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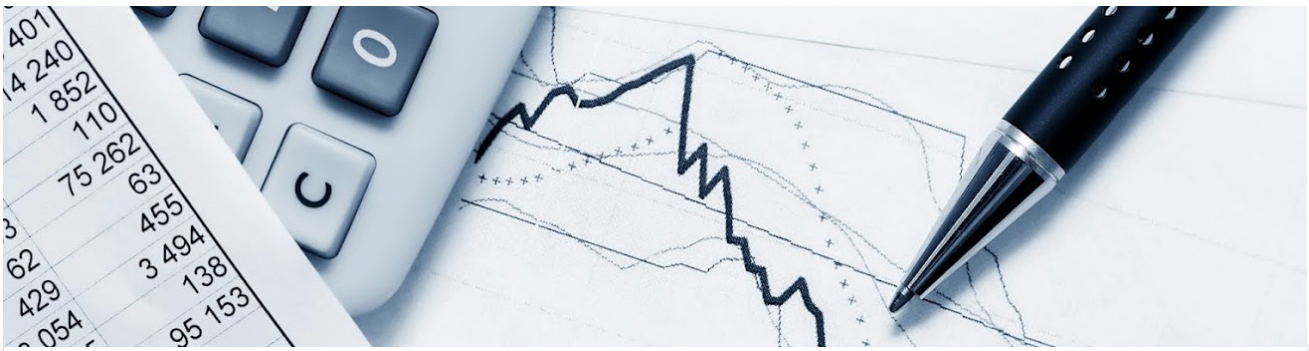

Establishing an International Advisory Centre on Investment Disputes?

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ABSTRACT

In the light of growing globalization and the significant increase in the number of investor-state disputes that has taken place over recent years, this paper proposes that it is time to establish an International Advisory Centre for Investment Disputes (I-CID) to serve all states — industrial, developing, and least-developed — by providing advice, capacity building, prevention, best-practices, and information sharing on issues related to defence in investor-state disputes.

Toward that end, it assesses the primary current challenges for respondent states defending investor-state dispute cases; examines the lessons to be taken from the successful implementation of the Advisory Centre on WTO Law and other initiatives, addresses specific questions and proposals related to an I-CID, and offers general conclusions for the future.

CONTENTS

LIST OF ABBREVIATIONS

ACWL	Advisory Centre on WTO Law
ANZ-ASEAN	Australia-New Zealand and Associate of Southeast Asian Nations
CETA	Comprehensive Economic and Trade Agreement
DSU	Dispute Settlement Understanding
EU	European Union
FIPA	Foreign Investment Promotion and Protection Agreement
FTA	Free-trade agreement
IADB	Inter-American Development Bank
IBA	International Bar Association
ICC	International Chamber of Commerce
ICCA	International Council for Commercial Arbitration
I-CID	International Advisory Centre for Investment Disputes
ICSID	International Centre for Settlement of Investment Disputes
IIA	International investment agreement
ISDS	Investor-state dispute settlement
LDC	Least-developed country
MENA	Middle East and North Africa
NGO	Non-governmental organisation
OAS	Organization of American States
PCA	Permanent Court of Arbitration
UNASUR	Union of South American Nations
UNCTAD	United Nations Conference on Trade and Development
US	United States
WTO	World Trade Organization

INTRODUCTION

The idea to establish an international centre to provide advice and defence services for states in international investment disputes is not new. It has been proposed and discussed by several Latin American states following the example of the successful Advisory Centre on WTO Law (ACWL) established to provide advice and defence services to states in World Trade Organization (WTO) disputes. It is gaining traction and global relevance with the increase of investment disputes under international investment treaties in all regions. The traditional divide between capital exporting and capital importing countries has lost relevance in the context of investor-state disputes. Investor-state arbitration is truly global and affects virtually all countries across all regions. Together with the exponential increase in costs of arbitration and the concern for the systemic legitimacy of investor-state arbitration, the establishment of an International Advisory Centre for Investment Disputes (I-CID) is timely.

After the first disputes that involved the members of the North American Free Trade Agreement (NAFTA) — Canada,[1] Mexico,[2] and the United States[3] (US) — Latin America was the next region to be hit by a wave of international investment disputes based on international treaties involving countries such as Chile,[4] Peru,[5] Venezuela,[6] Ecuador,[7] and Bolivia.[8] The explosion of cases against Argentina in the wake of its economic crisis, (with 43 cases pending in 2005) gave rise to strong reactions in the region. Three countries withdrew from the International Centre for Settlement of Investment Disputes (ICSID) Convention, while others terminated investment treaties and sought to establish alternative instruments and institutions to deal with investment disputes. This first wave of cases between 2000 and 2010 highlighted concerns about the ability of countries to deal with disputes and the urgent need to share expertise and experience while continuing to attract and retain foreign investment in their economies. As a result, several initiatives for an advisory centre have been discussed in the regional context. They will be reviewed in this paper.

Within the following decade, other regions, like Southeast Asia and the Arab region have had their share of investor-state disputes; but, the most important trend has been the cases against some western European countries, such as Spain, Italy, and the Czech Republic[9] or three cases against Germany. Changes in energy policies have triggered most of these cases. Some have been highly publicised and together with the ongoing negotiations of mega-regional investment treaties, have triggered a strong public opinion campaign against investor-state dispute settlement (ISDS), challenging the legitimacy of the system itself.

While ISDS is experiencing an existential crisis that is rattling its foundations, the WTO Dispute Settlement Understanding (DSU), has reached a cruising altitude and seems to be addressing the objective to allow all member countries, whether developing or developed, to make use of the DSU on a level playing field.

Among the many avenues for reform reshaping ISDS, a concrete and effective measure could be the establishment of an advisory and defence centre for states involved in investor-state disputes, along the lines of the ACWL that responds to the specificities of ISDS.

The time has come to take stock of early proposals to identify challenges for respondent states defending ISDS cases; (Section 2); to examine lessons from the successful implementation of the ACWL assisting and defending states in the WTO context (Section 4); and to identify specific questions and proposals related to an an I-CID (Section 4) before offering general conclusions concerning a way forward (Section 5).

EARLY PROPOSALS - CHALLENGES FOR RESPONDENT STATES

This section will review the challenges arising from ISDS cases for respondent states. Some of these challenges are the same for all countries and are recurrent. Some new developments in

1 21 Known investment treaty claims, according to UNCTAD IIA Issues Note N° 2 of May 2015

2 21 (ibid)

3 15 (ibid)

4 3 (ibid)

5 10 (ibid)

6 36(ibid)

7 21 (ibid)

8 11 (ibid)

9 According to UNCTAD IIA Issues Note N°2 of May 2015, 40 percent of new cases were initiated against developed countries in 2014 (the historical average is 28 percent) with a quarter of all new disputes being intra-EU cases.

investment arbitration create new challenges that will require new responses.

