourage claims, tribunals should (and do) shift costs in favor of successful claimants, but not require them to pay the state’s costs when they are unsuccessful.⁷³⁸ CCSI has not identified any treaty, state, or arbitration rule calling for this approach. However, as Schill hinted, data indicates that there is in fact “a one-way loser-pays rule that reliably operate[s] to investors’ benefit – rather than to the benefit of states or operating in a neutral way.”⁷³⁹ Tribunals do not always shift costs, but when they do, they more frequently shift them in favor of the successful claimant than the successful respondent. While such one-way shifting, and any ISDS reforms further solidifying that approach, would benefit SME (and other) claimants, its expressly imbalanced nature would likely exacerbate concerns among those states and other stakeholders already troubled by the asymmetrical nature and high costs of the ISDS system for states.⁷⁴⁰

Overall, clearer rules on cost allocation could be one reform approach that would affect SMEs’ access to ISDS by improving the quality of calculation they (or their funders) would engage in when deciding whether to bring a case. Each approach will have different implications not only for the ability of SMEs to bring claims, but also on issues such as (dis)incentives to file frivolous claims, and (dis)incentives to control costs.

6.3.3.2 Reforming ISDS procedures generally to reduce costs overall

There are various reform initiatives aiming to reduce the unjustified costs of ISDS. The outcomes of those efforts could potentially also lower the hurdles SMEs face in bringing claims.⁷⁴¹

6.3.3.3 Reforming ISDS or adopting specialized rules to reduce costs specifically for SMEs and/or small claims

In addition to general reform efforts relating to costs, there are some examples of initiatives aiming to make it easier for SMEs and/or investors with small claims to pursue cases.⁷⁴² Interviewees suggested, for example, sole arbitrators, small claims-type courts, or expedited procedures for certain kinds of claims. Again, the outcomes of these initiatives will influence whether and what other interventions may be appropriate.

Section 7. Conclusion

This 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; 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 is naturally reflective only of individuals actually interviewed, and insights provided through desk research), 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.

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, concerns regarding these costs show no signs of abating.

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 and including effective engagement in formal ISDS proceedings. As such, this 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 investor-state dispute settlement processes. The Study does so through the lens of "capacity challenges," capturing different challenges related to: investment policy-making; IIA negotiation; implementation and management of their IIAs and associated 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.

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, and its role as a capital importer or exporter (or both) particularly vis-a-vis its investment treaty partners, among other factors. States expressed different priorities in addressing these 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.

The Scoping Study considers previous attempts to establish an advisory center on international investment law. A key theme that emerged from interviews with those involved in or knowledgeable about these efforts was that policy-makers should not underestimate large and, perhaps moreso, small policy differences among and between states, as an unanticipated difference of opinion can stall or halt efforts, even when the finish line seems near.

Following the identification (and prioritization) of capacity challenges, it will be necessary to consider the model(s) that an Assistance Mechanism could take in order to address them. The Scoping Study surveys a wide variety of models that Assistance Mechanisms, both with respect to international investment law as well as those employed in other legal fields, may take to address various concerns. Models that are explored in depth in the Scoping Study include:

- **Institutionalized, multi-service support including legal representation of client governments.** Examples that are discussed in this category include the Advisory Centre on WTO Law, the African Legal Support Facility, and the International Development Law Organization’s Investment Support Programme for Least Developed Countries, as well as an investment law “hotline”.
- **Institutionalized, multi-service support not including legal representation of client governments.** 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), arbitration centers (such as ICSID, the PCA, and the SCC), and academic and non-profit centers (such as CCSI and IISD).
- **Financial or in-kind inputs.** Examples that are discussed in this category include arbitration trust funds (such as that provided by the PCA), third-party funding for respondent states, contingent fee representation, insurance products, and loans.
- **Pro bono, ad hoc legal and expert support to respondent states.** Examples that are discussed in this category include IDLO’s ISP/LDCs program along with other NGO and university-based programs that deliver services to states on a no-cost basis.
- **Intergovernmental knowledge-sharing hubs.** Examples that are discussed in this category include formal opportunities for government officials to share knowledge (e.g. IISD’s Annual Forum of Developing Country Investment Negotiators) as well as ad-hoc treaty-based or other networks.
- **Discrete capacity-building networks.** Examples that are discussed in this section include trainings and discrete capacity building offered by various Assistance Mechanisms, academic and non-profit institutions, law firms, and other governments, as well as Massive Open Online Courses.
- **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.

Various cross-cutting issues emerged from analysis and experience with existing Assistance Mechanisms. These cross-cutting issues should be considered by policy-makers as they consider the breadth and depth of services as well as the model(s) that an Assistance Mechanism could follow. The cross-cutting issues that are explored in depth in the Scoping Study include:

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

Interviews reflect a great diversity of perspectives as to how capacity challenges should be prioritized and addressed, and an even greater diversity of perspectives as to the feasibility and desirability of how cross-cutting concerns should shape outcomes.

Finally, the Scoping Study includes a section devoted to investors, with a focus on small and medium-sized enterprises (SMEs) as potential beneficiaries of any Assistance Mechanism. The Scoping Study revealed that although SMEs and states face some of the same issues with respect to their participation in ISDS, the rationales for, considerations regarding, and optimal modes of supporting each group may vary significantly.

The Scoping Study explores evidence related to SMEs' use of ISDS, as well as the hurdles that SMEs are having in effectively relying on IIAs and ISDS as a method to limit risk and resolve disputes. The Scoping Study explores how one might determine the scope of beneficiaries who may benefit from an Assistance Mechanism.

Based on the hurdles experienced and concerns expressed, the Scoping Study considers the forms of an Assistance Mechanism that may best assist SMEs in overcoming ISDS access issues. These include an ombuds-type office, pre-dispute technical assistance, market-based Assistance Mechanisms, capacity-building models, and a model incorporating institutionalized defense and legal representation. Depending on the type of assistance that would be offered to investors, consultations suggested fairly widespread hesitation of, or even strong opposition to, also including investors as beneficiaries of an Assistance Mechanism that is created or expanded to benefit states.

International investment law and ISDS are evolving, and outcomes of that evolution remain uncertain. Those developments must be kept in mind when assessing needs, and the options for addressing them, as each may change in the short-, medium-, and long-term. An Assistance Mechanism developed to be sustainable will need to be flexible to accommodate these developments. It will be important to consider whether and to what extent concerns regarding IIAs and ISDS are best resolved through reforms to treaties and dispute settlement thereunder, and whether and to what extent the costs of concerns that are not addressed should be shifted from beneficiaries of an Assistance Mechanism (e.g. certain respondent states and SMEs) to an Assistance Mechanism's funders (e.g. other states).

With respect to both states and investors, this scoping study has set forth a wide variety of existing capacity challenges and detailed existing Assistance Mechanisms that are available. Depending on the issue, robust, some, or no assistance is currently available. 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.

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).⁷⁴³ While general support was expressed for establishing an Assistance Mechanism, particularly as such a mechanism could complement other reform options being developed by WGIII, 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,⁷⁴⁴ 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),⁷⁴⁵ the possible structure of an Assistance Mechanism and how it could be financed,⁷⁴⁶ 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).⁷⁴⁷

The Working Group provided guidance to the UNCITRAL Secretariat in conducting certain preparatory work to assist the Working Group in these considerations.⁷⁴⁸ Requested information related to potential conflicts of interest and burdens on an Assistance Mechanism (particularly as they relate to the scope of its mandate),⁷⁴⁹ information on Assistance Mechanisms that are already providing services,⁷⁵⁰ criteria that may be applied to determine beneficiary states and services,⁷⁵¹ how capacity building may apply to various elements of investment treaty practice and dispute settlement proceedings,⁷⁵² and options for financing and staffing an Assistance Mechanism.⁷⁵³

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.

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CCSI Unified Consultation Protocol

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I. PHASE-SPECIFIC QUESTIONS

A. Country Representatives

a. Formulation of IIA Policy.

- (1) Does your country have a (formal or informal) policy towards international investment agreements? To what extent is this policy the result of binding legislation, and to what extent is it the result of policy discretion within administrations and civil service organizations?
- (2) Is this policy applied consistently in dealings with all counterparties, or are there certain regional neighbors, allied countries, rival countries, etc. who are negotiated with according to substantially different policies?
- (3) Do you feel that the development and implementation of IIA policy is limited by financial, technical, or capacity constraints, or do you feel that such policies have been thoroughly developed and implemented?
- (4) Do you feel that policy support provided by another stakeholder in the international IIA regime (for instance, wealthier countries, international civil society organizations, arbitrators and arbitral council acting in a pro bono capacity, etc.) would be useful to the formulation of national IIA policy? Have you had experience with getting support from any of these groups?
- (5) Would third-party advice or technical support raise conflict-of-interest or capacity concerns? How would those concerns differ depending on which parties were providing support? For instance, if attorneys providing advice on IIA policy also bring ISDS claims or otherwise benefit financially from the ISDS system, does that raise concerns?

b. Negotiation of IIAs

- (1) Do you feel that the international investment agreements your country has entered into are only entered into after a thorough and adequate assessments of impacts on domestic law, policy, and economic outcomes? Do you think more resources for conducting such assessments would be useful for negotiations (and subsequent ratification)?
- (2) Are your country's international investment treaties based on a model?
 - a. If so, did you receive external support in preparation of that model? [explain]
 - b. Do your agreements otherwise take a similar form from one to the next?
 - c. Are there some treaties that you believe represent your country's interests better? Worse?
 - d. What role did in-house capacity/external knowledge play in shaping outcomes?
 - e. What other factors are important in shaping outcomes? (e.g., strength of negotiating party, internal deadlines, trade-offs in terms of other issues being negotiated as part of an FTA)
- (3) Do you feel that your country is well-positioned to negotiate equitable IIAs that serve its long-term interests? If not, why not?

- (4) Would technical support help improve negotiating outcomes from your perspective?
- a. If so, what kind of support?
 - b. Are there limits or concerns?

c. Pre-Dispute Management of IIAs

- (1) Briefly describe where you see risks of claims arising – e.g., natural resource concessions, actions of local officials, etc.
- (2) When and how do you become aware that there may be an ISDS claim against the country? (e.g., notices of intent from companies/their attorneys, other communications by companies, communications from relevant ministries or local government entities, diplomatic or other communications from the home state, other?)
- a. Are there variations based on the sector, size or home country of the investor, or other factors?
- (3) What, if any, steps does your country take to (x) avoid investor-state disputes prior to their emergence, and (y) resolve disputes that have been identified.
- a. If there are steps, are these designed specifically to anticipate/avoid ISDS claims or do they exist as part of separate initiatives?
- (4) If there are steps taken under #3,
- a. what organizations, including non-state organizations (for example, industry organizations, unions, etc.) are involved in the process of pre-dispute management?
 - b. To what extent does this dispute management happen at the national level versus the subnational level? Are there national-level procedures and resources in place to reduce conflict between investors and subnational government bodies?
 - c. How effective do you see these processes to be?
 - d. What would make them more effective?
 - i. to what extent are these processes limited by resource constraints or technical capacity issues? To what extent are they limited by political constraints?
- (5) If there are no existing processes under #3, to what extent do you think they would be useful to establish generally or for the purposes of managing/avoiding ISDS claims? What are the limitations to establishing such mechanisms?
- (6) Do you believe there are any risks, concerns or limitations of these process (perceived or real?)
- (7) Do you see a role for supporting inter-state engagement on potential disputes (as opposed to just efforts relating to the host state and investor), such as good offices?
- (8) Would external analysis of the IIA consequences of proposed activities by government or private

sector actors be valuable to the pre-dispute management of IIA obligations?

d. Initial notices and cooling off periods

- (1) Is there an established and widely understood intergovernmental process to manage the receipt of the notice of intent and early steps to respond? Is it used? If not, what are the legal, technical or resource constraints to implementing fully this process?
- (2) What is your perspective of the utility of “cooling off periods”? Are there disputes that have been pursued against you that you believe could have been avoided with better dispute avoidance practices or better uses of cooling off periods? (If so, can you elaborate)?
- (3) What could make cooling off periods more useful? Are there capacity or resource constraints that are preventing them from serving the role you envisioned when including these provisions in your treaties?

e. Handling Disputes

(1) What resources does your country apply towards IIA disputes?

