

Leveling the Playing Field: Is it Time for a Legal Assistance Center for Developing Nations in Investment Treaty Arbitration?

Introduction

In the last 15 years, developing nations have signed over 1500 bilateral investment treaties (BITs) in an effort to attract foreign direct investment (FDI) by creating a more stable and transparent investment environment for foreign investors. BITs provide foreign investors with powerful new rights to protect their investments against expropriation and other forms of discrimination and the ability to sue governments directly through a form of dispute settlement known as investment treaty arbitration. The last 5 years have seen an explosion in the number of investment treaty arbitration claims filed against developing nations, challenging a wide array of sensitive government regulations and routinely seeking millions and even billions of dollars in damages.¹ Mounting an effective defense to these claims is essential for a developing nation, as even a single adverse award could wreak havoc on its economy, weaken its capacity to regulate in the public interest, and damage its reputation as a desirable investment location.

While the number of investor claims is growing, there are new concerns over how well-prepared developing nations are to cope with the challenge of litigating these claims.

¹ See Michael D. Goldhaber, *Arbitration Scorecard: Treaty Disputes*, Focus Eur., Summer 2005, available at: <http://www.americanlawyer.com/focuseurope/treaty0605.html>. This survey documents 59 investment treaty arbitrations with stakes of at least \$100 million and 18 over \$1 billion. A sampling of these claims include: 1) France Telecom's \$2.9 billion claim against Lebanon over its contract to build and operate Lebanese mobile phone network; 2) A Canadian mining company's \$1 billion claim against Venezuela for the expropriation of its gold mine; 3) Multiple claims relating to Argentina's currency crisis collectively worth tens of billions of dollars; 4) U.S. cellular communications company Motorola's \$2 billion claim against the Republic of Turkey over its investment in a Turkish mobile phone system; 5) A German consortium's \$500 million claim against the Philippines over the termination of a concession to build a new airport terminal.

Investment treaty arbitration is a complex form of litigation that demands much in the way of resources and legal expertise. Due to financial and administrative barriers, many developing nations do not have the legal expertise within their government service to defend investment treaty claims. As a consequence, most are forced to hire one of a handful of international law firms who charge the same premium market rates that wealthy individual investors and corporations pay for their services. Meanwhile, developing nations who cannot hire outside counsel face scattered and incomplete sources of legal authority, uncertainty over the meaning of key BIT provisions, and no organized legal assistance from the international community. Unfortunately, these concerns are far from theoretical: in interviews done for this article,² developing nation lawyers report not having access to fundamental sources of law and arbitration doctrine, or having to go to extraordinary lengths to obtain it.

This Article argues that developing nations' lack of affordable access to legal authority and expertise threatens to undermine the legitimacy of the investment treaty arbitration process. Part I reviews the history, significance, and content of the BIT, the international agreement largely responsible for providing foreign investors with powerful new rights. Part II looks at the rise of investment treaty arbitration, the actual arbitration process, and its impact on developing nations. Part III examines the serious barriers to the effective participation of developing nations in investment treaty arbitration. Part IV investigates how these barriers operate in practice, through two case studies based on interviews with current and former developing nation officials who have litigated investor-State arbitration cases. Finally, Part V argues for the creation of a legal assistance center, modeled on a similar effort at the WTO, to ensure that developing

² See Part IV, *infra*.

nations have access to the legal authority and expertise necessary to mount a competent defense to investment treaty arbitration claims.

I. The Bilateral Investment Treaty Movement

Over the last three decades, international investment law has undergone a remarkable amount of change. From the perspective of the foreign investor, international investment law now offers far more legal protection against expropriation and other forms of discrimination at the hands of a host State than in the 1970s.³ The primary tool effecting this change is the bilateral investment treaty (BIT), an agreement between two countries that creates rules to govern investments made by the nationals of one country into the territory of the other. This part will examine the origins of the BIT, its development, and the set of rights it provides foreign investors.

A. Origins of the BIT Movement

The origins of the BIT lie in the post-World War II efforts by capital-exporting States, chiefly the United States and European nations, to create a more rigorous international law of investment to protect the rapidly expanding investments of their companies and nationals abroad.⁴ Even as foreign direct investment began to take off in the period following World War II, foreign investors who sought the protection of international law found only scattered treaty provisions and contested principles⁵ of

³ Jeswald W. Salacuse, *Do BITS Really Work?: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain*, 46 Harv. Int'l L.J. 67, 70 (2005) [hereinafter Salacuse]

⁴ *Id.* at 70-71.