REVISITING TRADITIONAL CHALLENGES

Investment disputes continue to rise at a steady pace. An annual review of development in ISDS by the United Nations Conference on Trade and Development (UNCTAD) shows that there is an increase of about 40 investment treaty cases every year, with the total reaching 608 by the end of 2014. It should be noted that the number of cases compiled by UNCTAD does not reflect all disputes between foreign investors and states. With the increase of transparency in several arbitration institutions and treaties, the number of treaty-based cases is easier to access. However, a host of cases brought under investment contracts or before the International Chamber of Commerce (ICC) or regional arbitration institutions are not publicly known, and it is fair to say that the total number can easily be doubled.

By definition, states are the respondents in treaty disputes, since investment treaties provide protection for investors only and impose obligations on states alone. Thus far, investment treaties do not provide for the possibility to raise counter-claims. Moreover, investment treaty disputes are not the appropriate avenue for states to bring claims against investors. Peru[10] has recently launched an ICSID arbitration under a contract to claim compensation from a foreign company. Proposals have been made to broaden investment treaty arbitration and to allow counter-claims by states.[11] But, this in turn will broaden the need for advisory and defence services to bring all states up to speed with new opportunities.

Costs of investment arbitration have skyrocketed. Apart from a few record cases, such as the Yukos cases against Russia where the legal fees for the claimant alone are US$ 70 million or the Chevron saga that has been going on for over a decade, the average costs for an ISDS case are about US$ 10 million.[12] There is a clear relationship between the costs and the duration of investment cases. The average duration is three to five years for an investment treaty case, not taking into account annulment or review. Compared with cases brought to the WTO DSU, however, investment treaty cases are within a range of 5 to 10 times more expensive than trade disputes.

States have traditionally adopted three different approaches to the defence of their interests in ISDS cases. Some countries have decided from the outset to defend themselves with a dedicated in-house team. Other countries have used a combination of an in-house team working in various degrees of cooperation with outside counsel. The vast majority of states have outsourced their defence to outside counsel. Argentina, Canada, Spain, and the US are the four examples of countries that defended ISDS cases in-house. These countries have done it from their first case on. Among the top-10 defenders in ISDS cases, Venezuela, the Czech Republic, Egypt, Ecuador, India, Ukraine, and Poland rely completely on outside counsel. Mexico, for example, has taken a mixed-approach. In other countries with a large number of cases, for example Ecuador or Slovakia, in-house teams have been strengthened to manage the cases, but defence of the cases always involves representation by outside counsel. Several states are beginning to organise their prevention and defence policies to ensure they can identify problems with investors at an early stage, but also manage the defence of the case in an appropriate manner.[13] It is fair to say, however, that the first investment arbitrations have always taken states unprepared and the response has been organised on an ad hoc basis.

A systematic review of the 50 respondents with more than three cases shows that a minority of countries have dedicated in-house teams, even with a task limited to managing the cases and interacting with outside counsel. Few countries have an identified, dedicated, and structured lead agency or management team. More often than not, the cases are dealt with on an ad hoc basis with various ministries or agencies taking the lead. While this approach is mostly driven by budgetary concerns and by the lack of institutional infrastructure, it ignores efficiency and quality of the defence and creates consistency issues in the long run. Also, it is not viable to set up a dedicated defence team when states are dealing with only one or two ongoing cases. The question of a threshold of cases when making a cost-benefit assessment of an in-house defence team is certainly relevant, but it should not be the only consideration. Cases can be complex and have consequences other than strictly financial ramifications that need to be carefully monitored and dealt with.

Availability of skilled in-house lawyers is not evenly distributed among respondent countries, and capacity has not grown with the increase of disputes. One of the main issues facing a government is the rapid turnover of officials and the constant need to train and bring new officials up to speed on disputes, while losing institutional memory.

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10 Peru v. Caravali Cotaruse Transmisora de Energia ICSID ARB/13/24

11 Proposal by Emmanuel Gaillard, Improving Investment Treaty Arbitration: Two Proposals in *IBA e-book on Investment Arbitration* and Antonio Rivas, José. "ICSID Treaty Counterclaims: Case Law and Treaty Evolution" in *Reshaping the Investor-State Dispute Settlement System: Journeys for the 21st Century.* Eds. Jean Kalicki and Anna Joubin-BretBrill Nijhoff, 2015.

12 The average party costs for claimants and respondents are in the region of US$4.4 million and US $4.5 million respectively. To this can be added average tribunal costs of about US $750.000. The average "all in" costs of an investment treaty arbitration are therefore just short of US$10 million. The median figure is notably lower, but still substantial, at around US$6 million. *See* Matthew Hodgson "Costs in Investment Treaty Arbitration: The Case for Reform" p. 749 in *Reshaping the Investor-State Dispute Settlement System: Journeys for the 21st Century.* Eds. Jean Kalicki and Anna Joubin-Bret. Brill Nijhoff, 2015.

13 For an extensive discussion, see UNCTAD, Best Practices in Investment for Development: Managing Investment Disputes, the case of Peru, UNCTAD 2011 and World Bank Group, "Investor-state conflict management: a preliminary sketch", Think Piece prepared for the E15 Task Force on Investment Policy. Available at www.e15initiative.org/.

Investment disputes are more complex and involve many different areas of domestic and international law. Early NAFTA cases have shown the trend of bringing disputes over trade measures under the investment chapter of NAFTA. Recent years have seen a proliferation of investment treaty disputes over not only contractual obligations but also environmental and public health measures (e.g. tobacco) or measures taken in response to financial crisis. With the growing role of European Union (EU) policy and regulation, it is to be expected that yet another level of international rules will be challenged in investment disputes and will further increase complexity and conflicting levels of regulation.

TODAY'S NEW CHALLENGES FOR RESPONDENT STATES

Compared with 10 years ago, not much has changed, but everything has changed. Investments flows have become completely global, and countries continue to seek investment to boost their economies. Political risk has not disappeared with globalisation. It has only become stronger. Global investors have become stronger entities that match many countries in terms of financial and strategic power. At the same time, investment has become more footloose with an increased mobility for capital and investments. Competition for investment to position the economy in the global value chain is fierce. Investment treaties continue to be negotiated not only at the mega-regional but also at the bilateral level. And, investment treaty cases have grown exponentially.

In contrast to 10 years ago, a clear contagion from Latin America to other regions has taken place. In addition to the usual contractual disputes brought to international arbitration under ICSID, regions like Southeast Asia, the Arab Middle East or more recently Europe have become the target of investment treaty disputes. And, with this regional shift, international investment arbitration has become truly global. The players are becoming global with cases brought by developing country investors against developing countries, Chinese investors against European or Latin American[14] countries, and Arab investors against countries in the Middle East and North Africa (MENA). Law firms are becoming global with major investor-state arbitration teams, opening regional offices in Dubai, Hong Kong, or Singapore. Arbitration centres have also proliferated in all regions of the globe.[15] The World Bank continues to advocate international and domestic arbitration as a requirement in the *Doing Business* rating.

Investor-state dispute settlement procedures have been enhanced and have become more transparent. With transparency, information about amicable settlement of disputes (a steady 30 percent of all cases) has become available and triggered the need for new alternative processes, such as mediation, for example with the adoption of a set of Rules for Investor-State Mediation by the International Bar Association (IBA) that are finding their way into investment treaties and broader free-trade agreements (FTAs). Dispute prevention policies are also being developed with best practices in Colombia, the Dominican Republic, and Peru, and interest is growing in many regions.

