



Columbia FDI Perspectives

Perspectives on topical foreign direct investment issues

No. 241 December 17, 2018

Editor-in-Chief: Karl P. Sauvant (Karl.Sauvant@law.columbia.edu)

Managing Editor: Marion A. Creach (marion.creach@sciencespo.fr)

Lessons for a future advisory center on international investment law*

by

Robert W. Schwieder**

The investor-state dispute-settlement (ISDS) system has recently come under fire, with commentators and international organizations—including the European Commission¹ and UNCITRAL²—suggesting reforms to the regime. But regardless of whether future investment treaty arbitrations (ITA) are conducted through ISDS, an international court or some alternative, a successful litigation strategy will inevitably require substantial resources and expertise, implying possible disparities between developing and developed country participants. To level the playing-field, an advisory center on international investment law (ACIIL) should be established.

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

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

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

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

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

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

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

* **The *Columbia FDI Perspectives* are a forum for public debate. The views expressed by the author(s) do not reflect the opinions of CCSI or Columbia University or our partners and supporters. *Columbia FDI Perspectives* (ISSN 2158-3579) is a peer-reviewed series.**

** Robert W. Schwieder (robbie.schwieder@gmail.com) is a judicial law clerk for the Honorable Lawrence E. Kahn of the United States District Court for the Northern District of New York. This *Perspective* is based on [Robert W. Schwieder, "Legal aid and investment treaty disputes: Lessons learned from the Advisory Centre on WTO Law and investment experiences," *The Journal of World Investment and Trade*, vol. 19 \(2018\), pp. 628-666](#) available at

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

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

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

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

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

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

The material in this Perspective may be reprinted if accompanied by the following acknowledgment: “Robert W. Schwieder, ‘Lessons for a future advisory center on international investment law,’ Columbia FDI Perspectives, No. 241, December 17, 2018. Reprinted with permission from the Columbia Center on Sustainable Investment (www.ccsi.columbia.edu).” A copy should kindly be sent to the Columbia Center on Sustainable Investment at ccsi@law.columbia.edu.

For further information, including information regarding submission to the *Perspectives*, please contact: Columbia Center on Sustainable Investment, Marion A. Creach, marion.creach@sciencespo.fr.

The Columbia Center on Sustainable Investment (CCSI), a joint center of Columbia Law School and the Earth Institute at Columbia University, is a leading applied research center and forum dedicated to the study, practice and discussion of sustainable international investment. Our mission is to develop and disseminate practical approaches and solutions, as well as to analyze topical policy-oriented issues, in order to maximize the impact of international investment for sustainable development. The Center undertakes its mission through interdisciplinary research, advisory projects, multi-stakeholder dialogue, educational programs, and the development of resources and tools. For more information, visit us at <http://www.ccsi.columbia.edu>.

Most recent Columbia FDI Perspectives

- No. 240, Felipe Hees, Henrique Choer Moraes, Pedro Mendonça Cavalcante, and Pedro Barreto da Rocha Paranhos, “Investment facilitation: leaving the past behind,” December 3, 2018
- No. 239, Joseph M. Wilde-Ramsing and Marian G. Ingrams, “High time for government action to make the OECD Guidelines a force for sustainable FDI,” November 19, 2018
- No. 238, Andreas Tornaritis and Evi Neophytou, “Regional cooperation to enhance FDI in the development of offshore resources,” November 5, 2018
- No. 237, Alvaro Cuervo-Cazurra, “Host country concerns and policies toward state-owned MNEs,” October 22, 2018
- No. 236, Laza Kekic, “To what extent has FDI benefited the transition economies of Central and Eastern Europe?,” October 8, 2018

All previous *FDI Perspectives* are available at <http://ccsi.columbia.edu/publications/columbia-fdi-perspectives/>.