



**United Nations Commission on
 International Trade Law**
**Working Group III (Investor-State
 Dispute Settlement Reform)**
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Possible reform of investor-State dispute settlement (ISDS)

Advisory Centre

Note by the Secretariat

Contents

	<i>Page</i>
I. Introduction	2
II. Establishment of an advisory centre	2
A. General remarks	2
B. Preliminary outline of services	3
C. Preliminary considerations on beneficiaries	6
D. Existing models and initiatives	7
E. Questions for consideration.....	12



I. Introduction

1. At its thirty-fourth to thirty-seventh sessions, the Working Group undertook work on the possible reform of ISDS, based on the mandate given to it by the Commission at its fiftieth session, in 2017.¹ The deliberations and decisions of the Working Group at the thirty-fourth to thirty-seventh sessions are set out in documents [A/CN.9/930/Rev.1](#) and its Addendum, [A/CN.9/935](#), [A/CN.9/964](#), and [A/CN.9/970](#), respectively. At those sessions, the Working Group identified and discussed concerns regarding ISDS and considered that reform was desirable in light of the identified concerns.

2. At its thirty-seventh session, the Working Group agreed that it would discuss, elaborate and develop multiple potential reform solutions simultaneously ([A/CN.9/970](#), para. 81).² In that light, the Secretariat was requested to undertake preparatory work on a number of topics, including on the establishment of an advisory centre ([A/CN.9/970](#), para. 84).

3. Accordingly, this Note aims at providing information to assist the Working Group in the consideration of the establishment of an advisory centre on international investment law (“advisory centre”). As is the case for other documents provided to the Working Group, this Note was prepared with reference to a broad range of published information on the topic,³ and does not seek to express a view on the possible reform options, which is a matter for the Working Group to consider.

II. Establishment of an advisory centre

A. General remarks

4. At its thirty-sixth session, the Working Group heard proposals for the establishment of an advisory centre. Such proposals were made in relation to the concerns regarding the cost and duration of ISDS, and in light of the consideration that the cost of ISDS creates a burden on States, in particular developing and least developed countries, as well as investors, mainly small- and medium-sized enterprises

¹ *Official Records of the General Assembly, Seventy-second Session, Supplement No. 17 (A/72/17)*, paras. 263 and 264.

² The Working Group may wish to note that document [A/CN.9/WG.III/WP.166](#) provides an overview of reform options.

³ This Note was prepared with reference to a broad range of published information on the topic, including: Karl P. Sauvant, *The evolving international investment law and policy regime: Ways forward*, available at <https://www.ictsd.org/bridges-news/bridges-africa/news/the-evolving-international-investment-law-and-policy-regime-ways>; Karl P. Sauvant and Federico Ortino, *Improving the International Investment Law and Policy Regime: Options for the Future*, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2896922; Anna-Joubin-Bret, *Establishing an International Advisory Centre on Investment Disputes*, available at <https://www.ictsd.org/themes/global-economic-governance/research/establishing-an-international-advisory-centre-on>; Niall Meagher, *Representing Developing Countries Before the WTO: The Role of the Advisory Centre on WTO Law (ACWL)*, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2632006; Jeremy K. Sharpe, *An International Investment Advisory Centre: Beyond the WTO Model*, available at <https://www.ejiltalk.org/>; Robert W. Schwieder, *Legal Aid and Investment Treaty Disputes: Lessons Learned from the Advisory Centre on WTO Law and Investment Experiences*, available at <https://ssrn.com/abstract=3093651>. See also the publication by the Academic Forum, Karl P. Sauvant, *An Advisory Centre on International Investment Law: Key Features*, available under “ISDS fora” at: https://uncitral.un.org/en/library/online_resources/investor-state_dispute. The Working Group may also wish to note the Scoping Study under preparation by the Columbia Centre for Sustainable Investment (CCSI) on behalf of the Government of the Netherlands, that aims to address how to secure adequate legal defence for parties in proceedings under investment treaties. It may further wish to note that members of the Practitioners Group have been consulted in the preparation of this note.