The increase of investor-state disputes has increased the polarisation and perceived entrenchment of potential arbitrators. However, the limited community of international arbitrators coming from the small community of international investment law, public international law, and commercial arbitration has not grown at the same pace as arbitration cases. The community is grappling now with repeat players and drastic limitations on availability to dedicate to cases. Countries experiencing multiple claims are running out of potential arbitrators to hear their cases, and an exchange of experience with other states is crucial for states that have otherwise limited exposure to investment disputes. The divide between investment arbitration and commercial arbitration is deepening with new rules and treaty provisions applying to investment arbitration and making it more difficult for parties to find competent, available, and independent arbitrators to hear their cases and deal with investment disputes.

In addition, traditional bilateral investment treaties are being replaced by investment and trade agreements with a broader scope, including investment chapters in broader trade-based agreements. While the investment disciplines remain by and large the same, at least as far as the international responsibility of states is concerned, the coexistence within the same agreement of different types of dispute settlement mechanisms renders their application difficult and calls for a clear subordination of chapters and rules related to precedence.

Three important developments, however, have direct consequences on the ability of states to effectively defend themselves in investment disputes and deal with an increasing number of investment arbitration cases: (a) the emergence of third-party funding in investment arbitration; (b) the shifting of arbitration costs from a shared-costs to a loser-pays model; and (c) the increased role of state parties to interpretation and application of their treaties. The global legitimacy crisis of the investment arbitration system further highlights the need for states to be equipped and to fully participate in the debate on the reshaping and reform agenda.

Third-party funding in investment arbitration

Third-party funding in the context of investor-state disputes is a recent phenomenon, but it is clearly on the rise and gaining momentum. In a meeting of the International Council for

14 Ping An Life Insurance Company v. The Government of Belgium ICSID ARB/12/29 and Senor Tza Yap Shum v. The Republic of Peru ICSID ARB/07/6.

15 The most recent regional centres being established by Mauritius and Vietnam

Commercial Arbitration (ICCA)-Queen Mary Task force on Third-Party Funding,[16] a funder present at the meeting shared that for two-thirds of the cases registered by ICSID in 2014, claimants or claimants' counsels had inquired about third-party funding (if not sought funding) by this one company. To date, six international funds and one broker are active participants in the task force.

There is little doubt that the availability of third-party funding, in addition to other means of support for impecunious claimants or claimants preferring to finance their claims, will have an impact on investment disputes and, therefore, also on the risks for states to be subject to investor-state cases, including poor states with a small track-record of claims. Globalisation of ISDS has reached its cruising altitude, and no state is immune from investment treaty cases in the short run. The development of third-party funding for claimants raises acutely the issue of potential financial support or assistance for respondent states and the possibility to provide defence services at a lower cost or on a contingency basis.

Shifting of costs

Another recent development in investment arbitration, alongside the skyrocketing of costs, is the trend to shift costs to the losing party[17] and to depart from the traditional rule in international arbitration that each party bears its costs. While this development could be seen as a positive way of restoring balance and barring frivolous claims, it also brings new risk for states in the defence and control over costs of investment arbitration and, of course, an increased responsibility for state actors in charge of investment arbitration cases.

An increased role for states in ISDS cases under a new generation of treaties also comes with additional costs

The new generation of FTAs and particularly multi-party FTAs, also called mega-regional FTAs, include provisions allowing the member countries to intervene in dispute settlement procedures involving one of the members (non-disputing party submissions). They also favour technical committees to settle disputes related to specific measures, such as taxation or financial measures and generally involve the member states in the dispute settlement procedures related to the application and interpretation of the treaty. Such participation and involvement comes with a cost and requires human resources to ensure that each member country can participate actively and efficiently in the procedures as provided for in the treaty.

The need to reshape and reform ISDS and adapt it to the challenges of the 21st century

The ISDS system as established in the 1960s is undergoing a legitimacy crisis that is gaining momentum globally with the recent development in the EU. While questioning of the ISDS system in the mid-2000s by Latin American countries was considered a regional phenomenon looked at with suspicion in other parts of the world, concerns and dissatisfaction have gained traction with the negotiation of mega-treaties involving the EU, the US, and other major treaty partners, and grown beyond the isolated cases of South Korea or South Africa. To date, however, there is no global forum to research, discuss, evaluate, and reshape investment arbitration or foster alternatives to the system. Proposed institutional reform, such as through an appellate mechanism or an investment court, codes of conduct for arbitrators, control of costs and timelines should not be discussed only in small circles, but also in a global debate, and a global platform is critically lacking. An advisory centre could play a role in enhancing the ability of states to participate in discussions about arbitration and treaties.

LESSONS FROM EARLY INITIATIVES

The regional focus of ISDS cases in the early 2000s has given rise to regional initiatives by Latin American countries. With the globalisation of ISDS, a global approach is needed that can take stock and build on early projects.

The UNCTAD-IADB-OAS project

A country-driven initiative for Latin America launched with the support of UNCTAD, the Inter-American Development Bank (IADB) and the Organization of American States (OAS) was the most advanced project contemplating the establishment of an advisory centre. It involved Colombia, Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Panama, Mexico, Nicaragua, and Peru. Mexico formally joined the project at the last meeting, Uruguay participated in several meetings, including in the negotiations, as an observer, and Ecuador participated as an observer in the process. Chile indicated that it would not join the project formally and reserved its final decision depending on the outcome of the negotiations but pledged funds for its functioning. The US participated as an observer.

A request was made by Colombia, the Dominican Republic, and Central American countries to study the feasibility of an advisory centre to assist countries in handling and defending investor-state disputes. For this project, funded by the IADB through a Regional Public Good window, UNCTAD, the IADB, and member countries prepared a detailed set of consultation guidelines and a consultation report reviewing various services an advisory centre could provide, possible institutional options for such an initiative, and reflecting broadly the views of the international law community on this project.

16 Meeting in Paris on 29 January 2015 of the ICCA Queen Mary Taskforce on Third Party Funding – Sub-group on Investment Arbitration.

17 On the discussion of costs following the event, *see* Raviv, Adam. "Achieving a faster ICSID" p. 655 and Jeffrey Sullivan and David Ingle "Interim Costs Orders: The Tribunal's Tool to Encourage Procedural Economy" p. 732 in *Reshaping the Investor-State Dispute Settlement System: Journeys for the 21st Century*. Eds Jean Kalicki and Anna Joubin-Bret. Brill Nijhoff, 2015.

On 15 April 2009, a steering committee meeting of interested countries took place to come up with a consolidated vision and develop terms of reference for an advisory centre. The following key elements were agreed:

- The intergovernmental nature of the centre, established by states, for states, and run by states.
- The model was to be the ACWL operating in Geneva and assisting developing countries in trade disputes.
- The goal was to establish financial sustainability and cost effectiveness for the initiative beyond the first three years of operation
- The need for the Centre to carry out two functions:
    - an advisory function to assist countries in negotiation of treaties, drafting of dispute settlement clauses, prevention of investment disputes, early settlement, mediation, capacity building and sharing of experience and best practice, keeping databases of cases and arbitrators, carrying out research, and proposing secondment and trainee positions
    - a defence function to assist countries in the defence of ISDS cases, either through direct representation or as part of the defence team for the state. This issue, in turn, raised the problem of conflict of interest and the participation of home and host countries of investors, in the same mode as for the WTO ACWL.

