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EU Constitutional Framework for  
International Dispute Settlement  
and Rule of Law

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**Advisory Centre on International Investment Law**

Johanna Braun and Afolabi Adekemi



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and Jean Monnet Chair of EU Constitutional Framework for International Dispute Settlement  
and Rule of Law

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## **Abstract**

Over the last decade, the investor-State dispute settlement system (ISDS) has witnessed a heavy public backlash that has triggered a call for reform. One of the identified concerns in the reform discussions now ongoing at the United Nations Commission on International Trade Law (UNCITRAL) is the exorbitant cost of ISDS procedures. It is contended that the high cost of ISDS procedures impedes the right of access to justice of certain disputants who due to the high cost may not afford the quality legal representation or services necessary to diligently defend against an ISDS claim. The same goes for small investors potentially exposed to hostile host state actions. To create a level playing field, a reform option generally welcomed by all stakeholders is the establishment of an Advisory Centre on International Investment Law (ACIL). Although a welcome reform option, the ongoing debate at UNCITRAL Working Group III reveals the divergence amongst stakeholders on the key factors necessary for the creation of an ACIL. This article sheds light on these key factors, the divergence of positions amongst stakeholders, and unresolved questions that will ultimately determine whether or not an ACIL will become a reality.

## **Keywords**

ISDS – UNCITRAL – Working Group III – ACIL – ACWL – LDC

## **Biography of the authors**

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## Advisory Centre on International Investment Law

*Johanna Braun and Afolabi Adekemi\**

### A. Introduction

One of the main criticisms against the current investor-State dispute settlement (ISDS) system relates to the cost of ISDS procedures.<sup>1</sup> High costs may create an encumbrance to access justice for certain groups of disputants, in particular low-income countries that cannot afford the involvement in investment arbitration – especially given the cost of quality legal representation. This challenge is also true for micro, small, or medium-sized enterprises (MSME) having no financial power to protect their investment interests through ISDS against hostile State action. Importantly, “equality of arms” is a fundamental rule of law requirement that must be present in every fair and effective justice system. While not expected that all parties in ISDS should have equal financial means, it is yet imperative that effective access to the ISDS system should not be dependent upon the economic status of a party. In jurisdictions under European Union (EU) law, effective access to justice irrespective of party status is so fundamental that it’s regarded as a general principle of law that underlies the constitutional tradition common to member states of the EU.<sup>2</sup>

Although today a number of available options exist that parties use in addressing cost issues in ISDS,<sup>3</sup> including appointing counsels through tender proceedings, third-party funding, or adopting a cost-saving procedural timeline. Nevertheless, it is acknowledged by the stakeholders that further work is needed to promote a level playing field for all parties in ISDS. As a result, a potential solution now under consideration in UNCITRAL Working Group III (WG III) is the establishment of an Advisory Centre on International Investment Law (ACIL) similar to the World Trade Organization (WTO) Advisory Centre on WTO Law (ACWL). The ACWL is an intergovernmental organization established to provide advice and training on all matters relating to WTO law and offers support to developing and least-developed countries (LDCs) in WTO dispute settlement proceedings.<sup>4</sup>

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<sup>1</sup> See in general, UNCITRAL WGIII, Possible Reform of Investor-State Dispute Settlement (ISDS) – Cost and Duration, A/CN.9/WG.III/WP.153 (31 August 2018); *Kaufmann-Kobler/Potesta*, Reform of ISDS: Matching Concerns and Solutions, available at: <https://www.ejiltalk.org/reform-of-isds-matching-concerns-and-solutions/> (08/12/2022); *Gaukerodger/Gordon*, Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community, p. 19, available at: <http://dx.doi.org/10.1787/5k46b1r85j6f-en>. (08/12/2022).

<sup>2</sup> In this regard see, CJEU, *Johnston v. Chief Constable of the Royal Ulster Constabulary*, Case 222/84 [1986] ECR 1651, para. 19, p. 1682.; CJEU, *Unectef v. Heylens*, Case 222/86 [1987] ECR 4097, para. 14, p. 4117; CJEU, *Sofiane Fabas v Council of the European Union*, Case T-49/07, para. 59, p. 5579; See also, Articles 6 and 13 of the ECHR, reaffirmed by Article 47 of the Charter of fundamental rights of the European Union: “Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article”.

