

An Advisory Centre on International Investment Law: Key Features

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Karl P. Sauvant*

Table of contents

| | |
|---|-----------|
| Introduction: the importance of an adequate dispute-settlement process for the international investment regime | 1 |
| A. The precedent: the Advisory Centre on WTO Law | 3 |
| B. An Advisory Centre on International Investment Law | 5 |
| 1. Beneficiaries | 5 |
| 2. Services | 5 |
| a. Conflict avoidance | 6 |
| b. Conflict management at the national level | 7 |
| c. The handling of disputes reaching the international level | 8 |
| d. The possible scope of activities of an ACIIL | 8 |
| 3. Governance | 10 |
| 4. Financing | 10 |
| Summary, conclusions and the way forward | 11 |

Abstract

The United Nations Commission on International Trade Law (UNCITRAL) has put the idea of an Advisory Centre on International Investment Law (ACIIL) on its agenda. The Centre is meant to help under-resourced developing countries in international investment disputes. This paper begins with a brief review of the rise of such disputes and their costs, and outlines the principal characteristics of the Advisory Centre on WTO Law, as a precedent for an ACIIL. It then focuses on the possible key features of an ACIIL, namely the potential beneficiaries, the possible range of services it could provide, its governance, and its financing. The paper ends with a proposal for the way forward.

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Introduction: the importance of an adequate dispute-settlement process for the international investment regime

The international investment law and policy regime is one of the strongest international regimes in existence. It derives its strength from the facts that international investors can directly bring claims against allegedly offending States if they consider that their rights have been violated and that this investor-State dispute-settlement (ISDS) regime—arbitration by ad hoc tribunals—settles disputes in a manner that can be (and typically are) enforced. This dispute-settlement mechanism is at the heart of the international investment regime and therefore of great relevance for both States and investors.

Yet, this dispute-settlement mechanism has come under considerable criticism, as recognized in UNCITRAL's Working Group III on "Investor-State Dispute Settlement Reform".¹ Many of these criticisms are reflected in the Working Group's reports² (and, hence do not need to be repeated here). They are at the basis of the Working Group's efforts to improve the regime's dispute-settlement mechanism.

Improvement is all the more important as the number of investor-State disputes is rising,³ and there is considerable potential for more disputes. By the end of 2018, 942 known treaty-based ISDS cases had been reported, involving 117 countries as respondents.⁴ Some two-thirds of the cases had developing countries or economies in transition as respondents,⁵ and the great majority arose only since the year 2000. Moreover, ISDS proceedings can also be initiated on the basis of state contracts, as well as investment laws adopted by national legislatures, under dispute-settlement provisions contained in them. Contract-based ISDS cases numbered 127 in ICSID alone by the end of 2018,⁶ and those based on investment laws of host countries numbered 68⁷—virtually all of them involving developing countries or economies in transition. This brought the overall total of ISDS cases easily to well over 1,100 by the end of 2018.⁸

In addition, the average number of disputes has been growing over the years. Newly initiated treaty-based investment arbitrations averaged 8 per year during 1996-1998, rose more than fourfold to 36 per year during 2006-2008 and doubled further to 74 per year during 2016-2018.⁹ During the same time periods, the annual number of new contract-based cases at ICSID alone averaged 3, 6 and 6, respectively.¹⁰

It is quite likely that the number of disputes will grow further, as international investors discover and have recourse to the ISDS mechanism, facilitated perhaps (among other things), by third-party funders.¹¹ In fact, the potential for disputes is considerable, considering (1) the growth of inward FDI (with its stock amounting, at the end of 2018, to US\$32 trillion¹²); (2) the number of international investors controlling assets abroad (which is substantially over 100,000), the number of their foreign affiliates (which is substantially over one million) and the number of

investors¹³ in such affiliates (all of which, depending on the applicable international investment agreement (IIA), may have a right to initiate arbitration proceedings); (3) the number of State contracts and national investment laws granting international dispute-settlement recourse; and (4) the embeddedness of FDI in host countries, involving, as it does, a wide range of interactions relating to the production process over the entire life-cycle of a project and, more broadly, the relationship between foreign affiliates and host country governments. Add to that (5) the number of IIAs; (6) their proclivity towards broad definitions of “investors” and “investments”; (7) their open-ended formulation of investor protections, especially in old treaties; (8) the often imprecise drafting of (especially older) treaties, inflexible State contracts, as well as national laws that may be in conflict with international obligations; and (9) the fact that violations of investor rights can take place by different branches of governments and specialized agencies, and at any administrative level (i.e., not only the national level), including out of ignorance of existing obligations, increasing in this manner the possibilities of actions that can give rise to disagreements. Finally, (10) changing natural resource prices can become a source of conflict, in the absence of contract clauses that allow for adjustments in light of changed circumstances, in particular (11) when new governments come to power.

The potential for conflicts of all kinds between host States and international investors is therefore considerable, as are the potential liabilities. And, whatever the cause, it is virtually unavoidable that, as in every relationship, disputes arise from time to time between host States and international investors. A dispute-settlement regime is needed to settle them, especially if investors do not trust local courts, and governments of host States do not want to use—or cannot use—the courts of investors’ home countries.

Moreover, international investment disputes are costly.¹⁴ According to one study, average party costs per case between 2013 and end-May 2017 were US\$7.4 million for claimants and US\$5.2 million for respondents, with an upward trend; average tribunal costs were US\$1.1 million per case.¹⁵ During the same time period, the average amount of damages claimed¹⁶ amounted to US\$1.1 billion per case (excluding larger cases, it came to US\$196 million), also on an upward trend; however, the average amount awarded¹⁷ to successful claimants was considerably less, US\$171 million per case, again on an upward trend.¹⁸ As these numbers imply, though there are many cases in which the costs are much lower, there remain many in which the costs are much higher, reaching into the billions of dollars and accounting for substantial shares of foreign exchange. While different authors report different cost figures (and use different methodologies, e. g., report median costs),¹⁹ the main features are clear: costs are high and rising. To these financial costs, one has to add the potential reputational costs suffered by host countries and the potential loss of FDI inflows.²⁰