The initiative resulted in a draft treaty as well as a consolidated budget that was submitted to the interested countries and discussed at the meeting of the steering group held in Bogota, at the invitation of the government of Colombia on 26 and 27 May 2009. Panama made a formal offer to host the Centre based on a study that did not conclude on the feasibility of locating the Centre in Washington, DC. Several countries pledged funds for the setting up of the Centre, in the range of US$200,000 each for the first year. The second week of February 2010 had been earmarked for the ministerial signature of the constitutive treaty establishing the Centre. It has, however, not been followed-up on after several government transitions and changes in the teams involved in the steering committee discussions.

The UNASUR project

Among the objectives set by the Heads of States of the Union of South American Nations (UNASUR) in a plan of action issued in May 2008 was the establishment of an advisory centre on investment law and investor-state disputes for UNASUR member countries. The advisory centre was to be the third pillar of a complete overhaul of an ISDS system along with the creation of UNASUR investment arbitration rules and an UNASUR investment arbitration court. Upon the request of Bolivia (the coordinator of the UNASUR working group on ISDS at that time), UNCTAD had been invited to assist the working group and provide technical assistance and inputs, as far as technical options, budgetary issues, and institutional setting were concerned. Ecuador took the lead role after Bolivia and worked on a draft advisory centre treaty focusing on advisory and defence services. To date, the UNASUR advisory centre project has not made significant progress in establishing a centre.

The Arco del Pacifico (ARCO)[18] initiative

ARCO was set up as a political "counter fire" to UNASUR, but it has not been active since May 2009. The ARCO Ministerial Declaration of 10 October 2008 took note of an advisory centre project and recommended that such a centre be independent and of high technical quality and that multilateral initiatives be closely monitored. This approach was further reiterated at the Mexico meeting of the Ministers in March 2009.

The ANZ-ASEAN Forum initiative

In 2012, Vietnam proposed to the Australia-New Zealand and Associate of Southeast Asian Nations (ANZ-ASEAN) Forum that an advisory centre be established along the lines of the initiative supported by UNCTAD for Latin American countries in 2008-2010. The initiative emphasised the burden of costs and technical capacity on ASEAN member countries when faced with investor-state disputes and the need to share expertise and experience in dealing with such cases. It called upon the other members to support this initiative and to move it further into the ANZ-ASEAN agenda.[19]

A distinctive feature of all proposals was the need for a centre to provide capacity building and a forum to share experience and technical assistance to the member states with a view to building in-house capacity to deal with ISDS cases. The projects acknowledged the different levels of capacity as well as the different options chosen by states to defend ISDS cases (in-house capacity, outsourcing, or a combination). They also took into account the need to ensure perennity and stability in state teams, to build and preserve institutional memory, and to ensure coherence in the defence strategies. In addition, they all emphasised the need to provide capacity and assistance from the stage of negotiations to managing ISDS cases in an integrated approach.

18 ARCO was created to expand trade and investment with Asia and is funded largely by the IADB. Member states include Colombia, Costa Rica, Chile, Ecuador, El Salvador, Guatemala, Honduras, Nicaragua, Mexico, Panama, and Peru. ARCO had created a working committee to deal with investment issues in the region, with the mandate of exchange experience on investment negotiations, investment agreements and investor-state disputes.

19 See PowerPoint presentation by Dr. Tu Nguyen, Ministry of Justice, Vietnam

Capacity building and experience sharing have been central to programmes that have been carried out, spearheaded by UNCTAD's intensive training courses on managing investment disputes (unfortunately abandoned) and more recent exchange forums, such as the annual Prague Conference organised by the Ministry of Finance of the Czech Republic and PwC for government officials, summer academy programmes by various universities, and more recently a programme by the Columbia Center on Sustainable Investment.

Law clinics are offering research services to states in the early evaluation of cases and in the negotiation of investment treaties. An interesting project in this context was launched at the Graduate Institute in Geneva, called TradeLab.[20] It offers practical, project-specific legal expertise on trade and investment issues to developing countries, non-governmental organisations (NGOs), and smaller business stakeholders by teaming up expert lawyers and small groups of dedicated students, supervised by senior academics. Students work through legal clinics, pro bono, but get academic credits. Expert lawyers give some of their time for free; in other projects, clients may pay them. The ultimate goal is to offer high-quality legal services at no or lower prices to stakeholders who do not otherwise have access to legal expertise, by creating tailor-made legal teams and transferring capacity to both students and clients who are fully engaged in each project. Actors seeking advice, which has ranged from actual disputes and third-party or amicus submissions to legal scrutiny of proposed legislation and assistance with treaty negotiations, can submit questions and legal projects online or by contacting one of the legal clinics that are part of the TradeLab network (currently the Graduate Institute,[21] Georgetown Law,[22] and Ottawa Law[23]). Although TradeLab is a not-for-profit initiative based on crowdsourcing principles that can work on limited resources and should be self-sufficient over time, it has obtained major seed funding to kick-start its operations and expand, including in the Middle East and Africa.

The issue of the high cost for defending an ISDS case has been systematically addressed in the different regional initiatives, with the preferred option being to pool financial and human resources and make them available to all the member countries. The UNCTAD-IABD-OAS project favoured the recruitment of a team of high-calibre lawyers, working for the centre as they would for a law firm and with the costs paid by a trust fund to which all member countries would equally participate, allowing for lower hourly rates and costs for individual member states requesting services. It was not envisaged to fund defendant states through the centre but rather to provide the defence and advisory services at a reduced rate, secured by a multi-donor trust fund.

An interesting service is available at the Permanent Court of Arbitration (PCA) with a financial assistance fund[24] available for developing countries to help them meet part of the costs involved in international arbitration or other means of dispute settlement offered by the PCA. One might query the appropriateness of such an approach for an institution where independence and impartiality are needed. However, it offers an interesting perspective in addressing the lack of funding for respondent states. The Financial Assistance Fund was established by the Administrative Council in October 1994 and has been used so far in eight cases, two investment treaty disputes, three contract-based disputes, two state-state disputes, and one intra-state dispute. The funds made available to states can cover legal fees as well as all the arbitrators' fees and expenses. In the majority of cases, the funding by the Financial Assistance Fund was in the range of €100,000 (about US$106,000) with the largest amount granted so far being €750.000 (or roughly US$ 797,000) for one case.

The Canada-Colombia Foreign Investment Promotion and Protection Agreement (FIPA) illustrates yet another approach where both signatory states have included among the tasks of the Joint Committee on Investment (Article 3.a) capacity building, to the extent resources are available, in legal expertise on ISDS, investment negotiation and related advisory matters.[25] A generalisation of joint committees and technical committees in treaties, for example, tasked with the assessment of tax disputes, also allows for an early assessment and cooperation for the settlement of disputes.

