Facilitating Access to Investor-State Dispute Settlement for Small and Medium-Sized Enterprises: Tracing the Path Forward

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Abstract

The costs of accessing investor-state dispute settlement (ISDS) are notoriously high. International investment treaties and investment dispute settlement in particular have been primarily designed with large investors in mind – those with the means to access an international tribunal –, while small and medium-sized enterprises (SMEs) and individual or vulnerable investors can face significant barriers to accessing ISDS. This article is the first in legal scholarship to identify and evaluate the diverse opportunities that exist for the establishment and operation of mechanisms allowing SMEs better and easier access to ISDS. Drawing on the wealth of comparative experience from the functioning of existing dispute settlement assistance mechanisms in international courts and tribunals, the article argues that legal assistance is a more efficient and cost-effective tool than financial assistance and presents concrete proposals for the funding and operation of such a mechanism for SMEs. Finally, the article examines the political cost involved in facilitating SMEs' access to ISDS, in light of the fact that some states have been increasingly wary of ISDS, but it weighs this challenge against the imperative of ensuring effective access to justice.

Keywords

Small and medium-sized enterprises (SMEs), investor-state dispute settlement (ISDS), United Nations Commission on International Trade Law (UNCITRAL), access to

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justice, international investment agreements (IIAs), advisory centre on international investment law, procedural costs, legal assistance funds, expedited proceedings, UNCITRAL Working Group III.

1. Introduction

The costs of accessing investor-state arbitration are notoriously high. One of the concerns identified by states in relation to the reform of investor-state dispute settlement (ISDS) in Working Group III of the United Nations Commission on International Trade Law (UNCITRAL) is precisely the high cost of the current system of investment dispute settlement.[1] International investment treaties and investment dispute settlement in particular have been primarily designed with large investors in mind: those with the means to access an international tribunal. As a result of such exorbitant costs,[2] of which the biggest chunk is that of counsel fees (also termed 'party costs'),[3] small and medium-sized enterprises (SMEs) and individual or vulnerable investors[4] can face significant barriers to accessing ISDS.[5]

Investment treaties, whose purpose is to promote and protect foreign investment, cannot ignore the importance of SMEs – a term for which there is no globally-accepted definition –[6] in the world economy. According to recent World Bank data, SMEs represent the majority of businesses worldwide: they correspond to approximately 90% of all businesses.[7] They contribute to the creation of jobs and economic development, accounting for over 50% of employment.[8] In emerging economies, 'formal SMEs' contribute up to 40% of their gross domestic product (GDP) and these percentages are much higher 'when informal SMEs are included'.[9] The World Bank Group

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[1] UNCITRAL, Report of Working Group III (ISDS Reform) on the work of its thirty-sixth session, UN Doc. A/CN.9/964, 6 November 2018, §§ 109-134; UNCITRAL, Report of Working Group III (ISDS Reform) on the work of its thirty-fourth session – Part I, UN Doc. A/CN.9/930/Rev.1, 19 December 2017, §§ 35-57.

[2] Average party costs per case between 2013 and May 2017 were US$ 7,414,000 for claimants and US$ 5,188,000 for defendants, Matthew Hodgson and Alastair Campbell, *Damages and Costs in Investment Treaty Arbitration Revisited* (GAR News, 14 December 2017).

[3] Gabriel Bottini *et al.*, *Excessive Costs and Recoverability of Cost Awards in Investment Arbitration* 21 Journal of World Investment & Trade 251 (2020) at 255-256.

[4] In some contexts, a new acronym is gaining currency, that of 'MSMEs' (micro, small and medium-sized enterprises). For the sake of brevity, this article uses 'SMEs' to collectively refer to these various types of investors.

[5] Marc Bungenberg and August Reinisch, *From Bilateral Arbitral Tribunals and Investment Courts to a Multilateral Investment Court* (open access, Springer 2020), at 21; UNCITRAL, UN Doc. A/CN.9/930/Rev.1, *supra* note 3, § 41.

[6] E.g. see Lise Johnson and Brooke Guven*, Securing Adequate Legal Defense in Proceedings under International Investment Agreements: A Scoping Study* 11 Columbia Law School Scholarship Archive 1 (2019) at 106.

[7] See https://www.worldbank.org/en/topic/smefinance.

[8] *Ibid.*

[9] *Ibid.*

views SMEs as 'key vehicles to promote employment, value chain development, economic and social inclusion, and resilience in the face of fragility and conflict'.[10] In the European Union (EU), SMEs are even more crucial. They correspond to 99% of all businesses in the internal market.[11]

However, this numerical supremacy of SMEs and their contribution to economic development do not appear to have translated into an equivalent number of investment claims. A study suggests that the number of SMEs that resorted to international dispute settlement between 2008 and 2013 accounted for only about 15% of known disputes.[12] Another study of the Organisation for Economic Co-operation and Development (OECD) identifies a slightly higher but still low percentage of ISDS claims filed by SMEs.[13] This discrepancy between the high number of SMEs and the few investment claims can be explained, at least in part, by the difficulties SMEs face in case of a dispute with their host country. SMEs' preoccupation with the cost of accessing ISDS is intertwined with concerns about the duration of proceedings (the longer the proceedings, the higher the institutional and legal costs)[14] and the lack of legal resources and expertise (e.g., SMEs may have serious difficulties when it comes to initiating an investment claim or may even be unaware of the fact that they are protected under an investment treaty). It is even reported that large investors, and

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[10] World Bank Group Support for Small and Medium Enterprises, *A Synthesis of Evaluative Findings* (16 September 2019), available at https://elibrary.worldbank.org/doi/abs/10.1596/32536.

[11] The European Commission provides the following definition:

1. Following the EU terminology, the category of small and medium-sized enterprises (SMEs) is made up of enterprises which employ fewer than 250 persons and which have an annual turnover not exceeding EUR 50 million, and/or an annual balance sheet total not exceeding EUR 43 million.

2. Within the SME category, a small enterprise is defined as an enterprise which employs fewer than 50 persons and whose annual turnover and/or annual balance sheet total does not exceed EUR 10 million.

3. Within the SME category, a microenterprise is defined as an enterprise which employs fewer than 10 persons and whose annual turnover and/or annual balance sheet total does not exceed EUR 2 million.

Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (notified under document number C (2003) 1422) OJ L 124, 20/05/2003, 36-41, Annex, Article 2. This contrasts with the US definition of small businesses, which, according to the Office of Advocacy of the US Small Business Administration, are independent businesses having fewer than 500 employees. Accordingly, small businesses comprise 99.9% of all US firms, see https://cdn.advocacy.sba.gov/wp-content/uploads/2021/12/06095731/Small-Business-FAQ-Revised-December-2021.pdf.

[12] Joachim Karl, *The Treatment of Small and Medium- Sized Enterprises in International Investment Law* in Thilo Rensmann (ed) *Small and Medium-Sized Enterprises in International Economic Law,* at 261 (Oxford: OUP, 2017); contrast Scott Miller and Gregory Hicks *Investor-State Dispute Settlement: A Reality Check* (Washington: Center for Strategic and International Studies -CSIS-, 2015), at 10, discussing US SMEs. Some of the differences in numbers are due to the different definition of SMEs used in that context, i.e. enterprises with fewer than 500 employees, as opposed to enterprises with fewer than 250 employees in the EU definition, see also *supra* note 13.

[13] David Gaukrodger and Kathryn Gordon, *Investor- State Dispute Settlement: A Scoping Paper for the Investment Policy* Community 3 OECD Working Paper on International Investment 1 (2012/03) at 18.

[14] E.g., the International Centre for Settlement of Investment Disputes (ICSID) levies an annual administrative fee of US$ 42,000 for all registered arbitrations, see ICSID, Schedule of Fees, available at https://icsid.worldbank.org/services/content/schedule-fees.

especially 'extra-large companies with more than USD10 billion' have higher success rates in ISDS, especially when they reach the merits.[15] The classic ISDS system, such as arbitration under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) or the UNCITRAL Arbitration Rules, has not until now sufficiently taken into account these difficulties, which results in an imbalanced protection for SMEs, as well as natural persons, when compared to other investors.

Facilitating SMEs' access to ISDS became of particular concern to the EU, one of the most vocal proponents of ISDS reform. On the one hand, the EU has stressed the need to secure for SMEs better access to the prospective multilateral investment court that it negotiates in UNCITRAL Working Group III.[16] In other words, as part of the broader multilateral reform effort, the EU also aims to explore possible ways to support SMEs in investment dispute settlement.[17] As we shall see later, this interest of the EU in SMEs is shared by UNCITRAL, whose Working Group I is dedicated to SMEs with a current focus on their access to credit.[18] The United Nations Sustainable Development Goals (UN SDGs) too expressly encourage 'the formalization and growth of micro-, small- and medium-sized enterprises, including through access to financial services'.[19]

In addition, as the EU wishes to make ISDS accessible to SMEs, it has also been exploring options to facilitate their access to ISDS mechanisms under EU investment agreements. In contrast with the traditional ISDS system, which is synonymous with investment arbitration, EU trade and investment agreements, such as the Comprehensive Economic and Trade Agreement between, on the one hand, the EU and its member states and, on the other, Canada (CETA), and EU standalone investment protection agreements (IPAs), such as the EU-Singapore IPA, grant investors access to an investment court system. In this sense, Statement No. 36 by the Commission and the Council, included in the Council minutes at the time when CETA was signed, determined that the investment court system will improve access to ISDS 'for the most vulnerable users, namely SMEs and private individuals. To that end … the Commission will propose appropriate measures of (co)-financing of actions of small and medium-sized enterprises before that Court and the provision of technical assistance'.[20] More recently, the need to ensure access to ISDS for SMEs became a 'constitutional'

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[15] Gus Van Harten and Pavel Malysheuski, *Who Has Benefited Financially from Investment Treaty Arbitration?* 14 Osgoode Legal Studies Research Paper 1 (2016), at 20.

[16] E.g. see the following two documents from the UNCITRAL Working Group III, *Possible reform of ISDS: Submission from the EU*, UN Doc. A/CN.9/WG.III/WP.145, 12 December 2017, § 34; and *Possible Reform of ISDS: Submission from the EU and its Member States*, UN Doc. A/CN.9/WG.III/WP.159/Add.1, 24 January 2019, §§ 33, 51. See further European Parliament, Briefing, Multilateral Investment Court: Overview of the Reform Proposals and Prospects (2020).

[17] *Ibid*.

[18] See https://uncitral.un.org/en/working_groups/1/msmes.

[19] UN SDGs, goal 8, target 8.3.