⁵ As late as the 1970's, for example, many Latin American nations held the view – known as the “Calvo doctrine” – that States were only required to provide aliens the same treatment they gave to nationals. This was in direct conflict with the view of most developed nations – generally accepted today -- that a breach international law can arise if a State does not respect the “minimum standard of protection” under customary international law with regard to the treatment of foreign investors. See U.N. Conference on Trade and Development (UNCTAD), *Bilateral Investment Treaties in the Mid-1990s*, U.N. Doc. UNCTAD/ITE/IIT/7 (1998), p. 3. [hereinafter UNCTAD, BITs in the Mid-1990s]

customary international law.⁶ Without the protection of international law, investors had no assurances that a host State would not unilaterally change the terms of an investment contract or laws and regulations affecting the investment.⁷ At the same time, international law offered foreign investors no effective enforcement mechanism to challenge host States that injured or expropriated their investments. Recourse to the host state's courts was not considered adequate, as they may not be sufficiently impartial to adjudicate a claim against their own government.⁸ The only other option for aggrieved foreign investors was to seek "diplomatic protection" by persuading their home government to espouse their claim against the host state at the International Court of Justice.⁹ However, this process is by its nature more political than legal and is available only at the discretion of an investor's home State.¹⁰

Given the shortcomings of the customary international law, the United States and other capital-exporting nations turned to signing investment treaties to provide a source of clear and certain rules on foreign investment. The treaty movement began with Treaties of Friendship, Commerce, and Navigation (FCNs), agreements that addressed numerous subjects beyond investment including trade, maritime, and consular relations.¹¹ Despite containing some protections for investment, FCNs soon fell out of favor, as they contained only limited commitments and did not provide investors with the ability to initiate a claim directly against a host State.¹²

⁶ See Salacuse, *supra* note 3 at 68-70.

⁷ *Id.*

⁸ See UNCTAD, ICSID Dispute Settlement, Module 2.2: Selecting the Appropriate Forum, p. 10, at http://www.unctad.org/en/docs/edmmisc232add1_en.pdf

⁹ *Id.*

¹⁰ *Id.*

¹¹ David R. Adair, *Investors' Rights: The Evolutionary Process of Investment Treaties*, 6 *Tulsa J. Comp. & Int'l L.* 195, 196-97 (1999)

¹² *Id.*

With the failure of several early efforts to create a multilateral international treaty on foreign investment,¹³ the United States and Europe turned to negotiating BITs with individual developing nations.¹⁴ Unlike FCNs, BITs were focused solely on protecting FDI and contained an effective dispute resolution mechanism. Since the signing of the first BIT in 1959 between Germany and Pakistan, nearly 2400 BITs have been signed by over 175 nations, making it the most popular international agreement for protecting foreign direct investment.¹⁵ Initially, the vast majority of BITs were concluded between a developed and developing nation.¹⁶ However, developing nations are increasingly signing BITs with one another,¹⁷ reflecting the emergence of some developing nation firms as major regional and global investors.¹⁸ In addition to BITs, there are a handful of regional investment agreements that are part of wider trade and investment agreements like NAFTA and MERCOSUR. For all practical purposes, the increasingly dense network of BITs and regional agreements has displaced customary international law as the primary source of international law in the area of foreign investment.¹⁹

¹³ See Salacuse, *supra* note 3, at 71-72 (discussing the failure of various multilateral efforts to create an international investment law treaty); International Institute of Sustainable Development (IISD), *Investment and Sustainable Development: A Guide to the Use and Potential of International Investment Agreements*, p. 21-25 (surveying failed attempts at negotiating multilateral agreements on investment) [hereinafter IISD Guide].

¹⁴ Salacuse, *supra* note 3, p. 72-75.

¹⁵ UNCTAD, *World Investment Report 2003: FDI Policies for Development: National and International Perspectives*, p. 89. [hereinafter UNCTAD, 2003 World Investment Report] *Available at*: http://www.unctad.org/en/docs/wir2003ch3_en.pdf

¹⁶ *Id.*

¹⁷ The largest percentage of total BITs signed during 2004 were between developing nations (37 percent), followed closely by BITs between developed and developing nations (35 percent). BITs between developing nations now account for 25 percent of total BITs concluded. See UNCTAD, *Recent Developments in International Investment Agreements*, Research Note, August (2005) at 3 [hereinafter UNCTAD, *Recent Developments*] *at*

http://www.unctad.org/sections/dite_dir/docs/webiteit20051_en.pdf

¹⁸ *Id.* at 4.

