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The case for an advisory center on international investment law

by

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Since it is costly for developing and especially least developed country (LDC) members to participate in the World Trade Organization (WTO) dispute-settlement mechanism, the Advisory Center on WTO Law (ACWL) was launched in 2001; it provides subsidized, low-cost legal advice to developing and LDC members of the WTO. As an institution engaged in legal aid on a global scale, it currently has nine staff members. All are lawyers, providing over 200 legal opinions each year in response to requests from eligible members on potential trade disputes. The ACWL has been recognized for its role in helping represent poor countries in WTO disputes, and has a high level of satisfaction among its users.¹

Is there a need for a similar advisory center in the field of international investment arbitration? While no one denies the need for reform of investor-state dispute settlement (ISDS), few have offered specific recommendations.² Filed cases totaled at least 667 as of September 2015.³ New market entrants, such as third-party funders, are making the situation even more difficult for respondent countries. Unfortunately, many developing countries still lack human resources, face language barriers and often struggle with budget constraints. Therefore, compared to the WTO's dispute-settlement mechanism, it could be argued that the developing world has a stronger need for an ACWL-like institution in the field of investment arbitration in order to lessen their financial burden.

Given this need, why do we still not have such an institution?

- First, the WTO is a multilateral system built on one set of rules, working with one centralized state-to-state dispute-settlement mechanism. The international investment regime, however, is fragmented, consisting of more than 3,000 international investment agreements with several institutional and ad hoc forums.
- Second, the geographical dispersion of ISDS venues presents a problem. The WTO Panel and Appellate Body have a permanent seat in Geneva; this makes it easy for ACWL's lawyers to handle trade disputes.

- Third, there is the scope of fact-finding and legal fees. WTO cases are not inherently prone to lengthy fact-finding. However, investment arbitration requires significant time and expense for fact-finding and may make it difficult for a small, permanent institution to follow long and costly case procedures. The average WTO case costs about US\$600,000-700,000, while average investment-arbitration costs total more than US\$4 million⁴—more than the annual ACWL budget.
- Finally, lack of political support, budgetary constraints and perhaps lobbying by law firms have discouraged previous initiatives on an advisory center for investment arbitration in Latin American and ASEAN regions.⁵

This simple comparison might suggest that it is too difficult to establish an investment advisory center. However, there is one feasible option: to transplant the ACWL model into investment arbitration, but with regional offices in the main investment dispute hubs. Capacity building for in-house lawyers and assisting host countries in the defense of ISDS cases would be the main tasks for an investment dispute advisory center. In this case, the center could be launched under the auspices of one of the ISDS forums, potentially drawing on minimum contributions by member countries. Obviously, the minimum contribution would need to be higher than ACWL's. However, compared to the high legal fees of law firms, developing countries would still reap the benefits of inexpensive and efficient service. Developed countries could be asked to donate to the advisory center. Subsidizing the defense cost of host countries could be taken as biased against the interest of their investors in the short term; however, it would serve the policy goals of those countries in terms of viability of the investment-protection system for the longer term.

The International Centre for Settlement of Investment Disputes (ICSID) Secretariat would be well-placed to propose and launch such an institution. Since it arbitrates the majority of investment disputes, comprises 151 contracting member states from around the world and is backed by the World Bank, ICSID is uniquely positioned to play a meaningful role in establishing such an advisory center. Another potential candidate is the Permanent Court of Arbitration, which has the benefit of 20 years' experience administering its Financial Assistance Fund.

Ultimately, whether an advisory center on international investment law can be launched in the near future depends on the political will of governments. Nonetheless, it is worth thoughtful consideration.

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¹ Nora Plaisier and Paul Wijmenga, “Evaluation of trade-related technical assistance, three Geneva-based organizations: ACWL, AITC and QUNO”, IOB Working Document, Policy and Operations Evaluation Department, Netherlands Ministry of Foreign Affairs, 2004, pp. 1-36.

² Karl P. Sauvant and Federico Ortino, *Improving the International Investment Law and Policy Regime: Options for the Future* (Helsinki: Finnish Ministry of Foreign Affairs, 2013), pp. 119-122; Thanh T. Nguyen and Thi C. Vu, “Investor-state dispute settlement from the perspective of Vietnam: looking for a ‘post-honeymoon’ reform”, in Jean E. Kalicki and Anna Joubin-Bret, eds., *Transnational Dispute Management Journal*, vol. 1 (2014).

³ UNCTAD, available at <http://investmentpolicyhub.unctad.org/ISDS>.

⁴ Matthew Hodgson, “Counting the costs of investment treaty arbitration”, *Global Arbitration Review News* (March 24, 2014).

⁵ Anna Joubin-Bret, “Establishing an International Advisory Centre on Investment?”, E15 Initiative (December 2015), p. 6, available at <http://e15initiative.org/wp-content/uploads/2015/09/E15-Investment-Joubin-Bret-FINAL.pdf>.

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