- a. Legal: Are these disputes handled by in-house council, law firms, or some combination of the two?
 - i. If you use external counsel –
 1. Why?
 2. International and/or domestic?
 3. How do you choose? (e.g., relevance of cost/quality)
 4. For what issues? (e.g., do you use domestic for domestic law issues and international for treaty-related questions)
 5. Have you adjusted practices over time? Do you foresee/would you like further evolution?
 6. What have been your experiences?
 - ii. If you use domestic solely –
 1. Why did you choose that route?
 2. Can you explain your staffing (e.g., how many people are on staff, from what department, how do you accommodate ebbs and flows?)
 - iii. If you use a combination of both?
 1. Why did you choose that route?
 2. Can you explain your internal staffing (e.g., how many people are on staff, from what department, how do you accommodate ebbs and flows?)
 3. Can you explain the distribution of labor internally and externally?

b. Technical/expert:

- i. What is your perception of internal capacity on issues of valuation/damages?
- ii. What is your perception of internal capacity on technical issues of discovery, evidence gathering and document management?
- iii. Would you want additional support doing due diligence and discovery on claimant investors', their conduct, claims, etc?

c. (If relevant) On a scale of 0-5, with zero being very unsatisfied and 5 being extremely satisfied, how satisfied have you been with the –

- i. Quality of external legal representation you have received
- ii. Cost of external legal representation you have received

(2) Do you feel that the resources and legal and technical capacity your country has available to handle IIA disputes are sufficient? do you believe that you are at a disadvantage compared to other litigants within the IIA system?

(3) What additional resources or approaches do you feel would support your capacity to effectively handle active disputes? What are your perceptions of approaches such as:

- Access to capacity-building programs for internal staff.
- Access to specific technical assistance, like discovery related to investors/investments, and document management systems.
- Access to subscription services/databases (e.g., on arbitrators, investor-state law guide, iareporter)
- Access to special negotiated rates for private-sector assistance.
- Pro-bono services.
- Access to a dedicated advisory center.
- Setting up a litigation fund.
 - i. Loans.
 - ii. Grants.
 - iii. Insurance
- Reducing costs, e.g.,
 - i. Better enabling identification and dismissal of frivolous claims.
 - ii. Capping of fees for arbitrators? Capping fees for counsel? Other?
- Any other (please specify).

(4) How do your experiences with handling disputes under IIAs compare with handling disputes under other areas of international law (e.g., WTO, human rights) or other areas of domestic law? Are challenges of capacity and resources different? Why? How?

f. Managing Post-Award Processes.

(1) Do you feel that your government is well-positioned to challenge the results of adverse ISDS awards, resist enforcement? If not, what are the issues you face in this phase?

(2) Do you believe that your IIA counterparties consistently honor the results of ISDS awards, such an award for costs? If not, do you feel that this is the result of internal state enforcement capacity or is there another reason? What?

B. Private Sector Representatives

a. Formulation of IIA Policy.

- (1) To what extent have you, either in a paid or *pro bono* capacity, participated in or assisted in the formulation of a sovereign state's IIA policy?
 - a. What resources were required to thoroughly prepare for and conduct negotiations?
 - i. Human resources (support staff, junior, mid-level, senior, partner, specialized experts, etc.)
 - ii. Financial resources (rough cost)
 - iii. Time (rough timeline)
 - b. Did you feel that your clients had adequate access to those resources?
 - c. What role did precedent documents and model legislation play in those negotiations?
 - i. What was the source of this precedent? (e.g., civil society groups, existing IIAs, internal state resources, proprietary private sector documents).
 - ii. How was this precedent adapted for the specific circumstances of your clients?
 - iii. Did the source and format of this precedent raise any conflict-of-interest concerns?
 - d. What role did in-house capacity/external knowledge play in shaping outcomes?
- (2) With respect to your sovereign clients, to what extent do they have a (formal or informal) policy towards international investment agreements?
 - a. Is this policy applied consistently in dealings with all counterparties, or are there certain regional neighbors, allied countries, rival countries, etc. who are negotiated with according to substantially different policies?
 - b. With respect to your sovereign clients, do you feel that the development and implementation of IIA policy is limited by financial, technical, or capacity constraints, or do you feel that such policies have been thoroughly developed and implemented?
- (3) Do you feel that policy support provided by another stakeholder in the international IIA regime (for instance, wealthier countries, international civil society organizations, etc.) would be useful to the formulation of national IIA policy? Have you had experience working alongside any of these groups?
- (4) To what extent could third-party policy support raise conflict-of-interest concerns? How would those concerns differ depending on which parties were providing support? For instance, if attorneys providing advice on IIA policy also bring ISDS claims or otherwise benefit financially from the ISDS system, does that raise concerns? What steps could be taken to mitigate those concerns?

b. Negotiation of IIAs

- (1) To what extent have you, either in a paid or *pro bono* capacity, participated in or assisted in the negotiation of IIAs?

- a. What resources were required to thoroughly prepare for and conduct negotiations?
 - i. Human resources (support staff, junior, mid-level, senior, partner, specialized experts, etc.)
 - ii. Financial resources (rough cost)
 - iii. Time (rough timeline)
 - b. Did you feel that your clients had adequate access to those resources?
 - c. What role did precedent documents and model legislation play in those negotiations?
 - i. What was the source of this precedent? (e.g., civil society groups, existing IIAs, internal state resources, proprietary private sector documents).
 - ii. How was this precedent adapted for the specific circumstances of your clients?
 - iii. Did the source and format of this precedent raise any conflict-of-interest concerns?
 - d. What role did in-house capacity/external knowledge play in shaping outcomes?
 - e. What other factors are important in shaping outcomes? (e.g., strength of negotiating party, internal deadlines, trade-offs in terms of other issues being negotiated as part of an FTA)
- (2) Do you feel that the international investment agreements under which you practice were entered into after a thorough and adequate assessments of impacts on domestic law, policy, and economic outcomes?
 - (3) Do you feel that your sovereign clients are well-positioned to negotiate equitable IIAs that serve their long-term interests? If not, why not?
 - (4) Would technical support help improve negotiating outcomes from your perspective?
 - a. If so, what kind of support?
 - b. Are there limits or concerns?
 - (5) To what extent could third-party negotiation support raise conflict-of-interest concerns? How would those concerns differ depending on which parties were providing support? What steps could be taken to mitigate those concerns?

c. Pre-Dispute Management of IIAs

- (1) Briefly describe areas where you see risks of claims arising for your clients – e.g., natural resource concessions, actions of local officials, etc.
- (2) When and how do you become aware that there may be an ISDS claim against a country? (e.g., notices of intent from companies/their attorneys, other communications by companies, communications from relevant ministries or local government entities, diplomatic or other communications from the home state, other?)
 - a. Are there variations based on the sector, size or home country of the investor, or other factors?
 - b. To what extent does a pre-existing relationship with a country dictate at which stage

of the dispute you will be engaged?

c. What resources were required to thoroughly prepare for and conduct pre-dispute management?

- i. Human resources (support staff, junior, mid-level, senior, partner, specialized experts, etc.)
- ii. Financial resources (rough cost)
- iii. Time (rough timeline)

d. Did you feel that your clients had adequate access to those resources?

e. What role do resource constraints play in your clients' decisions to engage you at one stage of a dispute versus another?

(3) What, if any, steps do your sovereign clients take to (x) avoid investor-state disputes prior to their emergence, and (y) resolve disputes that have been identified.

a. If there are steps, are these designed specifically to anticipate/avoid ISDS claims or do they exist as part of separate initiatives?

(4) If there are steps taken under #3,

a. what organizations, including non-state organizations (for example, industry organizations, unions, etc.) are involved in the process of pre-dispute management?

b. To what extent does this dispute management happen at the national level versus the subnational level? Are there national-level procedures and resources in place to reduce conflict between investors and subnational government bodies?

c. How effective do you see these processes to be?

d. What would make them more effective?

- i. to what extent are these processes limited by resource constraints or technical capacity issues? To what extent are they limited by political constraints?

e. To what extent have you or other outside experts been involved in formulating these steps?

(5) If there are no existing processes under #3, to what extent do you think they would be useful to establish generally or for the purposes of managing/avoiding ISDS claims? What are the limitations to establishing such mechanisms?

(6) What resources are required to thoroughly develop a pre-dispute management plan?

- a. Human resources (support staff, junior, mid-level, senior, partner, specialized experts, etc.)
- b. Financial resources (rough cost)
- c. Time (rough timeline)

(7) Do you believe there are any risks, concerns or limitations of these process (perceived or real?)

(8) Do you see a role for supporting inter-state engagement on potential disputes (as opposed to

just efforts relating to the host state and investor), such as good offices?

- (9) Would external analysis of the IIA consequences of proposed activities by government or private sector actors be valuable to the pre-dispute management of IIA obligations?

d. Initial notices and cooling off periods

- (1) With respect to your sovereign clients, do you see that there are established and widely understood intergovernmental processes to manage the receipt of the notice of intent and early steps to respond? Are they used? If not, what are the legal, technical or resource constraints to implementing these processes fully?
- (2) What is your perspective of the utility of “cooling off periods”? Are there disputes that have been pursued against you that you believe could have been avoided with better dispute avoidance practices or better uses of cooling off periods? (If so, can you elaborate)?
- (3) What could make cooling off periods them more useful? Are there capacity or resource constraints that are preventing them from serving the role you envisioned when including these provisions in your treaties?

e. Handling Disputes

- (1) What resources do your sovereign clients apply towards IIA disputes?
- a. Legal: Are these disputes handled primarily by law firms, or some combination of in-house counsel and private sector firms?
 - i. If primarily external counsel:
 1. Why?
 2. Do you clients primarily use international or domestic counsel?
 3. For what issues? (e.g., do you use domestic for domestic law issues and international for treaty-related questions)
 4. How have these practices changed over time, and do you foresee further evolution?
 5. What have been your experiences?
 - ii. If your clients use a combination of both:
 1. Why did they choose that route?
 2. Can you explain the distribution of labor internally and externally?
 - b. Technical/expert:
 - i. What is your perception of your clients’ internal capacity on issues of valuation/damages?
 - ii. What is your perception of your clients’ internal capacity on technical issues of discovery, evidence gathering and document management?
 - iii. To what extent do you think sovereigns’ due diligence and discovery on claimant investors’, their conduct, claims, etc. is limited by a lack of expertise, manpower, or financial resources?

- (2) Speaking generally, what resources are required to thoroughly prepare for and conduct negotiations?
 - a. Human resources (support staff, junior, mid-level, senior, partner, specialized experts, etc.)
 - b. Financial resources (rough cost)
 - c. Time (rough timeline)
- (3) Do you feel that the resources and legal and technical capacity your sovereign clients have available to handle IIA disputes are sufficient? Do you believe that they are at a disadvantage compared to other litigants within the IIA system?
- (4) What additional resources or approaches do you feel would support your clients' capacity to effectively handle active disputes? What are your perceptions of approaches such as:
 - Access to capacity-building programs for internal staff.
 - Access to specific technical assistance, like discovery related to investors/investments, and document management systems.
 - Access to subscription services/databases (e.g., on arbitrators, investor-state law guide, iareporter)
 - Access to special negotiated rates for private-sector assistance.
 - Pro-bono services.
 - Access to a dedicated advisory center.
 - Setting up a litigation fund.
 - i. Loans.
 - ii. Grants.
 - iii. Insurance
 - Reducing costs, e.g.,
 - i. Better enabling identification and dismissal of frivolous claims.
 - ii. Capping of fees for arbitrators? Capping fees for counsel? Other?
 - Any other (please specify).

f. Managing Post-Award Processes.

- (1) Do you feel that your sovereign clients are well-positioned to challenge the results of adverse ISDS awards? If not, what are the issues you face in this phase?
- (2) Do you believe that your IIA counterparties consistently honor the results of ISDS awards, such as an award for costs? If not, why not?

C. Civil Society + Academic Representatives

a. Formulation of IIA Policy.