and individuals (A/CN.9/964, para. 119).⁴ The proposals are also addressed in submissions received from Governments (“Submissions”).⁵

5. In a Submission, it is suggested to establish an advisory centre following the model of the Advisory Centre on WTO Law (ACWL). Under that proposal, the advisory centre would be tasked to provide legal advice on investment law before a dispute arises and act as counsel when there is a dispute. The centre could also help States in capacity-building and the sharing of best practices.⁶ In another Submission, it is suggested that it would be highly desirable to establish a mechanism for supporting and assisting developing and least developed countries in dealing with ISDS cases so as to enable them to better prepare for, handle, and manage, disputes relating to international investment.⁷ It is further suggested in another Submission that an advisory centre could be tasked with providing low cost legal advice and advocacy support particularly for developing and least developed countries and small and medium-sized enterprises.⁸ It is highlighted in yet another Submission that a mechanism should be foreseen to ensure that all disputing parties can operate effectively in the investment dispute settlement regime and it is suggested that such an initiative may form part of the process of establishing a standing mechanism.⁹

6. The suggestion for an advisory centre is not new as shown in section D below. This suggestion has gained more attention with the increase, worldwide, of investment disputes under investment treaties, and the need to promote within States a better understanding of international investment promotion and protection. An advisory centre – through low-cost, high-impact solutions – would aim at helping States better understand, manage, and control the international investment regime.

B. Preliminary outline of services

7. Work on an advisory centre would require careful identification of the needs of potential beneficiaries. In that light, the Working Group may wish to consider the following possible services by an advisory centre: assistance in organizing the defence; support during dispute settlement proceedings; advisory services; alternative dispute resolution (ADR) services; as well as capacity-building and sharing of best practices. The services that would be rendered by an advisory centre would, in turn, have an impact on its form, structure and budget (see below, para. 65).

1. Assistance in organizing the defence

8. States have traditionally adopted three different approaches to the defence of their interests in ISDS cases. Some States organize their defence through a dedicated in-house team. Other States use a combination of an in-house team working in various degrees of cooperation with outside counsel. The vast majority of States outsource their defence to outside counsel.

9. A minority of States have set up a dedicated in-house defence team. Often, however, the claims are dealt with on an ad hoc basis with the involvement of various ministries and agencies for the reason that it might not be viable to set up a dedicated in-house defence team when States are dealing with only one or two ongoing cases, on an irregular basis. The question of a threshold of cases when assessing whether to

⁴ See [A/CN.9/WG.III/WP.153](#).

⁵ [A/CN.9/WG.III/WP.159/Add.1](#), Submission from the European Union and its Member States; [A/CN.9/WG.III/WP.161](#), Submission from the Government of Morocco; [A/CN.9/WG.III/WP.162](#), Submission from the Government of Thailand; [A/CN.9/WG.III/WP.164](#) and [A/CN.9/WG.III/WP.178](#), Submission from the Government of Costa Rica; [A/CN.9/WG.III/WP.174](#), Submission from the Government of Turkey; [A/CN.9/WG.III/WP.179](#), Submission from the Government of the Republic of Korea.

⁶ [A/CN.9/WG.III/WP.162](#), Submission from the Government of Thailand.

⁷ [A/CN.9/WG.III/WP.159/Add.1](#), Submission from the European Union and its Member States; [A/CN.9/WG.III/WP.161](#), Submission from the Government of Morocco.

⁸ [A/CN.9/WG.III/WP.174](#), Submission from the Government of Turkey.

⁹ [A/CN.9/WG.III/WP.159/Add.1](#), Submission from the European Union and its Member States.

set up an in-house defence team is relevant, but it is not the only consideration.¹⁰ Cases can be complex and have implications beyond purely financial considerations.

10. In that light, the Working Group may wish to consider whether the desirable level of efficiency and quality of the defence might be achieved through an advisory centre, tasked with the following services:

- (i) Assistance to States for the preparation of the defence of investment disputes, including assessment of the strengths and weaknesses of a case on a prima facie basis;
- (ii) Early assessment of the risks associated with a given claim, so as to permit identification of the strategy and course of action to adopt (this may include, for instance, consideration of whether other dispute resolution mechanisms, such as mediation, might be an option);
- (iii) Determination of the financial implications and earmarking of a budget for the defence of a case; and
- (iv) Assistance in the overall organization for dealing with ISDS.