<sup>3</sup> *Ruff/Belcher/Golsong/Lim/Pittman*, Financing a Claim or Defence, available at: <https://globalarbitrationreview.com> (08/12/2022).

<sup>4</sup> ACWL, The Services of ACWL, p. 3, available at: [https://www.acwl.ch/download/ql/Services\\_of\\_the\\_ACWL.pdf](https://www.acwl.ch/download/ql/Services_of_the_ACWL.pdf) (08/12/2022).

Given the ACWL's success in promoting capacity building and offering dispute settlement support to its beneficiaries,<sup>5</sup> several States in UNCITRAL WG III now support a similar model through the establishment of an ACIL as a desirable option for creating a level playing field in ISDS.<sup>6</sup> The following discussion now considers the aspects of the ACIL currently being considered at UNCITRAL (Part B); the stakeholders' positions on these aspects (Part C); the next steps in view (Part D); and some concluding remarks (Part E).

## **B. Aspects of the ACIL Currently Discussed at UNCITRAL**

WG III has expressed its general support to undertake preparatory work on the establishment of an ACIL.<sup>7</sup> Upon request of WG III, UNCITRAL's Secretariat has prepared draft provisions, which deal with a wide range of topics, including the services offered by an ACIL and its beneficiaries as well as its legal structure and budget questions.<sup>8</sup>

### I. Services

The draft provisions envisage a two-pillar structure for the services provided by the ACIL, consisting of an assistance mechanism and a forum to exchange information and discuss ISDS policies.<sup>9</sup> The first pillar would provide representation and assistance services related to alternative dispute resolution (ADR) as well as investor-State arbitration. The Centre could thus analyse the strengths and weaknesses of a given case, advise beneficiaries on the appropriate dispute resolution method, and provide representation and assistance in ADR proceedings.

Representation of States in ISDS proceedings could entail different kinds of "service models": (i) facilitation for States that primarily rely on in-house-counsel or external counsel, i.e. advice on specific disputes; (ii) support services to complement the existing in-house counsel or external counsel on more aspects of the proceedings; and (iii) full representation services for those States that lack in-house capacity and funds for experienced outside counsel or States that have little to no experience in ISDS.

The assistance services regarding ISDS proceedings partially overlap with the representation service. They include early risk assessment and the identification of a litigation strategy, the determination of a budget, assistance with arbitrator selection and appointment, the preparation of

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<sup>5</sup> See in general, *ACWL*, Report on Operations 2021, available at: <https://www.acwl.ch/the-acwl-publishes-report-on-operations-for-2021/> (08/12/2022).

<sup>6</sup> See UNCITRAL WG III, Submission from the Government of Thailand, A/CN.9/WG.III/WP.162 (Mar. 8, 2019); UNCITRAL WG III, Submission from the European Union and its Member States, A/CN.9/WG.III/WP.159/Add.1 (Jan. 24, 2019); UNCITRAL WG III, Submission from the Government of Morocco, A/CN.9/WG.III/WP.161 (Mar. 4, 2019); UNCITRAL WG III, Submission from the Government of Costa Rica, A/CN.9/WG.III/WP.164 (Mar. 22, 2019); UNCITRAL WG III, Submission from the Government of Columbia, A/CN.9/WG.III/WP.173 (June 14, 2019); UNCITRAL WG III, Submission from the Government of Turkey, A/CN.9/WG.III/WP.174 (July 11, 2019); UNCITRAL WG III, Submission from the Government of the Republic of Korea, A/CN.9/WG.III/WP.179 (July 31, 2019).

<sup>7</sup> UNCITRAL WG III, Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-eighth session (Vienna, 14-18 October 2019), available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/V19/104/76/PDF/V1910476.pdf?OpenElement> (5/12/2022), para. 28.

<sup>8</sup> UNCITRAL WG III, Advisory Centre, Note by the Secretariat (3 December 2021), available at: [https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/wp\\_212\\_advisory\\_centre\\_final\\_for\\_submission.pdf](https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/wp_212_advisory_centre_final_for_submission.pdf) (1/2/2022).