- (1) Do you feel that states have clear and consistent policies towards international investment agreements? To what extent does the presence of a consistent policy seem to vary, and based on what factors? (e.g., capital importing vs. capital exporting states)
- (2) Do you feel that the development and implementation of IIA policy is limited by financial, technical, or capacity constraints, or do you feel that such policies have been thoroughly developed and implemented?
- (3) Do you feel that policy support provided to sovereign countries by another stakeholder in the international IIA regime (for instance, wealthier countries, international civil society organizations, arbitrators and arbitral council acting in a pro bono capacity, etc.) would be useful to the formulation of national IIA policy?
 - a. Do you have any experience working with sovereign states to develop IIA policy? If so, what were the results of that process?
- (4) Would third-party advice or technical support raise conflict-of-interest or capacity concerns? How would those concerns differ depending on which parties were providing support? For instance, if attorneys providing advice on IIA policy also bring ISDS claims or otherwise benefit financially from the ISDS system, does that raise concerns?
- (5) Do you think that formal mechanisms or institutions that provided financial or technical ISDS aid to poorer countries would result in systemic changes to ISDS mechanisms, or would it represent an international commitment to existing systems? How much do you think the governance and funding structures of such institutions would affect their role?
- (6) If systemic changes to ISDS mechanisms are proposed, what role would you want to see an Advisory Center or other aid institution play? Would you be concerned that conflicts of interests between stakeholders might arise if the institution provided support during policy debates or state-state negotiations?

b. Negotiation of IIAs

- (1) Do you feel that the international investment agreements you have seen and worked with are only entered into after a thorough and adequate assessments of impacts on domestic law, policy, and economic outcomes? Do you think more resources for conducting such assessments would be useful for negotiations (and subsequent ratification)?
- (2) What is your perception of the usefulness of “model” IIAs in negotiation processes?
 - a. How well-positioned are states to negotiate based on their preferred model?
 - b. What conflicts of interest might arise when third-party models are used or third-party

advisors assist states in developing a model?

c. What capacity issues would you expect to limit the usefulness of such models?

- (3) Do you feel that countries are well-positioned to negotiate equitable IIAs that serve their long-term interests? If not, why not?
- (4) Would technical support help improve negotiating outcomes from your perspective?
 - a. If so, what kind of support?
 - b. Are there limits or concerns?

c. Pre-Dispute Management of IIAs

- (1) Briefly describe where you see risks of claims arising – e.g., natural resource concessions, actions of local officials, etc.
- (2) What is your perception of processes taken by states to (x) avoid investor-state disputes prior to their emergence, and (y) resolve disputes that have been identified?
 - a. How effective do these processes seem to be at reducing the volume and cost of ISDS?
 - b. What would make them more effective?
 - i. To what extent are these processes limited by resource constraints or technical capacity issues? To what extent are they limited by political constraints?
- (3) Do you believe there are any risks, concerns or limitations of these process (perceived or real?)
- (4) Do you see a role for supporting inter-state engagement on potential disputes (as opposed to just efforts relating to the host state and investor), such as good offices?
- (5) Would external analysis of the IIA consequences of proposed activities by government or private sector actors be valuable to the pre-dispute management of IIA obligations? What conflicts of interest can you foresee arising from external advice, and how do those conflicts change based on the parties providing support?

d. Initial notices and cooling off periods

- (1) What is your perspective of the utility of “cooling off periods”? Are there disputes that have been pursued against you that you believe could have been avoided with better dispute avoidance practices or better uses of cooling off periods? (If so, can you elaborate)?
- (2) What could make cooling off periods more useful? Are there capacity or resource constraints that are preventing them from being effective, or do they seem to function as intended?

e. Handling Disputes

- (1) Do you believe that some countries are at a disadvantage compared to other litigants within the IIA system when addressing active ISDS claims? If so, what creates those disadvantages?

- (2) Do you feel that the resources and legal and technical capacity countries have available to handle ISDS are sufficient?
- (3) What additional resources or approaches do you feel would support countries' capacity to effectively handle active disputes? What are your perceptions of approaches such as:
- Access to capacity-building programs for internal staff.
 - Access to specific technical assistance, like discovery related to investors/investments, and document management systems.
 - Access to subscription services/databases (e.g., on arbitrators, investor-state law guide, iareporter)
 - Access to special negotiated rates for private-sector assistance.
 - Pro-bono services.
 - Access to a dedicated advisory center.
 - Setting up a litigation fund.
 - i. Loans.
 - ii. Grants.
 - iii. Insurance
 - Reducing costs, e.g.,
 - i. Better enabling identification and dismissal of frivolous claims.
 - ii. Capping of fees for arbitrators? Capping fees for counsel? Other?
 - Any other (please specify).
- (4) How do your experiences with disputes under IIAs compare with disputes under other areas of international law (e.g., WTO, human rights) or other areas of domestic law? Are challenges of capacity and resources different? Why? How?

f. Managing Post-Award Processes.

- (1) Do you feel that governments well-positioned to challenge the results of adverse ISDS awards, resist enforcement? If not, what are the issues you see them facing in this phase?
- (2) Do you believe that IIA parties consistently honor the results of ISDS awards, such an award for costs? If not, why not?

II. INSTITUTION-SPECIFIC QUESTIONS

A. Institutional Forms

a. Advisory Center for International Investment Law

One institutional form that has been proposed to address capacity issues and disparities in ISDS is the "Advisory Center." Such an Advisory Center would take the form of an independent institution dedicated to ensuring that less-well-resourced states have an equal opportunity to defend their interests in ISDS proceedings. Such a Center might give free legal advice and training on IIA law and provide direct support in ISDS proceedings for free or at discounted rates.

- (1) Are you familiar with the Advisory Centre on WTO Law (ACWL) set up to assist countries in international trade law and international trade disputes?
 - a. Are you a member of the ACWL?
 - b. Have you used the services of the ACWL? (explain)?
 - c. What are the advantages/disadvantages of the ACWL from your perspective?
 - d. Do you think that support and assistance could be rendered through a centralized Advisory Center (perhaps patterned on the ACWL)?
- (2) Do you see any disadvantages of a centralized Advisory Center from the standpoint of participating governments? Of investors?
- (3) How would you rank (from 1: less important to 5: more important) the following criteria for set-up and provision of services by an Advisory Center?
 - High standard of quality of services.
 - Governance of the Advisory Center.
 - Impartiality (i.e., not favoring any government, investor, or class of governments or investors).
 - Neutrality (i.e., not advocating for particular interpretation of existing laws).
 - Transparency (in terms of its policies and activities).
 - No competition with law firms.
 - Professional liability.
 - Accountability (if so, to whom?).
- (4) What other important criteria are there?
- (5) Do you envision that the Center would, could or should have any restrictions in terms of the cases it could take, governments it could support, or arguments it could raise?
- (6) Do you think that an Advisory Facility should work with in-house experts only, rely solely on technical assistance from outside experts, or rely in part on in-house experts and in part on outside experts?
- (7) How do you see the relationship between an Advisory Center and academics/experts, arbitrators, counsels, other governments (non-beneficiaries)? What types of relationships do you believe would increase the Center's legitimacy among both direct participants in the ISDS system, as well as other observers and stakeholders, and which would decrease it?
 - a. Would affiliation with any of the aforementioned stakeholders raise concerns about organizational conflicts of interest?
 - b. Do you have concerns that the funding source of any such Advisory Center could create (real or perceived) conflicts of interest (e.g., if the funds come from states whose investors are frequent claimants)? If so, what funding or governance structure do you believe would minimize these conflicts?
- (8) How should an Advisory Center deal with possible cases involving supported States and/or SMEs as opposing parties?
- (9) Do you think that beneficiaries should pay for the services of an Advisory Center?

b. Ad hoc Capacity-Building and Technical Assistance

Another possible solution could be to offer technical assistance and training to government officials on how to manage the investment dispute process. This capacity assistance could be delivered by a range of actors, from intergovernmental organizations to local civil society groups to professional associations. Such assistance might also be expanded to build capacity and technical competence within the private sector, potentially including companies based in less developed countries and small and medium-sized investors.

- (1) What capacity-building tools and technical assistance projects do you believe would be most (from 1: least important to 5: most important)
 - Model documents and training modules related to negotiating investor-State dispute settlement provisions in international investment agreements.
 - Intensive training courses covering a range of technical topics relevant to investor-State dispute arbitration and managing investment disputes.
 - Seminars on emerging issues in investor-State dispute settlement.
 - Training for the national judiciary to create awareness among the judiciary at various levels about issues of international investment law, international arbitration or investment treaties.
 - Courses on ADR to create awareness about alternatives to investor-State dispute settlement, to develop an institutional/legal framework in the host country conducive to avoiding disputes and proposing alternatives, and to train conciliators in the host country.
 - Direct provision of technical experts and legal experts to support a government's internal negotiation and policy processes.
 - Any other (please specify).

- (2) What institutions do you believe can deliver capacity-building assistance in a way that is seen as legitimate and unconflicted? (from 1: less legitimate to 5: more legitimate)
 - Delivered by universities.
 - Delivered by private sector entities.
 - Delivered by governments.
 - Delivered by international organizations.

- (3) What types of assistance and capacity-building do you believe would be most valuable at each stage of the IIA cycle?
 - Formulation of IIA Policy.
 - Negotiation of IIAs
 - Pre-Dispute Management of IIAs
 - Notices of Intent
 - Handling Disputes
 - Managing Post-Award Processes.

c. Private-Sector Solutions

- a. Access to subscription services/databases (e.g., on arbitrators, investor-state law guide, iareporter)

- b. Access to special negotiated rates for private-sector assistance.
- c. Pro-bono services.
- d. Setting up a litigation fund.
 - i. Loans.
 - ii. Grants.
 - iii. Insurance
- e. Reducing costs, e.g.,
 - i. Better enabling identification and dismissal of frivolous claims.
 - ii. Capping of fees for arbitrators? Capping fees for counsel? Other?
- f. Any other (please specify).

(4) What mechanisms

(5) What role, if any, could fee award systems

- a.
- b. What conflicts of interest do you see fee award systems creating in

d. Direct Funding

Yet another proposed mechanism to secure adequate defense for states in ISDS involves the direct or indirect funding of

- (1) What types of direct and indirect financial support do you think would best meet the needs of disadvantaged IIA participants? How does this change at different stages of the IIA cycle?
- Loans.
 - Grants.
 - Access to special negotiated rates.
 - Setting up a dedicated litigation fund.
 - Any other (please specify).

B. Scope of Aid

a. Negotiating IIAs & Developing IIA Policy

- (1) What role could, and should, an aid institution play in supporting the negotiation and development of specific IIAs? Does that role change based on the institutional form (e.g., direct financial aid being used to hire third-party experts vs. institutional experts being provided by an Advisory Center)?
- (2) Would substantive policy advice and capacity-building programs be within the appropriate role of such an organization?
- (3) Would the generation of model interpretive statements or declarations be within the appropriate role of such an organization?
- (4) Could a single organization effectively provide negotiation and policy support for both/all states negotiating an IIA with each other? What types of internal “firewalls” would be needed to enhance the legitimacy of such support? If support could only be provided to one side, what would be the criteria for determining who gets such support?

b. Pre-Dispute Management and Alternate Resolution

- (1) Would external analysis of the IIA consequences of proposed activities by government or private sector actors be valuable to the pre-dispute management of IIA obligations? Would such analysis be tainted by or taint the legitimacy of subsequent support activities of the institution?
- (2) Could an aid institution serve as or provide access to third-party mediators? What do you see as the advantages and disadvantages of such support?
- (3) Could /should an aid institution help with state-state engagement, e.g., by providing “good offices” to facilitate conclusion of joint interpretations, pre-dispute filters, state-to-state resolution of disputes?

c. Handling Disputes

- (1) **Legal opinion.** An aid institution could provide analysis and legal opinions and expert reports to arbitral tribunals on all aspects of international investment law and jurisprudence. What do you think should be the range of such services?
 - a. If an aid institution were to remain at arm’s length to the litigation, would this be useful and sufficient?
 - b. Do you see any problem or possible conflict of interest arising from an aid institution providing legal opinions while also representing (or supporting the representation of) ISDS parties?
 - c. Could these problems be addressed if said aid institution created a “fire wall” and if so, what kind would be required?
- (2) **Public Party Defense.** An aid institution could provide specific assistance to resource-constrained governments, either directly or by retaining third-party experts and private-sector law firms. What do you think should be the range of such assistance?
 - Practical issues relating to setting up an international arbitration defense.
 - Advice about the internal organization of government defense efforts (cost estimates, technical ability requirements, staffing considerations, etc.).
 - Selection of procurement procedures and selection of counsel or arbitrators.
 - Technical assistance at various stages of the procedure.
 - i. Discovery (e.g., to understand corporate value chain, identity of investors)
 - ii. Valuation and damages
 - iii. Due diligence on counsel/arbitrators
 - Direct legal representation.
 - i. Shaping/informing arguments and strategy
 - ii. Doing legal research sought by the state
 - iii. Writing briefs
 - iv. Reviewing/editing briefs written by state counsel
 - v. Arguing motions or hearings
 - Should the institution be able to assist in inter-state disputes?
 - Should the institution be able to assist in the pursuit of counterclaims?
 - Any other (please specify).
- (3) What would be the key factors or criteria that must be addressed to ensure that the results of

services undertaken by an aid institution that performs direct representation are equivalent in quality to those performed by private sector practitioner?