11. In relation to point (iv) in paragraph 10 above, the Working Group may wish to note that States need adequate time to respond to claims, as they have to prepare their defence properly (A/CN.9/930/Rev.1, para. 50). For instance, States have to assemble factual information for each case and coordinate among various ministries and agencies. If an advisory centre were to provide assistance in relation to the organization of the defence, the beneficiaries of such services might be better prepared to handle investors' claims, organize their defence strategy and coordinate more efficiently. The Working Group may wish to consider whether this would have a positive impact on the duration and thereby the cost of ISDS, as lengthy proceedings are likely to result in higher cost (A/CN.9/930/Rev.1, para. 38).

2. Support during dispute settlement proceedings

12. The Working Group may wish to consider whether an advisory centre may assist in risk management, by promoting standard operating procedures for handling notices, proper authorities for representing the State effectively, appropriate coordination within and outside the government, and the ability to properly evaluate and instruct outside counsel. Representation of respondent States usually implies three essential tasks outlined below that are usually either completely or partially outsourced by the respondent State. The Working Group may wish to note that the presentation below is based on the current ISDS regime and might need to be adapted in light of the reform options.¹¹

(i) *Selecting and appointing arbitrators and decision makers*

13. The first step is the establishment of an arbitral tribunal, and this requires technical expertise, means and resources to research arbitrator profiles.

14. Therefore, with a view to addressing concerns such as lack of diversity of decision makers (A/CN.9/964, para. 90) as well as time and cost involved in the selection of arbitrators and counsel (A/CN.9/930/Rev.1, paras. 65 and 73), possible services for an advisory centre may include the following:

- (i) Establishment of a comprehensive database of potential arbitrators with complete and up-to-date profiles available to respondent States;
- (ii) Promotion of exchange of experience and expertise regarding the evaluation of arbitrator services;

¹⁰ As highlighted by the Working Group, available information suggests that 80–90 per cent of the costs in ISDS resulted from fees for legal representation and for experts (see A/CN.9/930/Rev.1, para. 36).

¹¹ See document A/CN.9/WG.III/WP.166 (overview of reform options).

- (iii) Advice and support in the case of arbitrator challenge; and
- (iv) Assistance regarding procurement of counsel and identification of experts.

(ii) *Written statements, documentary evidence*

15. During ISDS proceedings, the parties usually submit a wide range of documents, such as written statements, witness statements, expert reports and documentary evidence. Written statements include the statement of defence, any second round of rebuttal submissions and other submissions that the parties and the arbitral tribunal may consider necessary. Technical expertise is required not only on the substantive law issues, but also on the procedural conduct of ISDS to ensure an effective and adequate defence.

16. An advisory centre could therefore provide briefing services or cooperate with the in-house defence team or outside counsel to ensure high quality in the documents filed by the respondent State.

(iii) *Representation at hearings*

17. Hearings for the presentation of evidence by witnesses and experts and/or for oral argument are an important phase in ISDS.

18. Availability of high-quality legal services to handle hearings, building on expertise and leveraging the number of cases the advisory centre would defend could make it a cost-effective and competitive solution. Throughout the process, representatives of the respondent State could be included in the advisory centre's team, as a capacity-building measure. It would indeed be important to ensure State's approval of the arguments, in particular since statements from the respondent State would effectively represent its practice under international law. In addition, high-quality legal services would help the beneficiaries to establish credibility before the ISDS tribunal.

3. Advisory services

19. In addition to defence services, the Working Group may wish to consider the following range of advisory services:

- (i) Assistance to States for the review of, and potentially amendment to, their international investment instruments;
- (ii) Assistance to States regarding the setting-up of conflict management systems, including early dispute prevention policies and alert procedures;
- (iii) Assistance regarding the establishment of a lead agency that would ensure proper attention to potential disputes, provide adequate responses to problems with foreign investors, and defend the interests of the State at each stage; and
- (iv) Legal advice on whether a measure or the contemplated measure would violate treaty obligations (which might require considering whether early legal advice by an advisory centre would carry any formal significance).