[20] Statement No. 36 by the Commission and the Council on investment protection and the Investment Court System (ICS), 27 October 2016. This political commitment has not thus far been addressed from an institutional perspective.

obligation for the EU with Opinion 1/17 of the Court of Justice of the EU (CJEU).[21] In that Opinion, the Court declared CETA's ISDS mechanism compatible with EU law taking into account, among others, the EU's political statement and provisions in CETA aimed to facilitate SMEs' and natural persons' access to ISDS.[22] Latterly, the EU-Chile Advanced Framework Agreement (negotiations concluded in December 2022) has included a chapter dedicated to SMEs and enshrined the contracting parties' 'commitment to enhance the ability of SMEs to benefit from this Agreement'.[23] A December 2022 declaration of the major EU institutions has recognized that support for SMEs more generally is a legislative priority for the EU.[24] That said, the protection of SMEs is by no means an EU-centric aim.

The purpose of this article is two-pronged. For a start, this article identifies and evaluates the diverse opportunities that exist for the establishment and operation of mechanisms allowing SMEs better and easier access to ISDS when they are victims of wrongdoings abroad. The analysis takes into account access to both investment arbitration and the EU's investment court system and considers carefully the potential role of an advisory centre on investment law. In particular, the article focuses on means by which to improve SMEs' access to dispute settlement, including by reducing the financial burden on them when bringing a claim against their host state, and means by which it will be possible to finance their claims. This will contribute to eliminating legal barriers for SMEs when investing abroad and will open up the range and scope of economic opportunities available to them.

Second, the article examines the challenges involved in promoting SMEs' access to ISDS. States, of which some have been increasingly wary of ISDS, may like the idea of helping SMEs but is it not an oxymoron to expect that they will finance the claims of investors against them? This is a particularly thorny question when it comes to developing countries that sometimes do not have the means to defend themselves against investment arbitrations. The article examines the pros and cons of helping SMEs against this background. It also considers the topic in light of the ongoing debate on how to provide legal and/or financial assistance to developing countries in order to defend against investment claims.

To explore the research questions presented above, the article relies on comparative normative and scholarly legal research. In particular, it identifies options used in other legal fields in order to facilitate access to justice and determine whether and how they can be used to assist SMEs. The article makes two main contributions. The first contribution is normative: the article is the first in legal scholarship to focus on and analyse in depth the means by which SMEs' access to ISDS can be improved.

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[21] Catharine Titi, *Opinion 1/17 and the Future of Investment Dispute Settlement: Implications for the Design of a Multilateral Investment Court* in Lisa Sachs, Lise Johnson and Jesse Coleman (eds), *Yearbook on International Investment Law & Policy 2019,* at 536-538, 540 (Oxford: OUP, 2021).

[22] Opinion 1/17 *Comprehensive Economic and Trade Agreement between Canada and the EU* [2019] EU:C:2019:341, at paras 205-222.

[23] Chapter 30 and article 30.1 of the EU-Chile Advanced Framework Agreement.

[24] Joint Declaration of the European Parliament, the Council of the EU and the European Commission, EU Legislative Priorities for 2023 and 2024 (December 2022).

The second contribution is conceptual: the article explores the trade-offs involved in seeking to facilitate SMEs' access to dispute settlement and the potential concerns that this can raise, especially in developing countries.

The remainder of this article is organized as follows. After this introduction, Section 2 focuses on institutional mechanisms that can help improve SMEs' access to ISDS. It considers in particular the possibility of offering specialized legal services and/or financial assistance and places this discussion within the context of the creation of an advisory centre on international investment law. Section 3 turns to the normative actions and rules that can help reduce the overall cost of proceedings, both SME specific and non-specific. Section 4 considers the political cost of facilitating SMEs' access to ISDS and examines it against the rationale for it in the first place. A final section concludes.

2. Facilitating SMEs' Access to Dispute Settlement by Offering Specialized Legal Services and/or Financial Assistance: Focus on an Advisory Centre on International Investment Law

The negotiations in UNCITRAL Working Group III have considered the creation of an advisory centre on international investment law,[25] largely modelled on the Advisory Centre on World Trade Organization Law (ACWL). The ACWL is an intergovernmental organization independent from the World Trade Organization (WTO), and it was instituted by an international treaty, the Agreement establishing the Advisory Centre on WTO Law.[26] The ACWL, which, as we shall see, has its own budget, provides free legal advice on WTO law and gives support at preferential rates to parties in WTO dispute settlement proceedings.[27] Its services are not offered to investors or other private entities, since WTO dispute settlement only concerns interstate proceedings, but to 'developing countries, in particular to the least developed among them, and to countries with economies in transition'.[28]

Drawing on this model, the current UNCITRAL discourse on an assistance mechanism for ISDS proceedings has been so far driven primarily by considerations about some countries' access to dispute settlement.[29] Accordingly, the UNCITRAL

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[25] See https://uncitral.un.org/en/multilateraladvisorycentre. See also Karl Sauvant, *An Advisory Centre on International Investment Law: Key Features* 17 University of St Thomas Law Journal 354 (2020); Charlie Garnjana-Goonchorn, *An Advisory Centre on International Investment Law: Is Perfect the Enemy of Good?* 324 Columbia FDI Perspectives 1 (2022).

[26] On this see, Niall Meagher and Leah Buencamino, *Advisory Center on WTO Law,* in *Max Planck Encyclopedia of International Procedural Law* (Oxford: OUP, 2022); James Ransdell *Financial and Technical Support for Litigants in Inter-State Disputes: The Example of the WTO and the Advisory Centre for WTO Law* (2017), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2957476.

[27] Article 2(2) and Annex of the Agreement establishing the Advisory Centre on WTO Law. It also trains government officials in WTO law.

[28] Article 2(1) of the Agreement establishing the Advisory Centre on WTO Law.

[29] UNCITRAL, *Report of Working Group III (ISDS Reform) on the Work of its Thirty-eighth Session*, UN Doc. A/CN.9/1004*, 23 October 2019, at para. 30; UNCITRAL, *Possible Reform of ISDS: Advisory*

Secretariat has suggested that developing states and the least developed countries (LDCs) should be given priority as beneficiaries of the services to be offered by the prospective advisory centre on international investment law.[30]

However, it would be at least conceivable that such a new centre could also offer all or some of its subsidized or free services to the most vulnerable categories of investors, notably SMEs, in order to help them access ISDS.[31] In line with this hypothesis, the following paragraphs analyse various key aspects of this prospective advisory centre, including services, eligibility criteria, structure and decision-making, financing and scope of the assistance, with a focus on SMEs.

A. Possible Services to be Offered by the Centre to SMEs

The specific services to be offered by the prospective advisory centre on international investment law will need to be determined. In 2021, the UNCITRAL Secretariat suggested that the centre could provide services revolving around two broad pillars: an assistance mechanism, covering both 'representation and assistance services in mediation' or other kinds of alternative dispute resolution (ADR) and 'representation and assistance in international investment dispute settlement'; and it could serve as a forum for the 'exchange of information and policy considerations on prevention, avoidance, management of investment disputes'.[32] Regarding the latter, UNCITRAL suggested that the working group could consider allowing a broad number of stakeholders to benefit from the forum, including SMEs and natural persons.[33] However, it stopped short of suggesting that the former mechanism (assistance with dispute settlement) should be made available to SMEs but included as its potential beneficiaries only developing states and LDCs.[34] The Secretariat briefly explained the rationale for this limitation, noting the working group's hesitation in view of the challenge of establishing 'objective criteria' on which to give enterprises access to this assistance and that, if assistance with legal representation were granted to SMEs, conflicts of interest may arise.[35]

B. Eligibility Criteria for SME Beneficiaries

In order to allow SMEs to access the advisory centre on international investment law, it is necessary to establish appropriate eligibility criteria in order to ensure the legitimacy of doing so. A comparative analysis of the criteria used by international courts to grant assistance – where the potential beneficiaries are states or individuals –

Centre, Note by the Secretariat, UN Doc. A/CN.9/WG.III/WP.212, 3 December 2021, at para. 57.

[30] UNCITRAL, UN Doc A/CN.9/WG.III/WP.212, *ibid*., at paras 56-57.

[31] European Commission, *Impact Assessment: Multilateral Reform of Investment Dispute Resolution*, SWD (2017) 302 final (13 September 2017), at 52; Bungenberg and Reinisch, *supra* note 7, at 63.

[32] UNCITRAL, UN Doc A/CN.9/WG.III/WP.212, *supra* note 31, at paras 22-36.

[33] See *ibid.*, at para. 20, draft provision 7.

[34] *Ibid.*, at para. 56, draft provision 9.

[35] *Ibid.*, at para. 61. See also UNCITRAL, UN Doc. A/CN.9/1004*, *supra* note 31, at para. 30.

reveals a focus on the lack of economic resources.[36] It is doubtless that lack of funds would also be an essential criterion in the SME context. Given that not all SMEs are automatically vulnerable, every effort should be made to identify criteria that would allow an objective differentiation between them.

Additional eligibility criteria could be inspired by provisions in existing investment treaties relating to the types of investors that can receive protection under the treaty – definition of foreign investor, nationality, covered investment, substantial business activities in the territory of the host state, etc.[37] The criteria could also be directly linked to the particular SME, e.g. number of employees, turnover, capital. A combination of criteria would be another option or the establishment of new substantive conditions, such as conditions relating to the nature of the claim, e.g., only serious allegations of direct expropriation may qualify, or the monetary value of the claim.[38]

Additional filters or requirements for accessing assistance are those of a more procedural nature. For instance, carving out of the assistance SMEs that bring abusive claims or claims manifestly without legal merit or unfounded as a matter of law. Another possibility would be to allow access to assistance, so long as the jurisdiction of the arbitral tribunal or investment court and the admissibility of the claim are not, or are no longer, contested, drawing on examples such as the Trust Fund to Assist States in the Settlement of Disputes of the International Court of Justice (ICJ)[39] or the European Court of Human Rights (ECtHR).[40] A similar example that can provide inspiration is that of the Inter-American Commission of Human Rights (IACHR), which may grant resources from its Legal Assistance Fund upon the request of a petitioner, after it 'has declared the complaint admissible or has informed its decision to join the issue of admissibility to the merits'.[41] In that context, a petitioner who wishes to obtain financial assistance must demonstrate that he or she lacks the funds to cover his or her expenses and specify the expenses for which he or she asks the assistance.[42] However, this option has the disadvantage than an impecunious SME would still be prevented from accessing dispute settlement, if it does not have enough funds to reach the merits phase. Bearing in mind that SMEs appear to be particularly

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[36] In some contexts, however, complementary criteria are used, such as the case's factual or legal complexity, which can raise dilemmas, see Ezgi Özlü, *Legal Aid* in *Max Planck Encyclopedia of International Procedural Law,* at paras 41-55 (Oxford: OUP,2022).