<sup>9</sup> *Ibid.*, p. 6 (Draft provision 5 – Assistance Mechanism and Forum).

written statements and documentary evidence, and technical support on substantial and procedural conduct.<sup>10</sup>

According to WG III, representation and assistance should mainly be offered to developing States and least developed countries (LDCs). An additional goal of the representation and assistance services would be to build capacities within these States to lead and manage ISDS cases autonomously.

The second pillar envisaged by WG III would introduce a forum to share best practices and capacity building on a number of issues.<sup>11</sup> First, the ACIL could offer different services connected to dispute avoidance, including assistance with conflict management systems and with the creation of lead agencies that deal with potential disputes. Second, the forum could provide information on ADR methods as well as foster the exchange of information in this field. Third, the forum could provide legal and policy advice services. They would involve the review of and the potential amendment to States' international investment agreements but also the assessment of whether a (contemplated) State measure complies with the relevant State's treaty obligations.

In addition, or as an alternative to the three areas of services presented above, the ACIL could create knowledge-sharing mechanisms, data collections, and centralised repositories for arbitrators, mediators, and ISDS experts. Relatedly, the forum could promote a regular exchange of information between all stakeholders and could assist with the development of investment law guidelines. Finally, the ACIL could offer capacity-building services. In this context, the Centre would create trainee or secondment programmes to train State representatives in skills like treaty negotiation and interpretation as well as the management of ISDS cases.

## II. Beneficiaries

WG III would prefer to offer the ACIL's services only to States, ideally only to LDCs and States with limited experience in ISDS. However, there is some disagreement within WG III regarding MSMEs as beneficiaries. It is doubtful whether it would be possible to determine standardised requirements of an MSME as the requirements will depend on the respective home State's economy. Another problem concerns the risk of conflicts of interest, at least regarding services like legal representation.

WG III discusses the use of a "sliding scale" of beneficiaries, granting developed countries and MSMEs only access to the second pillar of services, the forum to exchange information, while developing countries and LDCs would have unlimited access to both pillars of the ACIL's services.

## III. Legal Structure

The draft provisions do not set out a clear legal structure. WG III seems to prefer a legally independent intergovernmental body as this body could define the nature, scope, and prioritisation of its activities and avoid conflicts of interests. On the other hand, if the ACIL was attached to any existing international organisation, to a standing multilateral tribunal, or an arbitral institution, it could create synergies and could benefit from existing institutional resources.

Moreover, WG III suggests setting up an independent governing board with representatives from all beneficiaries. Alternatively or additionally, an advisory board representing MSMEs and other

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<sup>10</sup> Ibid., p. 7 (Draft provision 6 – Services under the Assistance Mechanism).

<sup>11</sup> Ibid., p. 10 (Draft provision 7 – Technical Assistance Services and Capacity Building Activities under the Forum).

non-State actors could be established. However, the details of both these boards, including their exact roles, the rules governing their work, and issues of independence and impartiality still have to be figured out.

#### IV. Financing

The proposed financing of the ACIL is based on a study conducted by different organisations together with UNCITRAL's Secretariat.<sup>12</sup> It began by assessing an ACIL's workload and the connected costs. Depending on the cost scenario, the estimated budget of an ACIL within a five-year period will range between 10 to 16 million USD.<sup>13</sup>

It is suggested to charge States on a sliding scale, using the World Bank classification of high-income developing countries, upper-middle-income developing countries, and lower-middle-income developing countries.<sup>14</sup> The financing would consist of a one-time membership fee of 486,000 USD, 162,000 USD, and 81,000 USD, respectively. LDCs would not be charged a fee. Possible gaps could be filled with voluntary contributions by private donors, official development assistance organizations, and States.

Moreover, the Centre could charge fees for its services. LDCs and lower-middle-income developing countries could pay at a nominal rate while high-income and upper-middle-income developing countries could be charged at the market rate or a discounted rate. Costs could also be recovered in case the beneficiary State prevails. An endowment fund comparable to the ACWL's endowment fund could guarantee additional stability in funding the operations of the ACIL. Developing and developed countries could contribute according to their economic situation.