Given the centrality and potency of the regime’s dispute-settlement mechanism, it needs to be beyond reproach. This is one of the reasons why States are reviewing

their substantive obligations in IIAs, why many States are drafting revised model treaties and why UNCITRAL's Working Group III is discussing how the dispute-settlement mechanism can be improved. In doing so, it focuses on procedural improvements, as reflected in the Working Group's reports.²¹

One important aspect, however, is only beginning to get attention in the Working Group's discussions, and it is central to the legitimacy of the regime's dispute-settlement mechanism: the fact that many developing countries have neither the experienced personnel nor the financial resources to defend themselves adequately in international arbitral proceedings and prepare themselves properly in the crucial phase immediately ahead of such proceedings. This limits, de facto, their ability to have access to justice on the basis of equality of arms.²² It is a regime flaw that requires attention not only because of its bearing on the credibility—and hence legitimacy—of the investment regime, but also because of the often costly dispute-settlement process, its outcome in terms of awards, and its potentially negative reputational implications for the respondents as investment locations.

It is therefore laudable that UNCITRAL's Working Group III—in response to the suggestion of several member States²³—has put the issues of de facto access to justice and creating a level playing field in regard to international investment-dispute settlement on its agenda, under the title “Advisory Centre on International Investment Law”.²⁴ The following discussion addresses a number of issues related to the establishment of such a Centre, beginning with a brief description of a similar institution in the trade area.

A. The precedent: the Advisory Centre on WTO Law

Efforts to establish an Advisory Centre on International Investment Law (ACIIL)²⁵ can learn from the successful approach pursued in another field, namely the international trade area, when interested governments created the independent Advisory Centre on WTO Law (ACWL) as an intergovernmental organization.

The ACWL was established in 2001.²⁶ As of July 2019, 80 countries were entitled to its services.²⁷ Its establishment reflected the fact that, after the creation of the WTO in 1995, the number and complexity of WTO disputes had risen considerably. Even today, “[w]hile most developed countries have ‘in-house’ legal expertise that enable them to understand WTO law and to participate fully in the WTO legal system, most developing countries and LDCs [least developed countries] do not.”²⁸ Together with financial and institutional constraints, this situation made it difficult for developing countries to use the WTO's dispute-settlement mechanism effectively. The ACWL was therefore created “to provide these countries with this legal capacity and to help them to understand fully their rights and obligations under WTO law.”²⁹

Accordingly, the ACWL provides a range of important services to its beneficiaries: all developing countries that have become members of the Centre and have contributed to its Endowment Fund. In addition, LDCs are automatically entitled to

the Centre's services, without having to become ACWL members or having to contribute to its Endowment Fund, as long as they are WTO members or are in the process of becoming members.³⁰ (Developed countries are not entitled to the Centre's services.)

The services that the ACWL provides are (1) giving free advice, in the form of legal opinions, to governments on all procedural and substantive issues arising under WTO law; (2) assisting countries (for modest fees, but free-of-charge for LDCs) in all stages of the WTO's regular panel and Appellate Body proceedings as complainants, respondents and third parties, beginning with the initial assessment and preparation of cases and including advocacy at panel meetings (including answering questions from panels and parties at the meetings), to drafting notices of appeal and advocacy during Appellate Body hearings; (3) supporting alternative dispute-settlement proceedings; and (4) holding trainings on WTO law and procedures, as well as arranging secondments for government lawyers at the Centre.³¹ In 2018 alone, the ACWL prepared 237 legal opinions, assisted developing countries in 17 disputes (including five new ones), awarded training certificates to 39 delegates, and undertook various ad hoc trainings.³²

As to governance, the ACWL is independent from the WTO. Its General Assembly—consisting of representatives of the (in 2019) 47 members of the ACWL (36 developing countries; 11 developed countries, plus one associate developed country member³³) and the 44 LDCs entitled to the Centre's services—oversees the Centre's functioning, monitors its finances and adopts the annual budget.³⁴ The Management Board—consisting of six persons from developed and developing countries, serving in their personal capacity—decides on matters related to the efficient and effective operation of the ACWL and oversees the management of the ACWL's Endowment Fund; it reports to the General Assembly. Finally, an Executive Director and two Deputy Directors manage the ACWL's day-to-day operations; the Executive Director is also an *ex officio* member of the Management Board.³⁵

The ACWL is financed from the revenues of an Endowment Fund established through contributions from developed and developing country members; fees generated by supporting dispute-settlement proceedings; and voluntary contributions from members.³⁶ More specifically, the one-time contributions of newly acceding developing countries are determined on the basis of their share of world trade and per capita income, classified in three membership categories: Category A: CHF486,000; Category B: CHF162,000; and Category C: CHF81,000.³⁷ There is no fixed membership amount for developed countries; a financial contribution is agreed with the ACWL's General Assembly upon ratification of the ACWL Agreement. Developed countries also contribute the bulk of voluntary contributions. As already mentioned, LDCs that are members of the WTO (or are in the process of acceding to the organization) are entitled to the Centre's services without having to become members of the ACWL. The ACWL's proposed regular budget for 2019 is CHF4,665,000.³⁸

There is general agreement that the ACWL has done a good job³⁹ and in this manner has contributed to the legitimacy of the international trading system. The reasons include that it has had excellent leadership and dedicated staff; that its staff is respected and trusted by parties seeking the Centre's assistance, helping staff to establish an open and deep relationship with beneficiaries; and that it can act as an honest broker, including by advising governments when to seek a compromise.

B. An Advisory Centre on International Investment Law

Any effort to establish an Advisory Centre on International Investment Law can learn from the arrangements and experience of the Advisory Centre on WTO Law.⁴⁰ Thus, interested governments could establish an ACIIL as an independent intergovernmental organization to deal with international investment disputes, with its membership being open to all countries.