- (4) Do you see questions re quality? If so, how could those questions be resolved?
- (5) Do you see possible conflicts of interest for an aid institution to provide the services detailed above? If so, how could these conflicts be avoided?
- (6) Would you be willing to pay to use such a institution? (e.g., if rates were tied to prevailing rates for legal services in your country) Would you be willing to contribute to the cost of running such a center?

d. Post-Award Processes

- (1) Do you see a role for an aid institution to be involved in post-award processes (e.g., collecting on adverse cost awards)? If so, what types of support would be useful after the conclusion of a dispute process?
- (2) Should recipients of service from an aid institution be bound to accept and enforce the results of ISDS awards? Would any such requirement decrease the legitimacy and usefulness of the institution?

e. Services for Investors

- (1) Do you believe that an aid institution should make available services for small and medium sized enterprises (SMEs)?
- (2) What do you think about an aid institution providing any of the following to SMEs?
 - Specific technical assistance (e.g., providing a hotline for answering idiosyncratic questions about IIA obligations).
 - Access to ADR (e.g., providing mediation services).
 - Access to legal training and capacity-building services provided by the Facility.
 - Legal assistance in the pursuit of claims
 - Legal assistance in the defense of counterclaims.
 - A small claims facility to help fund cases by SMEs for low damage amounts
 - Specific rules for small claims to help speed processes.
 - An SME-specific facility to help fund cases for low damage amounts.
- (3) Would you be comfortable with an aid institution providing assistance to both States and SMEs that bring claims against those States? If so in what contexts? And if not, why?

III. GENERAL QUESTIONS

- (1) Outcomes of Negotiations
 - a. Do you feel that outcomes in negotiations are good and fair?
 - b. If you see issues, do they arise due to a lack of capacity of/support for one or more of the negotiating states?

- (2) Outcomes of ISDS
 - a. Do you feel that outcomes of ISDS are good and fair?
 - b. If you see issues, do they arise due to a lack of capacity of/support for one of the disputing parties?
- (3) If the answer to 1(b) or 2(b) is yes, do you feel that issues would be best addressed by (1) directly assisting disadvantaged parties (e.g., through external advice), or (2) building in-house capacity in affected nation-states. (Solicit other thoughts here?)
- (4) How do you feel about the current situation regarding international investment agreements? Do you think that the current international investment regime is fair?
- (5) What do you think about legitimacy challenges that international investment treaties, international investment law and the investor-State arbitration system are currently facing?
- (6) What do you feel are the primary legitimacy challenges international investment agreements face?
- (7) Do you feel that your country receives benefits from IIAs?
 - a. What benefits do you feel your country receives?
 - b. Do you feel that the resources and technical capacity your country has devoted towards IIA disputes are proportionate to the benefits of international investment agreements that your country and its residents receive?
- (8) Do you believe that ISDS *procedurally* disadvantages any of the following stakeholders (e.g., lack of technical or financial capacity to use ISDS mechanisms, lack of access to impartial arbitrators, conflicts of interest between arbitral counsel and clients, etc.)? If so, what are the procedural mechanisms (including costs, forum selection, etc.) that you believe generate this disadvantage?
 - a. Sovereign countries (either developed or less developed)
 - b. Citizens of sovereign countries
 - c. Subnational government entities, like municipalities
 - d. Domestic companies
 - e. Foreign investors
- (9) Do you believe that the *substance* of IIAs disproportionately disadvantage any of the following stakeholders? If so, what are the substantive rules (arbitral definitions of "takings," for example) that generate this disadvantage?
 - a. Sovereign countries (either developed or less developed)
 - b. Citizens of sovereign countries
 - c. Subnational government entities, like municipalities
 - d. Domestic companies
 - e. Foreign investors
- (10) What changes to either the procedure or substance of IIAs do you believe would have the greatest impact on the concerns that you have expressed about the IIA system?

Endnotes

- 1 The term “ISDS” is used throughout this 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.
- 2 The term “Assistance Mechanism” is used throughout this Scoping Study as a generic term that is meant to embody both the singular and/or plural – one or more entities, programs, or organizations that could be created or established to achieve desired objectives.
- 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. CCSI conducted interviews with government officials directly involved in investment policy-making, the negotiation of investment agreements, and/or the defense of investor-state claims from at least five states included in each economic classification.
- 4 Some of the private practitioners interviewed have experience in representing states in ISDS or other investment-law related matters, some in representing investors, and some in representing both states and investors. Several private practitioner interviewees have formerly acted as governmental officials working on investment law matters.
- 5 NGOs interviewed varied in their focus and primary constituency. For example, several NGOs provide technical assistance to states on IIA and ISDS matters. Others focus on governance, labor, environmental, and human rights issues as they are impacted by and relate to international investment law.
- 6 Todd Allee and Clint Peinhart, ‘Contingent Credibility: The Impact of Investment Treaty Violations on Foreign Direct Investment’ (2011) 65 International Organization 401 (calculating drops in FDI associated with even ultimately unsuccessful claims); but see Andrew Kerner and Krzysztof Pelc, ‘Do Investor State Disputes Harm FDI?’ (2019) Working paper, McGill University (finding that investment disputes do not harm FDI because the signaling function of an ISDS claim against a government is no longer significant).
- 7 UNCITRAL, ‘Possible Reform of Investor-State Dispute Settlement (ISDS)—Cost and Duration’ (2018) A/CN.0/WG.III/W.P.153.
- 8 Malcolm Langford, Daniel Behn and Laura Létourneau-Tremblay, ‘Empirical Perspectives on Investment Arbitration: What Do We Know? Does It Matter?’ (2019) ISDS Academic Forum Working Group 7 Paper, 3-4.
- 9 In absolute terms, government revenue and expenditures of large developing countries such as India and Brazil may be greater than some developed states. However, that does not generally hold true for revenue and expenditure on a per capita basis, or as a share of GDP. For this data, see generally, <https://data.oecd.org/government.htm>; OECD, OECD Factbook 2015-2016; ourworldindata.org. For 2015, for instance, according to the data at data.oecd.org, Mexico, Costa Rica, and Colombia spend least among OECD countries per capita, but as a percentage of GDP, Chile, Ireland and Colombia spend least. Data for Mexico on spending as a percentage of GDP, however, was not present; and Costa Rica spent more than as a percentage of GDP than Ireland and Korea.
- 10 UNCITRAL, ‘Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-seventh session (New York, 1-5 April 2019) A/CN.9/970; 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.
- 11 Interview with lower middle-income government official conducted on 4 April 2019 (on file with authors); Interview with individual with experience with existing Assistance Mechanism for states in ISDS conducted on 7 June 2019 (on file with authors).
- 12 Interview with individual with experience with existing Assistance Mechanism for states in ISDS conducted on 7 June 2019 (on file with authors); Interview with lower middle-income government official conducted on 25 April 2019 (on file with authors).
- 13 Interview with individual with experience with existing Assistance Mechanism for states in ISDS conducted on 7 June 2019 (on file with authors); Interview with low-income government official conducted on 30 October 2019 (on file with authors).
- 14 Interview with lower middle-income government official conducted on 25 April 2019 (on file with authors). One interviewee familiar with an existing Assistance Mechanism stated that “Classroom sessions were completely useless; I felt like they had zero impact, and we did a lot of that for a couple of years.” Interview with individual with experience with existing Assistance Mechanism for states in ISDS conducted on 7 June 2019 (on file with authors). A lower-middle income government official agreed that “the key is efficient capacity building.” Interview with lower-middle income government official conducted on 4 April 2019 (on file with authors).
- 15 Interview with private practitioner conducted on 30 April 2019 (on file with authors).
- 16 Interview with private practitioner conducted on 30 April 2019 (on file with authors); Interview with

- 17 upper middle-income government official conducted on 2 May 2019 (on file with authors).
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.
- 18 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.
- 19 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.
- 20 Tsetetsi 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.
- 21 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.
- 22 Marc L Busch, Eric Reinhardt, and Gregory Shaffer, 'Does Legal Capacity Matter? A Survey of WTO Members' (2009) 8 *World Trade Review* 559.
- 23 Jeremy K. Sharpe, 'Control, Capacity, and Legitimacy in Investment Treaty Arbitration' (2018) 211 *AJIL Unbound* 261.
- 24 For example, TradeLab, and existing Assistance Mechanism, in part seeks to "democratize knowledge" noting that typical counsel may identify a problem with an investor, frame it as a litigation concern, and then "farm[] it out wholesale to a foreign lawyer or law firm may do more harm than good." By removing the matter from the hands of the government officials and their stakeholders, in-country ownership is reduced, and this makes learning and interaction, such as empowering government officials and local law firms, more difficult. In turn, this reduces the ability to find an agreed solution to problems, because parties refer discussions to their lawyers, and this kind of "over-legalization" then becomes a risk to long-term, sustainable, out-
- 25 Tsetetsi 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.
- 26 One interviewee noted that efforts to develop an advisory center must be (perceived to be, and actually be) representative and viewed from the perspective of a broad range of potential users to have legitimacy, and cautioned that the advisory center effort already risks being placed in a context that largely ignores Asia and other areas of the world. For example, UNCITRAL's WGIII, which is currently considering an advisory center, takes place in Vienna and New York (notwithstanding the intersessional meetings in South Korea, the Dominican Republic and Guinea), and now there is a North American based institution conducting a study for a European country on the needs of particular (and particularly developing) states. This interviewee has advised that these perceptions are important. Interview with academic conducted on 29 April 2019 (on file with authors). On the question of whose concerns a mechanism will respond to, one interviewee stated, for example "to be told 'this is the option where the funding will be available to you' is not empowering." Interview with NGO with experience working with developing countries conducted on 4 April 2019 (on file with authors). Another noted that it is important to be conscious of any "disconnect" between "big-thinkers" and users of a mechanism. Interview with individual with experience with existing Assistance Mechanism for states in ISDS conducted on 26 April 2019 (on file with authors).
- 27 The 2030 Agenda for Sustainable Development recognizes the need for governments to encourage "financial flows, including foreign direct investment, to States where the need is greatest," and to "[a]dopt and implement investment promotion regimes for least developed countries." UN General Assembly, 'Transforming Our World: The 2030 Agenda for Sustainable Development' (2015) A/RES/70/1. Notably, the 17 sustainable development goals are accompanied by 169 specific targets and 230 indicators, many of which specifically focus on the important role of foreign direct investment in achievement of the goals.
- 28 Interview with lower middle-income government official conducted on 25 April 2019 (on file with authors).
- 29 There has been increasing criticism of the restrictions on access to academic research that result from the prices charged by academic publishers. As