[37] Catharine Titi, *The Evolution of Substantive Investment Protections in Recent Trade and Investment Treaties (Think Piece),* RTA Exchange ICTSD and Inter-American Development Bank (2018) available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3281574, at 6-7.

[38] Johnson and Guven, *supra* note 8, at 106.

[39] See ICJ, *Secretary-General's Trust Fund to Assist States in the Settlement of Disputes through the International Court of Justice, Report of the Secretary-General*, UN Doc. A/59/372, 21 September 2004, at para. 14.

[40] Rule 105 indicates that the Court does not grant legal aid until 'observations in writing of the admissibility of that application are received form the respondent Contracting Party … or where the time-limit for their submission has expired'.

[41] Article 2 of the IACHR Rules on the Legal Assistance Fund of the Inter-American Human Rights System (IAHRS).

[42] Article 5, *ibid*.

vulnerable in the early stages of investment disputes,[43] this procedural hurdle could be removed by including a caveat similar to the one applicable to the Trust Fund of the International Tribunal for the Law of the Sea (ITLOS), according to which assistance is provided 'in appropriate cases, principally those proceeding to the merits where jurisdiction is not an issue, but in exceptional circumstances may be provided for any phase of the proceedings'.[44] This more flexible approach coincides with that applied by the ACWL, whose 2007 Decision on Billing Policy and Time Budget covers up to 147 hours of consultation services, e.g. legal assessment of the case or analysis of evidence; and abundant panel proceeding services – up to 444 hours, which include initial services such as the preparation of a request for the establishment of a panel.[45]

When extrapolating possible eligibility criteria of a procedural nature to the SME context, one has to take into account that the ACWL, the ICJ fund and the ITLOS Trust Fund are addressed to states – not SMEs. It is possible that an SME faces greater challenges than a state when it comes to raising adequate funds or relying on an inhouse legal team to submit a claim. In addition, funds benefitting non-state petitioners, such as the IACHR Legal Assistance Fund, concern human rights disputes, which cost on average a lot less than investment disputes, notably due to the absence of user fees.[46] These considerations show that it may be preferable not to impose some of the procedural constraints that exist in those contexts on SMEs.

C. Structure and Decision-making Regarding Requests for Legal/Financial Assistance

Further issues that need to be addressed concern the internal structure and functioning of the prospective advisory centre on international investment law. The UNCITRAL Secretariat has suggested the creation of a governing board solely composed of representatives of the members (states and regional economic integration organizations) and supported by full-time staff. Representatives of SMEs in the centre's governing structure would be limited to the advisory board, a body whose functions have not yet been defined.[47]

When we consider the possibility of SMEs accessing not only the forum services, but also the dispute settlement services of the prospective centre, an important question that emerges is who should decide whether the applicant SME qualifies for assistance. Some international organizations decide requests for legal/financial assistance according to the following model: the secretariat conducts a first review of the request, and its admissibility and scope are subsequently determined by a higher body,

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[43] Johnson and Guven, *supra* note 8, at 108-109.

[44] GA Res. 55/7, 30 October 2000, Annex 1, at para. 5, see also para. 7. See further Guideline 5 of the Legal Aid Policy for the African Court on Human and People's Rights.

[45] ACWL, *Billing Policy and Time Budget*, Doc. ACWL/MB/D/2007/7.

[46] E.g. see ECtHR, *Questions and Answers* (undated) https://www.echr.coe.int/documents/questions_answers_eng.pdf.

[47] UNCITRAL, UN Doc A/CN.9/WG.III/WP.212, *supra* note 31, at paras 13-18.

e.g. the Directive Council in the case of the IACHR,[48] or the Presidency in the Inter-American Court of Human Rights (IACtHR).[49] In international criminal tribunals, the decision is directly made by the Registrar and a denied request may be reviewed by the President, at the suspect's request.[50] In cases brought before the ECtHR, it is the President of the chamber who makes the decision, either after receiving an applicant's request or on his or her own initiative (*motu proprio*). The Rules of that Court make provision for the President to invite the defendant state to submit its comments in writing regarding the possibility of offering legal aid to the claimant – person, non-governmental organization (NGO) or group of individuals.[51] In the case of the Financial Assistance Fund (FAF) of the Permanent Court of Arbitration (PCA), the decision is taken by its Board of Trustees.[52] The trust funds assisting states in the ICJ and ITLOS are 'independent' mechanisms, where, for each request for financial assistance, the Secretary General establishes on an ad hoc basis a panel of experts composed of three persons of the highest judicial and moral standing. The financial assistance is granted by the Secretary-General on the basis of the evaluation and recommendations of this panel.[53]

If the prospective advisory centre on international investment law grants decision-making power to a collegiate body, the question emerges whether the interests of SMEs would somehow be represented. If bodies such as the Board of Trustees of the PCA FAF are taken as a reference, rules against conflicts of interest will make this very unlikely to happen.[54] By the same token, if one of the functions to be assigned to the advisory board of the centre is the decision on SMEs' requests for legal/financial assistance for dispute settlement services, issues such as the independence and impartiality of the advisory board members will have to be regulated.

D. Centre Financing and Scope of Financial/Legal Assistance for SMEs

Let us now turn to two distinct but interrelated issues. The first is how to finance a future advisory centre on international investment law and the second how and to

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[48] Article 6 of the IACHR Rules on the Legal Assistance Fund of the IAHRS.

[49] Article 3 of the IACtHR Rules for the Operation of the Victims' Legal Assistance Fund.

[50] Articles 7-13 of the Directive on the Assignment of Defence Counsel (Mechanism for International Criminal Tribunals), 14 November 2012.

[51] Rules 105-110 of the Rules of the ECtHR.

[52] PCA, *Financial Assistance Fund for Settlement of International Disputes, Terms of Reference and Guidelines* (11 December 1995) at para. 8.

[53] ICJ, *Terms of Reference, Guidelines and Rules of the Secretary-General's Trust Fund to Assist States in the Settlement of Disputes through the ICJ*, at paras 6-13; GA Res. 55/7, 30 October 2000, Annex I, at paras 6-9. Nicolas Angelet *et al.*, *Note on the Costs and Financing of an Advisory Centre on International Investment Law*, 18 July 2020, available at https://uncitral.un.org/sites/uncitral.un.org/files/aciil_note_on_costs_financing_24_august_2020_final_updated.pdf.

[54] Túlio Di Giacomo Toledo and Jan Raeimon Nato, *Financial Assistance Fund for Settlement of International Disputes: Permanent Court of Arbitration (PCA)* in *Max Planck Encyclopedia of International Procedural Law,* at paras 24-25 (Oxford: OUP, 2022).

what extent this new mechanism should offer subsidized or free legal services to SMEs wishing to initiate ISDS proceedings.

One estimation is that the establishment and functioning costs of the centre for five years may be situated between US$ 10 million and US$ 16 million,[55] the variation depending on the volume of its staff.[56] According to UNCITRAL, these figures suggest that the financing of the centre must come from complementary sources of income, which can be very diverse with a potentially greater weight to be placed on non-voluntary contributions.[57] Various comparative experiences show that budgetary stability is essential in order to cement the independence, efficacy, and permanence of a future advisory centre.[58] From an economic-legal perspective, these funds may be received through an international endowment fund,[59] similar to the ACWL Endowment Fund.[60] UNCITRAL has relied extensively on the financial structure of the ACWL Fund as a useful reference to propose the financial structure of the prospective advisory centre on international investment law.[61]

According to the Agreement establishing the Advisory Centre on WTO Law, the annual budget of this body comes from three funding sources: the Centre's endowment fund, fees for services rendered by the Centre, and voluntary contributions made by governments, international organizations or private sponsors.[62] Starting with the first source, developing country members contributed to the creation of the fund with a one-time fee whose amount depended on each country's share of world trade and per capita income (Annex II).[63] Developed country members contributed to the creation of the fund with a higher one-time fee as well as a contribution to the annual budget during the first five years (Annex I).[64] LDCs were not required to contribute

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[55] UNCITRAL, UN Doc A/CN.9/WG.III/WP.212, *supra* note 31, at para. 17.

[56] These costs could be reduced if the new advisory centre secures support similar to that obtained, for example, by the PCA, whose headquarters were built thanks to donations by Andrew Carnegie and the Dutch Government, see https://www.vredespaleis.nl/carnegie/carnegie-foundation/?lang=en.

[57] UNCITRAL, UN Doc A/CN.9/WG.III/WP.212, *supra* note 31, at para. 19.

[58] In contexts such as that of the ICJ Trust Fund, which depends on voluntary financial contributions, it seems that the expectations regarding financing have not been sufficiently met in reality. Thus, the UN Secretary General declared in 2004: 'the Fund has had a decreasing level of resources since its inception. … I strongly urge all States and other relevant entities to give serious consideration to making contributions to the Fund, not only in a substantial manner but also on a regular basis', ICJ, *supra* note 41, at para. 10. Since the situation does not appear to have improved, this request has been reiterated more recently, see ICJ, *Secretary-General's Trust Fund to Assist States in the Settlement of Disputes through the International Court of Justice, Report of the Secretary-General*, UN Doc. A/77/204, 20 July 2022, at para. 8.

[59] Angelet *et al*., *supra* note 55, at para. 62.

[60] See in general Agreement establishing the Advisory Centre on WTO Law.

[61] Legal aid is a key issue that is also currently being discussed in other legal contexts such as ECOWAS, https://gna.org.gh/2021/11/ecowas-court-to-create-legal-aid-fund-to-facilitate-access-to-justice/.

[62] Article 5 of the Agreement establishing the Advisory Centre on WTO Law.

[63] The fee ranged between US$ 300,000 and US$ 50,000.