Naturally, making such a Centre operational requires addressing a number of issues. Some of these are outlined next.⁴¹

1. Beneficiaries

To begin with—and using as the principal criterion that respondent governments should be under-resourced—the beneficiaries could only be developing countries and economies in transition that are members of the ACIIL, with, on the one hand, taking into account level of income, and, on the other hand, granting special conditions to LDCs.⁴² Many of these countries do not have the top-level in-house human capacity to deal effectively with highly complex issues of international investment law, and many have great difficulties allocating the financial resources required to hire international law firms to help in their defense. (A number of developed countries, too, do not have the in-house human capacity required to deal with the entire range of issues related to investment disputes. Switzerland, for example, seeks external support to defend itself in ISDS cases, but it has the financial means to hire outside lawyers to deal with cases if and when they arise.)

Moreover, if States face (or are likely to face) disputes only from time to time, the opportunity costs of building up highly competent⁴³ in-house capacity (and the possibility that competent staff may be rotated within the government, or hired away by international law firms) may not be attractive. At the same time, it would be desirable for government lawyers to be part of any defense teams and to develop the capacity to prevent and resolve disputes at the national level (see below).

2. Services

Ideally, an ACIIL would assist requesting governments in the entire range of challenges related to the international investment law and policy regime in general and sources of conflicts in particular. Most notably, such assistance could be geared towards (1) seeking to avoid that conflicts arise in the first place, including through

help in the drafting of IIAs, State contracts and national investment laws in a manner that helps to avoid conflicts between international investors and host States; (2) the management of conflicts between international investors and host country governments at the national level so that, if and when conflicts arise (including at the sub-national level), these do not reach the international level but rather are resolved locally; and (3) the handling of disputes reaching the international level so that they are managed properly when they reach that level.

There is no doubt that a number of countries would benefit from technical assistance in regard to this entire range of challenges. Ideally, therefore, an ACIIL could become a one-stop shop, so to speak, and provide comprehensive assistance to under-resourced governments. However, at least two considerations need to be kept in mind when discussing the possible scope of activities of an ACIIL, namely the desirability to avoid duplicating the work of other organizations and, at the same time, keep funding needs down. Therefore, and before turning to the services an ACIIL could provide, a brief review of the assistance already available to developing countries is in order.⁴⁴

a. Conflict avoidance

The imprecise drafting of IIAs, State contracts and national laws and their insufficient implementation can be important reasons for conflicts between international investors and host States that eventually become ISDS cases and result in high costs for respondents. Addressing this issue is therefore important. In fact, a number of organizations offer technical assistance in this respect (ranging from the training of government officials to making ad hoc advisory services available to requesting countries), often based on research.

Regarding the drafting of IIAs and issues surrounding these agreements, UNCTAD has a long-standing programme to provide training on the negotiation of such treaties, based on extensive and in-depth research and the monitoring of trends; informed by intergovernmental deliberations in its Investment Commission and its “Reform Package for the International Investment Regime”;⁴⁵ and, upon request, supplemented by country-specific advisory services.⁴⁶ UNCTAD’s “Investment Policy Hub”, in particular, provides comprehensive information about the principal IIA matters, including information on investment treaties, investment disputes, investment laws, and policy measures.⁴⁷ The OECD, too, has an intergovernmental body dealing with investment issues whose deliberations are partly related to the organization’s Policy Framework for Investment,⁴⁸ and the legal research undertaken on investment matters. The Investment Policy and Promotion Unit of the World Bank Group also provides training in the international investment area.⁴⁹ Additionally, there are various non-governmental organizations that organize training and advisory services and undertake related research, including the International Institute for Sustainable Development⁵⁰ and the Columbia Centre on Sustainable Investment.⁵¹

Regarding the drafting of State contracts, negotiations support is available through the International Senior Lawyers Program, which has a long-standing programme to provide pro bono legal services to requesting governments in relation to investment and commercial contracts involving foreign investors.⁵² The African Legal Support Facility offers the same support to African governments, free of charge.⁵³ And the recently established CONNEX initiative provides, also free of charge, multidisciplinary teams to requesting governments of developing countries and transition economies world-wide negotiating contracts with international investors, focused on extractive industries and also infrastructure.⁵⁴ Finally, the International Development Law Organization (IDLO) offers negotiation support related to the LDCs, based on pro bono and reduced-fee services.⁵⁵

Regarding national investment laws, the same organizations that provide support for the negotiation of IIAs also assist in the drafting of national investment laws. In addition, various countries provide funding for this purpose in the framework of their bilateral programmes.

Finally, and as observed earlier, even when the appropriate instruments are in place, it is also necessary to avoid ill-advised actions by State authorities, sometimes out of ignorance of provisions in IIAs. This challenge requires primarily action at the national level. In particular, it requires that central governments inform their ministries and various sub-national entities about the obligations they have entered into through international treaties.

b. Conflict management at the national level

If and when conflicts between international investors and host States occur—as they inevitably do, as discussed earlier—the challenge becomes to manage them properly and to avoid that they reach the international level. For this purpose, a number of countries have established mechanisms to monitor investor grievances before they escalate into outright conflicts, with a view towards resolving them. One such early-warning mechanism consists of the creation of the institution of investment ombudspersons. The most well-known of these is probably the Office of the Foreign Investment Ombudsman, a grievance-resolution centre established in the Republic of Korea in 1999.⁵⁶ Another approach is to create national coordination committees to which conflicts are being reported, with a view towards resolving them. Chile, Colombia, Costa Rica, Mexico, and Peru are examples for how this can be done.⁵⁷

These mechanisms are very useful to address grievances and manage conflicts, and they are becoming more valuable as the number of international investment disputes rises and disputes become more complex and costlier to resolve.⁵⁸ For this reason, the World Bank is supporting countries in the establishment of investment-grievance mechanisms to deal with investor grievances at an early stage and, if possible, resolve them.⁵⁹

c. The handling of disputes reaching the international level

When disputes reach the international level, the challenge becomes managing them in a manner that respondent States are in the best possible position to prepare and defend themselves adequately.