- recounted by one reporter, “the largest academic publisher, Elsevier, regularly has a profit margin between 35-40%, which is greater than Google’s. With financial capacity comes power, lobbyists, and the ability to manipulate markets for strategic advantages – things that underfunded universities and libraries in poorer countries do not have.” Jason Schmitt, ‘Paywalls Block Scientific Progress: Research Should Be Open to Everyone’ The Guardian (28 March 2019).
- 30 Policy briefing on WIR 2019 with a Focus on SD-oriented IIIA Reform presented by Elisabeth Tuerk, Chief, International Investment Agreements Section, Division on Investment and Enterprise, UNCTAD, 16-17 October 2019, Vienna.
- 31 UNCTAD Investment Policy Hub, Investment Policy Framework for Sustainable Development, <<https://investmentpolicy.unctad.org/investment-policy-framework>> accessed 24 July 2019. The Investment Policy Framework for Sustainable Development was launched in 2012 and re-launched in 2015 at the Financing for Development Conference in Addis Ababa. UNCTAD continuously updates its policy advise to account for new developments and lessons learned.
- 32 UNCTAD Investment Policy Hub, Investment Policy Framework for Sustainable Development, <<https://investmentpolicy.unctad.org/investment-policy-framework>> accessed 24 July 2019.
- 33 UNCTAD Investment Policy Hub, Investment Policy Framework for Sustainable Development, <<https://investmentpolicy.unctad.org/investment-policy-framework>> accessed 24 July 2019.
- 34 UNCTAD Investment Policy Hub, Investment Policy Framework for Sustainable Development, <<https://investmentpolicy.unctad.org/investment-policy-framework>> accessed 24 July 2019.
- 35 UNCTAD Investment Policy Hub, Investment Policy Framework for Sustainable Development, <<https://investmentpolicy.unctad.org/investment-policy-framework>> accessed 24 July 2019.
- 36 UNCTAD, World Investment Report 2019: Special Economic Zones, Figure III.8 (2019).
- 37 UNCTAD Investment Policy Hub, Investment Policy Reviews, <<https://investmentpolicy.unctad.org/investment-policy-review>> accessed 24 July 2019.
- 38 UNCTAD Investment Policy Hub, Investment Policy Reviews, <<https://investmentpolicy.unctad.org/investment-policy-review>> accessed 24 July 2019.
- 39 UNCTAD Investment Policy Hub, Investment Policy Reviews, <<https://investmentpolicy.unctad.org/investment-policy-review>> accessed 24 July 2019.
- 40 UNCTAD Investment Policy Hub, Investment Policy Reviews, <<https://investmentpolicy.unctad.org/investment-policy-review>> accessed 24 July 2019.
- 41 UNCTAD Investment Policy Hub, Investment Policy Framework for Sustainable Development, <<https://investmentpolicy.unctad.org/investment-policy-framework>> accessed 24 July 2019.
- 42 UNCTAD Investment Policy Hub, Investment Policy Framework for Sustainable Development, <<https://investmentpolicy.unctad.org/investment-policy-framework>> accessed 24 July 2019.
- 43 Independent Evaluation of the Development Account Project, “Strengthening the Capacity of Developing Country Policy Makers, Investment Promotion Officials and Academia in Two Priority Sectors to Attract Investment for Sustainable and Inclusive Development (DA Project 1415R), UNCTAD Evaluation and Monitoring Unit (Dec. 2018) Para 3, 6.
- 44 Independent Evaluation of the Development Account Project, “Strengthening the Capacity of Developing Country Policy Makers, Investment Promotion Officials and Academia in Two Priority Sectors to Attract Investment for Sustainable and Inclusive Development (DA Project 1415R), UNCTAD Evaluation and Monitoring Unit (Dec. 2018) Para 20.
- 45 Independent Evaluation of the Development Account Project, “Strengthening the Capacity of Developing Country Policy Makers, Investment Promotion Officials and Academia in Two Priority Sectors to Attract Investment for Sustainable and Inclusive Development (DA Project 1415R), UNCTAD Evaluation and Monitoring Unit (Dec. 2018) Para 20.
- 46 Independent Evaluation of the Development Account Project, “Strengthening the Capacity of Developing Country Policy Makers, Investment Promotion Officials and Academia in Two Priority Sectors to Attract Investment for Sustainable and Inclusive Development (DA Project 1415R), UNCTAD Evaluation and Monitoring Unit (Dec. 2018), Annexes attached to UNCTAD’s Work Programme on International Investment Agreements, Activities Report (2017).
- 47 OECD, OECD Investment Policy Reviews, <<https://www.oecd.org/investment/countryreviews.htm>> accessed 24 July 2019.
- 48 OECD Declaration on International Investment and Multinational Enterprises (adopted by the Governments of OECD Member countries on 21 June 1976).
- 49 OECD, ‘Policy Framework for Investment: From Advice to Action’ (2016) OECD, 2.
- 50 OECD, OECD Investment Policy Reviews, <<https://www.oecd.org/investment/countryreviews.htm>> accessed 24 July 2019.
- 51 OECD, ‘Policy Framework for Investment: From Advice to Action’ (2016) OECD, 2.
- 52 OECD, ‘Policy Framework for Investment: From Advice to Action’ (2016) OECD, 2.
- 53 OECD, ‘Policy Framework for Investment: From Advice to Action’ (2016) OECD, 2.
- 54 OECD, ‘Policy Framework for Investment: From Advice to Action’ (2016) OECD, 2.
- 55 OECD, Investment for development: Regional and country initiatives, <<http://www.oecd.org/daf/inv/investment-global-outreach.htm>> accessed 12 August 2019.
- 56 OECD, Freedom of Investment at the OECD, <<http://www.oecd.org/daf/inv/investment-policy/foi.htm>> accessed 30 July 2019.
- 57 OECD, Investment, <<http://www.oecd.org/investment/>> accessed 12 August 2019.
- 58 World Bank Group, ‘Investment Policy and Promotion: Attracting Foreign Investment and Maximiz-

- ing Impact for the Local Economy' (2019).
- 59 World Bank Group, 'Investment Policy and Promotion: Attracting Foreign Investment and Maximizing Impact for the Local Economy' (2019). One recent study has found that governments that receive technical assistance from the World Bank's Foreign Investment Advisory Service are more likely to include investment arbitration, including advance consent to investment arbitration, in their domestic laws, as advised by the WBG. Tarald Laudal Berge and Taylor St. John, 'Translating International Templates into Domestic Laws: The World Bank and National Investment Laws with Arbitration' PluriCourts research paper (forthcoming 2019) (on file with authors). This result is explained by the World Bank's ability to define and promote "international best practice."
- 60 Notably, the World Bank's Independent Evaluation Group found that the World Bank's investment climate reforms, programs, and projects focused too narrowly on reforms that would benefit certain businesses and too little on ensuring the broader social value of those World Bank initiatives. See World Bank Group, Independent Evaluation Group, 'Private Sector Development: Recent Lessons from Independent Evaluation' (2016), 6 ("Analysis showed that, within the limits of the available measures of investment climate indicators, the Bank Group had been successful in improving the investment climate in client countries, as measured by the number of laws enacted, streamlining of processes and time, or simple cost savings for private firms. However, the impact on investments, jobs, business formation, and growth and the social value of regulatory reforms—that is, their implications for inclusion and shared prosperity as reflected in results—had not been properly included in the design of reforms and assessment of their impact. Instead, Bank Group support focused predominantly on reducing costs to businesses."); World Bank Group, Independent Evaluation Group, 'Investment Climate Reforms: An Independent Evaluation of World Bank Group Support to Reforms of Business Regulations (2015), 97-115.
- 61 World Bank Group, International Bank for Reconstruction and Development, <<https://www.worldbank.org/en/who-we-are/ibrd>> accessed 24 July 2019.
- 62 World Bank Group, International Bank for Reconstruction and Development, <<https://www.worldbank.org/en/who-we-are/ibrd>> accessed 24 July 2019.
- 63 World Bank Group, International Development Association, <<http://ida.worldbank.org/>> accessed 24 July 2019.
- 64 World Bank Group, International Finance Corporation, <https://www.ifc.org/wps/wcm/connect/corp_ext_content/ifc_external_corporate_site/home> accessed 24 July 2019.
- 65 World Bank Group, Multilateral Investment Guarantee Agency, <<https://www.miga.org/>> accessed 24 July 2019.
- 66 While the only other World Bank Group institution, the International Center for Settlement of Investment Disputes, is not included in this list, to the extent an investment that had been supported by other WBG institutions were to be the subject of a dispute at IC-SID, there may be at a minimum a perceived conflict of interest within the WBG.
- 67 World Bank Group, Maximizing Finance for Development (MFD), <<https://www.worldbank.org/en/about/partners/maximizing-finance-for-development>> accessed 24 July 2019.
- 68 International Institute for Sustainable Development, Annual Forum of Developing Country Investment Negotiators, <<https://www.iisd.org/project/annual-forum-developing-country-investment-negotiators>> accessed 29 July 2019.
- 69 Columbia Center on Sustainable Investment, Executive Training on Investment Treaties and Arbitration for Government Officials, <<http://ccsi.columbia.edu/work/projects/arbitration-training/>> accessed 29 July 2019.
- 70 OECD, Freedom of investment at the OECD, <<http://www.oecd.org/daf/inv/investment-policy/foi.htm>> accessed 29 July 2019.
- 71 IDLO, Investment Support Programme for Least Developed Countries, <<https://www.idlo.int/Investment-Support-Programme-LDCs>> accessed 25 July 2019.
- 72 TradeLab, Home, <<https://www.tradelab.org/>> accessed 25 July 2019.
- 73 Interview with individual with experience with existing Assistance Mechanism conducted on 7 June 2019 (on file with authors).
- 74 Interview with NGO with experience working with developing countries conducted on 4 April 2019 (on file with authors).
- 75 Interview with NGO with experience working with developing countries conducted on 4 April 2019 (on file with authors); Interview with upper middle-income country conducted on 9, 10 May 2019 (on file with authors).
- 76 Interview with NGO with experience working with developing countries conducted on 4 April 2019 (on file with authors).
- 77 Interview with individual with experience with existing Assistance Mechanism for states in ISDS conducted on 7 June 2019 (on file with authors); Interview with NGO with experience working with developing countries conducted on 4 April 2019 (on file with authors).
- 78 Interview with high-income government official conducted on 4 April 2019 (on file with authors); Nora Plaisier and Paul Wijmenga, 'Evaluation of Trade-Related Technical Assistance, Three Geneva Based Organizations: ACWL, AITC, and QUNO' (2004) IOB Working Document.
- 79 Interview with lower middle-income government official conducted on 4 April 2019 (on file with authors); Nora Plaisier and Paul Wijmenga, 'Evaluation of Trade-Related Technical Assistance, Three Geneva Based Organizations: ACWL, AITC, and QUNO' (2004) IOB Working Document.
- 80 Interview with NGO with experience working with

- developing countries conducted on 4 April 2019 (on file with authors).
- 81 Interview with individual who has worked at an arbitration center conducted 21 May 2019 (on file with authors).
- 82 Interview with upper middle-income country government official conducted on 4 April 2019 (on file with authors).
- 83 Interview with NGO with experience working with developing countries conducted on 4 April 2019 (on file with authors).
- 84 Interview with NGO with experience working with developing countries conducted on 4 April 2019 (on file with authors).
- 85 Interview with lower middle-income government official conducted on 25 April 2019 (on file with authors).
- 86 Interview with lower middle-income government official conducted on 25 April 2019 (on file with authors).
- 87 Interview with lower middle-income government official conducted on 25 April 2019 (on file with authors); Interview with NGO with experience working with developing countries conducted on 4 April 2019 (on file with authors).
- 88 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.
- 89 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.
- 90 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. Brazil, for example, which has not ratified any treaties containing ISDS provisions, is one example of a country that has maintained adherence to its own domestic policy preferences on how IIAs will be used.
- 91 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.
- 92 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.
- 93 See also Julia Seiermann, 'Only Words? How Power in Trade Agreement Texts Affects International Trade Flows' (2018) UNCTAD Research Paper No. 26, UNCTAD/SER.RP/2018/8.
- 94 Malcolm Langford, Daniel Behn and Laura Létourneau-Tremblay, 'Empirical Perspectives on Investment Arbitration: What Do We Know? Does It Matter?' (2019) ISDS Academic Forum Working Group 7 Paper, 4 ("The litigation is also unidirectional across development status. For example, there is no decided case in which a clamant-investor from a middle or low-income state has sued a high-income state.").
- 95 Interview with lower middle-income government official conducted on 25 April 2019 (on file with authors).
- 96 For more in-depth analysis and some criticism of these negotiating rounds see Lauge Poulsen, *Bounded Rationality and Economic Diplomacy: The Politics of Investment Treaties in Developing Countries* (Cambridge University Press 2015) (hereafter Poulsen, *Bounded Rationality*) 91-99.
- 97 UNCTAD, *World Investment Report 2019: Special Economic Zones*, Figure III.8 (2019).
- 98 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.
- 99 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.
- 100 As compared to other government measures, however, taxation measures are relatively frequently excluded from IIAs, or from certain obligations (e.g., FET) or aspects (ISDS) of the treaties.
- 101 Interview with government officials conducted on 4 April 2019 (on file with authors) (example of lack of cross-ministerial investment law sensitivity given by high-income government official).
- 102 Peru, for instance, has invested specifically in dispute prevention projects. One project was an electronic platform that would provide information