20. The Working Group may wish to consider that many States could benefit from expert advice on international investment law and policy. It may be noted that the expertise necessary to engage in these advisory services may differ (in some cases significantly) from that required for defence. In that respect, close interaction between defence counsel, treaty negotiators and implementing agencies/authorities is important for a number of reasons and an advisory centre may help facilitate that interaction.

4. Alternative dispute resolution (ADR) services

21. Dispute resolution mechanisms that are alternative to arbitration, such as mediation, are increasingly included in investment treaties as part of ISDS provisions. Resorting to the ADR's flexible procedures, where possible, constitutes a cost- and

time-effective solution in addition to preserving long-term relations (see [A/CN.9/930/Rev.1](#), paras. 52 and 74).

22. The Working Group may wish to consider whether an advisory centre might be established as a facility to also offer ADR services and support early settlement of disputes, in particular during the cooling-off period or before a final award is rendered. The functions of an advisory centre may range from handling ADR to only keeping a roster of experts available to act as mediators or early neutral evaluators. An advisory centre could also help ensuring that alternative dispute settlement methods would be properly conducted, which is essential for government officials in charge of negotiations under public scrutiny. This would assist them in settling disputes without fearing public criticism and allegations of corruption. An aspect to be considered, however, is how the centre would handle potential conflicts of interest that might arise from its activities, in particular where it would be involved in both ADR and defence services.

5. Capacity-building and sharing of best practices

23. An advisory centre could provide a platform for capacity-building, sharing of best practices among government officials and sharing of information. These services could be implemented, for instance, through training programmes, offering trainee and secondment positions, and by providing information on ISDS, including managing a database of cases. An advisory centre could serve as a standing forum for government officials to engage regularly on the full range of investment issues. It would thereby permit risk mitigation by helping States train officials, implement obligations, and avoid disputes.

24. Regarding sharing of information, the Working Group may wish to note that there are many valuable resources available to help States with investment-related issues.¹² These resources, however, often are dispersed across multiple institutions, with little coordination or harmonization. States may be unaware of their existence, or lack resources or institutional capacity to channel information to appropriate agency personnel. An advisory centre could also play a role by compiling, organizing, and disseminating existing resources to relevant state officials.

C. Preliminary considerations on beneficiaries

25. The Working Group may wish to consider that the beneficiaries of the services of an advisory centre could either:

- (i) Include all respondent States, whether developing or developed, capital importing or capital exporting; this approach would be supported by the fact that the divide between capital exporting and capital importing countries has lost much of its relevance in the context of ISDS, which affects many countries across all regions;
- (ii) Be limited to all or some developing and least developing countries or to least developing countries only; or also include on an ad hoc basis States with little experience in the field and States that face difficulties (for instance, situations where States have very limited financial capacities, or are in situations of political turmoil);
- (iii) Be extended to small- and medium-sized enterprises fulfilling certain requirements (such as having a legitimate claim with certain chances of success

¹² For instance, practice notes, such as ICSID's practice notes for respondents, policy papers, such as UNCTAD's investment policy reviews, reports, action plans, and monitors, model texts, such as the Energy Charter Secretariat's model instrument for managing investment disputes; handbooks, such as APEC's investment treaty negotiators handbook; research tools, such as UNCTAD's Investment Policy Hub, and PluriCourts' Investment Treaty Arbitration Database (PITAD).

and being unable to financially afford the legal claim, having regard to size, origin and other relevant items).

26. The Working Group may wish to note that the question of access to ISDS would be an important principle in the consideration of possible beneficiaries. The financial impact of enlarging the list of potential beneficiaries would also need to be taken into account.