This begins with undertaking proper preparations when respondents are faced with formal notices of disputes by claimants, that is, before arbitral proceedings begin. This is an important stage that may well be decisive for the subsequent deliberations. In particular, governments that have not yet (or seldom) been involved in international arbitral proceedings often lack the experience of how to handle a notice of consultation or dispute. For this reason, ICSID has issued detailed and practical step-by-step guidance on how to respond to investment claims;⁶⁰ it also provides capacity-building technical assistance on how cases are processed under ICSID rules.⁶¹

However, when it comes to formal international arbitral proceedings, virtually no support is available to respondent governments. The Permanent Court of Arbitration (PCA) has a Financial Assistance Fund that is financed by voluntary contributions; it helps developing countries that meet certain conditions meet part of the costs of (the relatively few) investment arbitrations administered by the PCA.⁶² The United Nations Secretary-General's Trust Fund to Assist States in the Settlement of Disputes through the International Court of Justice (ICJ) can assist States that do not have the necessary financial resources in relation to expenses incurred in (the relatively few) ICJ investment arbitration cases; it is funded by voluntary contributions and, hence, its support depends on the availability of funds.⁶³ On occasion, individual governments receive financial support from private foundations, such as Uruguay in its case of *Philip Morris vs. Uruguay*.⁶⁴ The African Legal Support Facility may selectively help countries in Africa in arbitration cases in which it has assisted them in negotiating the underlying contracts.⁶⁵ IDLO offers dispute-settlement support for LDCs, based on pro bono and reduced-fee services.⁶⁶ It is however not clear to what extent services offered on a pro bono basis can be relied on and are sustainable as an approach, given the costs involved; however, some firms may provide such services as a strategy to enter the market and build up their practice.⁶⁷

In other words, no predictable services comparable to those available in other areas related to the international investment law and policy regime in general and sources of conflicts in particular are available to support under-resourced respondent governments in international investment disputes.

d. The possible scope of activities of an ACIL

A wide range of issues related to the international law and policy regime requires attention, and under-resourced countries could benefit from technical assistance in regard to most of them. Fortunately, there are various support services available

regarding most of them, even if these could be strengthened. However, when it comes to the handling of investment disputes at the international level, virtually no predictable support is available to under-resourced governments that are respondents in international investment disputes.

This is particularly worrisome because—as discussed earlier—the number of investment disputes is large, the potential for many more disputes is substantial and the costs of international dispute-settlement proceedings (both, in terms of financial costs and possible negative effects for host countries) can be considerable; moreover, it is quite likely that high-quality representation may increase the likelihood of success in international dispute settlement.⁶⁸ At the same time, most developing countries and economies in transition do not have the human and financial resources to defend themselves adequately in international dispute-settlement proceedings; this, in turn, bears on the very legitimacy of the international investment law and policy regime.

In light of this situation, an independent Advisory Centre on International Investment Law would fill an important lacuna in the international investment regime. It could have, as its core purpose and competency, to assist under-resourced beneficiary governments in obtaining adequate legal defense in international investment disputes. Such assistance could focus on the selection and appointment of arbitrators; the preparation of statements and evidence; the development of legal arguments; and the representation at hearings. Incorporating government lawyers from respondent States in defense teams—including in the form of mixed teams—would contribute to capacity building. Assistance could also include providing alternative dispute-resolution services and giving legal advice on procedural and substantive issues arising under international investment law. Moreover, since a number of disputes are settled amicably after arbitrations have commenced and before final awards are rendered, the Centre could play a useful role in promoting such settlements.⁶⁹

The scope of the Centre's work could also encompass the initial assessment and preparation of cases, given that proper preparations are crucial for the actual hearings of disputes; this could include analyses of risks associated with cases and advice to governments as to whether or not they should seek to settle a case—or seek mediation—before formal proceedings begin. Close cooperation with ICSID to prepare governments for possible cases would be very desirable in this respect,⁷⁰ considering that that organization is already providing services in this area. This would also contribute to the building of local capacity regarding ISDS issues.

In having this clear focus, an ACIIL would avoid duplication of the work of other organizations and—also an important consideration—it would become financially more feasible, as dispute-settlement proceedings alone can be very expensive. In fact, particular care needs to be taken not to overload the mandate of a Centre, as otherwise financial considerations might ultimately prevent the Centre's establishment.

Beyond its core mandate, the Centre's work could eventually be extended to provide technical assistance and capacity building in other areas of the international investment regime, in particular as regards the creation of conflict-management arrangements at the national level and the exchange of experience and best practices. Such a phasing-in could take place in the light of experience gained, be made dependent on need and the availability of resources and be subject to the avoidance of duplication.

3. Governance

Membership in an ACIIL could be open to all countries: developing countries, economies in transition and developed countries. As with the ACWL, an ACIIL could have a general assembly (consisting of representatives of its members and beneficiaries) to oversee all aspects of the Centre's functioning, and a management board (consisting of a small number of representatives chosen to reflect the organization's membership) to decide matters related to the Centre's operation. Such a structure would allow the ACIIL operate in an independent manner.

An Executive Director could manage the Centre's day-to-day activities. The Executive Director would have to provide competent leadership, supported by dedicated staff who is respected and trusted by beneficiary respondents. This, in turn, would allow the staff to establish a strong relationship with respondents and to act as an honest broker, including by advising governments on when to seek to settle a dispute. In fact, such a Centre might be in a better position than any other organization to acquire the trust and deep cooperation of its clients.

Crucially—and this is central to the Centre's credibility—the in-house staff of lawyers would have to be experts in international investment law. Staffing would have to recognize that international investment law is not a unified body of law, making it a complex⁷¹ matter to resolve investment disputes—although not necessarily a more complex matter than resolving WTO disputes: WTO law includes many different agreements covering various topics (antidumping, subsidies, intellectual property, technical barriers, etc.), while investment disputes (although involving a much higher number of instruments) are largely about a handful of provisions.⁷² (The ACWL had, as of July 2019, a professional staff of 12, with four additional staff on its secondment programme.⁷³)

4. Financing

As discussed earlier, the conduct of arbitration proceedings is costly. Hence, the establishment of an ACIIL would require the creation of a substantial trust fund. It could be financed by countries that have a particular interest in a functioning international investment regime and are in a position to provide technical assistance funds, as well as one-time payments by governments becoming members of the Centre.