- about IIAs to which Peru was a party, and enable investors and public officials to provide early warnings of brewing disputes. Another project “focused on the design of a capacity building program aimed at training public officials, at all levels of government, on issues related to the prevention of international investment disputes,” and providing “guidance on [IIA] commitments” and a “prevention manual for” ISDS disputes. Magrit F. Cordereo Hiar, ‘Peruvian State’s Strategy for Addressing Investor State Disputes, Investment Policy Brief’ (2016) South Centre no.6, 2. Yet, as noted by the author of the policy brief describing those initiatives, a Legal Advisor in the Special Commission that represents the State of Peru in international investment disputes, the dispute prevention system still “faces major hurdles due to multiple challenges arising from ISDS. Indeed, after the establishment of SICRECI, Peru continued to face a rising number of ISDS cases.” Magrit F. Cordereo Hiar, ‘Peruvian State’s Strategy for Addressing Investor State Disputes, Investment Policy Brief’ (2016) South Centre no.6, 5.
- 103 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.
- 104 Mavluda Sattorova, *The Impact of Investment treaty Law on Host States: Enabling Good Governance?* (Hart Publishing 2018) 85.
- 105 Mavluda Sattorova, *The Impact of Investment treaty Law on Host States: Enabling Good Governance?* (Hart Publishing 2018) 85; 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.
- 106 See Lise Johnson, ‘Space for Local Content Policies and Strategies: A Crucial Time to Revisit an Old Debate’ (2017) (noting that definitions of local content are unclear).
- 107 A review of some countries’ lists of non-conforming measures provisions helps illustrate the scope of policy areas states perceive their liberalization provisions can directly impact.
- 108 Interview with a high-income government official conducted on 31 May 2019 (on file with authors).
- 109 See, e.g., UNCTAD, ‘International Investment Policy-making in Transition: Challenges and Opportunities of Treaty Renewal’ (2013) IIA Issues Note, No. 4, UNCTAD/WEB/DIAE/PCB/2013/8; USAID and Asia-Pacific Economic Cooperation, ‘Investor-State Dispute Prevention Strategies’ (2013); UNCTAD, ‘Best Practices in Investment for Development: How to Prevent and Manage Investor-State Disputes, Lessons from Peru’ (2011) Investment Advisory Series B, no. 10; UNCTAD, ‘Investor-State Disputes: Prevention and Alternatives to Arbitration, New York and Geneva’ (2010) UNCTAD Series on International Investment Policies for Development.
- 110 See UNCTAD, *Issues in International Investment Agreements (Second Series)*, <[https://unctad.org/en/Pages/Publications/Intl-Investment-Agreements---Issue-Series-II-\(Revised-Editions---Sequels\).aspx](https://unctad.org/en/Pages/Publications/Intl-Investment-Agreements---Issue-Series-II-(Revised-Editions---Sequels).aspx)> accessed 29 July 2019.
- 111 UNCTAD, *Investor-State Dispute Settlement: Review of Developments in 2017*, IIA Issues Note, (2018).
- 112 See for example TradeLab, *Projects*, <<https://www.tradelab.org/projects>> accessed 30 July 2019.
- 113 Vienna Convention on the law of treaties concluded at Vienna on 23 May 1969 (1969) No. 18232, art 31(3) (1)(b); Interview with academic conducted on 4 April 2019 (on file with authors).
- 114 Anthea Roberts, ‘Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States’ (2010) 104 *American Journal of International Law*, 179; see also Taylor St John and Geoffrey Gertz, ‘State Interpretations of Investment Treaties: Feasible Strategies for Developing Countries’ (2015) Oxford GEG Policy Brief; Lise Johnson and Merim Razbaeva, ‘State Control over Interpretation of Investment Treaties’ (2014) Columbia Center on Sustainable Investment Policy Paper; Lise Johnson, ‘Ripe for Refinement: The State’s Role in Interpretation of FET, MFN, and Shareholder Rights’ (2015) GEG Working Paper 101; Susan D. Franck, *Arbitration Costs: Myths and Realities in Investment Treaty Arbitration* (Oxford University Press 2019).
- 115 See e.g. *Mesa Power Group v Canada*, UNCITRAL, PCA Case No. 2012-17, Canada Observations on the Bilcon Award, 14 May 2015; Mexico Submission on the Bilcon award, 12 June 2015; United States Submission on the Bilcon Award, 12 June 2015.
- 116 India, for instance, proposed a Joint Interpretive Statement to dozens of its treaty parties, setting forth its understanding of a number of treaty provisions. UNCTAD, ‘Recent Developments in the International Investment Regime’ (2018) IIA Issues Note, 6.
- 117 Anthea Roberts, ‘Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States’ (2010) 104 *American Journal of International Law*, 179; see also Taylor St John and Geoffrey Gertz, ‘State Interpretations of Investment Treaties: Feasible Strategies for Developing Countries’ (2015) Oxford GEG Policy Brief; Lise Johnson and Merim Razbaeva, ‘State Control over Interpretation of Investment Treaties’ (2014) Columbia Center on Sustainable Investment Policy Paper; Lise Johnson, ‘Ripe for Refinement: The State’s Role in Interpretation of FET, MFN, and Shareholder Rights’ (2015) GEG Working Paper 101.
- 118 Recent texts that include these provisions include Central America-Korea FTA (2018) arts 9.23(2), 9.24(2); EU-Vietnam Investment Protection Agreement (2019), art 3.42(5); The Kingdom of the Netherlands, ‘Netherlands Draft Model BIT’ (2019) art 24(2).
- 119 Jeremy Sharpe, ‘The Agent’s Indispensable Role in International Investment Arbitration’ (2018) 33 *ICSID Review* 3, 699-700.
- 120 Brazil’s investment treaties contain a number of these features. See, e.g., Brazil-Guyana Bilateral In-

- vestment Treaty (BIT) (2018) arts 18, 20, 24, arts 27-28; Brazil-Chile Free Trade Agreement (FTA) (2018) arts. 8.18-8.20, 8.24, 8.26. See also, e.g., EU-Vietnam Investment Protection Agreement (2019) ch 4.
- 121 See, e.g., Brazil-Chile Free Trade Agreement (FTA) (2018) art 8.19, referring to the establishment of ombudsmen or focal points for collecting and responding to investor concerns; this is a common approach across Brazil's investment agreements; EU-Vietnam Free Trade Agreement (2019) ch 13. While that chapter is in the EU-Vietnam Free Trade Agreement, its title and provisions refer expressly to "investment". Among its provisions, chapter 13 states that the parties "shall, jointly or individually, review, monitor and assess the impact of the implementation of this Agreement on sustainable development through their respective policies, practices, participative processes and institutions" (art 13.13), and "shall convene a new or consult an existing domestic advisory group or groups on sustainable development with the task of advising on the implementation of this Chapter" (art 13.15(4)).
- 122 EU-Vietnam Free Trade Agreement (FTA) (2019) art 13.15(4)-(6).
- 123 See, e.g., David Gaukrodger, 'The Legal Framework Applicable to Joint Interpretive Agreements of Investment Treaties' (2016) OECD Working Papers on International Investment 2016/01; Kathryn Gordon and Joachim Pohl, 'Investment Treaties over Time - Treaty Practice and Interpretation in a Changing World' (2015) OECD Working Papers on International Investment 2015/02.
- 124 As noted, some specific treaties may provide mechanisms with respect to the treaty.
- 125 UNCTAD, 'Fact Sheet on Investor-State Dispute Settlement Cases in 2018' (2019) 2 IIA Issues Note.
- 126 Susan D. Franck, *Arbitration Costs: Myths and Realities in Investment Treaty Arbitration* (Oxford University Press 2019) 101-102.
- 127 Jeremy Sharpe, 'The Agent's Indispensable Role in International Investment Arbitration' (2018) 33 ICSID Review 3, 699-700.
- 128 Interview with lower middle-income government official conducted on 25 April 2019 (on file with authors); Interview with a high-income government official conducted on 31 May 2019 (on file with authors); Interview with upper middle-income government official conducted on 9, 10 May 2019 (on file with authors).
- 129 Interview with private practitioner conducted on 21 May 2019 (on file with authors); Interview with private practitioner conducted on 29 May 2019 (on file with authors).
- 130 Interview with arbitration center conducted on 21 May 2019.
- 131 Report of the High-Level Committee to Review the Institutionalization of Arbitration Mechanism in India (30 July 2017).
- 132 UNCTAD, *Investor-State Disputes: Prevention and Alternatives to Arbitration*, <https://unctad.org/en/pages/PublicationArchive.aspx?publication_id=422> accessed 31 July 2019.
- 133 ICSID, 'Practice Notes for Respondents in ICSID Arbitration' (2015).
- 134 Interview with private practitioner conducted on 21 May 2019 (on file with authors).
- 135 Anna Joubin-Bret, 'Establishing an International Advisory Centre on Investment Disputes?' (2015) International Centre for Trade and Sustainable Development (ICTSD) and World Economic Forum.
- 136 Anna Joubin-Bret, 'Establishing an International Advisory Centre on Investment Disputes?' (2015) International Centre for Trade and Sustainable Development (ICTSD) and World Economic Forum.
- 137 Anton Strezhnev, 'Why Rich Countries Win Investment Disputes: Taking Selection Seriously' (22 September 2017) Unpublished draft (on file with authors).
- 138 Anton Strezhnev, 'Why Rich Countries Win Investment Disputes: Taking Selection Seriously' (22 September 2017) Unpublished draft (on file with authors).
- 139 For example, Bloomberg Philanthropies and its partners provided financial support and technical assistance to the Uruguayan government's legal team when Uruguay was sued by Philip Morris International.
- 140 Interview with private practitioner conducted on 29 May 2019 (on file with authors).
- 141 Interview with individual with experience with an existing Assistance Mechanism for states in ISDS conducted on 24 April 2019 (on file with authors).
- 142 Interview with individual with experience with an existing Assistance Mechanism for states in ISDS conducted on 24 April 2019 (on file with authors).
- 143 Interview with arbitration center conducted on 22 October 2019 (on file with authors).
- 144 Interview with upper middle-income government official conducted on 2 May 2019 (on file with authors).
- 145 Jeremy Sharpe, 'The Agent's Indispensable Role in International Investment Arbitration' (2018) 33 ICSID Review 3, 693.
- 146 Interview with upper middle-income government official conducted on 20 May 2019 (on file with authors).
- 147 Interview with private practitioner conducted on 29 May 2019 (on file with authors).
- 148 Jeremy Sharpe, 'The Agent's Indispensable Role in International Investment Arbitration' (2018) 33 ICSID Review 3, 685-92.
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- 159 For example, CCSI is aware of one high-income government that has hosted a secondee from an upper middle-income country. It remains unclear to the authors the extent to which this model can actually achieve a desired outcome of full-transition to an in-house model. If such a model of capacity-building is considered, more attention should be devoted to understanding how this objective might be achieved, if desired.
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- 168 Catharine Titi, et al., 'Excessive Costs and Insufficient Recovery of Cost Awards' (2019) Academic Forum on ISDS Working Group 1.
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- 172 The concept of a 'hotline,' or an 'on-call' Assistance Mechanism that could support governments without a full procurement process, is discussed further in Section 4.1.4.
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- 175 Interview with private practitioner conducted on 21 May 2019 (on file with authors).
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- 587 Interview with individual with experience with existing Assistance Mechanism for states in ISDS conducted on 7 June 2019 (on file with authors).
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- 589 Interview with individual with experience with existing Assistance Mechanism for states in ISDS conducted on 7 June 2019 (on file with authors);
- 590 Interview with individual with experience with existing Assistance Mechanism for states in ISDS conducted on 22 April 2019 (on file with authors).
- 591 Interview with individual with experience with existing Assistance Mechanism for states in ISDS conducted on 7 June 2019 (on file with authors).
- 592 Interview with individual with experience with existing Assistance Mechanism for states in ISDS conducted on 7 June 2019 (on file with authors). Nora Plaisier and Paul Wijnemga, 'Evaluation of Trade-Related Technical Assistance, Three Geneva Based Organizations: ACWL, AITC, and QUNO'(2004) IOB Working Document, 33 ("A number of delegates noted that ACWL looks at the WTO rules from a development perspective when providing legal advice, which distinguishes them from most other legal advisors.") Users also recognized the extent to which the legal arguments raised reflected policy and political determinations and appreciated the ACWL's understanding of relevant political dynamics. *Ibid* at 21.
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- 595 Interview with individual with experience with existing Assistance Mechanism for states in ISDS conducted on 22 April 2019 (on file with authors).
- 596 One issue to keep in mind is that costs presently associated with international investment law including, in particular, costs of ISDS proceedings, are products of the current system. These costs may fall or rise depending on what, if any, reforms to IIAs and their dispute settlement mechanisms are adopted in connection with ongoing reform discussions.
- 597 An early study, published in June 2004, reported that to that time the time budget had never been exceeded. The time budgets were nevertheless increased slightly after that study. Nora Plaisier and Paul Wijnemga, 'Evaluation of Trade-Related Technical Assistance, Three Geneva Based Organizations: ACWL, AITC, and QUNO'(2004) IOB Working Document.
- 598 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. That document also contains more detailed information on the hours budgeted for each phase.
- 599 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 a large number of 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