D. Existing models and initiatives

1. The Advisory Centre on WTO Law

(a) Description

27. The Advisory Centre on WTO Law (hereinafter referred to as the “ACWL”) was established in 2001 with the purpose of discharging primarily three functions to developing States and particularly the least developing countries (also referred to below as “LDCs”), namely, providing:

- (i) Legal advice on the WTO law;
- (ii) Support during WTO dispute settlement proceedings; and
- (iii) Training to government officials (see art. 2 of the Agreement Establishing the Advisory Centre on WTO Law or “Agreement”).¹³

Legal Advice

28. ACWL was created as an independent, impartial, and non-political source of legal advice. It offers free of charge legal advice on both procedural and substantive issues of the WTO law to developing countries and LDCs. Legal advice can be divided in three main categories:

- (i) Legal opinions relating to the issues arising in WTO decision-making and negotiations;
- (ii) Legal opinions relating to the measures taken or contemplated by the WTO Member or LDC seeking the advice to ascertain consistency with the WTO law;
- (iii) Legal opinions relating to the measures of another WTO Member that the developing State or LDC seeking the advice is considering challenging in order to assess such a challenge.

Support in Dispute Settlement

29. ACWL assists countries at all stages of dispute settlement – WTO’s panel, Appellate Body and implementation proceedings as well as in arriving at mutually-agreed solutions through good offices, conciliation and mediation.¹⁴

30. During the times when ACWL is approached on the same matter by opposing parties, it normally assists the party that first requested the advice. The other party is provided support through an external counsel.¹⁵

Structural organization

31. With respect to its structural organization, ACWL is composed of a General Assembly, a Management Board and an Executive Director (art. 3 of the Agreement). This multi-level structure was established with the aim to enable ACWL to work in an independent and non-political manner. The General Assembly, which meets at least twice a year, consists of all the ACWL Members which includes both developed,

¹³ See <http://www.acwl.ch/basic-documents/>.

¹⁴ See <http://www.acwl.ch/legal-advice/>.

¹⁵ Decision 2007/8, adopted by the Management Board on 19 November 2007, available at: <http://www.acwl.ch/download/ACWL-MB-D-2007-8.pdf>.

developing and least developed countries. Similarly, the Management Board also consists of representatives of developed, developing and least developed countries.¹⁶

32. Further, with respect to its financial organization, ACWL relies on the Endowment Fund,¹⁷ fees levied for legal services,¹⁸ and the voluntary contributions by governments, international organizations or private sponsors.¹⁹ ACWL charges a fee for providing support in dispute settlement proceedings on an hourly basis, providing for a time limit for specific service.²⁰ Fees for legal advice and membership fee take into account the share of world trade of the countries, indicative of their per capita income (determined by WTO and World Bank statistics, see Notes, Annex II of the Agreement). Originally, it was believed that after an initial 5-year transitional period, ACWL would rely on the income from its Endowment Fund and the legal fees. To date, ACWL is still dependent on the voluntary contributions from the developed countries.²¹

Training programmes

33. ACWL provides training in three forms, namely:

- (i) Annual Training Course (provided to delegates from of the ACWL Members, structured on a three-year cycle);
- (ii) Secondment Programme for Trade Lawyers (provided to lawyers from the governments of LDCs and developing Member States who take part as paid trainees for a nine-month period);
- (iii) Seminars (organized on an ad hoc basis on legal issues of topical interest to ACWL developing and least developed Member States).

34. These activities enhance the legal capacity of the developing and least developed countries, which in turn help to avoid as well as resolve the disputes.²² In this manner, ACWL provides holistic assistance by acting like a legal firm in rendering advice and by promulgating its development-oriented objective²³ of building in-house expertise for the developing and least developed countries.

(b) ACWL model and ISDS

Decentralised/Geographically fragmented system

35. The Working Group may wish to note that there are important differences between the legal regime of investment and ISDS on one hand, which is decentralised and fragmented among various sources of law, and the WTO system on the other, which is governed by a specific set of rules, with a single agreement and has its seat at Geneva, Switzerland.