The Centre could charge some of its members modest fees for its assistance, if only to make sure that they are conscientious in using its services and to signal serious commitment.⁷⁴ Moreover, in cases in which tribunals allocate (part of) the costs of arbitration and/or defense to claimants, these funds should revert to the trust fund.⁷⁵ Beyond that, the Centre would need to elicit voluntary contributions, including from foundations. Finally, it may also be worthwhile to consider a longer-term approach in the framework of which IIAs could stipulate that investors with claims above a certain size need to pay a small percentage of their claims into the ACIIL's trust fund, contributing in this manner to the financing needs of the Centre.⁷⁶ While such an approach raises all sorts of questions and hence would need to be further thought through,⁷⁷ it could also contribute to more conservative claims⁷⁸ and furthermore discourage frivolous claims.

Underlying the important question of how to finance a Centre is the consideration that a well functioning and broadly accepted international investment regime is in the interest of States and investors.

Summary, conclusions and the way forward

There is undeniably a substantial need for assistance for under-resourced States on a range of issues related to the international investment law and policy regime. Nowhere is that need greater than in relation to its dispute-settlement mechanism, the heart of the investment regime.

The centrality and potency of the regime's dispute-settlement mechanism makes it important that all States have de facto access to it on the basis of equality of arms, to defend themselves in the best possible manner. This is all the more important in light of the rise of international investment disputes (and the substantial potential for considerably more disputes) and the costs of these disputes. Yet, many developing countries simply do not have the experienced personnel and financial resources to defend themselves adequately in international investment disputes. It is a regime flaw that undermines the credibility—and hence legitimacy—of the investment regime.

The proposal for an Advisory Centre on International Investment Law that is now on the agenda of UNCITRAL's Working Group III is meant to rectify this deficiency.

There are many issues that need to be decided in establishing an ACIIL,⁷⁹ especially its beneficiaries, the scope of its services, its governance, and its financing. Given that establishing such a Centre is costly (in light of the costs of international dispute settlement) and considering the work undertaken by other organizations, it would be advisable to focus the Centre's work on assisting under-resourced governments in the legal defense in international investment disputes.

Hence, and more specifically, the core mandate of an ACIIL—its central objective and competence—could consist of providing under-resourced governments

(through its own staff, in combination with representatives of the respondent governments) with assistance in the selection of arbitrators, the development of legal arguments, the preparation of statements and evidence, and the representation at hearings. It could also include providing alternative dispute-resolution services and giving legal advice on issues arising under international investment law. The focus of its mandate could furthermore include the initial assessment and preparation of cases, given that proper preparations are crucial for the actual hearing of cases.

Such an Advisory Centre would complement the assistance provided by various governmental and non-governmental organizations in other matters related to the investment regime, especially regarding conflict avoidance (including the negotiation of IIAs) and conflict management at the national level. Over time, with experience gained, depending on need and the availability of resources, and subject to the avoidance of duplication, the Centre's services could eventually be extended to other areas of assistance.

In determining the services provided by an ACIIL, care needs to be taken that the scope of its work does not become too broad: overloading the Centre's mandate at the outset could risk raising the financial resources that are required to bring it into existence, jeopardizing the entire project.

By providing administrative and legal assistance to under-resourced respondents, an ACIIL would establish a level playing field in international investment disputes. It would provide *de facto* access to justice and equality of arms. In this manner, the ACIIL would fill a significant lacuna in the international investment regime, a lacuna that is of great importance for many developing countries and economies in transition and, more fundamentally, for the credibility and hence legitimacy of the regime itself. Efforts leading to its establishment should be initiated as soon as possible, in parallel to other efforts to improve the international investment law and policy regime.

It is therefore timely for the UNCITRAL Working Group III to consider the desirability of an Advisory Centre on International Investment Law, in light of the questions raised in this paper. Perhaps an informal inter-sessional meeting hosted by interested governments could then develop—on the basis of broad elements laid out by the Working Group—a considered understanding of the key issues involved in relation to the establishment of an ACIIL, for consideration during a subsequent session of the Working Group. Beyond that, interested governments may also want to consult on the idea of an ACIIL at the margins of other meetings, especially in a regional context. Finally, and as a preparatory step, the UNCITRAL Secretariat—or the ISDS Academic Forum—could perhaps organize a webinar for interested government representatives to outline the idea of an Advisory Centre on International Investment Law and, in this manner, contribute to reaching an informed understanding of the idea.

¹ See, “Working Group III: 2017 to present. Investor-State Dispute Settlement Reform”, available at

² See, UNCITRAL, “Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fourth session (Vienna, 27 November–1 December 2017)”, document A/CN.9/930/Rev.1 of 19 December 2017, available at <https://undocs.org/en/A/CN.9/930/Rev.1>, and its Addendum: UNCITRAL, “Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fifth session (New York, 23–27 April 2018)”, document A/CN.9/935, available at <https://undocs.org/A/CN.9/935>; UNCITRAL, “Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-sixth session (Vienna, 29 October–2 November 2018)”, document A/CN.9/964, available at <https://undocs.org/A/CN.9/964>; and UNCITRAL, “Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-seventh session (New York, 1–5 April 2019)”, document A/CN.9/970, available at <https://undocs.org/A/CN.9/970>.

³ For a recent comprehensive discussion of the rise of treaty-based investment disputes and their salient features, see, Roberto Echandi, “The debate on treaty-based investor-State dispute settlement: empirical evidence (1987-2017) and policy implications”, *ICSID Review*, 2019, pp. 1-30, and Malcolm Langford, Daniel Behn and Laura Letourneau-Tremblay, “Empirical perspectives on investment arbitration: what do we know? Does it matter?” ISDS Academic Forum Working Group 7 Paper, 15 March 2019, available at https://www.cids.ch/images/Documents/Academic-Forum/7_Empirical_perspectives_-_WG7.pdf.

⁴ See, UNCTAD, “UNCTAD fact sheet: number of new investor-state dispute settlement cases in 2018”, *IIA Issues Note*, issue 2 (May 2019), available at https://unctad.org/en/PublicationsLibrary/diaepcbinf2019d4_en.pdf, p. 1.