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- 603 Data on the number of ISDS cases brought between 1 January 2009 and 31 December 2018 is drawn from UNCTAD, ICSD Case No. UNCT/14/2, <<https://investmentpolicy.unctad.org/investment-dispute-settlement>> accessed 30 July 2019.
- 604 There are also opportunity costs that can arise from law firms' or other pro bono providers' decisions to support IIA-related activities as opposed to other pro bono clients (an issue that cuts across many other topics and models discussed in this paper).
- 605 For instance, the General Assembly of the ACWL adopted in 2015 a decision aiming to make it easier for developed countries to contribute to the ACWL as 'Associate Members' or 'Contributing Observers', instead of requiring countries to go through the process of acceding to the ACWL in order to contribute. The decision provided that any "Contributing observer shall have the right to participate in the General Assembly and to have access to or receive all documents that are available or circulated to ACWL Members," but "does not have the right to make proposals, unless invited to do so, nor participate in decision-making." See ACWL, 'Report on the Thirty-Third Meeting of the General Assembly, held 9 December 2015' (2015) ACWL/GA/R/2015/2, fn 3.
- 606 Interview with private practitioner conducted on 21 May 2019 (on file with authors).
- 607 Interview with private practitioner conducted on 21 May 2019 (on file with authors).
- 608 This issue is discussed further in the sections on existing examples. Those issues of financial viability, however, could change depending on outcomes of ISDS reform discussions. Under each of the funding models, in some contexts, the person or entity bearing the cost can potentially subsequently recover it from an adverse party in litigation. If, for instance, a legal clinic supports a case on a pro bono basis, it may be able to recover from a losing claimant the costs it incurred in providing that support; similarly, if a law firm supports a case at discounted rates (paid for by the respondent state or a third-party donor), fees paid for that defense may also be recoverable from the claimant. Yet at present, recoverability of fees is uncertain (especially so for respondent states). ISDS reform that addresses fee shifting and recoverability could have important consequences for the viability of some funding models covered briefly above and discussed in more detail below.
- 609 Interview with individual with experience with existing Assistance Mechanism for states in ISDS conducted on 7 June 2019 (on file with authors).
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- 616 Interview with individual with experience with existing Assistance Mechanism for states in ISDS conducted on 26 April 2019 (on file with authors).
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- 618 IDLO, Launch of the Investment Support Programme for the Least Developed Countries: Summary of the Debate, <<https://www.idlo.int/news/highlights/launch-investment-support-programme-least-developed-countries-summary-debate>> accessed 22 July 2019.
- 619 Email from David Tanenbaum, Director, ISP/LDCs, to undisclosed recipients, 3 December 2019 (on file with authors).
- 620 Interview with individual with experience working for an arbitral institution conducted on 22 October 2019 (on file with authors).
- 621 Interview with individual with experience working for an arbitral institution conducted on 22 October 2019 (on file with authors).
- 622 Interview with individual with experience working for an arbitral institution conducted on 22 October 2019 (on file with authors).
- 623 Interview with individual with experience working for an arbitral institution conducted on 22 October 2019 (on file with authors).
- 624 Interview with individual with experience working for an arbitral institution conducted on 22 October 2019 (on file with authors).
- 625 Reports available at United Nations, Secretary-General's Trust Fund to Assist States in the Settlement of Disputes through the International Court of Justice, <<https://www.un.org/law/trustfund/trustfund.htm>> accessed 22 July 2019.
- 626 Gbenga Oduntan, 'Access to Justice in International Courts for Indigent States, Persons and Peoples' (2019) Indian Journal of International Law.
- 627 Gbenga Oduntan, 'Access to Justice in International Courts for Indigent States, Persons and Peoples' (2019) Indian Journal of International Law Section 3 (citing Richard J. Rogers, 'Assessment of the ICC's Legal Aid System' (2017) Global Diligence LLP, 9-10).
- 628 Gbenga Oduntan, 'Access to Justice in International Courts for Indigent States, Persons and Peoples' (2019) Indian Journal of International Law Section 3

- (citing Richard J. Rogers, 'Assessment of the ICC's Legal Aid System,' (2017) Global Diligence LLP, 9-10).
- 629 ACWL, 'Report of the Task Force' (2015) ACWL/GA/W/2015/5, 19. See also Table 10 above.
- 630 For a discussion of some of these issues, see ACWL, 'The Governance of the ACWL: A Note By The Management Board' (2015) AWWL/MB/W/2015/20.
- 631 It was said, for instance, that because the ACWL supports cases against developed donor governments, that can raise some nearer term issues for those governments. Nevertheless, its longer-term objectives were in line with the interests of developed country governments in that, overall, the ACWL aimed to help support developing country governments participate in and enforce the rules of the WTO system, including by bringing claims. By enabling claims to be brought, the ACWL, can help advance the WTO's market opening function.
- 632 Nora Plaisier and Paul Wijmenga, 'Evaluation of Trade-Related Technical Assistance, Three Geneva Based Organizations: ACWL, AITC, and QUNO'(2004) IOB Working Document, 33. In 2017, the Canadian representative at an ACWL General Assembly meeting stated that "the Canadian government had recently launched its new Feminist International Assistance Policy (FIAP), positioning gender equality and the empowerment of women and girls at the heart of Canada's international assistance efforts. ... He stated that any decision by Canada to financially contribute to the ACWL activities would have to be made in accordance with the FIAP." United Kingdom of Great Britain and Northern Ireland, 'Voluntary National Review of Progress Toward the Sustainable Development Goals' (2019) 202, citing funding for the ACWL as one of the activities advancing SDG Target 16.8.
- 633 See Australian Department of Foreign Affairs and Trade, 'National Interest Analysis [2010] ATNIA 24: Accession to the Agreement Establishing the Advisory Centre on WTO Law, done at Seattle on 30 November 1999' (1999), para 8.
- 634 See Australian Department of Foreign Affairs and Trade, 'National Interest Analysis [2010] ATNIA 24: Accession to the Agreement Establishing the Advisory Centre on WTO Law, done at Seattle on 30 November 1999' (1999), para 10 (noting that becoming a member of the ACWL would enable Australia to 'promote Australian foreign and trade policy interests' and contribute to the work of the ACWL by participating in deliberations and engaging in decision-making); see also Australian Parliamentary Joint Committee on Treaties, 'Report 115 tabled on 21 March 2011' (2011), paras 11.7, 11.18, 11.23.
- 635 One state said that it could not financially support a mechanism engaged in dispute resolution for this reason. Interview with high income country conducted on 13 June 2019 (on file with authors).
- 636 One interviewee from an international organization said, for instance: "A lot of these cases also involve corruption; would a Center go out and represent the most corrupt governments because they have the most cases against them, and then other less-corrupt states pay for that aid? What if states are funding defense against their own investors?" Interview with a private practitioner conducted on 4 April 2019 (on file with authors).
- 637 See, e.g. Damien Charlotin and Jarrod Hepburn, 'US Courts Diverge from ICSID Annulment Committee on Venezuela's Representation in International Disputes' Investment Arbitration Reporter (23 May 2019). Also illustrating these issues, in a recent ISDS case against Libya, the tribunal retracted a settlement agreement that it had previously entered as an ISDS award between the claimant investor and, purportedly, the government of Libya. The retraction decision was based on the tribunal's post-award determination that the settlement agreement had not been agreed by the appropriate Libyan authorities. Damien Charlotin, 'Revealed: Reasons Why Bit Tribunal Retracted 2016 Consent Award; Confusion Swirling Around Libya's True Government had Offered Opportunity for Investor to Strike What Tribunal Initially Viewed as a Respondent-Authorized Settlement' Investment Arbitration Reporter (25 July 2019).
- 638 See Haley J. Swedlund, 'Can Foreign Aid Donors Credibly Threaten to Suspend Aid? Evidence From a Cross-National Survey of Officials' (2017) 24 Review of International Political Economy 454-496 (discussing circumstances in which some donors might suspend aid).
- 639 Tied aid is aid offered on the condition that it be used to procure goods or services from the provider of the aid. It is criticized for its negative impacts on sustainable development objectives. See e.g. OECD, Untied Aid <<https://www.oecd.org/dac/financing-sustainable-development/development-finance-standards/untied-aid.htm>> accessed 6 August 2019.
- 640 ACWL, 'Report on the Thirty-Third Meeting of the General Assembly' (2015) ACWL/GA/R/2015/2, 7-9. See also Nora Plaisier and Paul Wijmenga, 'Evaluation of Trade-Related Technical Assistance, Three Geneva Based Organizations: ACWL, AITC, and QUNO'(2004) IOB Working Document, at 31 (assessing the ACWL based on the extent to which it has contributed to the formulation of a national policy of the developing country at the interface of trade and development), and 32 (noting different questions for evaluating the ACWL, based on the extent to which they supported Dutch funding objectives and/or the objectives of the ACWL, thereby also signaling that the two sets of objectives are not necessarily the same).
- 641 ACWL, 'Report on the Thirty-Third Meeting of the General Assembly' (2015) ACWL/GA/R/2015/2, 8-9.
- 642 Nora Plaisier and Paul Wijmenga, 'Evaluation of Trade-Related Technical Assistance, Three Geneva Based Organizations: ACWL, AITC, and QUNO'(2004) IOB Working Document, 7 (noting that a "number of developed countries cannot be convinced of the benefits of funding ACWL; they feel that they would fund their opponents in the dispute settlement system").
- 643 Some of the issues relating to the nature of cases

- and outcomes supported may be particularly relevant to development agency support. In 2017, for instance, the Canadian representative at an ACWL General Assembly meeting stated that “the Canadian government had recently launched its new Feminist International Assistance Policy (FIAP), positioning gender equality and the empowerment of women and girls at the heart of Canada’s international assistance efforts. ... He stated that any decision by Canada to financially contribute to the ACWL activities would have to be made in accordance with the FIAP.” The representative from Australia similarly stated that Australia’s “decision on the funding of the ACWL ... would be taken on the basis of the development outcomes resulting from the ACWL’s work ACWL.” ACWL, ‘Report on the Thirty-Sixth Meeting of the General Assembly’ (2017) ACWL/GA/R/2017/1, 4. For some discussions of issues and indicators relevant for monitoring and evaluating the ACWL see e.g. Nora Plaisier and Paul Wijmenga, ‘Evaluation of Trade-Related Technical Assistance, Three Geneva Based Organizations: ACWL, AITC, and QUNO’ (2004) IOB Working Document, 5 (noting challenges with using number of cases supported by the ACWL and outcomes of disputes as indicators of success), and 31 (evaluating the ACWL based on whether it has contributed to developing country policy-making at the interface of trade and development).
- 644 During one consultation with governments, it was said, “We often see that firms don’t want to bring certain arguments because internally they also represent claimants. You need to know what other claims the lawyer is managing and whether there are issue conflicts. Firms in multiple cases might not bring effective arguments because they might be undercut.”
- 645 See Section 5.1.1, supra.
- 646 Interview with individual with experience with existing Assistance Mechanism for states in ISDS conducted on 7 June 2019 (on file with authors).
- 647 Interview with individual with experience with existing Assistance Mechanism conducted on 5 November 2019 (on file with authors).
- 648 Interview with low-income government official conducted on 31 October 2019 (on file with authors).
- 649 See e.g. EU Council Directive 2002/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes, art. 6(1) Official Journal L 026, 31/01/2003 P. 0041 – 0047 (stating that in the matters governed by that Directive, “EU Member States may provide that legal aid applications for actions which appear to be manifestly unfounded may be rejected by the competent authorities.”).
- 650 Steven K. Berenson, ‘Public Lawyers, Private Values: Can, Should, and Will Government Lawyers Serve the Public Interest?’ (2000) 41 B.C. L. Review 789, 797-800.
- 651 The possibility of non-disputing parties as beneficiaries was raised during UNCITRAL WGIII’s 38th Session. 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, ¶ 30.
- 652 The possibility of amicus curiae as beneficiaries was raised during UNCITRAL WGIII’s 38th Session. 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, ¶ 30.
- 653 Interview with individual with experience with existing Assistance Mechanism for states in ISDS conducted on 30 April 2019 (on file with authors).
- 654 E.g. Interview with upper middle-income government official conducted on 2 May 2019 (on file with authors).
- 655 Interview with upper middle-income government official conducted on 19 May 2019 (on file with authors).
- 656 Interview with low-income government official conducted on 31 October 2019 (on file with authors).
- 657 Interview with low-income government official conducted on 31 October 2019 (on file with authors).
- 658 Interview with low-income government official conducted on 31 October 2019 (on file with authors).
- 659 Interview with low-income government official conducted on 31 October 2019 (on file with authors).
- 660 Interview with upper middle-income government official conducted on 2 May 2019 (on file with authors).
- 661 Interview with low-income government official conducted on 31 October 2019 (on file with authors).
- 662 Interview with low-income government official conducted on 31 October 2019 (on file with authors).
- 663 Interview with upper middle-income government official conducted on 2 May 2019 (on file with authors). Interview with individual with experience with existing Assistance Mechanism for states in ISDS conducted on 22 April 2019 (on file with authors).
- 664 Interview with individual with experience with existing Assistance Mechanism for states in ISDS conducted on 22 April 2019 (on file with authors).
- 665 Interview with individual with experience with existing Assistance Mechanism for states in ISDS conducted on 22 April 2019 (on file with authors); Interview with individual with experience with existing Assistance Mechanism for states in ISDS conducted on 26 April 2019 (on file with authors).
- 666 Interview with individual with experience with existing Assistance Mechanism for states in ISDS conducted on 22 April 2019 (on file with authors). Robert W. Schwieder, ‘Legal Aid and Investment Treaty Disputes: Lessons from the WTO Law and Investment Experiences’ (2018) 19 Journal of World Investment and Trade 628-66, 144-145.
- 667 Robert W. Schwieder, ‘Legal Aid and Investment Treaty Disputes: Lessons from the WTO Law and Investment Experiences’ (2018) 19 Journal of World Investment and Trade 628-66, 144-145, citing United States Government Accounting Office, ‘World Bank and IMF: Pay and Benefits Compared with Those of Other Organizations’ (1995), 3.
- 668 Interview with individual with experience with existing Assistance Mechanism for states in ISDS con-