Nature of case

36. The ISDS cases are by nature varied and complex as they arose under various sources of law, including different investment treaties. The fact-finding process may be quite lengthy, potentially time-consuming and costly. In comparison, WTO cases are not prone to such difficulties and focus regularly on specific legal questions. Importantly, it would be difficult to assign particular time limits with respect to each

¹⁶ ACWL consists of a team of nine full-time lawyers and several lawyers seconded by member countries. To date, it has assisted eligible countries in more than 40 WTO disputes and provided more than 200 legal opinions.

¹⁷ Composed of contributions made by Member States according to para. 2, of art. 6, of the Agreement.

¹⁸ See the schedule of fees, see Annex IV of the Agreement.

¹⁹ See art. 5 of the Agreement.

²⁰ Decision 2007/7, adopted by the management board on 19 November 2007, available at: http://www.acwl.ch/download/basic_documents/management_board_docs/ACWL-MB-D-2007-7.pdf.

²¹ See http://cadmus.eui.eu/bitstream/handle/1814/35747/RSCAS_PP_2015_02.pdf, p. 6.

²² https://www.wto.org/english/news_e/sppl_e/sppl207_e.htm.

²³ https://brill.com/view/journals/jwit/19/4/article-p628_2.xml?lang=en, pp. 646-647.

service that an advisory centre would provide, as is the case in the WTO dispute settlement system.

Nature of parties

37. In the multilateral trading system governed by the WTO Agreements, the disputing parties are Member States of WTO acting either as claimant or respondent. In contrast, the disputing parties in ISDS include both States, as respondent, and investors, as claimant, and it might be difficult to determine the beneficiaries.

2. Legal financial assistance and advisory centre-like initiatives

38. Some institutions, such as the Permanent Court of Arbitration at The Hague (PCA) and the International Court of Justice (ICJ) foresee financial assistance to States for the settlement of disputes. Further, a number of initiatives to establish an advisory centre have been undertaken.

(a) Financial Assistance Fund of the Permanent Court of Arbitration (PCA)

39. PCA established a Financial Assistance Fund (FAF) for the Settlement of International Disputes in 1994 to provide financial assistance to certain States with the aim to help Contracting Parties meet the costs of dispute settlement procedures administered by PCA according to the terms of reference and guidelines as approved on 11 December 1995.²⁴ Prerequisite for receiving any grants is the availability of funds.

40. The States requesting assistance need to be party either to the 1899 Hague Convention for the Pacific Settlement of International Disputes or of the 1907 Convention for the Pacific Settlement of International Disputes, or any institution or enterprise owned and controlled by such State, which has submitted an agreement for the settlement of its dispute under the PCA and which is listed on the “DAC List of Aid Recipients” prepared by the Organization for Economic Cooperation and Development (OECD).

41. The following costs for the dispute settlement procedures administered by PCA are eligible to be covered: fees and expenses in relation to the members of an arbitral body; the expenses in relation to the implementation of an award or other decision or recommendation; fees in relation to agents, counsel, experts and witnesses; and operational or administrative expenses in relation to oral or written proceedings.

42. The implementing office for the Fund responsible for its administration is the International Bureau of the PCA. Allocations or disbursements from the Fund are made pursuant to a decision of the Board of Trustees.

43. The Board of Trustees comprises three to seven members, having experience in international dispute resolution and who should be of the highest moral standing. The members are appointed by the Secretary-General with the approval of the Administrative Council for a term of four years, which may be renewed.

44. The funding is assured by voluntary financial contributions by States, intergovernmental organizations, national institutions, as well as natural and legal persons.²⁵ Requests for financial assistance are accepted only to the extent that funding is available.

(b) Secretary-General’s Trust Fund to Assist States in the Settlement of Disputes through the International Court of Justice (ICJ)

45. The Secretary-General’s Trust Fund to Assist States in the Settlement of Disputes through the International Court of Justice (“the Trust Fund”) was established in 1989 under the Financial Regulations and Rules of the United Nations.

²⁴ <https://pca-cpa.org/wp-content/uploads/sites/6/2016/01/Financial-Assistance-Fund-for-Settlement-of-International-Disputes.pdf>.

²⁵ See annual report from 2018 for the list of contributors to the fund and beneficiaries.