The main lesson from these initiatives is the importance of political support coming from the right level. The UNASUR initiative was the top-down approach with a strong political push from political leaders but no traction and capacity on the ground to develop the institutional mechanism to actually set up the Advisory Centre. The political message was maybe too strong and too entrenched to enroll support from a broader international community. Budgetary issues also played a role with several member countries facing severe budgetary constraints and not prepared to contribute with funding.[26] The lobby of international law firms definitely played a strong role in discouraging this initiative, as it did for other initiatives.

The UNCTAD-IADB-OAS initiative lacked the top political support, the topic being considered too technical to be of

20 TradeLab, www.tradelab.org (last accessed 27/07/2015).

21 Trade and Investment Law Clinic, Graduate Institute, http://graduateinstitute.ch/trade-law-clinic (last accessed 27/07/2015).

22 International Economic Law Practicum, Georgetown Law, available athttp://apps.law.georgetown.edu/curriculum/tab_courses.cfm?Status=Course&Detail=2582 (last accessed 27/07/2015).

23 New Active Learning Option: uOttawa Joins TradeLab and Launches the Trade and Investment Clinic, uOttawa, http://commonlaw.uottawa.ca/15/index.php?option=com_content&task=view&id=11308&Itemid=666 (last accessed 27/07/2015).

24 http://www.pca-cpa.org/showpage.asp?pag_id=1179 (last accessed 14/07/2015)

25 http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/colombia-colombie/chapter8-chapitre8.aspx?lang=eng (last accessed 14/07/2015)

26 Interestingly, those countries have continued to face costly ISDS cases and resorted to expensive outside representation.

interest to political leaders. It further suffered from some degree of politicisation as a counter-project to the UNASUR initiative, although it was technically a precursor. In this context, the funding constraints and the lack of budgetary visibility were the main hurdles to its effective implementation. However, the draft treaty could be used as a template to illustrate the issues that need to be addressed, and the thorough research carried out for the project could be useful.

The experience gathered during the last decade in Latin America in establishing an institution capable of giving advice and providing defence services is very important in the context of a more global initiative. Several issues were raised and discussed in the regional context that are even more relevant in the global context. Issues of language, of legal system (whether common law or civil law), and issues related to the types of treaties arise and have been addressed. Similarly, the in-depth discussion of the scope of services to be provided by an advisory centre in each of the scenarios is very relevant today. Should the centre provide advisory services only or should it also provide defence services? Should it be limited to early advice and assistance, including or not the provision of amicable settlement, mediation, or conciliation? Should the centre be available to all member countries of an organisation or only to the poorer members? These questions lead to the key issue of access to services and whether the services should be provided on a cost basis or be subsidised, whether countries facing numerous disputes should be given access with the risk of exhausting available resources, as well as issues related to conflict of interest, and confidentiality.

LESSONS FROM THE WTO ACWL

The successful WTO ACWL has been considered as a viable example to be used in the context of investor-state dispute arising between foreign investors and host states from international investment agreements (IIAs).

One of the core objectives of establishing the WTO DSU was to level the playing-field for all member countries and to ensure that all members could access the DSU and bring claims, whether developing member countries with sophisticated legal expertise or least-developed countries (LDC) where experience of international disputes and financial means to sustain long and costly disputes was unavailable.

The ACWL gives free legal advice and training on WTO law and provides support in WTO dispute settlement proceedings at a discounted rate. These services are available to the developing country member of the ACWL (32 at present) and to LDCs that are members of the WTO or are in the process of acceding to the WTO (42 at present).

The ACWL enables these countries to obtain a full understanding of their rights and obligations under WTO law and to have an equal opportunity to defend their interests in WTO dispute settlement proceedings.[27] The ACWL was created as an independent, impartial, and non-political source of legal advice. These factors have been keys to the ACWL's success. The ACWL has developed an excellent reputation for the quality, credibility, confidentiality, and impartiality of its advice. While the ACWL does not remedy all of the legal capacity constraints facing its users in participating in the WTO legal system, it is now recognised as an essential part of the system.

The ACWL was established in the late 1990s upon the initiative of four WTO member countries concerned that "the WTO legal system was becoming too complicated and too burdensome for them to be able to participate fully in the system." The WTO ACWL was established and has been successful in advising and defending either completely or alongside state teams in WTO cases. To address this problem in a manner that did not compromise the impartiality of the WTO Secretariat, WTO members preferred to set up an independent intergovernmental organisation that would provide legal assistance to developing states and LDCs.

Agreement to establish the ACWL was reached at the WTO Ministerial Conference in Seattle in 1999, and the ACWL began operations two years later. At the ACWL's inauguration ceremony, the then-Director-General of the WTO, Michael Moore, said, "Today, and within the framework of the WTO dispute settlement system, the ACWL takes another, almost revolutionary, step forward in international adjudication, by establishing itself as the first true centre for legal aid within the international legal system." Article 2.1 of the Agreement Establishing the ACWL provides that "the purpose of the [ACWL] is to provide legal training, support and advice on WTO law and dispute settlement procedures to developing countries, in particular to the least developed among them, and to countries with economies in transition."[28]

The ACWL consists of a team of nine full-time lawyers and several lawyers seconded by member countries. To date, it has assisted eligible countries in more than 40 WTO disputes and provided more than 200 legal opinions. Maximum charges of the ACWL for a complainant or respondent for consultations, panel proceedings, and appellate body proceedings amount to between CHF138,000 (roughly

27 *See* www. Acwl.org and Meagher, Niall. Representing Developing Countries before the WTO: the Role of the Advisory Centre on WTO Law (ACWL) RSCAS Policy Paper 2015/02.

28 Ibid p. 4-5

US$135,000) and CHF277,000 (US$172,000), depending on the category of member country requesting assistance; for LDCs, that amount is CHF34,000 (roughly US$33,000).[29] These fees are also binding for external counsels, in case they are in conflict. Minimum free-market rates for litigating a relatively simple WTO dispute through to the basic panel report stage may range from US$250,000 to US$750,000.

As explained by Niall Meagher, the current Executive Director in his in-depth survey of the ACWL, "the structure of an intergovernmental organization was a very suitable means of providing the kinds of services that the ACWL would provide. In the words of one commentator, 'an international organization can provide collective goods and take advantage of a variety of economies of scale, specialization, and pooling of resources more effectively than states can do on their own.'" (Guzman, p 15) Thus, the ACWL is a public good that pools the legal experience of its developing country members and the LDCs in the very specialised field of law generally and in WTO dispute settlement procedures in particular and enables each of them to draw on this expertise to defend their own interests as needed.

There were four other main challenges facing the founders of the ACWL in devising its structure and governance.

First, the ACWL would be financed in large part by developed countries that would not be entitled to its services and, for the reasons explained in the following paragraph, could not have direct control over its operations. This required the developed countries to be able to commit to providing funding to an organisation that, while in the long term serving the policy goals of those countries in terms of the viability of the multilateral trading system, might in the short term, provide legal support to developing countries with positions opposing those of the developed countries.