[64] US$ 1,000,000 and US$ 1,250,000 respectively. Recent reports indicate that the bulk of its current funding comes from 12 developed country members (Australia, Canada, Denmark, Finland, Germany, Ireland, Italy, the Netherlands, Norway, Sweden, Switzerland, and the United Kingdom), although these

to the endowment fund but are fully entitled to use its services (Annex III). Coming to the second source, the ACWL charges fees for the legal services it offers its beneficiaries, that is, LDCs and developing countries, with the hourly fee depending on the category of country in question.[65] Finally, as to the third source, the ACWL receives voluntary contributions made by governments, international organizations or private sponsors for specific purposes that are not related to dispute settlement, such as training.[66]

Based on this structure, it has been suggested that a prospective advisory centre on international investment law could draw from the same type of income sources: membership fees, fees paid by the beneficiaries, and voluntary contributions; other sources are possible too, namely non-voluntary funding such as recovery of costs from beneficiaries who have prevailed in a dispute or users' fees to be paid by all ISDS users.[67]

It is therefore envisageable that the advisory centre on international investment law could be significantly funded by states. Logically, for such a mechanism to function correctly, it must be made to be competitive and reliable, rather than a second-rate option for those who cannot afford to pay a highly-specialized law firm or attract third-party funding. This may imply non-negligible economic outlays, which would also increase in direct proportion to the types of authorized beneficiaries. That is, including SMEs in the list of beneficiaries of dispute settlement assistance would probably come at a cost for states, which is a controversial issue and will be considered in section 4.

Let us now turn to the details of a possible offer by the advisory centre on international investment law of subsidized or free legal services to SMEs, since better understanding these options will allow us to better appreciate the feasibility of adding SMEs to the beneficiaries of dispute settlement assistance. As the following paragraphs will show, in many international contexts financial and/or legal assistance are provided to certain beneficiaries either via specific funds or via the institution's operational budget. The former option, that is, assistance from a dedicated separate budget,[68] is offered by various international courts and tribunals, e.g. the ICJ Trust

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states are not entitled to use the services of the ACWL (Article 6 of the Agreement establishing the Advisory Centre on WTO Law). WTO, *WTO Members Mark 20th Anniversary of the Advisory Centre on WTO Law* (27 September 2021); *ACWL Report on Operations* (2020), available at https://www.acwl.ch/download/dd/reports_ops/Final-Report-on-Operations-website.pdf, at 41.

[65] CHF40 per hour for LDCs; CHF162 per hour for Category C members; CHF243 per hour for Category B members; and CHF324 per hour for Category A members. A budget adopted by the management board stipulates the maximum number of hours that members/LDCs 'may expect the ACWL to charge for each procedural step in a typical WTO dispute settlement proceeding', see https://www.acwl.ch/organisational-structure/.

[66] See https://www.acwl.ch/organisational-structure/.

[67] UNCITRAL, UN Doc A/CN.9/WG.III/WP.212, *supra* note 31, at paras 32-33. See further Bungenberg and Reinisch, *supra* note 7.

[68] See e.g., David Anderson, *Trust Funds in International Litigation* in Nisuke Ando *et al.* (eds) *Liber Amicorum Judge Shigeru Oda* (vol 2, Leiden: Brill, 2002).

Fund,[69] the ITLOS Trust Fund,[70] the PCA FAF,[71] the Legal Assistance Fund of the IACtHR,[72] and the Legal Assistance Fund of the IACHR.[73] The latter option, assistance as part of the court's operational budget, exists in courts or commissions such as the ACHRP,[74] the ECtHR,[75] and the International Criminal Court (ICC).[76] The decision to offer assistance to either states or individuals in human rights or criminal cases rests on the view that the adequate availability of assistance contributes to advancing the peaceful settlement of disputes and protects basic procedural principles.[77] Despite presenting a number of idiosyncratic characteristics, this experience could also serve as a useful reference when reflecting on the possibility of designating SMEs as beneficiaries of a prospective advisory centre on international investment law.

Assuming that an SME meets the eligibility criteria established for accessing the services of the advisory centre, a critical question is whether the assistance would cover all expenses of the beneficiary or only some of the expenses related to the dispute settlement process. This is also closely-related to another crucial question, that is, whether this aid, regardless of its scope, would be channelled through financial assistance or direct legal assistance. In the case of the former, it would also be useful to specify how to quantify the assistance and when to award it.

The funds of international adjudicative bodies settling disputes between states offer financial assistance that can be very broad.[78] In this sense, the ICJ Trust Fund may cover a wide range of expenses, including some related to the execution of ICJ judgments. A non-exhaustive list includes assistance with the 'preparation of memorials, counter-memorials and replies'; fees for counsel and payment of the expenses of agents, experts, and witnesses; fees for legal research; costs incurred in relation to oral proceedings, including interpretation services for languages other than English and French; costs for the reproduction of technical materials, such as cartographic evidence; and 'costs relating to the execution of a judgment of the Court (e.g., demarcation of boundaries)'.[79] Likewise, the financial coverage of the ITLOS Trust Fund,

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[69] ICJ, *supra* note 41.

[70] GA Res. 55/7, 30 October 2000.

[71] PCA, *supra* note 54.

[72] See IACtHR Rules for the Operation of the Victims' Legal Assistance Fund.

[73] See the IACHR Rules on the Legal Assistance Fund of the IAHRS.

[74] The funding is currently derived from that Court's operational budget, which comes from assessed contributions of the member states of the African Union, see Guideline 8 of the Court's 2016 Legal Aid Scheme.

[75] Article 50 of the European Convention of Human Rights.

[76] E.g. see ICC, *Programme Budget for 2021*, available at https://asp.icc-cpi.int/sites/asp/files/asp_docs/ASP19/ICC-ASP-19-Res1-ENG.pdf.

[77] See, e.g., ICJ, *supra* note 41, at para. 3 of the Annex.

[78] See also Ilias Bantekas, *Trust Funds* in *Max Planck Encyclopedia of International Procedural Law,* at para. 6 (Oxford: OUP, 2022).

[79] The payment may be partially disbursed in advance – no more than 50% of the total amount of assistance awarded – and the final payment shall only be made 'against receipts evidencing actual expenditures for the total amount of the approved costs', ICJ, *supra* note 41, at paras 8, 9, 13 of the Annex.

created in 2000 and inspired by the ICJ Trust Fund, may include the preparation of the application and of written pleadings; counsel fees for written memorials and oral pleadings; travel expenses for legal representation in Hamburg during the various phases of the dispute settlement process; and, similarly to the ICJ, assistance in relation to the execution of an order or judgment of ITLOS, such as marking a territorial sea boundary.[80]

However, practice shows that these UN funds have been resorted to only rarely and the assistance offered has been quantitatively modest. For instance, the highest amount of financial assistance thus far reported to have been granted by the ICJ Trust Fund is US$ 350,000 per applicant,[81] and in 2005 the ITLOS Trust Fund granted Guinea-Bissau $20,000.[82] Outside the UN context, financial assistance is also the mechanism chosen by the PCA through a voluntary fund constituted in 1994.[83] The publicly available economic data on the assistance offered by this FAF is in principle more positive than the aforementioned UN experiences – 12 PCA disbursements were made to beneficiaries[84] totalling approximately €1.25 million.[85] In fact, assistance under the PCA's FAF may seem substantial, as it has been reported that, for example, in the *Abyei* arbitration, the amount granted was €753,000.[86] Nevertheless, scholars

[80] GA Res. 55/7, 30 October 2000, at para. 9 of the Annex.

[81] Various expenses were defrayed (cost of agents, counsel, experts or witnesses, staff costs, costs of reproduction of maps and production of technical documents, expenses incurred in connection with the memorial, countermemorial and replies, costs of legal research, and costs incurred in connection with oral proceedings and the demarcation of a frontier), ICJ, *supra* note 41, at para. 4.

[82] Marco Benatar *Trust Fund: International Tribunal for the Law of the Sea (ITLOS*) in *Max Planck Encyclopedia of International Procedural Law,* at para. 24 (Oxford: OUP,2022). According to the *2021 Annual ITLOS Report*, the financial statements of the trust fund showed a balance of US$ 202,605 as of 31 December 2021. It appears that the most recent request for financial assistance was made by Panama, See United Nations Convention on the Law of the Sea (UNCLOS), *Report of the 28th meeting of the Meeting of States Parties* (New York, 11-14 June 2018), SPLOS/324, https://digitallibrary.un.org/record/1637148?ln=es, at para. 103.

[83] PCA, *supra* note 54.

[84] Some authors have stated that FAF contributions may be granted to non-state entities, e.g. see Toledo and Nato, *supra* note 56, at para. 36. Although it is true that the term 'qualifying state' also covers 'any institution or enterprise owned and controlled by such State', it does not seem that the current FAF would admit a financial request from an SME initiating an investor-state arbitration.

[85] Toledo and Nato, *supra* note 56, at para. 1. See also PCA's *Contribution to the Report of the Secretary General on Oceans and the Law of the Sea* (2019). In its *Contribution* (2020), the PCA states that in *The Duzgit Integrity Arbitration (Malta v. São Tomé and Príncipe)*, PCA Case No. 2014-07, 'São Tomé's share of the costs of the proceedings was also partially defrayed through an application to, and a grant from, the PCA Financial Assistance Fund for the Settlement of International Disputes'.

[86] Brooks Daly, *Permanent Court of Arbitration* in Chiara Giorgetti (ed.) *The Rules, Practice, and Jurisprudence of International Courts and Tribunals,* at 49 (Leiden: Brill 2012). The categories of expenses are broadly defined, namely institutional fees and expenses; the expenses for the implementation of awards or other decisions; 'payments to agents, counsel, experts and witnesses; and operational or administrative expenses connected with oral or written proceedings', PCA, *supra* note 54, at para. 2.

have stressed that even in this case, financial assistance only covered 20% of the total costs of the arbitration.[87]

Ultimately, this type of financial assistance via fund, where the applicant has to submit ex ante itemized statements of estimated costs and an ex post statement of expenditures, has not yielded convincing results so far. Practice shows that only nine applications were made to the ICJ Trust Fund between 1989 and 2021.[88] The limited number and/or amount of disbursements impact the effectiveness of trusts such as the ICJ Trust Fund and may be due to both the limited resources of the voluntary fund – as of the end of July 2022, the balance of the fund stood at US$ 3,402,306 –[89] and the need to accommodate potential future financial applications.[90] This would explain why the ICJ Trust Fund has so far responded to applications by defraying only limited expenses.[91] The ITLOS Trust Fund has given similar results and it has been criticized for being 'underfinanced and underutilized' and for having 'yet to live up to its full potential'.[92]

Another form of financial assistance is that offered by some regional human rights courts, which do not have a legal aid fund but resort to the institution's general budget when awarding predefined lump sums to the applicant. The Rules of the ECtHR establish that 'legal aid may be granted to cover not only representatives' fees but also travelling and subsistence expenses and other necessary expenses incurred by the applicant or appointed representative'.[93] In this case too, the amounts granted by way of legal aid are very low, representing only a contribution to the global legal costs of the dispute. This merely complementary or even hortatory character is clearly reflected in the legal aid rates of the ECtHR, which establishes a lump sum fee of only 850 euros for the preparation of the case and 300 euros for appearance at an oral hearing before the Court or for attending the hearing of witnesses (including

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[87] Freya Baetens and Rumiana Yotova, *The Abyei Arbitration: A Model Procedure for intra-State Dispute Settlement in Resource-rich Conflict Areas* 3 Goettingen Journal of International Law 417 (2011), at 443. A FAF peculiarity that is positive for its beneficiaries is that the financial assistance can be fully provided in advance, Toledo and Nato, *supra* note 56, at para. 22.