46. Applications may be submitted by States when they do not have the necessary financial resources. The beneficiaries may include Member States of the United Nations, State members to the Statute of ICJ, non-member States fulfilling the criteria under the Security Council resolution 9 (1946) of 15 October 1946.

47. Financial assistance is provided for expenses incurred in relation to: (a) disputes submitted to the Court through a special agreement; or (b) the execution of a judgment rendered by the Court.

48. Expenses that are covered by the fund include memorials and replies, fees of the counsels, agents, experts or witnesses, oral proceedings, evidence and the execution of a judgment of the Court.

49. The process of granting financial assistance is as follows. A request for providing financial assistance is examined for admissibility by a panel of three experts, who are persons of the highest judicial and moral standing, nominated by the Secretary-General in order to examine the application for financial assistance. This deliberation is bound by strict code of confidentiality, wherein the financial needs of the requesting State and the availability of funds are taken into consideration. The panel sends to the Secretary-General its recommendation regarding the amount of the financial assistance to be awarded, the amount of the advance to be allocated and the types of expenses to be covered. The Secretary-General then takes the final decision regarding the amount of financial assistance from the Trust Fund as well as the amount of advance (not more than 50 per cent of the financial assistance awarded).

50. The Trust Fund is funded by voluntary contributions by States, intergovernmental organizations, national institutions and non-governmental organizations as well as natural and juridical persons.²⁶ Requests for financial assistance are accepted only to the extent that funding is available.

(c) UNCTAD-IADB-OAS Project (2006)

51. The initiative for establishing an advisory centre for the Latin American States was undertaken with the support of UNCTAD, the Inter-American Development Bank (IADB) and the Organization of American States (OAS) in 2006.

52. A steering committee prepared a draft treaty for establishing an advisory centre in May 2009, providing a legal foundation to the proposed centre. It was agreed *inter alia* that the centre would:

- Be an intergovernmental entity;
- Be based on the ACWL model and provide assistance to developing and least developed countries;
- Carry out two functions: first, an advisory function, ranging from assisting countries in negotiations, drafting, prevention of disputes, early settlement, capacity-building and sharing of experience, keeping database of cases and arbitrators, offering secondment and trainee positions; second, a defence function, to help countries in the defence of investment disputes either through direct representation or as part of the defence team representing the State;
- Provide legal advice, capacity-building and technical assistance in ISDS;
- Work in a financially self-sufficient manner; and
- Have its headquarters initially in Washington D.C. and later in Panama City, for which funds were pledged by various countries.

53. This project was funded by IADB through a Regional Public Good window. It engaged a team of lawyers funded by a trust fund contributed to equally by all the member States. In addition, funding of a full-fledged assistance to respondent States

²⁶ To date, financial assistance was provided to eight developing States.

was not contemplated – only defence and advisory services were provided at a reduced rate through the use of the trust fund.

54. This project was discontinued for various reasons including several government transitions and changes in the teams participating in the steering committee, as well as the concomitant the launching of the Union of South American Nations (UNASUR) project which was based on similar objectives.

(d) The UNASUR Project (since 2008)

55. The UNASUR project was launched in 2008 along the lines of the UNCTAD-IADB-OAS negotiations through the signing of a Constitutive Treaty by the leaders of several South American States.

56. Due to their concerns with the ISDS regime, the UNASUR countries sought to replace it with “a regional dispute advisory centre on investment law and investor-State disputes for UNASUR member countries”, referred to as the Southern Observatory on Investment and Transnational Corporations, along with the creation of UNASUR investment arbitration rules and an UNASUR investment arbitration court. The purpose of the centre was to primarily create “equal conditions between investors and states”, to “promote sustainable investment that respects State sovereignty”, and to provide “a source of information and generate debate, discussion, reflection and exchange of knowledge and experiences on investment and international investment arbitration, in order to promote clear and transparent rules.” Its focus was on consultations or mediation instead of arbitration.

57. No public announcements have been made since the Second Ministerial Meeting in September 2015, where “nearly 80 per cent” of the proposed legal framework has been agreed to.