Second, in the words of Claudia Orozco of Colombia, one of its main founders, the ACWL "had to be politically independent . . . from the policies of donor countries and from user developing countries." Thus, no member could have any influence over how the ACWL provided legal advice to the developing countries and LDCs. As one commentator stated, "the autonomy of the ACWL was of the utmost importance to the signatories of the agreement establishing it. An ACWL that was an extension of developed countries' hegemony would have been worse than not having one at all" (Mshomba, p. 93).

Third, the ACWL's mandate is limited to legal advice. Therefore, it has to act in a non-political manner and not take positions on issues of policy on which its members and the LDCs might have very different views. It was very important to the founders of the ACWL that it avoid the "Frankenstein" problem whereby it might have ended up becoming a monster," impact[ing] the system in ways that harm, rather than help, the interests" of its developing country members and LDCs that seek its advice (Guzman, p. 2).

Fourth, the ACWL had to be able to guarantee the confidentiality of its advice. Developing countries and LDCs would not be willing to use the ACWL unless they could be absolutely confident that the nature of their legal concerns or the advice they received would not be disclosed publicly or reported to any other party, including the ACWL's developed country members. These challenges were met by devising a multi-level structure for the management of the ACWL. The purpose of this structure is to ensure that the ACWL can work independently and in a non-political manner.

Under this structure, the ACWL is governed jointly by its developed and developing country members. All of the ACWL's members — developed and developing — participate in the ACWL's General Assembly. The General Assembly evaluates the performance of the ACWL, elects the Management Board, adopts the annual budget proposed by the Management Board, and adopts regulations proposed by the Management Board relating to certain other matters.

The Management Board takes the decisions necessary to ensure the efficient and effective operation of the ACWL. Accordingly, it appoints the Executive Director in consultation with members, prepares the ACWL's annual budget for approval by the General Assembly, supervises the administration of the ACWL's Endowment Fund, and initiates proposals on regulations on specific matters for adoption by the General Assembly.[30]

The Management Board comprises representatives of developed country members, each category of developing country members, and the LDCs. The members of the Management Board are selected "on the basis of their professional qualifications in the field of WTO law or international trade relations and development." Importantly, in order to ensure the independence, impartiality, and confidentiality of the ACWL's work, the members of the Management Board serve in their personal capacities and are not representing their governments or countries of origin."

Several lessons can be drawn from the experience of the ACWL from its structure, mandate, staffing, and budget, but even more so from its success in almost 15 years of functioning.

Of course, the ACWL is faced with defending states members of a multilateral system and under a state-state dispute settlement understanding where only states are parties to disputes, either as claimants or as defendants. Another major difference lies in the outcome of awards rendered by WTO panels where no monetary compensation is awarded for damages, but where the outcome seeks to restore the overall

29 *See*, http://www.acwl.ch/e/disputes/Fees.html andBown, Chad P. and Kara M. Reynolds. "Trade flows and trade disputes," *Review of International Organizations*, vol. 10 (June 2015), pp. 157-158.

30 Ibid p. 5-6

balance of the international trading system. However, in addition to the functioning of the centre, critical issues, such as the way the ACWL has navigated competition with private law firms, sets a valuable example. With a share of only 20 percent of all the WTO cases, the ACWL plays a pivotal role for poorer member countries but is not perceived as unfair competition to in-house teams or to private law firms.

TWO PILLARS OF SERVICE FOR AN I-CID

Centre

When facing investor-state disputes, states have two major needs that can be divided into two main pillars of service. While these services, and particularly the representation services are traditionally available from law firms, more often than not, states carry out some of the tasks, such as appointment of arbitrators or negotiation of the procedural calendar, themselves. None of these services are exclusive and should be seen as necessarily outsourced to an I-CID or to a law firm. Many services can be provided by one or the other and can be mutually beneficial. A good early evaluation of the case by the I-CID may lead to the contracting of a law firm to represent the state in a dispute. Similarly, a law firm may also specialise in assisting its state clients in investment mediation procedures or in early settlement discussions. In practice, and like the area of international trade disputes, both types of services may co-exist and complement one another.

DEFENCE SERVICES

Defence services are the most easy to identify when an investment arbitration is looming, a notice of intent has been received, or an arbitration has been registered. At this stage, it is often too late to take proactive prevention measures and try to settle the case amicably before the arbitration starts. However, a number of decisions need to be taken at this early stage that go beyond the traditional hiring of outside counsel for representation.

Settlement negotiations

With the development of more detailed procedures during the cooling-off period (recourse to negotiation, mediation, or conciliation) or even as stand-alone and parallel proceedings, such as the investor-state mediation provisions in the draft Canada-EU Comprehensive Economic and Trade Agreement (CETA) and other recent treaties, advisory and defence services are also required to effectively and efficiently deal with these alternative procedures.

In practice, about 30 percent of the known investment treaty cases are settled before a final award has been rendered. With increased transparency and availability of information on such early settlements, government officials in charge of these negotiations are exposed to more publicity and possibly public scrutiny about the deals entered into with foreign investors about a dispute. Accountability becomes stronger; hence, the need for a transparent and accountable process for the negotiations. This new market niche could be filled by an I-CID and take care of the traditional suspicion that law firms do not want to support their clients in amicable settlement procedures as it means an early and less advantageous termination of a case for them.

Early assessment

At an early stage of a dispute, a risk-assessment may also be necessary for the state agency in charge of the dispute to make recommendations for settlement or for adopting an appropriate defence strategy. A neutral assessment prepared by an advisory centre, highlighting the strengths and weaknesses of the case on a *prima facie* basis may help the state take necessary decisions, decide to hire counsel, take up the defence in-house, or take a mixed approach. It may also help to identify the financial implications and earmark a budget for the defence of a case that may take several years if it goes its full course.

Conformation of a team

When the case is starting, advice is generally required on the conformation of a defence team for the state. It generally implies identifying the "aggrieving" agency and within the "aggrieving" agency, the entity responsible for the measure or for the conduct challenged by the foreign investor(s). In the absence of an identified state agency, notices of arbitration are often sent to the highest level of government (The President or Prime Minister's office). Communication of documents, identification of potential witnesses, confidentiality measures, and coordination processes are warranted at this stage. While several countries are beginning to organise themselves for the defence of investor-state disputes, the majority of state agencies in charge of disputes still vary case by case, and the communication and cooperation procedures need to be developed and enforced each time. The budgetary implications of this institutional organisation should not be underestimated, and assistance could be sought from an I-CID to deal with both the budgetary and the institutional management of the case.

REPRESENTATION SERVICES

A number of essential issues arise from representation of states in ISDS cases, all linked to the fact that the state does

not take the initiative of the arbitration and is therefore subject to time constraints when preparing the defence strategy for the case. Issues of procedure, language, choice of arbitrator(s), procurement for legal services, procurement for expert services (legal experts, technical experts, documenting the case, cooperation between a lead agency in charge of the defence and the "aggrieving agency" through which the case has arisen, and assessment of possible contractual counter-claims) arise for each new case, although a lead agency can leverage the experience of a previous case or cases.

Representation of defendant states implies three essential tasks that are either completely or partially outsourced by state agencies.

