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### **Lessons for a future advisory center on international investment law\***

by

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The investor-state dispute-settlement (ISDS) system has recently come under fire, with commentators and international organizations—including the European Commission<sup>1</sup> and UNCITRAL<sup>2</sup>—suggesting reforms to the regime. But regardless of whether future investment treaty arbitrations (ITA) are conducted through ISDS, an international court or some alternative, a successful litigation strategy will inevitably require substantial resources and expertise, implying possible disparities between developing and developed country participants. To level the playing-field, an advisory center on international investment law (ACIIL) should be established.

The ACIIL idea dates back to the mid-2000s, when scholars called for an institution to provide legal aid and expert guidance to developing countries.<sup>3</sup> Most proposals envision a center modeled after the Advisory Centre on WTO law (ACWL), which since 2001 has provided its developing country clients with subsidized legal advice, training and dispute-settlement support in trade law. Despite important differences between trade law and investment law,<sup>4</sup> proponents hope that an ACIIL could emulate the ACWL’s ability to “pool[] the legal experience of its developing country members” and “enable[e] each of them to draw on this expertise to defend their own interests.”<sup>5</sup>

The first effort toward establishing an ACIIL originated in 2004 at UNCTAD. Since then, two Latin American projects—one spearheaded by UNCTAD, the other by the Union of South American Nations—have come closest to realizing the ACIIL vision, only to fall short at the finish line. Nonetheless, those efforts, together with the example set by the ACWL, provide lessons for a future ACIIL.

First, an ACIIL will require participation from both developed and developing countries, implying the need for a broad base of political and economic support. Crucially, to ensure an adequate base of funding—nearly all of which will likely come from government sources—negotiators should focus attention on the legitimacy gains an ACIIL would offer. Doing so will

most effectively appeal to potential donors' self-interests, by tying the ACIIL to the critiques lodged against ITA. The center's competitive overlap with private law firms should also be minimized. Limiting the availability of ACIIL services (e.g., to respondent governments facing a disproportionate number of suits) could help avoid negative lobbying efforts in the early stages of the center's development.

Negotiators must also find ways to protect the future center's impartiality. For example, the ACIIL's mandate should be limited to the provision of legal advice and representation, with a proscription on non-dispute-related political and/or strategic assistance. Asking the ACIIL to provide guidance on the drafting and negotiation of investment treaties, for example, would risk undermining the ACIIL's neutrality by forcing it to weigh in on uniquely controversial and often distributive arrangements. Additionally, negotiators might consider actively (if quietly) eschewing the support of certain powerful developed countries, whose participation might give an appearance of impropriety.

Leadership and talent retention will also be of utmost importance. Much of the ACWL's success can be attributed to its founders and early leaders; similarly strong personalities will be needed to spearhead the ACIIL campaign. The quality of a future ACIIL's services will depend on its ability to attract and retain talented personnel. Competitive salaries would help resolve that problem, but could undermine the center's cost-effectiveness. The ACIIL could instead emulate the in-house model espoused by some government agencies, by hiring a small number of younger candidates while utilizing on-the-job training, lock-step salary structures and time-based bonuses to incentivize retention.

Implicit in each of the above considerations is the central tension that the ACIIL will face: balancing the competing goals of providing high-quality services while retaining a cost-effective structural footprint. That strain will only be exacerbated by the costly nature of ITA proceedings, at least as compared to WTO disputes. To manage it, the ACIIL should only provide dispute-resolution services to governments, while offering less-costly trainings to other ITA participants (e.g., developing country small and medium-sized enterprises). Additionally, the ACIIL should limit the number of representations it can provide to any one country and should require a minimum number of attorneys from the referring country's government to supplement its legal team. However, care must be taken to tailor any cost-cutting measures to the unique circumstances characteristic of investment disputes. After all, ultimately the center's success will depend on its ability to function effectively within the ITA framework, regardless of the reforms it may undergo.

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[https://papers.ssrn.com/sol3/cf\\_dev/AbsByAuth.cfm?per\\_id=2536190](https://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=2536190). The author is grateful to Anna Joubin-Bret, Frieder Roessler and an anonymous peer reviewer for their helpful comments.

<sup>1</sup> [European Commission, “Report of the 15th round of negotiations for the Transatlantic Trade and Investment Partnership,” Oct. 21, 2016, pp.1-2.](#)

<sup>2</sup> [UNCITRAL, “Possible reform of investor-State dispute settlement \(ISDS\),” Working Group III Working Paper 149, Nov. 2, 2018.](#)

<sup>3</sup> Eric Gottwald, “Leveling the playing field: Is it time for a legal assistance center for developing nations in investment treaty arbitration?” *American University International Law Review*, vol. 22 (2007), pp. 237-275; [Karl P. Sauvant and Federico Ortino, \*Improving the International Investment Law and Policy Regime: Options for the Future\* \(Helsinki: Ministry for Foreign Affairs of Finland, 2013\).](#)

<sup>4</sup> Frieder Roessler, “Dispute settlement in the WTO: From a deliberately designed to a spontaneously grown order,” in *Assessing the World Trade Organization* (CUP, 2017), p. 108.

<sup>5</sup> [Anna Joubin-Bret, “Establishing an international advisory centre on investment disputes?” \*E15 Initiative Paper\* \(ICTSD, WEF, 2015\), p. 8.](#)

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