### **C. Stakeholders and their Positions**

Following the draft provisions on an ACIL prepared by the UNCITRAL Secretariat at the request of WG III,<sup>15</sup> comments have been received from States expressing their respective positions on the initial draft, especially with regards to the main elements such as the scope of services, beneficiaries, legal structure, and financing.<sup>16</sup>

#### I. Services

The initial draft released by the UNCITRAL Secretariat contemplates a broad range of services open to comments from the Member States, including:

- Pre-dispute and dispute avoidance services;
- Mediation and other alternative dispute resolution (ADR) services;
- Representation and assistance services in ISDS;
- Legal and policy advisory services;

<sup>12</sup> *Angelet et al.*, Note on the costs and financing of an Advisory Centre on International Investment Law, available at: [https://uncitral.un.org/sites/uncitral.un.org/files/aciiil\\_note\\_on\\_costs\\_financing\\_24\\_august\\_2020\\_final\\_updated.pdf](https://uncitral.un.org/sites/uncitral.un.org/files/aciiil_note_on_costs_financing_24_august_2020_final_updated.pdf) (20/03/2023).

<sup>13</sup> UNCITRAL WG III, Possible Reform of Investor-State Dispute Settlement (ISDS) – Advisory Centre, A/CN.9/WG.III/WP.212/Add.1 (3 December 2021), paras. 14-17, available at: <https://documents-dds-ny.un.org/doc/UNDOC/LTD/V21/090/97/PDF/V2109097.pdf?OpenElement> (20/03/2022).

<sup>14</sup> *Ibid.*, paras. 17-18.

<sup>15</sup> UNCITRAL WG III, Report of Working Group III (Investor-State Dispute Settlement Reform), A/CN.9/1004\*, para. 40ff., available at: <https://documents-dds-ny.un.org/doc> (09/12/2022).

<sup>16</sup> UNCITRAL WG III, Comments from delegations on the Initial Draft on the Establishment of Advisory Centre, available at: <https://uncitral.un.org/sites/uncitral.un.org/> (09/12/2022).



- Capacity building and sharing of best practices.

From these listed services, noteworthy are the areas where States have expressed differing views as to the scope of services a future ACIL should deliver to its beneficiaries. For example, considering the likelihood of operating on a limited budget, there is a concern shared by States including Indonesia, Panama, and Switzerland that an ACIL with a broad scope of services as contemplated in the initial draft may end up inefficient to serve its main purpose, therefore the need to narrow down its scope of services.<sup>17</sup> For instance, the possibility of an ACIL serving as a mediation centre, as part of its ADR services, is one considered not to fall within its core purpose and therefore should be excluded. This opinion is equally shared by the EU and its Member States, Chile, Colombia, and Mexico.<sup>18</sup>

Another area of divergence is the possibility of legal representation services. States like Canada, Chile, Colombia, Mexico, Korea, and Switzerland have opposed full legal representation contemplated in the initial draft.<sup>19</sup> This opposition is premised on the view that full-legal representation may be counterproductive to the capacity-building agenda of the ACIL to make the beneficiary States more self-reliant in the management of future ISDS proceedings. The EU and its Member States on the other hand do not oppose full-legal representation so far it is conducted in parallel with significant involvement of the beneficiary State.<sup>20</sup> The Republic of Korea shares a similar view that while an ACIL may engage in representative services, “the main defence work should be conducted and organized by the respondent government and/or its outside legal counsel”.<sup>21</sup>

Notably, besides States’ submission of comments on the initial draft on the establishment of an ACIL, comments have also been received from non-governmental organizations (NGOs). For example, the Corporate Counsel International Arbitration Group (CCIAG) and the United States Council for International Business (USCIB) also denounce the possibility of an ACIL that offers party representation services. This they argue is unnecessary particularly given the limited resources to be at the ACIL’s disposal.<sup>22</sup> Another important stakeholder contribution to note is the comment from the United Nations Conference on Trade and Development (UNCTAD), buttressing the views already expressed in WGIII that an ACIL should avoid the duplication of services on international investment law already in existence.<sup>23</sup> According to UNCTAD, draft provision 2(d)(i)<sup>24</sup> of the initial draft duplicates an already existing service provided by UNCTAD, “including the sharing of best practices, on treaty drafting, IIA reform, and the development of model IIAs”.<sup>25</sup>

On the other hand, the availability of the same or similar investment law services in multiple institutions could make room for a healthy competition amongst the international investment law

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<sup>17</sup> Ibid., p. 25, 28, 38.