Appointing arbitrator(s)

The first step is the establishment of an arbitration tribunal, and this requires more and more technical expertise and means to research arbitrator profiles. The increase in the number of cases and the relative stability in the number of arbitrators appointed in investment disputes considerably narrows the pool of available arbitrators and makes it necessary to conduct research to broaden the list of names. The ballot process used by various arbitration institutions makes it mandatory to have a reservoir of potential arbitrators to come up with a suitable candidate after the first or second round of consultations. One of the obvious tasks for an I-CID could be to establish a comprehensive database of potential arbitrators with complete and up-to-date profiles to make them available to defendant states who wish to make the appointment themselves before hiring outside counsel.[31] More often than not, countries appoint arbitrators before having appointed counsel to represent them, either because of the threat of default appointment and the time it takes to carry out an international tender to identify suitable counsel. Mostly, however, state teams appoint arbitrators to avoid costs and to take into account the fact that the budget for the defence of the case is not secured at this stage, and a possible settlement is still contemplated. An I-CID could also promote the exchange of experience and expertise when it comes to evaluating arbitrator services, which represent the most important decision in the defence of the case. Advice and support in the case of arbitrator challenges is also essential.

Drafting and filing memorials

A highly time- and cost-intensive step in investment arbitration is the drafting of memorials. An average of four sets of memorials, often exceeding 200 pages, is necessary in an investment arbitration, and numerous communications are necessary between the parties and the arbitral tribunal. Issues of language, legal drafting expertise, and efficiency arise; but, most importantly, technical expertise is required not only on the substantive law issues, but also on the procedural conduct of the arbitration to ensure an effective and adequate defence. Too many defendant states still rely on inexperienced local lawyers mainly for budgetary reasons and are not well versed in choosing appropriate representation. An I-CID could provide briefing services or cooperate with the state team or outside counsel, whether local lawyers or international lawyers, to ensure high quality in the briefs filed by the respondent state.

Document production

Under the influence of Anglo-Saxon litigation and arbitration techniques, arbitration often involves lengthy document production procedures that require not only experience and expertise, but also sometimessimply access to document management tools that are not available to an in-house team when confronted with the first or the second investment treaty arbitration. An I-CID could provide support for the document production phase and for overall case document management through extranet or other facilities available to defending states.

Representation in hearings

An important element of the defence in a case consists in the defence and advocacy of the case at hearings. At least two hearings, sometimes lasting several days, if not weeks, will be involved and will require teams of lawyers to prepare, react, draft, and plead the case throughout the hearing(s). Availability of high-quality legal services to handle hearings, building on expertise and leveraging the number of cases the I-CID will defend can make it a cost-effective and competitive service to be provided to defendant states or to the team of the state in charge of investment disputes. A lot of expertise and experience is available from state teams already and could be enhanced in an established advisory centre that could eventually benefit from the secondment of state officials not currently dealing with an active case that could be seconded to the case of another state.

Dealing with experts, particularly damages experts

Damage expertise has become an integral part of an investment arbitration case, and again, synergies and leveraging expertise and experience may be useful for state teams facing cases and for states confronted with their first or second investment arbitration. Costs are high for this specialised expertise, which traditionally involves international accounting or consulting firms. Few of these firms have made it their specialty to provide damages assessments in investment arbitration. It is a service that could be mutualised or where synergies could operate, if not developed fully by the I-CID as part of the defence services it provides. Quality and cost control definitely could be also provided.

31 It could establish a link with an initiative developed by Arbitrator Intelligence to also make qualitative evaluations available.

ADVISORY SERVICES

States engaging in international investment agreements or investment contracts with foreign investors may require advisory services on upstream prevention mechanisms, ranging from negotiating good treaties, negotiating good contracts, providing early alerts about problems, addressing problems with investors, and providing responses to government officials when they encounter problems in their day-to-day dealing with investors. A number of recent studies on dispute prevention policies and investor-state dispute management mechanisms are available that identify the type of assistance needed by a state to establish a lead agency, ensure proper attention to potential disputes, provide adequate responses to problems with foreign investors, and defend the interests of the state at each stage.[32]

Several countries involved in ISDS cases for several years now have developed frameworks to prevent and manage disputes. While the emphasis in some countries is on the defence itself, in all cases, the framework has identified a clear role for the lead agency in charge of the defence of cases also in the upstream prevention mechanisms, from the negotiation of treaties to alternative dispute settlement or direct negotiation with investors.[33]

THE RELEVANCE OF CAPACITY BUILDING AND SHARING OF BEST PRACTICES

An essential function of an I-CID could be to provide a platform for capacity building and the sharing of information and best practices among government officials. In the absence of an international institution to serve as a forum for international investment issues and while the possibility of a comprehensive investment treaty, including institutional arrangements comparable to the WTO is remote, there is a strong need for a forum where government officials in charge of investor-state disputes can exchange information on ongoing or decided cases, legal issues, arbitrators, counsel, technical experts, costs for services, arbitration institutions, and new issues of interest to states participating fully in international investment negotiations and cooperation.

Capacity building is not available on investment treaty arbitration as such, and while several universities or academic institutions offer courses or summer academies with discounted tuition fees, a more hands-on training and capacity building is not available. It should be noted that states are recurrently facing recruitment issues and are in need of capacity building given the important turnover in state teams, either because government officials move to law firms or because of career moves. Several state teams have been entirely renewed since they were first set up, and while the circle of international investment lawyers is relatively small, problems of institutional memory or even case memory are important.

It could provide for career and training opportunities for young lawyers seconded by their governments, as it is done at the ACWL, contributing to further diffusing international investment law, investment dispute settlement, and dispute prevention policies within their home governments.

POLICY OPTIONS AND INSTITUTIONAL MODELS

From the early experience in Latin America, it is possible to infer that the most appropriate model for an advisory centre on investment law is an independent international institution based on the model of the WTO ACWL. It need not necessarily be a new institution; the services could also be provided by an existing institution, such as ICSID or one of the regional arbitration centres or a separate entity, like the Stockholm Centre's Institute, provided issues of conflict of interest and budget are well taken care of. Universities or NGOs have a role to play, for example, in capacity building, but it will certainly be more limited for mere reasons of budgetary constraints and control by the beneficiary states. Similarly, it would not be sustainable and healthy to rely on pro bono services by law firms otherwise involved in arbitration cases. A combination of services relying on synergies between various experts and actors of investment arbitration is desirable in order to achieve a high quality of services at an affordable cost.

As far as membership is concerned, a first question that arises is whether members and beneficiaries can or must overlap or whether it should be like in the ACWL, where members and beneficiaries are not necessarily the same and where beneficiaries are exclusively developing WTO members or LDCs? It is clear that the approach taken by WTO members is mandated by the need to ensure that all developing member countries can use and benefit from the WTO DSU in an equal manner with their industrialised counterparts. In the investment context, the issues are completely different. All countries, whether developing, least-developed, or developed are virtually the target for ISDS cases when they have signed contracts and treaties granting the right to investors to bring them to arbitration. Even assuming that a trend will emerge for states to use treaty arbitration to bring counter-claims, the system is designed for investors as claimants and states as defendants. Should this be taken into account in designing an I-CID? Obviously, yes, because there is a lot to gain from pooling not only resources, but also experience and expertise. The issues arising in the defence of a case for an industrial country are often the same as for an LDC. While the resources and budget are not comparable, the burden and the lack of available expertise may be the same. Access to services and membership should be carefully considered when embarking on the institutional design of an advisory centre.