⁵ See, UNCTAD, Investment Dispute Navigator, available at <https://investmentpolicy.unctad.org/investment-dispute-settlement>. For the classification of countries, see UNCTAD, *World Investment Report 2019: Special Economic Zones* (Geneva: UNCTAD, 2019), annex table 1.

⁶ See, ICSID, “Spotlight on contract-based disputes at ICSID”, available at <https://icsid.worldbank.org/en/Pages/resources/Spotlight-on-Contract-based-Disputes-at-ICSID.aspx>. As of December 31, 2018, ICSID had registered 706 cases under the ICSID Convention and Additional Facility Rules. Contract-based cases amounted to 16% of the total. See, ICSID, “The ICSID caseload—statistics (Issue 2019-1)”, available at [https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%202019-1\(English\).pdf](https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%202019-1(English).pdf), p. 7.

⁷ *Ibid.*, p. 10. In a few of these cases, the instrument of consent was also a treaty.

⁸ These are publicly known disputes only.

⁹ See, UNCTAD, “Investment Dispute Navigator”, available at <https://investmentpolicy.unctad.org/investment-dispute-settlement>.

¹⁰ See, ICSID, “Spotlight on contract-based disputes”, *op. cit.* In a few of these cases, the instrument of consent was also a treaty.

¹¹ See, Brooke Guven and Lise Johnson, “The policy implications of third-party funding in investor-state dispute settlement” (New York: CCSI, 2019), available at <http://ccsi.columbia.edu/files/2017/11/The-Policy-Implications-of-Third-Party-Funding-in-Investor-State-Dispute-Settlement-FINAL.pdf>. It is not clear to what extent (if at all) respondents have had access to third-party funders.

¹² See, UNCTAD, *World Investment Report 2019*, *op. cit.*, p. 216.

¹³ It has been observed that, “As a consequence of ISDS tribunals’ permissive approach to SRL [shareholder reflective loss](the “pro-SRL interpretation”), investment treaties expose the States parties to multiple (potentially limitless) claims in relation to a single dispute. The firm, as well as its individual shareholders, may all bring suit over the same alleged treaty breach. And most treaties require neither that such claims be joined nor that they be brought simultaneously.” See, Julian Arato, Kathleen Claussen, Jaemin Lee, and Giovanni Zarra, “Reforming shareholder claims in ISDS”,

UNCITRAL Academic Forum on ISDS Working Paper 2019/9, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3433465, para. 7.

¹⁴ For a discussion, see, for example, Catherine Titi, Julien Chaisse, Marko Jovanovic, Facundo Pérez Aznar, and Gabriel Bottini, “Excessive costs & insufficient recoverability of cost awards,” Academic Forum on ISDS, 14 March 2019, available at https://www.cids.ch/images/Documents/Academic-Forum/1_Costs_-_WG1.pdf; see also Langford et al., op. cit., pp. 7-10, and Susan D. Franck, *Myths and Realities in Investment Treaty Arbitration* (Oxford: OUP, 2019). Moreover, there are other costs: as Nicolas Angelet pointed out, the financing of investment arbitration disproportionately affects the financing of public welfare in developing countries, such as health and education.; see his “Financing investor-State dispute settlement: is there a role for the African Development Bank?” ICCA Congress Series, no. 19, pp. 546-555.

¹⁵ Matthew Hodgson and Alistair Campbell, “Damages and costs in investment treaty arbitration revisited,” Allen & Overy, 14 December 2017, available at http://www.allenoverly.com/SiteCollectionDocuments/14-12_17_Damages_and_costs_in_investment_treaty_arbitration_revisited_.pdf. The mean averages are distorted by the largest claims.

¹⁶ Excluding Yukos vs. the Russian Federation.

¹⁷ Again excluding Yukos vs. the Russian Federation.

¹⁸ Ibid.

¹⁹ See, Langford et al., op. cit., Echandi, op. cit., Titi et al., op. cit., and Luke Nottage and Ana Ubilava, “Costs, outcomes and transparency in ISDS arbitrations: evidence for an investment treaty Parliamentary Inquiry,” Sydney Law School Research Paper no. 18/46, August 2018, available at <https://ssrn.com/abstract=3227401>.

²⁰ Thus, it has been claimed that the filing of claims leads to substantial losses in FDI inflows; see, Todd Allee and Clint Peinhardt, “Contingent credibility: the impact of investment treaty violations on foreign direct investment”, *International Organization*, vol. 65 (2011), p. 414. Research by Shahryar Minhas and Karen L. Remmer suggests that, while disputes registered at ICSID between 1984 and 2006 did not have an impact on the reputation of host States respondents in international investment disputes and investment flows to them, those registered after 2006 did. See their “The reputational impact of investor - State disputes,” *International Interactions*, vol. 44 (2018), pp. 862 - 887, available at <https://www.tandfonline.com/doi/ref/10.1080/03050629.2018.1492384>.

²¹ Op. cit.

²² The same issue can be raised for resource constrained international investors, especially small and medium-sized enterprises and natural persons. This issue is not being discussed here.

²³ See (as of 31 July 2019), documents A/CN.9/WG.III/WP.162 - Submission from the Government of Thailand, para. 26; A/CN.9/WG.III/WP.159/Add.1 - Submission from the European Union and its Member States, para. 38; A/CN.9/WG.III/WP.161 - Submission from the Government of Morocco, para 18; A/CN.9/WG.III/WP.164 - Submission from the Government of Costa Rica, Annex I (c); A/CN.9/WG.III/WP.173 - Submission from the Government of Colombia, p. 8; A/CN.9/WG.III/WP.174 - Submission from the Government of Turkey (advance copy), section III; and A/CN.9/WG.III/WP.179 - Submission from the Government of the Republic of Korea (advance copy), section 2, all available at https://uncitral.un.org/en/working_groups/3/investor-state.