<sup>18</sup> Ibid., p. 7, 14.

<sup>19</sup> Ibid., p. 3, 7, 33, 38.

<sup>20</sup> Ibid., p. 14 f.

<sup>21</sup> Ibid., p. 33.

<sup>22</sup> Ibid., p. 45.

<sup>23</sup> Ibid., p. 48.

<sup>24</sup> Ibid., “Draft provision 2: The Centre shall provide the following services: ... (d) Legal and policy advice on matters relating to international investment law, including assistance to State Beneficiaries for: (i) The review of, and potential amendment to, their international investment instruments; and...”.

<sup>25</sup> Ibid., p. 50.

service providers. Albeit, these service providers are mainly government funded and do not operate as typical commercial enterprises in a market competition. They yet rely on funding from non-governmental sources for their successful operations and existence. As a result, the quality of non-governmental funding that these institutions are able to attract, will likely depend on the quality of service that they deliver. Therefore, the overlap of investment law services does not automatically entail a duplication that should be avoided. Instead, it could also translate into a healthy competition that would enhance the quality of the services delivered to the ACIL's beneficiaries.

## II. Beneficiaries

Discussions at WG III so far suggest a political consensus amongst States that developing and least developed countries should be the primary beneficiaries of the ACIL services, with LDCs having priority status. What remains unsettled though is whether the beneficiary coverage should extend to developed countries and MSMEs. In this regard, there are divergent positions.

Some countries have argued against the inclusion of MSMEs as beneficiaries, for example, Chile, Colombia, and Mexico fall into this category. By offering capacity-building services to States on the management of their investment regime, it is argued that MSMEs' protection is also indirectly secured.<sup>26</sup> As for Indonesia, extending ACIL coverage to MSMEs will amount to States' funding claims against themselves which is not the goal of the Centre.<sup>27</sup> Costa Rica, Switzerland, and Vietnam have also opposed the inclusion of MSMEs under the ACIL beneficiary coverage.<sup>28</sup> The Republic of Korea also argues that the inclusion of MSMEs as beneficiaries is of less priority compared to States, particularly given the likely limited resources of the Centre and the lack of a global benchmark in defining small businesses.<sup>29</sup>

However, other States have expressed support for the coverage of MSMEs including developed countries, although with limited access to the services of the Centre. For example, Canada supports access to capacity building for both MSMEs and developed countries. MSMEs, in particular, should be granted access to databases, research tools, and workshop resources. Panama also supports granting capacity-building services to all, including developed countries and MSMEs. The EU and its Member States even adopt a much broader position by preferring that not only MSMEs should be beneficiaries of the ACIL but also other individual and vulnerable investors. The precise meaning of MSMEs, individual or vulnerable investors is undefined at this point, but the EU and its Member States offer to explore options for a duly defined non-state beneficiary to the ACIL, provided the services of the Centre are offered as part of a broader institutional reform of ISDS, encompassing the creation of a permanent multilateral investment court (MIC).<sup>30</sup> Panama is another State in favour of having MSMEs as beneficiaries at least in a limited form.<sup>31</sup>

From the NGO's contribution on the subject of ACIL beneficiaries, the CCIAG and USCIB take the position that the rationale for providing services to under-resourced States is equally applicable to MSMEs to guarantee a level playing field in ISDS.<sup>32</sup> Arguably, this same rationale – to guarantee

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<sup>26</sup> Ibid., p. 7.

<sup>27</sup> Ibid., p. 25.

<sup>28</sup> Ibid., pp. 9, 39, 42.

<sup>29</sup> Ibid., pp. 34 f.

<sup>30</sup> Ibid., pp. 18 f.

<sup>31</sup> Ibid., p. 29.

<sup>32</sup> Ibid., pp. 54 f.

a level playing field– justify extending the ACIL beneficiary coverage to under-resourced individual investors. Additionally, even local communities that qualify as vulnerable (non-disputing parties) may benefit from the ACIL’s advisory services on how to ensure that their interest is factored into any potential ISDS award.