(e) ANZ-ASEAN Forum (2012)

58. In the context of the Australia-New Zealand and Associate of Southeast Asian Nations (ANZ-ASEAN) Forum in 2012, a regional investment advisory centre was proposed, but not pursued.

(f) Other initiatives

59. The initiatives mentioned above were not pursued for different reasons, mainly due to limited political as well as financial support, although the Latin-American initiatives made notable progress insofar as coming up with a draft constitutive treaty.

60. Currently, a number of initiatives with a less encompassing approach are being undertaken, such as:

- The Investment Support Programme for Least Developed Countries (ISP/LDCs) (collaborated programmes providing on-demand legal assistance, training and capacity-building support, specifically to LDCs and other eligible entities with the aid of legal experts who provide pro bono or reduced fee services).²⁷
- TradeLab (a project whereby students and experienced legal professionals, public officials especially from developing countries, small and medium-sized enterprises and civil society work and train together to build legal capacity through the method of “learning by doing”).²⁸
- The Scoping Study (commissioned by the Government of the Netherlands to the Columbia Centre on Sustainable Investment (CCSI) that aims to address how to secure adequate legal defence for parties in proceedings under investment treaties).

²⁷ See <https://www.idlo.int/Investment-Support-Programme-LDCs>.

²⁸ The TradeLab, Graduate Institute in Geneva (with Georgetown Law and Ottawa Law), see <https://www.tradelab.org/>.

61. Recurrent annual conferences and courses, training programmes are periodically organized for government officials. This includes academic programmes by various universities to allow for an exchange of best practices and experiences.²⁹ Such pro bono and other initiatives are small scale in nature.

E. Questions for consideration

62. The Working Group may wish to note that the establishment of an advisory centre could be undertaken in conjunction with – or entirely independently from – any other reform options and may also usefully complement certain reform options to strengthen the legitimacy of the investment regime. The following questions might need consideration.

1. Scope of services and beneficiaries

63. Section II, B and C above provide an outline of the services that an advisory centre might render as well as the possible beneficiaries. Questions for consideration include the determination of the scope of such services and beneficiaries.

2. Possible forms and structure

64. The Working Group may wish to note the key consideration that an advisory centre should provide its services in a competent and independent manner, devoid of any political influence. The principle of independence would need to be carefully maintained for securing legitimacy of the centre. Matters for consideration include how to ensure that confidentiality would be preserved, and conflicts of interest would be avoided. In addition, the following questions would need to be considered:

- Whether the centre would be a legally independent intergovernmental body; or whether it would be set up under the form of a trust fund handled by an organization, or under another form;
- Whether staff should be permanent, composed of consultants or of a combination of both;
- Whether members (States paying the membership fees) and beneficiaries (States entitled to the assistance services) would or should overlap for the purpose of access to services.

3. Funding of the advisory centre

65. Regarding funding, the Working Group may wish to consider whether the services would be provided on a cost basis or be subsidised, whether States facing numerous disputes should be given access to the services of the centre with the risk of exhausting available resources. The question of funding is closely connected to the following matters:

Scope of Services and beneficiaries: (see above, para. 63).

- Financial Governance: this would require determination of contributors; for instance, whether the contributors should be member States (where the centre is set-up as an intergovernmental organization), beneficiaries of the services with certain eligible beneficiaries exempted from payments, and/or other donors.
- Impact of the structure and legal framework: see above, paragraph 64; for instance, if an advisory centre were to be attached to an existing institution, it could then rely on the resources of such institution.
- Location: it should be determined whether an advisory would have its seat in one location or would be organized on a regional basis; logistical, as well as

²⁹ <http://ccsi.columbia.edu/work/projects/arbitration-training/>.

legal and financial implications might need to be taken into account in that respect;

- The quality of the legal services: in addition to providing affordable services, focus should also be on the quality of those services. The question of liability in case of default by the advisory centre would also need to be addressed and would be connected to the question of its structure and whether immunities would apply. These matters would be essential for building legitimacy of an advisory centre and trust of the users.
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