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The case for an Advisory Centre on International Investment Law

Karl Sauvant (Columbia Law School)/October 17, 2019

In his **post** of 30 August 2019, Pablo Pérez-Salido discussed the proposal at UNCITRAL's Working Group III for the establishment of an Advisory Centre on International Investment Law (ACIIL). This post seeks to make a case for such an Advisory Centre.¹⁾ It complements the excellent **Secretariat document** on the same subject, which is the basis of the discussions in the Working Group III that began on 15 October 2019. More specifically, the present post makes three points on this subject, relating to the need for such a Centre; the scope of its work; and the way forward.

The need for an ACIIL

We know that the number of ISDS cases is now over 1,000, and we also know that the potential for many more cases is very high, among other things because the number of international investors is very high (well over 100,000), the number of foreign affiliates is very high (well over 1 million) and many of the 3,000-plus IIAs contain ISDS provisions.

At the same time, we know furthermore that there are many under-resourced developing countries that neither have the human resources to defend themselves adequately in international investment disputes, nor do they have the funds to hire international law firms to do so.

Hence, establishing an Advisory Centre on International Investment Law would be very desirable. It could be an independent international institution tasked with assisting under-resourced developing countries in defending themselves adequately in international investment disputes. The Advisory Centre on WTO law could serve as a precedent and model.

Establishing such a Centre would level the playing field and provide de facto access to justice to under-resourced developing countries. It would also strengthen the legitimacy of the international investment regime. (Establishing an Advisory Centre is independent from other needed reforms of the international investment regime.)

The scope of work of an ACIIL

The core competency of an Advisory Centre should be to represent, together with lawyers from the respondent States, under-resourced developing country respondents in international investment disputes and the immediate preparation of such disputes. There are three reasons for this focus:

- First, while technical assistance is required across a wide range of issues related to the international investment regime, such assistance is available in a number of areas from both international organizations and other institutions. An example concerns trainings about issues

that are addressed in international investment agreements. It would indeed be desirable to avoid duplicating the work of other organizations.

- Second, there is currently no institution that provides assistance in the representation of respondents in international investment disputes—under-resourced developing countries are left entirely on their own if and when they face disputes. In other words, there is a real gap in the international investment regime that needs to be filled.
- The third reason for which the core competency of an Advisory Centre should be to help developing countries to defend themselves adequately in international investment disputes is that—as is well-known—conducting such disputes is already very costly. Adding additional responsibilities to the mandate of a Centre might risk to overload the Centre’s mandate and, therefore, might risk making the establishment of the ACIIL so expensive that the funds cannot be raised to bring it into existence. (Of course, nothing would prevent States from widening the mandate of the Centre once it is up and running, in the light of experience gained.)

The way forward

Maybe the deliberations of Working Group III could benefit from an informal inter-sessional meeting that examines the many *technical* issues related to the establishment of an Advisory Centre. It could be helped in this work by the detailed scoping study being finalized by the CCSI for the government of the Netherlands. Perhaps such an event could be organized by interested countries and be held in a developing country. The outcome of such a meeting could then help the Working Group to arrive at a considered understanding of the issues involved.

Beyond that, and as a preparatory step, the UNCITRAL Secretariat—or the Academic Forum—could perhaps organize a webinar for interested government representatives to kick off the technical discussions.

In summary, I think there is a distinct need for establishing an ACIIL; it should have a clear focus on helping under-resourced developing countries in defending themselves adequately in international investment disputes; and it would be desirable if UNCITRAL’s Working Group III began as soon as possible the examination of the technical issues involved.

Establishing an Advisory Centre would close a real gap in the international investment regime; it would level the playing field for under-resourced developing countries, thus providing them with de facto access to justice; and it would strengthen the legitimacy of the international investment regime.

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1. ↑ This post is based on Karl P. Sauvant, “An Advisory Centre on International Investment Law: Key Features”, prepared for the Academic Forum on ISDS and available here: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3450919#.