The issue regarding beneficiaries of the ACIL, especially whether MSMEs will be covered remains a possible deal-breaker for the parties in WG III. Particularly from an EU perspective, equitable access to an effective ISDS system for MSMEs is fundamental for the legitimacy of ISDS. It remains unclear how the differences in positions on beneficiaries will be addressed to reach a satisfactory result for all States, especially since WG III has the mandate to deliver a consensus-based result.

### III. Legal Structure

Unlike the issue regarding beneficiaries, WG III might have less trouble reaching a consensus on the legal structure of the ACIL. So far it appears the States are in favour of an independent impartial and non-political intergovernmental advisory centre modelled in one form or another after the ACWL. This is the position expressed by most States that have commented on the initial draft provisions, including Canada, Korea, and Switzerland.

While it is conceivable that the ACWL can provide a valuable model for the ACIL, it is also important to note the distinction between the WTO and the ISDS regime. As rightly noted by the government of Indonesia,<sup>33</sup> the former is based on a single multilateral agreement with a centralised dispute resolution system and procedural rules, while the latter is the direct opposite – based on over three thousand bilateral investment treaties without a centralised dispute resolution system or procedural rules. Also, unlike the ISDS system, the WTO system provides no private individual access to dispute settlement. This distinction, *inter alia*, counters the appropriateness of the WTO ACWL as an effective model for an ACIL. Rather, stakeholders must dig deeper to establish an ACIL compatible with the particular characteristics of ISDS.

Another notable area of States’ difference arises from the issue of whether an ACIL should be linked to a permanent MIC. Chile, Colombia, and Mexico share the view that while an ACIL could follow international models like the ACWL, it should be completely independent and not linked to a permanent court.<sup>34</sup> In contrast, as earlier noted, the EU and its Member States favour the creation of the ACIL as an independent body yet linked to a permanent MIC set up for the adjudication of investment disputes.<sup>35</sup>

### IV. Financing

Regarding finance, the emerging consensus is that all member States of the ACIL should contribute to the Centre’s finance according to their level of development. In any case, the funding plan should exclude any financial burden on developing and least-developed countries. Further, States – including Korea, Indonesia, and Panama – have expressed support for multiple sources of income for the ACIL beyond its members, for example, allowing year-round voluntary contributions to the Centre, including private donors, and ISDS user fees.<sup>36</sup>

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<sup>33</sup> Ibid., p. 24.

<sup>34</sup> Ibid., p. 8.

<sup>35</sup> Ibid., pp. 19 f.

<sup>36</sup> Ibid., pp. 25, 30, 36,

## D. Next Steps

Based on the discussions at the 43<sup>rd</sup> session, the Secretariat will now prepare a revised set of provisions on services and beneficiaries.

A number of questions still remain unanswered. With regards to the services provided, WG III has advocated for a flexible approach according to the requests that the ACIL would receive. As earlier noted, it has been recommended that the ACIL should avoid duplicating services that are already provided by other organisations.<sup>37</sup> Instead, the ACIL could compile information on the support mechanisms that already exist.<sup>38</sup> In a second step, the Centre could then unite the places providing such support services with the respective beneficiary.<sup>39</sup>

While training on international investment law and policy is still widely requested,<sup>40</sup> such services could be perceived as a threat to the ACIL's independence.<sup>41</sup> On the other hand, such programs are not only relatively cost-efficient,<sup>42</sup> but they could also be very effective since they may help avoid ISDS cases altogether.

Still, not all disputes will be avoided. The ACIL could therefore offer legal support in those cases that make it to arbitral proceedings. Tasks could include, for example, support with appointing arbitrators, preparing memorials, or representation in hearing.<sup>43</sup> Even though legal support would be immensely helpful to create a level-playing field, it is also very expensive.<sup>44</sup> WG III should therefore discuss whether these services should only be provided for a fee. Such a fee could, of course, also be customised according to the specific beneficiary's economic situation.<sup>45</sup>

<sup>37</sup> See e.g. *Columbia Center on Sustainable Investment (CSSI)*, Securing Adequate Legal Defense in Proceedings Under International Investment Agreements – A Scoping Study, available at: <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/securingadequatedefense.pdf> (5/12/2022), pp. 18 ff.; *Sharpe*, An International Investment Advisory Center: Beyond the WTO Model, available at: <https://www.ejiltalk.org/an-international-investment-advisory-center-beyond-the-wto-model/> (5/12/2022); see also UNCITRAL WG III, Advisory Centre, Note by the Secretariat (3 December 2021), p. 13.

