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Possible reform of Investor-State dispute settlement (ISDS)

Submission from the Governments of the Netherlands, Peru and Thailand

Note by the Secretariat

This note reproduces a submission received on 18 March 2020 from the Governments of the Netherlands, Peru and Thailand in preparation for the thirty-ninth session of the Working Group. The submission is reproduced as an annex to this Note in the form in which it was received.



Annex

Cover Note

Foreign direct investment plays an important role in financing sustainable development as it secures means for economic activity and fosters growth and employment. UNCTAD indicated that over 2.5 trillion USD of additional investment is yearly needed to accomplish the Sustainable Development Goals (SDGs). Investment agreements can improve the investment environment of the Contracting Parties, thereby contributing to facilitating foreign investments and the achievement of the SDGs.

Several bilateral and multilateral initiatives have recently been launched to modernize the system for the settlement of international disputes between investors and states, including within the framework of UNCITRAL. As highlighted during the discussions in the Working Group, specific attention should be devoted to the fact that not all parties in proceedings under International Investment Agreements have access to adequate legal defence.

As a result of the high costs and technical nature of the proceedings, it is observed that sometimes one disputing party has superior knowledge of and experience with procedures under International Investment Agreements than the other.

Building on discussions in the Working Group on this issue, the Ministry of Foreign Affairs of the Netherlands, together with Thailand and Peru, commissioned a scoping study on Securing Adequate Legal Defense in Proceedings under International Investment Agreements. The aim of the study is to provide delegations with a clear, transparent and fact-based overview how adequate legal defence in proceedings between investors and States can be better secured.

This Scoping Study has been prepared by the Columbia Centre on Sustainable Investment, which is solely responsible for its contents. The study does not represent any official position of the Netherlands, Thailand or Peru on this issue, but solely aims to provide government officials and other interested parties with clear policy-making options and guidelines, and to provide a basis for discussions on the desirability and feasibility of creating or expanding an Assistance Mechanism to assist States and other users of and stakeholders in the IIA and investor-state dispute settlement (ISDS) system to more effectively participate in and benefit from this system. The study also includes a section devoted to small and medium-sized enterprises (SMEs) as potential beneficiaries of the identified Assistance Mechanisms.

Below is an executive summary of the Scoping Study. The full version is available at: <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/securingadequatedefense.pdf>.

Executive summary of the Scoping Study

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 defence 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-à-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 centres (such as ICSID, the

PCA, and the SCC), and academic and non-profit centres (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 policymakers 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 centre on international investment law. A key theme that emerged from interviews with those involved in or knowledgeable about these efforts was that policymakers should not underestimate large (such as how a centre will be financed) and, perhaps more so, small policy differences among and between States (such as the location of a centre), 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 defence 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 the Working Group'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 centre"). While general support was expressed for establishing an Assistance Mechanism, particularly as such a mechanism could complement other reform options being developed by Working Group III, 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 borne 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.