²⁴ See in this context the report prepared by the UNCITRAL Secretariat for this agenda item: United Nations Commission on International Trade Law, Working Group III (Investor-State Dispute Settlement Reform), “Possible reform of investor-State dispute settlement (ISDS): Advisory Centre. Note by the Secretariat”, Thirty-eighth session, Vienna, 14-18 October 2019, document A/CN.9/WG.III/WP.168 of 25 July 2019, available at <https://uncitral.un.org/sites/uncitral.un.org/files/wp168.pdf>. There may be other ways in which this objective could be achieved. In particular, one could establish a litigation fund on which countries could draw; one could set up a revolving fund into which successful respondents could pay a part of the damages that they did not need to pay; and one could seek to mobilize pro bono or reduced-fee services.

²⁵ For a discussion of earlier efforts to establish an ACIIL, see Anna Joubin-Bret, “Establishing an International Advisory Centre on Investment Disputes?” (Geneva: ICTSD and WEF, 2015), available at <http://e15initiative.org/wp-content/uploads/2015/09/E15-Investment-Joubin-Bret-Final.pdf>, and Robert Schwieder, “Legal aid and investment treaty disputes: Lessons learned from the ACWL and investment experiences”, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3093651#. See also, 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. 238-275, Luke Nottage and Kate Miles, “‘Back to the future’ for investor-State arbitrations: Revising rules in Australia and Japan to meet public interests,” Sydney Law School Research Paper No. 08/62, June 2008, available at <https://ssrn.com/abstract=1151167>, p. 21, Karl P. Sauvant, “The evolving international investment law and policy regime: ways forward. E15 Task Force on Investment Policy” (Geneva: International Centre for Trade and Sustainable Development and World Economic Forum, E15 Initiative, 2016), available at <https://ssrn.com/abstract=2721465>, ch. 3.4, and Franck, op. cit., pp. 301-302.

²⁶ For a discussion of the ACWL, see Niall Meagher and Leah Buencamino, “The Advisory Centre on WTO Law (‘ACWL’),” *Max Planck Encyclopedia of International Procedural Law* (forthcoming 2019) and the literature cited therein, and Niall Meagher, “Representing developing countries before the WTO: the role of the Advisory Centre on WTO Law (ACWL)”, available at https://cadmus.eui.eu/bitstream/handle/1814/35747/RSCAS_PP_2015_02.pdf.

²⁷ See, ACWL, “Members”, available at <https://www.acwl.ch/members-introduction/>.

²⁸ ACWL, “The services of the ACWL,” available at https://www.acwl.ch/download/ql/Services_of_the_ACWL.pdf, p. 2.

²⁹ Ibid.

³⁰ Ibid., p. 5.

³¹ Ibid., pp. 8-26.

³² ACWL, “Report on operations 2018”, available at https://www.acwl.ch/download/dd/reports_ops/Final_Report_on_Operations_2018-for-website.pdf, p. 1.

³³ The associate member status was designed to facilitate the participation of interested governments pending ratification of the ACWL agreement. Associate members have all the privileges of a full member, except the right to vote (there have not been any votes so far). Currently, Germany is the only associate member; it is in the process of becoming a full member.

³⁴ See, ACWL, “Members”, op. cit., and ACWL, “The services of the ACWL”, op. cit., p. 4.

³⁵ Ibid.

³⁶ Ibid.

³⁷ Ibid., pp. 5-6.

³⁸ See, ACWL, “Budget for 2019: Proposal of the Management Board,” document ACWL/MB/W/2019/6 of 5 October 2018, available at https://www.acwl.ch/download/general_assembly_mmeeting_documents/11.12.2018/ACWL-MB-W-2018-6-Budget-for-2019.pdf, para. 5.

³⁹ See, e.g., James Ransdell, “Financial and technical support for litigants in inter-State disputes: the example of the WTO and the Advisory Centre for WTO Law”, 1 February 2017, available at <https://ssrn.com/abstract=2957476>, Gregory C. Shaffer, “Assessing the Advisory Centre on WTO Law from a broader governance perspective”, 29 November 2011, Minnesota Legal Studies Research Paper No. 11-46, available at <https://ssrn.com/abstract=1966251> and Chad Bown, *Self-Enforcing Trade: Developing Countries and WTO Dispute Settlement* (Washington: Brookings Institution Press, 2009).

⁴⁰ For one conception of an ACIIL, see Jeremy Sharpe, “An international investment advisory center: Beyond the WTO model”, *EJIL: Talk!*, 26 July 2019, available at <https://www.ejiltalk.org/an-international-investment-advisory-center-beyond-the-wto-model/>.

⁴¹ For an exhaustive discussion of the issues, see, CCSI, “A scoping study on securing adequate legal defense in proceedings under international investment agreements. Prepared for the Ministry of Foreign Affairs of the Netherlands by the Columbia Center on Sustainable Investment”, forthcoming.

⁴² One could also consider the possibility of granting other members of the ACIIL (including developed countries) the right to seek assistance in specific circumstances, e. g., to request legal opinions when a number of (developed and developing country) governments face claims arising out of the same measures/circumstances, as this may help clarify issues of relevance to the investment regime as a whole.

⁴³ And if the in-house capacity is not top-level, respondents may be at a disadvantage when defending themselves. Moreover, if, because of inadequate representation, respondents lose cases, unfortunate precedents (even if not binding) may be set for subsequent cases, with potential systemic implications.

⁴⁴ For a comprehensive review, see CCSI, *op. cit.*

⁴⁵ See, UNCTAD, “UNCTAD’s Reform Package for the International Investment Regime (2018 edition)”, available at <https://investmentpolicy.unctad.org/publications/1190/unctad-s-reform-package-for-the-international-investment-regime-2018-edition->.

⁴⁶ See, UNCTAD, “Review of technical cooperation activities of UNCTAD and their financing. Report by the Secretary-General of UNCTAD”, document TD/B/WP/290/Add. 1, available at https://unctad.org/meetings/en/SessionalDocuments/wpd290add1_en.pdf.

⁴⁷ See, UNCTAD’s “Investment Policy Hub”, available at <https://investmentpolicy.unctad.org>.

⁴⁸ See, OECD, “The Policy Framework for Investment,” available at <https://www.oecd.org/investment/pfi.htm>.

⁴⁹ See, World Bank, “Investment policy and promotion”, available at <https://www.worldbank.org/en/topic/investment-climate/brief/investment-policy-and-promotion>.