<sup>38</sup> *CSSI*, Securing Adequate Legal Defense in Proceedings Under International Investment Agreements – A Scoping Study, available at: <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/securingadequatedefense.pdf> (5/12/2022), p. 83; *Gottwald*, Am. U. Int'l L. Rev. 2007/2, 237, S. 270.

<sup>39</sup> *Ibid.*

<sup>40</sup> See eg *Schill/ Vidigal*, (2019) 18.3 Law Pract. Int. Court. Trib. 2019/3, 314, p. 339; *El-Kady/ De Gama*, ICSID Review 2019/2, 482, p. 492; *Joubin-Bret*, (2015) E15 Task Force on Investment Policy Think Piece 2015, p. 11; *Gottwald*, Am. U. Int'l L. Rev. 2007/2, 237, p. 270.

<sup>41</sup> *Schwieder*, JWIT 2018/4, 628, p. 658 f.

<sup>42</sup> *CSSI*, Securing Adequate Legal Defense in Proceedings Under International Investment Agreements – A Scoping Study, available at: <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/securingadequatedefense.pdf> (5/12/2022), p. 88: once the training programs are set up, they can be used again.

<sup>43</sup> *Gottwald*, Am. U. Int'l L. Rev. 2007/2, 237, p. 272; *Sharpe*, An International Investment Advisory Center: Beyond the WTO Model, available at: <https://www.ejiltalk.org/an-international-investment-advisory-center-beyond-the-wto-model/> (5/12/2022); *Sauvant*, Academic Forum on ISDS Concept Paper 2019/14, p. 9.

<sup>44</sup> The defence of an average ISDS case costs USD 5 million, see *CSSI*, Securing Adequate Legal Defense in Proceedings Under International Investment Agreements – A Scoping Study, available at: <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/securingadequatedefense.pdf> (5/12/2022), p. 88.

<sup>45</sup> UNCITRAL WG III, Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-eighth session (Vienna, 14–18 October 2019) available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/V19/104/76/PDF/V1910476.pdf?OpenElement> (5/12/2022), paras. 32-33.

Regarding the beneficiaries, the Working Group should determine a methodology to assess whether a State is developing. Moreover, if MSMEs were to benefit from the ACIL's services as well, conflicts of interest could arise. This is particularly of concern where both a respondent State and a claimant-MSME were to benefit from legal support in the same or closely related dispute. For this the ACIL needs to set up measures to guarantee the confidentiality and impartiality of the process. It should therefore be assessed whether MSMEs could only be provided with limited access to the ACIL<sup>46</sup> or if the staff could be divided between the two beneficiaries so that different staff would be responsible for States and MSMEs<sup>47</sup>.

Based on a Scoping Study, WG III considers that ombudspersons, technical assistance, capacity-building, or legal representation would especially serve MSMEs with limited access to ISDS.<sup>48</sup> However, if States bar the ACIL from providing these services, it remains unclear whether and which institution would remedy these issues. In addition, the ACIL should develop rules to deal with capacity problems. Rules should also be created for potential conflicts of interest, where the ACIL provides guidance in treaty formulation, interpretation, *and* defence.

The staffing of the ACIL remains unclear.<sup>49</sup> It should be decided whether to opt for permanent staff and/or for a mix of consultants such as academics and practitioners as well as member-government secondees. It should also be noted that staffing could impact the Centre's independence and impartiality. Moreover, the Working Group should consider the staff's diversity, regarding their expertise and experience but also their legal, social, and political backgrounds.<sup>50</sup>

Finally, the ACIL's location is not yet determined. It depends on various factors, including its legal form, its mandate, the identity and preference of beneficiaries and donors, and its budget. The Centre could also maintain different regional offices or virtual centres in the form of dedicated desks, for example in regional development banks.<sup>51</sup>

Once all of these open questions are settled, the ACIL's financing has to be determined. In the first years, the ACIL will probably depend on contributions by member States and third-party

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<sup>46</sup> *CSSI*, Securing Adequate Legal Defense in Proceedings Under International Investment Agreements – A Scoping Study, available at: <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/securingadequatedefense.pdf> (5/12/2022), Section 6.3.2.

