

Note on access to ISDS for small and medium-sized enterprises and individual investors

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In light of the differing views that have been expressed within Working Group III in relation to whether and under what conditions to give access to the Advisory Centre on Investment Law to small and medium-sized enterprises (SMEs), we are sharing the findings of some legal research published in December 2023.³

The cost of accessing investor-state dispute settlement (ISDS) is notoriously high and it has been identified as a concern by Working Group III. Investment dispute settlement was primarily designed with large investors in mind – those with the means to access an international tribunal –, while SMEs and individual or vulnerable investors can face significant barriers to accessing ISDS. We recognize that there is a political cost to facilitating access to ISDS for SMEs and vulnerable investors, but we also consider that it is important to keep in mind the rationale for offering such assistance: it is the need to ensure the right of effective access to justice.

We have reviewed the means by which SMEs' access to ISDS can be improved by addressing options for providing legal and/or financial assistance to them and by examining the rules that can help reduce the overall cost of ISDS. We have focused on institutional mechanisms and especially the possibility of the 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, we have found that legal assistance is a more efficient and cost-effective tool than financial assistance and we have presented concrete proposals as to the funding and functioning of such a mechanism for SMEs.

The institution's budget determines its capacity to act efficiently and make a difference, therefore it is important to secure stable and adequate funding. For this, it is necessary for a prospective Advisory Centre on International Investment Law to establish both assessed contributions and beneficiary fees. Regarding beneficiary fees, it seems reasonable to assume that SMEs may be willing to pay fees, provided that they are offered quality legal services at a competitive price. Voluntary contributions that can complete the financing of a future advisory centre could come from business groups that may want to support the creation of the 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 the establishment of an advisory centre. Their contributions, however, may be a source of controversy. For this reason, it would be necessary

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³ Katia Fach Gómez and Catharine Titi, 'Facilitating Access to Investor-State Dispute Settlement for Small and Medium-Sized Enterprises: Tracing the Path Forward' (2023) 34 (7) *European Business Law Review* 1039.

for the future advisory centre to develop from the outset a set of guidelines on conflicts of interest capable of detecting red flags. Another possible source of financing is the reimbursement of expenses. 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.

Drawing on the model of the Advisory Centre on World Trade Organization Law (ACWL), the future Advisory Centre on International Investment Law 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 short, even assuming eventual inefficiencies in the early stages of the advisory centre's operation, legal assistance would be more efficient both for SMEs and for the mechanism – and, as a consequence, for the entities funding the mechanism too – than pure financial assistance.

This would not prevent the centre from contracting external counsel if necessary. For example, additional legal staff may be needed in case of a high influx of cases. 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 or a case requiring very specific expertise. 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.

Facilitating access to ISDS for SMEs and private investors does not mean that all investors would automatically benefit from the Centre's assistance. Eligibility criteria could be inspired by provisions in existing investment treaties relating to the types of investors that are covered by the treaty – definition of foreign investor, nationality, covered investment, substantial business activities in the territory of the host state, etc. The criteria could also be 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. Additional filters or requirements for accessing assistance could be added of a more procedural nature, such as by carving out of the assistance SMEs that bring abusive claims or claims manifestly without legal merit or unfounded as a matter of law.