[88] See ICJ, *supra* note 60, at para. 4.

[89] *Ibid.* at para. 7.

[90] This led Tzanakopoulos to conclude that 'not all good ideas flourish in practice', Antonios Tzanakopoulos, *The Secretary-General's Trust Fund to Assist States in the Settlement of Disputes Through the International Court of Justice* 45 Oxford Legal Studies Research Paper (2019) available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3347205.

[91] *Ibid*. See further Brooks Daly and Sarah Melikian *Access to Justice in Dispute Resolution: Financial Assistance in International Arbitration* in K. Nadakavukaren Schefer (ed.), *Poverty and the International Economic Legal System: Duties to the World's Poor,* at 211 (Cambridge: CUP, 2013); Peter HF Bekker *International Legal Aid in Practice: The ICJ Trust Fund* 87 American Journal of International Law 639 (1993).

[92] Benatar, *supra* note 84, at paras 26, 30. See further, Charles Claypoole, *Access to International Justice: A Review of the Trust Funds Available for Law of the Sea-Related Disputes* 23 International Journal of Marine & Coastal Law 77 (2008).

[93] Rules 108-109.

preparation for the same).[94] The Legal Aid Policy for the African Court on Human and People's Rights stipulates nominally higher lump sums for counsel fees, e.g. US$ 2,500-3,000 for preparing and filing the application 'based on 30 hours of work'.[95] Other amounts are provided, for example, for the reply to the respondent or for an eventual public hearing, while some procedural actions are expressly excluded from the scope of funding, e.g. this is the case for additional pleadings or for providing additional information requested by the court.[96] The same scheme should cover some travel expenses but, e.g., air travel will only cover economy class.[97]

A mixed system of assistance is used in human rights protection under the Organization of American States (OAS). On the one hand, there exist two funds[98] in order to assist individual petitioners before the IACtHR[99] and the IACHR.[100] In the IACtHR context, the exact amount of the assistance offered by the fund is not specified. The alleged victims must 'state precisely the aspects of their participation in proceedings that require use of the resources of the Victims' Legal Assistance Fund', and the presidency of the Court, after evaluating the request, shall 'indicate the aspects of the litigation that may be funded'.[101] In the IACHR context, the wording is more detailed, as the fund is meant 'to defray the costs of "gathering and sending" documentary evidence, the costs involved in attending hearings for the alleged victim, witnesses, and other costs that the IACHR deems relevant to the processing of a petition'.[102] This more specific drafting, however, has not generated so far a widespread and far-reaching financial assistance. Based on the information provided on the OAS website, the average assistance offered by the ACHR fund to the last twelve accepted requests does not reach the modest amount of US$ 3,000.[103]

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[94] ECtHR, *Legal Aid Rates*, available at http://www.omct.org/files/2006/11/3633/handbook1_eng_01_part1.pdf, at 33; Lize Glas, *Translating the Convention's Fairness Standards to the European Court of Human Rights* 10 European Journal of Legal Studies 11 (2018).

[95] Guideline 4 of the Legal Aid Policy for the African Court on Human and People's Rights.

[96] *Ibid*.

[97] *Ibid*.

[98] Article 3 of the Rules of Procedure for the Operation of the Legal Assistance Fund of the IAHRS.

[99] Jo Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights* (CUP 2012); Roberta Muscat and Guillem Cano Palomares, *Internal Organisation of Regional Human Rights Courts: The European Court of Human Rights and the Inter-American Court of Human Rights* in Paulo Pinto de Albuquerque and Krzysztof Wojtyczek (eds), *Judicial Power in a Globalized World,* at 326-328 (Cham: Springer, 2019).

[100] On this Commission, which is not *strictu sensu* an adjudicative body, see Alfonso Santiago, and Gardner Lange, *The First Sixty Years of the Inter-American Commission on Human Rights* 27 Texas Hispanic Journal of Law & Policy 83 (2021).

[101] Article 2 of the IACtHR Rules for the Operation of the Victims' Legal Assistance Fund.

[102] Article 4 of the IACHR Rules on the Legal Assistance Fund of the IAHRS.

[103] See https://www.oas.org/en/iachr/jsForm/?File=/en/iachr/mandate/basics/legalafund.asp#3. On the IACtHR, see https://www.corteidh.or.cr/casos_resoluciones_fondo_legal.cfm?lang=en. The modest nature of this assistance may be influenced by the very tight budgets of both institutions, Cesare PR Romano and Faraz Shahlaei, *Financial Aspects of International* Adjudication in *Max Planck Encyclopedia of International Procedural Law,* at paras 35-37 (2022), as well as by the voluntary nature of the contributions. It must be noted that the IACtHR Victims' Legal Assistance Fund does not

On the other hand, attention must be paid to the second mechanism introduced by these human rights bodies: the so-called Inter-American Defender, an expression used to refer to a person designated by the Court to represent persons who have not themselves selected counsel to represent them.[104] A 2010 Memorandum of Understanding with an external institution, the Inter-American Association of Public Defenders (AIDEF, in Spanish) laid the foundation for this mechanism. The Inter-American Defender is a public defender on secondment from an AIDEF state to the inter-American institutions.[105] The Defender provides legal representation free of charge and, taking the IACtHR as an example, he or she only charges the expenses arising from the defence that will be paid through the Court's Victims Legal Assistance Fund.[106] To date, the AIDEF has granted legal assistance through the Defender in 27 IACtHR cases.[107] This may explain why the two funds discussed here are named legal assistance funds instead of financial assistance funds.

In international criminal courts, the legal nature of the assistance is likewise underlined.[108] Just as in the case of the inter-American system of human rights protection, here too we find the two pillars of legal aid for defence and legal representation. This is the case of the ICC.[109] The legal aid for defence paid by the Court is designed to

> cover all costs reasonably necessary … for an effective and efficient defence, including the remuneration of counsel, his or her assistants … and staff, expenditure in relation to the gathering of evidence, administrative costs, translation and interpretation costs, travel costs and daily subsistence allowances. Upon request, associate counsel may also be covered by legal assistance paid by the Court.[110]

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receive resources from the regular OAS budget, but only from cooperation projects and states' voluntary contributions, see https://www.corteidh.or.cr/fondo_asistencia_legal_victimas.cfm?lang=en.

[104] Article 2(11) of the Rules of Procedure of the Inter-American Court of Human Rights. See further Mara Yadira Castro Escate, *El defensor interamericano como garantista del debido proceso en la corte interamericana de Derechos Humanos* (2021); Valeska David *The Inauguration of the Inter-American Defenders' Era* 7 Inter-American & European Human Rights Journal 245 (2014).

[105] *Reglamento Unificado para la actuación de la AIDEF ante la Comisión y la Corte Interamericanas de Derechos Humanos* (March 2021), available at https://aidef.org/wp-content/uploads/2022/09/Reglamento_Unificado_actuacion_de_la_AIDEF_junio_2021.pdf.

[106] IACtHR, *2021 Annual Report*, at 159-160.

[107] *Ibid.*

[108] The financial aid funds that do exist in this context differ from those analysed in this article, since the beneficiaries of ICC legal aid are victims and their families.

[109] Silvana Arbia *The International Criminal Court: Witness and Victim Protection and Support, Legal Aid and Family Visits* 36 Commonwealth Law Bulletin 519 (2010); Simon M. Meisenberg, *The Right to Legal Assistance at the International Criminal Tribunal for Rwanda: A Review of its Jurisprudence* in Emmanuel Decaux, Adama Dieng, and Malick Sow (eds), *From Human Rights to International Criminal Law* (Leiden: Brill, 2007).

[110] Regulation 83(1) of the Regulations of the ICC concerns legal assistance granted to defendants. Regulation 83(2) concerns the more limited legal assistance that may be granted to victims. The Court explains the reason for this discrepancy:

However, in this case too, it seems that the economic relevance of this legal aid for defence has thus far proved to be limited, constituting only 2.2% of the Court's total budget request for 2020.[111] Within the framework of the reform of the ICC Legal Aid Policy, which has been ongoing since 2012, it has become clear that the current mechanism is underfunded and has not reached optimal efficiency. Consequently, it has been suggested that a revised Legal Aid Policy should be 'accessible, effective, sustainable and credible, including ensuring equality of arms … and adequate facilities to Defence teams to prepare and conduct an effective defence'.[112] Regarding legal representation, the ICC offers two lists of private, external professionals (a list of counsel and a list of assistants to counsel),[113] with the amount of their remunerations and other expenses – currently, in the process of being updated – being determined on the basis of fixed lump sums.[114] The ICC also counts with two permanent Offices of Public Counsel, which may offer institutional legal assistance to defence and victims in ICC proceedings.[115]

The foregoing shows that the use of financial and legal assistance has some shortcomings and faces implementation difficulties. There is, however, a model that seems to yield more positive results: the ACWL. In that case, the centre's beneficiaries – LDCs and developing countries – pay fees for the legal aid received in WTO dispute settlement proceedings.[116] The former states contribute with a lower amount and, in any case, the centre's rates are below market price. The legal assistance is mostly

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> 'While any defendant has the right to have legal assistance paid by the Court, victims' parallel right is not absolute. In both cases, the provision of legal aid has to be balanced against the available resources within the Court's budget. Another fundamental difference between defendants and victims regarding the legal aid system stems from the fact that the former stands to lose his or her liberty, and the presumption of innocence requires that they benefit from legal representation even if the person so concerned lacks sufficient means to cover the costs of their defence. Moreover, victims' participation in the proceedings is limited to the extent that the relevant Chamber authorises them to present their views and concerns, and therefore the scope of legal aid depends on the actual forms of participation decided in each case.'

See *Guide for Applicants to the ICC List of Counsel and Assistants to Counsel*, available at https://www.icc-cpi.int/sites/default/files/ICC_GuideForApplicants_ENG.pdf, at 13.

[111] ICC, *Independent Expert Review of the International Criminal Court and the Rome Statute System* (Final Report, 30 September 2020), Doc. ICC-ASP/19/16, at para. 831. The legal aid budgets of previous years are available at https://asp.icc-cpi.int/bureau/WorkingGroups/legalaid.