- 669 ducted on 22 April 2019 (on file with authors).
Interview with individual with experience with existing Assistance Mechanism for states in ISDS conducted on 30 April 2019 (on file with authors).
- 670 Interview with high income country conducted on 13 June 2019 (on file with authors).
- 671 UNCITRAL, 'Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-seventh session, New York, 1-5 April 2019' (2019) UN Doc A/CN.9/970, para 84; 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.
- 672 Interview with NGO conducted on 4 April 2019 (on file with authors); Interview with academics conducted on 4 April 2019 (on file with authors).
- 673 Interview with academics conducted on 4 April 2019 (on file with authors).
- 674 Interview with low-income government official 31 October 2019 (on file with authors).
- 675 Interview with low-income government official 31 October 2019 (on file with authors).
- 676 E.g. Robert W. Schwieder, 'Legal Aid and Investment Treaty Disputes: Lessons from the WTO Law and Investment Experiences' (2018) 19 *Journal of World Investment and Trade* 628-66.
- 677 Interview with private practitioner conducted on 21 May 2019 (on file with authors).
- 678 Interview with private practitioner conducted on 29 May 2019; Interview with private practitioner conducted on 21 May 2019 (on file with authors).
- 679 Interview with private practitioner conducted on 30 April 2019 (on file with authors).
- 680 Interview with private practitioner conducted on 30 April 2019 (on file with authors).
- 681 Interview with NGO conducted on 23 April 2019 (on file with authors).
- 682 Interview with NGO conducted on 23 April 2019 (on file with authors).
- 683 Interview with NGO conducted on 23 April 2019 (on file with authors).
- 684 Interview with NGO conducted on 23 April 2019 (on file with authors).
- 685 Interview with NGO conducted on 23 April 2019 (on file with authors).
- 686 Interview with academics conducted on 4 April 2019 (on file with authors).
- 687 Interview with academics conducted on 4 April 2019 (on file with authors).
- 688 Interview with high-income government official conducted on 3 June 2019 (on file with authors).
- 689 Interview with individual with experience working at an arbitration center conducted on 21 May 2019 (on file with authors).
- 690 Interview with upper middle-income government official conducted on 9, 10 May 2019 (on file with authors).
- 691 Interview with private practitioners conducted on 21 May 2019 (on file with authors); Interview with NGO conducted on 23 April 2019 (on file with authors).
- 692 Interview with upper middle-income government official conducted on 2 May 2019 (on file with authors).
- 693 Interview with upper middle-income government official conducted on 2 May 2019 (on file with authors).
- 694 Interview with upper middle-income government official conducted on 2 May 2019 (on file with authors).
- 695 Interview with upper middle-income government official conducted on 2 May 2019 (on file with authors).
- 696 Interview with individual with experience with existing Assistance Mechanism for states in ISDS conducted on 22 April 2019 (on file with authors); Interview with individual with experience with existing Assistance Mechanism for states in ISDS conducted on 7 June 2019 (on file with authors); Interview with NGO with experience working with developing countries conducted on 4 April 2019 (on file with authors); Interview with private practitioners conducted on 21 May 2019 (on file with authors); Interview with NGO conducted on 23 April 2019 (on file with authors); Interview with academics conducted on 4 April 2019 (on file with authors).
- 697 Interview with academics conducted on 4 April 2019 (on file with authors).
- 698 Interview with NGOs conducted on 23 April 2019 (on file with authors).
- 699 Joachim Karl, 'The Treatment of Small and Medium-Sized Enterprises in International Investment Law' in Thilo Rensmann (ed), *Small and Medium-Sized Enterprises in International Economic Law* (Oxford University Press 2017) 241-265, 241 fn 1.
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- 701 Adil El Madani, 'SME Policy: Comparative Analysis of SME Definitions' (2018) 8 *International Journal of Academic Research in Business and Social Sciences*, 106.
- 702 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-subsidiary, 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-

- er, 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).
- 703 The World Bank Group, 'The Big Business of Small Enterprises: Evaluation of the World Bank Group Experience with Targeted Support to SMEs, 2006-12' (2014) 17 (quoting Tom Gibson and H. J. van der Vaart 'Defining SMEs: A Less Imperfect Way of Defining Small and Medium Enterprises in Developing Countries' (2008) Brookings Institution).
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- 705 Susan D. Franck, *Arbitration Costs: Myths and Realities in Investment Treaty Arbitration* (Oxford University Press 2019) 82.
- 706 Scott Miller and Gregory N. Hicks, *Investor-State Dispute Settlement: A Reality Check* (Center for Strategic International Studies 2015) 10
- 707 Perry S. Bechky, 'Microinvestment Disputes' in Thilo Rensmann (ed) *Small and Medium-Sized Enterprises in International Economic Law* (Oxford University Press 2017) 267-290.
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- 712 Joachim Karl, 'The Treatment of Small and Medium-Sized Enterprises in International Investment Law' in Thilo Rensmann (ed.) *Small and Medium-Sized Enterprises in International Economic Law* (Oxford University Press 2017) 241-265, 261.
- 713 Interview with upper middle-income government official conducted on 2 May 2019 (on file with authors).
- 714 Interview with investor conducted on 29 October 2019 (on file with authors).
- 715 Interview with investor conducted on 29 October 2019 (on file with authors).
- 716 Interview with investor conducted on 29 October 2019 (on file with authors).
- 717 Interview with investor conducted on 29 October 2019 (on file with authors).
- 718 Interview with investor conducted on 29 October 2019 (on file with authors).
- 719 Interview with individual with experience working for an arbitration center conducted on 22 October 2019 (on file with authors).
- 720 Interview with individual with experience working for an arbitration center conducted on 22 October 2019 (on file with authors).
- 721 Interview with investor conducted on 29 October 2019 (on file with authors).
- 722 Perry S. Bechky, 'Microinvestment Disputes, in *Small and Medium-Sized Enterprises in International Economic Law*' in Thilo Rensmann (ed.) *Small and Medium-Sized Enterprises in International Economic Law* (Oxford University Press 2017) 267-290. Not all ICSID tribunals apply the Salini test and, if they do, not all apply the "economic development" criterion. That criterion appears to be the most controversial of the set – which is commonly, but not always, described as constituting the following four factors: contribution of money/assets, risk, duration, and a contribution to the host State's economy. Some individual BITs incorporate a version of the Salini test in their definitions of an "investment". When they do, however, they often leave out the "economic development" prong.
- 723 See, e.g., Catharine Titi, et al., 'Excessive Costs and Insufficient Recovery of Cost Awards' (2019) Academic Forum on ISDS Working Group 1, 5. See also discussion in Section 2.3.2.
- 724 The World Bank Group, Independent Evaluation Group, *The Big Business of Small Enterprises: Evaluation of the World Bank Group Experience with Targeted Support to SMEs, 2006-2012* (2014) 10-16.
- 725 Interview with academics conducted on 4 April 2019 (on file with authors).
- 726 Interview with investor conducted on 29 October 2019 (on file with authors).
- 727 See Catharine Titi, et al., 'Excessive Costs and Insufficient Recovery of Cost Awards' (2019) Academic Forum on ISDS Working Group 1 (noting that, in ICSID disputes, party costs typically constitute about 92 percent of total costs of ISDS proceedings, and tribunal costs the remaining 8 percent). It is often unclear, however, how much of party costs are counsel fees and how much are expert fees.
- 728 According to Franck, the top twenty-one legal entities in terms of frequency of ISDS representation include the following firms: Freshfields Bruckhaus Deringer, White & Case LLP, King & Spalding LLP, Matrix Chambers, Sidley Austin LLP, Shearman & Sterling LLP, Covington & Burling LLP, Appleton & Associates, Allen & Overy LLP, Arnold & Porter LLP, Essex Court Chambers, Squire Patton Boggs, Debevoise & Plimpton LLP, and Pillsbury Winthrop Shaw Pittman. This list uses their current names. Some had different names (e.g., pre-merger) when

- they were handling one or more of the disputes counted in the database. The remaining legal entities in the list are respondent state in-house counsel teams, and one individual, Stephen M. Schwebel.
- 729 Franck finds that claimants, on average, used two separate legal entities in their defense. Susan D. Franck, *Arbitration Costs: Myths and Realities in Investment Treaty Arbitration* (Oxford University Press 2019) 100.
- 730 Susan D. Franck, *Arbitration Costs: Myths and Realities in Investment Treaty Arbitration* (Oxford University Press 2019) 102-103. Nevertheless, the snapshots presented by this data do not reveal trends over time to inform whether diversity and competitiveness in the field are increasing or decreasing, or why, with implications for future availability of quality lower cost counsel.
- 731 Interview with investor conducted on 29 October 2019 (on file with authors).
- 732 The definition provided is substantially based on Proposed Rule 13 [Notice of Third-Party Funding] of ICSID, 'Proposals for Amendment of the ICSID Rules' (2019) Working Paper #2 Volume 1.
- 733 Interview with investor conducted on 29 October 2019 (on file with authors).
- 734 Interview with investor conducted on 29 October 2019 (on file with authors).
- 735 Interview with investor conducted on 29 October 2019 (on file with authors).
- 736 There are often questions about who "won" and who "lost"; and there may also be issues regarding what fees and costs are shift-able. They may, for instance, need to be deemed "reasonable" based on a particular benchmark, and may exclude certain categories of expenses.
- 737 See, e.g., *International Thunderbird Gaming Corp v Mexico*, UNCITRAL, Award, 26 January 2006, paras. 210-221 (ordering the ultimately unsuccessful claimant to pay a portion of Mexico's costs); *International Thunderbird Gaming Corp., Separate Opinion of Thomas Wälde*, 1 December 2005, para. 142 (also including a lengthy discussion and critique of cost shifting, paras. 124-147).
- 738 Stephan W Schill, 'Arbitration Risk and Effective Compliance' 7 *Journal of World Investment and Trade* 653 (2006).
- 739 Susan D. Franck, *Arbitration Costs: Myths and Realities in Investment Treaty Arbitration* (Oxford University Press 2019) 217-220.
- 740 [UNCITRAL Working Group III](#), 'Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-seventh session 9 April 2019' (2019) A/CN.9/970 (noting concerns expressed in Working Group III); see also David P. Rosenberg, 'Fee Shifting in Investor-State Arbitration: Doctrine and Policy Justifying Application of the English Rule' (2011) 60 *Duke Law Journal* 977.
- 741 See, e.g., Catharine Titi, et al., 'Excessive Costs and Insufficient Recovery of Cost Awards' (2019) Academic Forum on ISDS Working Group 1 (providing some suggestions regarding how to do this).
- 742 See, e.g., The Kingdom of the Netherlands, 'Netherlands draft model BIT' (2019) arts 20(3), 22(5), 19(7).
- 743 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.
- 744 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 30.
- 745 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 31-36.
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- 753 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 47-48.
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- 763 This amount is €10,687 for fees, with a possible €1000 for expenses.
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