⁵⁰ See, e.g., IISD, “12th Annual Forum of Developing Country Investment Negotiators”, available at <https://www.iisd.org/event/12th-annual-forum-developing-country-investment-negotiators>. Some trainings are provided together with the South Centre.

⁵¹ See, CCSI, “Policy and advisory work + investment law and policy”, available at http://ccsi.columbia.edu/work/projects/?proj_type=policy-advisory&proj_area=investment-law-policy.

⁵² For details, see, International Senior Lawyers Project, “Our work”, available at <http://islp.org/our-work/>.

⁵³ For details, see, African Legal Support Facility, “What we do”, available at <https://www.aflsf.org/tags/african-legal-support-facility>.

⁵⁴ For details, CONNEX Support Unit, “About”, available at <https://www.connex-unit.org/en/>.

⁵⁵ For details, see, IDLO, Investment support services for least developed countries” available at <https://www.idlo.int/Investment-Support-Programme-LDCs#Partners>; the programme is based on pro bono or reduced-fee services.

⁵⁶ For details, see, “Foreign Investment Ombudsman, About us”, available at <http://ombudsman.kotra.or.kr/eng/au/message.do>. For a discussion, see F. Nicolas, S. Thomsen and M. Bang, “Lessons from investment policy reform in Korea,” OECD Working Papers on International Investment, n°2013/02 (2013).

⁵⁷ For a discussion, see USAID and APEC, “Investor-State dispute prevention strategies: selected case studies” (Washington, DC: USAID and APEC, 2013), available at https://www.apec.org/Groups/Committee-on-Trade-and-Investment/~/_media/Files/Groups/IEG/20130625_IEG-DisputePrevention.pdf. See also, APEC, *Best Practices Guidebook: Capacity Building to Ensure Appropriate and Prompt Consideration of Investors’ Complaints to Improve the Investment Climate within APEC* (Moscow: Ministry of Economic Development, 2012), available at https://www.apec.org/-/_media/APEC/Publications/2015/7/Best-Practices-Guidebook--CapacityBuilding-to-Ensure-Appropriate-and-Prompt-Consideration-of-Investo/IEG_Best-Practices-Guidebk-2015.pdf.

⁵⁸ The fact that many disputes are settled during arbitral proceedings suggests that these disputes could potentially have been settled nationally before reaching the international level: of the disputes brought to ICSID, 36% of the cases were disputes that were settled or proceeding were otherwise discontinued. See, ICSID, “The ICSID caseload—statistics (Issue 2019—1)”, available at [https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%202019-1\(English\).pdf](https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%202019-1(English).pdf).

⁵⁹ See, World Bank, “Investment policy and promotion: product offering” (Washington, DC: World Bank Group, n.d.), available at <http://pubdocs.worldbank.org/en/952171510251453291/IPP-Tools-booklet.pdf>.

⁶⁰ See, ICSID, “Practice notes for respondents in ICSID arbitration”, available at <https://icsid.worldbank.org/en/Documents/resources/Practice%20Notes%20for%20Respondents%20-%20Final.pdf>.

⁶¹ See, ICSID, “Introduction to ICSID course”, available at <https://icsid.worldbank.org/en/Pages/about/Introduction-to-ICSID-Courses.aspx>.

⁶² See, PCA, “Financial Assistance Fund”, available at <https://pca-cpa.org/en/about/structure/faf/>.

⁶³ See, ICJ, “Financial assistance to parties”, available at <https://www.icj-cij.org/en/financial-assistance-to-parties>.

⁶⁴ Bloomberg Philanthropies supported Uruguay in this case. See, Sarah Boseley, “Bloomberg and Gates launch legal fund to help countries fight big tobacco,” *The Guardian*, 18 March 2015, available at <https://www.theguardian.com/society/2015/mar/18/bloomberg-gates-foundation-fund-nations-legal-fight-big-tobacco-courts>.

⁶⁵ Information provided by Stephen R. Karangizi, Director and Chief Executive Officer, ALSF.

⁶⁶ For details, see, IDLO, op. cit.

⁶⁷ In addition, since most investment-dispute cases do not involve a clear public interest (as, e.g., in Philip Morris vs. Uruguay), but rather are of a purely commercial nature, this reduces the appeal of pro bono services.

⁶⁸ For a discussion of the extent to which attorney experience affects arbitration outcomes, see, Susan D. Franck and Lindsey R. Wylie, “Predicting outcomes in investment treaty arbitration,” *Duke Law Journal*, vol. 65 (2015), pp. 461-526.

⁶⁹ See, Ana Ubilava, “Amicable settlements in investor-State disputes: empirical analysis of patterns and perceived problems,” Sydney Law School, Research Paper no. 19/17, March 2019, available at <http://dx.doi.org/10.2139/ssrn.3352181>.

⁷⁰ This could be done, for example, through joint workshops in interested countries, in order to familiarize governments with the range of issues surrounding investment disputes.

⁷¹ One of the complexities concerns the possibility that the ACIIL, in representing States, may have to take different positions on the same obligation, depending on the underlying instrument.

⁷² However, ACIIL lawyers would require a different skill set than those working in the ACWL because advocacy in WTO disputes is different from advocacy in ISDS, where extemporaneous oral pleadings and witness examination are essential.

⁷³ See, ACWL, “Staff”, available at <https://www.acwl.ch/staff/>.

⁷⁴ There is also the question of avoiding that a few governments with many disputes de facto monopolize the Centre on account of a relatively high number of arbitrations they face. One approach to dealing with this issue is to consider a progressive scale of fees.

⁷⁵ This would require setting up an internal system for ACIIL lawyers to account for their time spent on a particular case.

⁷⁶ An idea advanced by Patrick Pearsall.

⁷⁷ For example: Would such an approach lead to investors claiming that the damages suffered were actually higher on account of such a provision? Would tribunals compensate for this in determining awards? Should (part of) such a payment be reimbursed if investors prevail?

⁷⁸ See, Nottage and Ubilava, op. cit., whose statistics suggest that claims may be overstated.

⁷⁹ For an exhaustive discussion of the issues involved, see CCSI, “A scoping study”, op. cit.