[112] ICC holds Seminar on Review of Legal Aid System, 2 June 2022, available at https://www.icc-cpi.int/news/icc-holds-seminar-review-legal-aid-system; ICC, *supra* note 113, at para. 328.

[113] Rule 21.2 of the ICC Rules of Procedure and Evidence respects the freedom of choosing one's counsel ('The Registrar shall create and maintain a list of counsel who meet the criteria set forth in rule 22 and the Regulations. The person shall freely choose his or her counsel from this list or other counsel who meets the required criteria and is willing to be included in the list').

[114] *List of Counsel before the ICC*, available at https://www.icc-cpi.int/about/registry/list-of-counsel; *List of Assistants to Counsel*, available at https://www.icc-cpi.int/about/registry/list-of-assistants; *Guide for Applicants to the ICC List of Counsel and Assistants to Counsel*, available at https://www.icc-cpi.int/sites/default/files/ICC_GuideForApplicants_ENG.pdf, at 13.

[115] Regulations 77 and 81 of the ICC Regulations.

[116] Legal advice on WTO law is free for LDCs up to a certain number of hours, Agreement establishing the Advisory Center on WTO law, Annex IV.

offered by the centre's specialized staff. The ACWL rules, however, provide for subcontracting external legal services in case of a conflict of interests[117] and consequently the Centre draws on a Roster of External Legal Counsel.[118] It is reported that in the last two decades this advisory centre has assisted in more that 50 WTO disputes – around 20% of the total number of disputes – and has provided approximately 2,500 legal opinions to LDCs and developing countries.[119] This kind of results explains the interest that the ACWL model has generated in UNCITRAL Working Group III. It also leads us to reflect on whether it would not also be the most appropriate model on which to draw in order to facilitate SMEs' access to dispute settlement in a future advisory centre on investment law.

Decisions then regarding the financing of an advisory centre on international investment law can affect the spectrum of services offered to its beneficiaries. The comparative analysis of international courts shows the importance of stable and adequate funding, since the institution's budget determines its capacity to act efficiently and therefore make a difference and survive in time. That is why, although a priori it may not be the stakeholders' preferred option, it is necessary for a prospective advisory centre on international investment law to establish both assessed contributions and beneficiary fees.

Regarding the beneficiary fees, it seems reasonable to assume that SMEs willing to access an investment arbitration tribunal or a permanent multilateral body may be willing to pay fees, provided that they are offered quality legal services at a competitive price. The big question at this stage is whether states are going to allow SMEs to qualify as beneficiaries of a system that must be created from scratch and therefore requires a relevant capital injection. Opening the door to SMEs will increase very considerably the number of potential beneficiaries, and at the same time there is an opportunity cost. Assuming that the advisory centre will initially have limited staff and that it will slowly grow, making SMEs beneficiaries from the moment the centre is created could complicate access for other beneficiaries, such as LDCs, generally considered as more legitimate.

In relation to the voluntary contributions that can complete the financing of a future advisory centre, it does not seem unreasonable that business groups may want to support the creation of this centre, although it is unclear to what extent individual SMEs (as opposed to business groups) will be willing to contribute to the upfront costs for

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[117] The Agreement establishing the Centre provides that 'when two Members or a Member and a least developing country seek the services of the Centre, and subcontracting external legal counsel becomes necessary, the fees for both parties will be increased by 20 percent', Agreement establishing the Advisory Center on WTO law, Annex IV, Decision 2007/8, adopted by the Management Board on 19 November 2007 Revised Rules for Support in WTO Dispute Settlement Proceedings through External Legal Counsel, Doc. ACWL/MB/D/2007/8.

[118] The ACWL clarifies that when two beneficiaries pursuing incompatible objectives request the support of the ACWL on the same matter, the ACWL's staff normally assists the party that first requested advice and it provides support to the other party through external counsel, see https://www.acwl.ch/external-counsel/.

[119] Meagher and Buencamino, *supra* note 28, at para. 6.

the establishment of an advisory centre. Their contributions, however, may be a source of controversy. For this reason, it would be necessary for the future advisory centre to develop from the outset a set of guidelines on conflicts of interest capable of detecting red flags in this delicate matter.

Another possible source of financing is the reimbursement of expenses. Following in the footsteps of other international institutions,[120] the advisory centre could in some cases, such as if the defendant state loses, obtain reimbursement for its services from the SME, a kind of contingency fee, assuming that the latter has obtained compensation. Adding this type of rule could reduce some of the reluctance towards the possible incorporation of SMEs into the pool of the centre's beneficiaries.[121]

Developing the hypothesis that in the future SMEs could receive subsidized or free legal services from an advisory centre on international investment law, we have so far shown that the ACWL can be a good starting point. Based on that model, the future centre could prioritize inhouse legal assistance, which appears to be a more appropriate solution than financial assistance that could or not cover SMEs' full expenses and would require further supervision of how the aid offered has been spent. If, as a general rule, SMEs were forced to turn to external law firms, the ultimate cost for the mechanism and the SME would be higher than if legal assistance were provided by an inhouse team. In other words, even assuming eventual inefficiencies in the early stages of the advisory centre's operation, such as because the inhouse team will not as yet have developed sufficient experience, legal assistance would be more efficient both for SMEs and for the mechanism – and, by the same token, for the entities funding the mechanism too – than pure financial assistance; in the same way that a country

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[120] Article 9 of the IACHR Rules on the Legal Assistance Fund of the IAHRS ('Reimbursement of expenses to the Legal Assistance Fund. The Commission shall include among the recommendations of the report on the merits of a claim … an estimate of the expenses incurred and charged to the Legal Assistance Fund so that the State concerned may reimburse the amount to that Fund'); Article 5 of the IACtHR Rules for the Operation of the Victims' Legal Assistance Fund ('Reimbursement of Costs to the Victims' Legal Assistance Fund. The Secretariat of the Court shall inform the respondent State of the expenditures made from the Victims' Legal Assistance Fund so that the State may submit observations thereto by the established deadline. The Tribunal shall evaluate in its judgment whether to order the respondent State to reimburse expenditures made from the Inter-American Court of Human Rights' Legal Assistance Fund'). Within the ECtHR context, 'any amount received in legal aid will be deducted from compensation that may be awarded by way of just satisfaction for costs and expenses', Council of Bars and Law Societies of Europe, *The European Court of Human Rights: Questions & Answers for Lawyers* (2020), available at https://www.echr.coe.int/Documents/Q_A_Lawyers_Guide_ECHR_ENG.pdf, at 14; Philip Leach, *Taking a Case to the European Court of Human Rights,* at 46-47 (Oxford:OUP, 2011); Karen Reid, *A Practitioner's Guide to the European Convention on Human Rights* (6th edn, Oxford: Sweet & Maxwell, 2019).

[121] This would also require the implementation of an effective mechanism to claim and monitor reimbursements, given that there is the prior experience of institutions such as the IACtHR, where up to now only a low compliance rate has been achieved with respect to reimbursements into the Legal Assistance for Victims Fund ordered by the Court in its judgments, IACtHR, *supra* note 108, at 153.

that faces many legal disputes may be better off developing its proper expertise in dealing with disputes rather than outsourcing its legal defence.[122]

This would not prevent the centre from contracting external counsel if necessary. For example, additional legal staff may be needed during the early stages of the centre's operation. In this case, an ad hoc arrangement should be intended to increase the legal capacity and know-how of the inhouse team while working on a particular case, rather than leave the external counsel and the SME to work directly together. It would also be possible to resort to external lawyers in a specific dispute due to a conflict of interests. In that case, as happens in the context of the ACWL and some international courts, the beneficiary may also be able to benefit from reduced legal fees.[123]

Given that the authors of this article prioritize specialized legal aid over merely financial aid, it is important to reflect on the timing, extent and rates of such legal assistance. From the perspective of SME beneficiaries, the optimal option would be to offer inhouse legal aid as soon as possible, covering the widest possible range of legal situations and issues, and completely free-of-charge. It must be acknowledged, however, that these are decisions with a crucial political and economic component. As has been made clear in the analysis of various international adjudicative bodies, it is unhelpful to make generous statements in writing, if reality shows that the institution does not have the necessary financial and technical support to make them a reality. As things stand, it does not seem realistic that a consensus can be reached to grant SMEs totally free access to a broad range of services. Therefore, a more viable solution would be to determine that, at least in the first phases of the centre's operation, SME claimants will only benefit from reduced fees for specific services. Both the specific services covered and the amounts of the reduced fees offered to SMEs must be clearly stipulated. Such favourable treatment of vulnerable SMEs is mirrored in some contemporary examples. For instance, the pandemic has driven institutions like the Arbitration and Mediation Center of the World Intellectual Property Organization (WIPO) to apply a 25% reduction to its fees in mediation and arbitration cases where an SME is involved.[124]

Alternative or complementary approaches to granting SMEs legal aid also exist. First, some stakeholders could charitably fund SMEs, either as an individual initiative or within the framework of an advisory centre's SME support service.[125] There are

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[122] Rodrigo Polanco, *Systems of Legal Defence Used by Latin American Countries in Investment Disputes* in Katia Fach Gómez and Catharine Titi (eds), *The Latin American Challenge to the Current System of Investor-State Dispute Settlement*, Special Issue, Volume 17, Journal of World Investment and Trade (2016).

[123] E.g. applicants to the ITLOS Trust Fund may resort to a list of offers of professional assistance on the basis of reduced fees, GA Res. 55/7, 30 October 2000, at para. 13 of the Terms of Reference (Annex I).

[124] *WIPO's Arbitration and Mediation Center Launches New Effort to Support SMEs*, available at https://www.wipo.int/amc/en/news/2021/news_0003.html.