<sup>47</sup> Bungenberg/Reinisch, para. 190.

<sup>48</sup> See UNCITRAL WG III, Advisory Centre, Note by the Secretariat (3 December 2021), p. 16, referring to *CSSI*, Securing Adequate Legal Defense in Proceedings Under International Investment Agreements – A Scoping Study, available at: <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/securingadequatedefense.pdf> (5/12/2022).

<sup>49</sup> See UNCITRAL WG III, Possible reform of investor-State dispute settlement (ISDS) – Advisory Centre, available at: <https://documents-dds-ny.un.org/doc/UNDOC/LTD/V21/090/91/PDF/V2109091.pdf?OpenElement> (5/12/2022), paras. 17 f.

<sup>50</sup> Nationality of the staff or location of the ACIL may seem like details but previous attempts to establish an ACIL have failed in part due to disagreements over these issues, see *CSSI*, Securing Adequate Legal Defense in Proceedings Under International Investment Agreements – A Scoping Study, available at: <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/securingadequatedefense.pdf> (5/12/2022), p. 45 f.

<sup>51</sup> See UNCITRAL WG III, Possible reform of investor-State dispute settlement (ISDS) – Advisory Centre, available at: <https://documents-dds-ny.un.org/doc/UNDOC/LTD/V21/090/97/PDF/V2109097.pdf?OpenElement> (5/12/2022), paras. 6 ff.

donors.<sup>52</sup> In the longer run, however, the ACIL could charge fees for the services.<sup>53</sup> This would not only prevent beneficiaries from frivolously requesting the ACIL services<sup>54</sup> but could also ensure more reliable funding than purely relying on donations.

## E. Conclusion

As the debate for the creation of an ACIL advances in WG III, actors agree that an ACIL is aimed at creating a level playing field through effective access to justice to ISDS. Given this undisputed aim, it is somewhat ironic for Member States to advocate that the ACIL beneficiaries be limited to “under-resourced” states, excluding MSMEs or other potentially vulnerable actors in ISDS. An ACIL that benefits just state actors will only level the pitch on one half of the ISDS field, on the other half, access to ISDS will remain a privilege of the well-resourced private actors.

Nevertheless, one cannot also ignore that an ACIL can only function efficiently if it takes on responsibilities within its limited resources. Therefore, the extent of the responsibility an ACIL can shoulder – whether for State or non-State actors – will depend on its budget. The ACIL’s budget will require further discussions regarding not only the Centre’s financing but also related questions pertaining to its legal structure as well as the services it will provide.

Despite the differences and open questions, possibly the motive behind this reform option may inspire the political will necessary to cross the divide and derive the consensus to bring the ACIL into reality.

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<sup>52</sup> *Gottwald*, Am. U. Int’l L. Rev. 2007/2, 237, p. 274; *Joubin-Bret*, (2015) E15 Task Force on Investment Policy Think Piece 2015, p. 13. On third-party donors see also *Umirdinon*, Columbia FDI Perspectives No 175, available at: <https://academiccommons.columbia.edu/doi/10.7916/D8445MNH>, (5/12/2022), p. 2; *Sawant*, Academic Forum on ISDS Concept Paper 2019/14, p. 10.

<sup>53</sup> *Joubin-Bret*, (2015) E15 Task Force on Investment Policy Think Piece 2015, p. 13; *Sawant*, Academic Forum on ISDS Concept Paper 2019/14, p. 11.

<sup>54</sup> *CSSI*, Securing Adequate Legal Defense in Proceedings Under International Investment Agreements – A Scoping Study, available at: <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/securingadequatedefense.pdf> (5/12/2022), p. 94; *Angelet* et al, Note on the costs and financing of an Advisory Centre on International Investment Law, available at: [https://uncitral.un.org/sites/uncitral.un.org/files/aciil\\_note\\_on\\_costs\\_financing\\_24\\_august\\_2020\\_final\\_updated.pdf](https://uncitral.un.org/sites/uncitral.un.org/files/aciil_note_on_costs_financing_24_august_2020_final_updated.pdf) (5/12/2022), para. 84.

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