32 *See* UNCTAD. Best Practices in Investment for Development: Managing Investment Disputes, the case of Peru, UNCTAD 2011 (above 13)

33 Three examples: Peru, Canada, and Dominican Republic.

Another question related not only to membership and beneficiaries, but also to the scope of services for a centre is whether it should focus solely on defendant states or whether it should also provide services to claimants, for example to small- and medium-sized enterprises, to ensure that they can use ISDS and have access to investment arbitration on an equal footing. When discussed in the context of the Latin American project, this was discarded as not desirable. There are certainly pros and cons to broadening the mandate of an advisory centre. It would be in consonance with practice in law firms representing claimants and defendants alike, and from a technical point of view, it may not create too many difficulties. However, when it comes to funding and overall governance to ensure independence and impartiality, it may be advisable to separate the two types of clientele and consequently the focus.

Another important consideration relates to the scope of the services to be provided by an advisory centre. As discussed above, the two main pillars are advisory services and defence services with an overarching need for capacity building and pooling of expertise across the board.

Advisory services begin upfront from the negotiation of a treaty or a contract involving foreign investors to the assessment of consistency between investment-friendly and protective policies and enacting of laws and regulations, whether sectoral or of general application. Assisting member countries in early dispute prevention policies, designing conflict management systems, and setting-up early alert procedures could be entrusted to an advisory centre, taking advantage of available expertise and experience in other member countries. Early assessment of a case to identify the type of reaction and strategy is also a valuable service that will enable a member state to decide on the course of action, on whether to settle amicably, pursue a mediation or a conciliation, or to prepare the defence of an arbitration case.

The question then arises whether the advisory centre could provide mediation services or conciliation services, whether it should keep a roster of experts available to be called on to act as early neutral evaluators, mediators, or conciliators. Together with capacity building and pooling of resources for alternative dispute resolution mechanisms, it could provide a platform to strengthen the offer.

Regarding the scope of services, the main question arises concerning whether and to what extent an advisory centre should embark on the actual representation and defence of investor-state cases. It is obvious, again, that this is where the countries' lack of resources and expertise is more crucial. However, it raises all sorts of issues ranging from budget and staffing to conflict of interest, "hijacking" of the means of the centre by one country that is the target of numerous cases. To illustrate this concern, had Argentina been the member of an advisory centre established for Latin America, with 46 cases in 2004, it would have exhausted the means of the centre by far. These issues can be dealt with and wereaddressed by Latin American countries when designing their respective projects. It is clear that an advisory centre providing only advisory services without the actual defence service would lose a lot of traction. It would be considered with a lot more benevolence by private practitioners but would certainly miss its call.

Costs and funding are of course crucial when it comes to setting up a centre that has to work for several years before it will break even or even start to generate sustainable income. It will obviously depend on donor or member contributions at the beginning and before it becomes economically viable, especially if it seeks excellence in the recruitment standards and in the outputs. As a matter of principle, states should pay for the defence of their cases and should bear full financial responsibility when facing an investment dispute. However, beyond the issue of pooling resources, the mere costs of an investment arbitration procedure are prohibitive for many states. Here again, the example of the ACWL could come in handy. Asystem of subsidised, capped, or otherwise limited fees also applicable to outside counsel when involved in a case is an interesting precedent. It is especially interesting in the context of a highly competitive and global market for law firms and could have broader benefits than simply keeping the fees low.

Experience in Latin America has shown that it is essential for a couple of champion-countries to get together to launch an initiative and the right time and with the right level of political support. The current turmoil surrounding investment arbitration could provide the opportunity for like-minded countries to work together toward establishing such an advisory centre, inviting all other countries to join them in their initiative. International institutions could support the initiative and contribute their expertise in addition to financial support.

CONCLUSION

The time for setting up an I-CID has definitely come, and the rationale for establishing a centre is stronger than ever.

First, it is time the international ISDS community acknowledges that it is not an isolated legal island, but part of a broader international economic law continent where synergies and parallels must be exploited for international cooperation among states to be meaningful and effective. This also includes the means to interpret and enforce rules and obligations stemming from international investment agreements under broader-based treaties, such as the new mega-regional treaties or FTAs.

Second, an advisory centre initiative needs to be global, and the issues of advice, defence, and capacity building

need to be approached at a global level. The globalisation of ISDS entails the need for states to defend themselves adequately in investor-state disputes and possible recourse to mutualised defence services, prevention services, and a platform for capacity building or information exchange should be available to all states. Such advisory, defence, and technical assistance services should be available for all defendant states, whether developing or developed, whether capital importing or capital exporting, taking into account that to date, 99 of 195 states have been defendants in one or more treaty-based investor-state disputes, with likely many more being involved in investment arbitration. It is essential that the I-CID is run by states, funded by states, and available for states. It is also essential that it is available to states with no experience or otherwise ill-prepared to face such disputes (no capacity, no funds, political turmoil, pressure, etc.) on an *ad hoc* basis.

Third, the quality of the legal services provided by the Centre is essential for the system to gain in legitimacy, predictability, and efficiency. The I-CID can and must provide the best possible legal services, building on existing expertise in state teams. While the pool of international investment lawyers is limited, it should be remembered that many law firms have built an investment treaty practice entirely from scratch on the basis of a first and a second investment dispute, recruiting junior and more senior lawyers with experience in public international law for example, but mostly learning by doing. The myth of a reserved area of the law unavailable to lay men or women must be strongly questioned, as long, of course, as the highest quality of service is available.

Fourth, an adequate defence entails not only the need for high-quality legal services, but also affordable legal services, with an optimal cost-benefit ratio. Too many countries today continue to rely on cheap defence schemes, if at all, and contribute with poor defences to the creation of questionable precedents that in the end do not help claimants and defendants. Too many cases are being cited in investment disputes as "jurisprudence," where key arguments have not been developed and the defence strategies are poor. Consequently, they contribute to the poor record of international investment law. Statistics show an increasing number of cases won by defendant states. Attempts to continue to improve the ratio should be encouraged against the overall objective of peaceful settlement and continued investment.

Fifth, the creation of an I-CID would mean a concrete and effective contribution to resolving the current legitimacy crisis of ISDS. It could accompany a transition between one type or another of dispute settlement, patterned on an international investment court or on a state-state DSU, depending on its evolution. It may help to correct the perceived imbalance between the means available to states facing investment disputes and the means available to claimants with deep pockets or benefitting from third-party funding arrangements.

Sixth, in the meantime, and with the increase of broader FTAs with mechanisms for state involvement in interpretation, in non-disputing party submissions, and in monitoring claims and arbitration procedures, the playing-field must indeed be levelled to ensure that all state members of such agreements can fully participate and benefit from the frameworks.

It could contribute to further improve the quality of international investment law and international investment dispute settlement in an era where the problems generated by political risk have not disappeared and where a specific response to investment attraction and retention continues to be crucial.

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