[125] The argument recently presented by Finland when increasing its financial commitment to the ACWL for the period 2022-2026 could also be used by a stakeholder willing to provide specific support to SMEs in the context of the future advisory center. The Permanent Representative of Finland to the WTO declared that 'Finland sees the ACWL's work as helping to achieve Finland's goal of building

precedents in the investment arbitration context, beyond third-party funding, where external stakeholders offered financial aid to a disputing party. For example, Bloomberg Philanthropies provided legal assistance to the defendant state in the *Philip Morris v Uruguay* arbitration.[126] Similar initiatives could become widespread and emerge in the context of a prospective international investment court, even supporting the claimant. It is impossible to affirm that there will not be a single case in the future where a vulnerable SME will raise a claim that may enjoy the sympathy of some kind of charity. Even a more structured SME legal service may be accepted within an investment court, especially if legal aid is provided at zero cost for the court. A challenge lies however in that such initiatives cannot be controlled by the treaty parties but depend on the good will of the stakeholders. Second, international courts, such as the African Court on Human and People's Rights, collaborate with organizations that provide pro bono legal aid services.[127] Some antecedents of international pro bono assistance given by law firms in international arbitrations also exist, such as in the *Abyei* arbitration.[128] Within the context of a standing multilateral investment court, it cannot be ruled out that there will be law firms willing to offer pro bono services to SMEs, taking into account that they are highly valued long-term clients within the legal community. Therefore, it could be interesting for the future advisory centre to develop guidelines on such pro bono assistance that law firms may provide. Lastly, we must not exclude the possibility that in the future some adjudicators will choose to reduce their remuneration in cases initiated by vulnerable SMEs. A few years ago, it would have been unthinkable that some investment arbitrators would turn down parallel assignments as counsel in investment arbitration cases. Today, however, in light of the changing ethics of the profession,[129] arbitrators are increasingly doing so. Therefore, ad hoc fee arrangements when the claimant is a vulnerable SME should not be ruled out, and the same can be said of law firm fees.

In the worst-case scenario for SMEs, in which none of the above options allow them to become beneficiaries of dispute settlement assistance, SME-friendly stakeholders could launch other initiatives to assist them. In other international courts, we have examples of private organizations offering financial support for capacity building.[130] Such training programmes, which are undoubtedly useful, would nevertheless generate their positive effects in the longer run as opposed to the rest of the proposals presented in this section, whose effect would be felt more immediately.

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a secure and predictable rules-based multilateral trading system by supporting the participation of developing and least-developed countries in that system', *Finland Commits €1.4 million in Additional Financial Support for the ACWL for 2022-2026*, available at https://www.acwl.ch/finland-announces-continued-financialsupport-for-the-acwl-2/.

[126] Reuters, *Bloomberg Charity Adds $220 Million to Anti-smoking Effort* (22 March 2012).

[127] See https://www.african-court.org/wpafc/fees-and-legal-aid/.

[128] Maya Steinitz, *Internationalized Pro Bono and a New Global Role for Lawyers in the 21st* Century 12 Yale Human Rights & Development Law Journal 205 (2009).

[129] Katia Fach Gómez, *Key Issues of International Investment Arbitrators. A Transnational Study of Legal and Ethical Dilemmas* (Cham, Switzerland: Springer, 2019).

[130] E.g. see https://www.itlos.org/en/main/the-registry/training/itlos-nippon-foundation-capacity-building-and-training-programme/.

3. Facilitating SMEs' Access to Investment Dispute Settlement by Reducing Procedural Costs

In addition to the legal or financial assistance mechanisms discussed above, states and arbitration centres can facilitate SMEs' access to ISDS by targeting the cost and efficiency of the dispute settlement process, either specifically for SMEs or in general for all stakeholders. They can adopt rules that aim to either improve the accessibility and efficiency of ISDS or reduce the overall cost of proceedings. These rules are addressed in this section both in relation to the current ISDS system and in relation to a prospective multilateral investment court.

A. Rules Specific to SMEs

Rules can be drafted that are specific to SMEs or, more generally, to low-value claims. Such rules already exist in some recent treaties and, if their appropriateness and effectiveness are confirmed, they could be increasingly included in future international investment treaties and in investment contracts with SMEs. Some of these rules are considered in this section.

First, it is possible to provide for expedited proceedings, which could help reduce the time and cost of the dispute settlement process. Expedited proceedings would be especially useful for low-value claims, where 'low value' would need to be defined. For example, the Canadian model BIT of 2021 provides for the possibility of expedited proceedings, subject to the agreement of the disputing parties, for claims that do not exceed CAD$ 10 million.[131] According to ICSID, expedited proceedings 'may be particularly helpful in providing access to investment arbitration for small and medium sized companies'.[132] Inspiration can also be drawn from rules more often used in commercial arbitration, such as in order to reduce administrative and legal costs, e.g. by stipulating a documents-only procedure, 'with no hearing and no examination of witnesses or experts'.[133]

Second, recourse to a sole adjudicator, as opposed to a panel of three, can also help reduce costs. The Dutch model BIT of 2019 states that the appointing authority should take into account 'the desirability of keeping the costs of the procedure as low as possible, especially for small and medium sized enterprises', when deciding whether the tribunal should consist of one member.[134] The Canadian model BIT as well as the ICSID Arbitration Rules link expedited arbitration to the requirement to appoint a

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[131] Articles 47-53 of the Canadian model BIT (2021).

[132] ICSID, *Updated Backgrounder on Proposals for Amendment of the ICSID Rules* (12 November 2021), at 2.

[133] E.g. see Article 3 (Appendix III) of the 2021 Arbitration Rules of the International Chamber of Commerce. See further Charalampos Giannakopoulos, *The 2022 Amendments to the ICSID Arbitration Rules*, CIL Blog (undated) https://cil.nus.edu.sg/blogs/the-2022-amendments-to-the-icsid-arbitration-rules-incremental-improvements-against-the-backdrop-of-isds-reform-by-charalampos-giannakopoulos/.

[134] Article 20(3) of the Dutch model BIT (2019).

sole arbitrator.[135] Even outside expedited proceedings, the Canadian model provides that the respondent 'may give sympathetic consideration' to the claimant's request that a sole arbitrator should be appointed, 'in particular if the investor is a micro, small, or medium-sized enterprise or the compensation or damages claimed are relatively low'.[136] The same wording appears in the Belgium-Luxembourg Economic Union (BLEU) model BIT of 2019.[137] EU (trade and) investment agreements also establish that the respondent must give sympathetic consideration to a request from the claimant to have the case heard by a single judge instead of by a division of three judges when the claimant is an SME.[138] That said, it is as yet unclear how the number of judges sitting in a division will impact party costs, that is, especially, legal representation costs (as opposed to institutional costs that, in a court, should be zero or very low).

A third option would be to hold part of the proceedings by videoconference, telephone or similar means of communication. The Canadian model BIT makes provision for sympathetic consideration to be given by the respondent to the investor's request, when the investor is an SME.[139] It must be stressed, however, that this provision relates to consultations.[140] A similar provision exists in the BLEU model BIT.[141]

A fourth option concerns the allocation of the costs of dispute settlement. For example, EU investment agreements include the loser pays principle, which provides as the default rule that the costs of the proceedings shall be borne by the unsuccessful party, meaning that investors, including SMEs, would not have to pay for the costs of a successful claim.[142] But the loser pays principle can also be a double-edged knife, so to speak, for an investor, since, if the dispute settlement body finds in favour of the respondent, then the investor will have to pay the respondent's costs too. The Dutch model BIT starts from the default rule that the costs of the proceedings shall be borne by the unsuccessful party, but provides that the tribunal may determine that such allocation is unreasonable in the circumstances of the case, such as if the unsuccessful party to the dispute is an SME.[143] The same substantive reflection could lead a tribunal to hold that being an SME is one of the 'relevant circumstances' that would exempt a disputing party from providing security for costs under ICSID Arbitration Rule 53.[144] However, this could sometimes be counterproductive, since security for

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[135] Articles 49-50 of the Canadian model BIT; Rules 76(1) and 77 of the ICSID Arbitration Rules (2022).

[136] Article 27(9) of the Canadian model BIT.

[137] Article 19(b)(6) of the BLEU model BIT (2019).

[138] Eg Articles 8.23(5) and 8.27(9) of CETA.

[139] Article 25(3) of the Canadian model BIT.

[140] Article 25 *ibid*.

[141] Article 19(b)(3) of the BLEU model BIT (2019).

[142] E.g. Article 8.39(5) of CETA. On the loser pays principle, see further Bottini *et al.*, *supra* note 5, at 259.

[143] Article 22(5) of the Dutch model BIT.

[144] When drafting the new ICSID Arbitration Rule 53, the EU and the Netherlands requested that the interests of individuals and SMEs be specifically taken into account, ICSID, *Rule Amendment Project: Member State & Public Comments on Working Paper #1* (3 August 2018).

costs is recommended when there is a concern that the investor may be unable to cover the costs of the arbitration, such as when an impecunious investor brings a frivolous case against a host state. Exempting such an investor from providing security for costs could be harmful to the host state.

The above rules are interesting innovations that could help improve SMEs' access to ISDS. However, their practical significance will likely be reduced by the fact that the cost-cutting mechanism (e.g. expedited proceedings or the appointment of a single adjudicator) often requires the agreement of the respondent state. If a state suspects that the SME will be deterred from pursuing the dispute if it does not agree to the cost-cutting mechanism, it is probable that it will refuse to consent to it and these optional mechanisms will probably not be much used.

Finally, the new flexibility sometimes present in treaties that expressly allow the parties' joint committee to revise different rules over time may also be of use in this context. CETA offers an example specific to SMEs: the Agreement's Joint Committee may 'consider supplemental rules aimed at reducing the financial burden on claimants who are natural persons or small and medium-sized enterprises. Such supplemental rules may, in particular, take into account the financial resources of such claimants and the amount of compensation sought.'[145] This provision was directly relied upon by the CJEU in Opinion 1/17 to support the Court's finding that CETA's dispute settlement mechanism is compatible with EU law.[146] This 'open door' approach allows the treaty parties to update the rules taking into account new conditions and future innovations in relation the SMEs' access to ISDS. That said, since the provision does not make a concrete promise, it is also possible that it never does result in the adoption of actual provisions putting it into effect.

