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An Advisory Centre on International Investment Law: Is perfect the enemy of good?

by
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Any government official having experienced an investor-state dispute-settlement (ISDS) case knows the long-lasting pain it causes. Likely, many of those from developing countries also felt somewhat lost and overwhelmed by the lack of know-how. They face an on-going conundrum. In their first ISDS case, in-house lawyers realize that they lack adequate ISDS skills. External legal counsel is too expensive; but since ISDS cases are high profile, funds must somehow be found at great opportunity cost. Between cases, the dilemma continues: should developing countries spend scarce resources to develop in-house capacity for disputes that may never arise, or should external counsel be hired at great cost again?

In the debate in UNCITRAL's Working Group III (WGIII) on ISDS reform, delegates agree on the benefits of an Advisory Centre on International Investment Law (ACIIL).[1] They include: good legal advice at reasonable cost, pre-, during and post-dispute; the training and preparation of in-house lawyers, which also helps governments in negotiating dispute-prevention mechanisms in treaties; a platform for states to exchange experience on ISDS and related matters; and the legitimacy of "branded" legal advice at reasonable cost, facilitating officials to explain to their superiors and the public the reasons for actions that need to be taken—which makes it easier for states that have lost cases to accept ISDS in future treaties. Accessibility to legal advice is the backbone of an equitable and legitimate ISDS regime.

Despite the apparent benefits of an ACIIL, establishing it is a complex task. In the WGIII negotiations, there is a danger of lack of progress. Too little debate, and the ACIIL does not materialize. Too much debate, and the process gets bogged down at the risk of many countries losing interest. A guiding balance should be struck as soon as possible.

Within the framework of ISDS reform options, the opportunity to establish an ACIIL is unique because it can be done independently from taking other decisions. With a little political will,

acceptance and compromise, the ACIIL could start functioning relatively soon, perhaps in two-to-three years. It could begin modest and grow at a later stage.

For the ACIIL to start, WGIII should address the following issues:

- *Scope of services*. The services provided must be limited at first: fewer services, fewer complications. The ACIIL can give advice (both pre-dispute and their early stages); represent countries in a limited number of ISDS cases; train government officials; and act as a platform for its developed and developing country members to exchange experience. It can provide access to external counsel for litigation services that it cannot deliver with its limited resources, on the basis of a roster of counsel prepared to work for the ACIIL at preferential rates.

- *Beneficiaries*. Developing countries—especially the least developed countries—should be the first beneficiaries. Providing services to SMEs—which are often also under-resourced—should be dealt with separately, as this would otherwise give rise to complications and conflicts-of-interest issues for the ACIIL. Discussions of this matter should be left to a later stage.

- *Possible legal structure and funding*. Though an independent and treaty-based organization would be the ideal solution for many countries, limited services could be initially provided by attaching the ACIIL to an international organization with expertise in the investment law area. Countries in a position to do so, and foundations, could contribute to the project, complemented by a tiered-fees arrangement based on the income of each country, similar to that of the WTO's Advisory Centre on WTO Law.

Once in operation, states can decide if the Centre should be scaled up.

The EU has proposed an ACIIL as part of a comprehensive ISDS reform package, including a new Multilateral Investment Court (MIC). This approach, however, faces a controversial debate. Combining the MIC and the ACIIL over-complicates the process and denies the long-awaited benefits of an ACIIL to many developing countries. It would therefore be undesirable to make the ACIIL's establishment dependent on any other actions. Recent progress on the Code of Conduct shows that WGIII can prioritize issues if it so chooses. Progress on an ACIIL will facilitate timely access to affordable legal advice, strengthen the legitimacy of the international investment regime and generate good will for UNCITRAL's WGIII negotiations. If and when the establishment of the MIC were successful, the two could be joined if states so wished.

Kick-starting a modest ACIIL now would sow the seeds for a more full-scale ACIIL in the future. Some might want to discuss this matter until a perfect way forward has been found—but, if past repeated failed attempts were to be a lesson, the perfect should not be the enemy of the good. Establishing an ACIIL now is a deliverable that can be done in short time—it is a win-win option for the international community.

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negotiations. The opinion expressed in this *Perspective* is solely that of the author and does not reflect the position of the Royal Thai Government. The author wishes to thank Abdou El Azizi, Meg Kinnear and two anonymous reviewers for their helpful peer reviews.

[1] For a full discussion, including on issues such as funding, see, Karl P. Sauvant, "An Advisory Centre on International Investment Law: Key features", *University of St. Thomas Law Journal*, vol. 17 (April 2021), pp. 354-372.

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