B. Rules Intended to Improve the Efficiency and Overall Accessibility of ISDS

Other options not specific to SMEs that aim to lower procedural costs or to improve the efficiency of the dispute settlement process could have as a result reduced participation costs for SMEs in ISDS. First, consolidation of disputes or other rules for the joinder of proceedings arising out of the same state measures could help make the dispute settlement process more efficient and reduce the cost of accessing ISDS. Some treaties already provide such rules.[147] These can also be drafted so as to target SMEs in particular. The Dutch model BIT states that the tribunal shall in principle accept consolidation requests, especially when the claimant is an SME.[148] Such rules may be particularly relevant in the case of state measures that could result in potentially numerous SME claims, such as claims relating to the withdrawal of feed-in tariffs in

[145] Article 8.39(6) of CETA.
[146] Opinion 1/17, *supra* note 24, at para. 207.
[147] Eg Article 34 of the Canadian model BIT; Article 40 of the Moroccan model BIT (2019).
[148] Article 19.7 of the Dutch model BIT.

renewable energies or claims arising out of the Covid-19 pandemic.[149] Class or mass action for identical claims is another possibility worth exploring.[150] In contrast with consolidation or joinders, mass claims are brought as part of the same action from the beginning. There is a caveat however, and that is that mass or class action is problematic in ISDS,[151] e.g. in the context of the Argentine sovereign bond disputes, Argentina argued that it was impossible to defend itself properly, since the circumstances surrounding the purchase of the sovereign bonds of each of its thousands of claimants were not known to it.[152]

Second, rules that can help make third-party funding available to SMEs, typically only available for large claims, could improve SMEs' chances of accessing ISDS.[153] Third-party funding is a mechanism by which a disputing party secures funds from a party external to the dispute in order pursue a claim in exchange for remuneration dependent on the outcome of the dispute.[154] As a counterpart, however, consideration must be given to whether, despite or especially because of third-party funding, security for costs has to be required of an SME, in case it loses an unmeritorious dispute. A final relevant reflection concerns how artificial intelligence, to the extent that SMEs have access to it, can help reduce costs, e.g. by providing an early-case assessment, both in terms of avoiding frivolous claims and claims unfounded as a matter of law.[155]

C. Rules Intended to Reduce the Overall Costs of the Dispute Settlement Process

Other options that aim to lower procedural costs without targeting SMEs in particular could also result in reducing participation costs for SMEs. States' efforts to reduce overall costs are especially notable in relation to the prospective establishment of a standing multilateral investment court. If this project succeeds, it would eliminate user fees (or user fees would be very low).[156] The establishment of a multilateral

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[149] On the negative impact of the Covid-19 pandemic on SMEs worldwide, see WTO, *General Council Statement of 14 May 2020*, Doc. WT/GC/215.

[150] UNCITRAL, Note by the Secretariat on *Possible Reform of ISDS*, UN Doc. A/CN.9/WG.III/WP.149, 5 September 2018, at para. 34.

[151] Bungenberg and Reinisch, *supra* note 7, at 21.

[152] E.g. see the tribunal's discussion of this in *Abaclat et al. v Argentina*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, 4 August 2011, at para. 487.

[153] José Àngel Rueda-García, *Third-Party Funding and Access to Justice in Investment Arbitration: Security for Costs as a Provisional Measure or a Standalone Procedural Category in the Newest Developments in International Investment Law* in Katia Fach Gómez (ed.), *Private Actors in International Investment Law,* at 120 (Cham: Springer 2021).

[154] E.g. UNCITRAL, Note by the Secretariat on *Possible reform of ISDS: Third-Party Funding*, UN Doc. A/CN.9/WG.III/WP.157, 24 January 2019, at para. 5; Rueda-García, *supra* note 155.

[155] E.g. predictive analysis as used in commercial arbitration, Kathleen Paisley and Edna Sussman *Artificial Intelligence Challenges and Opportunities for International Arbitration* 11 New York Dispute Resolution Lawyer 35 (2018); John Zeleznikow, *Using Artificial Intelligence to Provide Intelligent Dispute Resolution Support* 30 Group Decision and Negotiation 789 (2021).

[156] Catharine Titi *et al.*, *Comparative Costs and Financing of Permanent Dispute Settlement Mechanisms* 1 Academic Forum on ISDS Working Group Paper 1 (2022), at 2 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4130295.

investment court with permanent judges could also help reduce party costs. According to the EU, the different concerns about ISDS are systemic and intertwined.[157] So, costs are related to the lack of predictability of interpretations: since there is no established interpretation of the law, 'diligent disputing parties will put forward every plausible argument'.[158] By the same token, a permanent dispute settlement mechanism 'will lead to a reduction of the costs and duration of proceedings in a number of ways, which would contribute to ensure effective access for small and medium-sized enterprises to the standing mechanism'.[159] A standing mechanism would mean that appointed judges will be selected by lot to hear a particular case,[160] which would in turn eliminate party costs related to researching potential candidates to act as arbitrators, and the number of arbitrator challenges (and attendant costs) would be reduced too.[161] Rules limiting the duration of proceedings can have a similar effect.[162]

4. The Political Cost of Facilitating SMEs' Access to ISDS

While helping SMEs better access ISDS under international investment agreements is an emerging goal for key actors in international investment negotiations, such as the EU, it is not without challenges and it is not uncontested: it comes at a price. In fact, not only will states most likely have to foot the bill for SMEs to be able to access ISDS, but this will probably also increase the number of disputes against states, leading to the (a priori) incoherent situation where states are funding claims against themselves. This can prove particularly controversial in the case of developing countries with limited financial resources.

Be that as it may, states have been seeking ways in which to reduce the number of disputes they face. In their effort to avoid investment disputes, some states have terminated their investment treaties,[163] stopped providing access to ISDS, or, in the case of Brazil, only ever ratified investment treaties that do not give access to ISDS but so-called 'dispute prevention' mechanisms.[164] Facilitating SMEs' access to ISDS contrasts with some such trends and the scepticism expressed by some states vis-à-vis

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[157] Submission from the EU and its Member States, *supra* note 18, § 10.

[158] *Ibid.*, §§ 10, 55.

[159] *Ibid.*, *supra* note 18, § para 51.

[160] E.g., see Article 8.27 of CETA. See further Andrea Bjorklund *et al.*, *Selection and Appointment of International Adjudicators: Structural Options for ISDS Reform* 11 Academic Forum on ISDS Concept Paper 1 (2019) at 12, 16, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3787334.

[161] Submission from the EU and its Member States, *supra* note 18, §§ 52-53. See also Thordis Ingadottir, *The Financing of International Adjudication* in Cesare Romano, Karen Alter and Yuval Shany (eds) *The Oxford Handbook of International Adjudication,* at 601 (Oxford: OUP, 2013).

[162] E.g. Article 8.39(7) of CETA.

[163] The recent call of the European Parliament for the withdrawal of EU member states from the Energy Charter Treaty (ECT), a multilateral investment protection treaty for the energy sector, can be interpreted in the same light.

[164] Catharine Titi, *International Investment Law and the Protection of Foreign Investment in Brazil* 2 Transnational Dispute Management 1 (2016).

ISDS. In particular, in light of the high cost of proceedings, developing states themselves may face serious financial difficulties when defending against investment claims.[165] In the context of UNCITRAL Working Group III, it was stated that

> the high costs of ISDS paid with public funds were difficult to justify for developing States, whose financial resources were scarce. In that context, it was stated that such costs and awards made against those States could compete with urgent developmental needs. It was added that responding to an ISDS claim posed a disproportionately heavy burden on the officials of smaller States.[166]

Obtaining developing states' agreement to fund the claims of SMEs, when they themselves are seeking financial assistance in order to defend against ISDS claims, will be a challenge. It is recalled that the discussions in UNCITRAL Working Group III on the creation of an advisory centre on international investment law aim precisely to offer assistance to developing countries.[167] Such countries may not be in a position to assist SMEs and indeed they may be unwilling to do so, since this would be encouraging further claims.

Yet these observations must be put in perspective. It is possible that the desire to help SMEs access dispute settlement has a regional or developed country focus – at least in part. The EU and its member states as well as Canada are some among the most vocal proponents of this new policy objective of facilitating SMEs' access to ISDS, although the issue has also been raised at the multilateral level.[168] First, not all options analysed in this article impose a financial burden on states (e.g. providing for expedited proceedings would reduce the financial costs for all participants, both states and SMEs). Second, the institutional mechanisms that do require funding, such as an advisory centre, will primarily be funded by developed – as opposed to developing – states, as is the case of the ACWL.[169] Ultimately, depending on the funding arrangements, the advantages for developing countries as beneficiaries of the mechanism may outweigh the disadvantage of the need for them to contribute to the fund and, indirectly, to SME claims.

Alternatively, we can imagine an SME funding/legal assistance mechanism of a national or regional scope, e.g., an EU-wide advisory centre offering legal and/or financial assistance to EU SMEs only in relation to their investments in third countries. In that case, states will be essentially funding the claims of their SMEs against third countries, but not SME claims against themselves.

In fact, the reasons why states wish to facilitate SMEs' access to ISDS must be kept in mind. States are interested in facilitating access to ISDS of their own SMEs when they face problems in a third country. By doing so, they can guarantee effective

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[165] UNCITRAL, UN Doc. A/CN.9/930/Rev.1, *supra* note 3, § 40.
[166] *Ibid*.
[167] See *supra* note 32.
[168] UNCITRAL, UN Doc. A/CN.9/930/Rev.1, *supra* note 3, § 41.
[169] See *supra* notes 65-66.

access to justice not only for big investors but also for those financially vulnerable (SMEs and individuals). Access to justice is enshrined as a human right in international human rights instruments, such as the European Convention of Human Rights,[170] the American Convention on Human Rights,[171] and the Charter of Fundamental Rights of the EU.[172] It was in light of the latter and its requirement for 'legal aid [to] be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice'[173] that the CJEU examined the question of SMEs' access to ISDS in Opinion 1/17 and found that CETA's investment court must 'have the characteristics of an accessible and independent tribunal'.[174] In the EU context, by providing an improved access to ISDS for SMEs and physical persons, the EU and its member states will be complying with a constitutional obligation imposed on them by the CJEU.[175] It is also in this light that the political cost of facilitating SMEs' access to ISDS must be examined, that is, while keeping in mind that whatever the cost, the underlying rationale is to guarantee SMEs' and natural persons' effective access to justice in the context of an investment treaty dispute.

5. Conclusion

This article has presented for the first time the institutional mechanisms and normative actions that can help improve SMEs' access to ISDS and has considered the political cost of doing so. It suggested that, while some states may resist the idea of assisting SMEs in bringing claims, the rationale for offering such assistance must be kept in mind: it is the need to ensure the right of access to justice. The article has looked into the means by which SMEs' access to ISDS can be improved, both by addressing options for offering legal and/or financial assistance and by examining the rules that can help reduce the overall cost of ISDS. The article focused in particular on institutional mechanisms and especially an advisory centre on international investment law making its services available to SMEs. Drawing on the wealth of comparative experience from existing dispute settlement assistance mechanisms that facilitate access to various international courts and tribunals, the article has shown that legal assistance is a more efficient and cost-effective tool than financial assistance and presented concrete proposals as to the funding and functioning of such a mechanism for SMEs. Its overarching argument is that SMEs (and natural persons) deserve assistance and that there are some means, relatively uncontroversial, to help them access ISDS.

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[170] Article 6 of the European Convention on Human Rights.
[171] Article 8 of the American Convention on Human Rights.
[172] Article 47 of the Charter of Fundamental Rights of the EU.
[173] *Ibid*.
[174] Opinion 1/17, *supra* note 24, at para. 191.
[175] Titi, *supra* note 23, at 536-538, 540. See also *supra* note 23.