¹⁹ See UNCTAD, *BITs in the Mid-1990s*, *supra* note 5, at 4.

As net capital-exporters, developed nations sign investment treaties primarily to protect the investments of their nationals and companies abroad. Developing nations, meanwhile, sign investment treaties in an effort to promote foreign direct investment (FDI).²⁰ The basic assumption behind an investment treaty is that the existence of a treaty with clear, enforceable rules will attract more FDI by offering a more stable investment environment.²¹ With the decline in lending from commercial banks and official aid programs during 1980s and 1990s, FDI has become the most important source of external capital for developing nations,²² offering a host of potential benefits, including job creation, technology transfers, and integration into global networks of production.²³

However, by signing a BIT a developing nation assumes obligations that may prove costly in the future. As net-importers of capital, developing countries bear most of the risk of investor litigation inherent in signing a BIT. Moreover, BIT obligations can lead to a loss of “national policy space” for host States by creating legal obstacles to its ability to change key economic and regulatory policies in the future.²⁴ Hence, when deciding whether or not to sign a BIT developing nations must carefully weigh the

²⁰ See UNCTAD, 2003 World Investment Report, *supra* note 15, at 85. The extent to which BITs actually attract increased flows of FDI is not clear. See Mary Hallward Driemeier, *Do Bilateral Investment Treaties Attract FDI? Only a bit...and they could bite*, World Bank Working Paper No. 3121, June 2003 at http://wdsbeta.worldbank.org/external/default/WDSContentServer/IW3P/IB/2003/09/23/000094946_03091104060047/Rendered/PDF/multi0page.pdf (finding little evidence from 20 year study of FDI flows from OECD to developing nations that BITs stimulate additional investment); *But see* Salacuse, *supra* note 3, at 111. (finding that BITs have a particularly strong effect on encouraging FDI to developing nations).

²¹ See Salacuse, *supra* note 3, at 77.

²² See UNCTAD, 2003 World Investment Report, *supra* note 15, at 85.

²³ However, the potential benefits from FDI are far from automatic. In order to maximize the benefits of FDI, developing nations must create the right domestic policy environment, including maintaining a skilled workforce and sound infrastructure that allows them to become suppliers to the foreign enterprise. See UNCTAD, 2003 World Investment Report, *supra* note 15, at 87-88.

²⁴ *Id.* at 145-6.

potential benefits of increased FDI against the increased exposure to litigation from investors.²⁵

B. How do BITs protect investment?

Bilateral investment treaties contain two key innovations that make them a popular investment promotion device. First, they provide investors with a clear set of investment protection standards that have the status of international law. Second, they offer investors direct access to a binding, neutral form of investment dispute resolution to enforce their treaty rights. Together, these innovations operate to restrain host state government in how they treat foreign investors and investments.

There is substantial uniformity in the core content of most BITs.²⁶ Virtually all BITs address four substantive areas: the scope and definition of foreign investment, admission and establishment, standards of treatment during the post-establishment phase, compensation in the event of expropriation, and dispute settlement.²⁷ BIT standards of treatment can be broken down into specific standards that address discrete issues and general standards that apply to all aspects of a foreign investment. Specific standards frequently address issues like the right to transfer capital out of the host state, performance requirements, and the employment of foreign personnel.²⁸ For conceptual clarity, the general treatment standards can be further classified as creating either absolute or relative standards for host state conduct.²⁹ Absolute standards compare the host state's conduct against an external minimum standard usually drawn from customary

²⁵ See UNCTAD, BITs in the Mid-1990s, *supra* note 5, at 7.

²⁶ UNCTAD, 2003 World Investment Report, *supra* note 15, at 89.

²⁷ *Id.*

²⁸ See e.g. United States Trade Representative (USTR), Updated U.S. Model Bilateral Investment Treaty (Feb. 5, 2004), Arts. 7-9, [hereinafter U.S. Model BIT] at

http://www.ustr.gov/assets/Trade_Sectors/Investment/Model_BIT/asset_upload_file847_6897.pdf

²⁹ For a comprehensive overview of both the absolute and relative standards common in BITs, see UNCTAD, BITs in the Mid-1990s, *supra* note 5, at 53-65.

international law. These include protection from unlawful expropriation and the requirements that States provide investors with “fair and equitable treatment,” “full protection and security,” and treatment consistent with international customary law.³⁰ Relative standards, on the other hand, measure host state conduct by reference to how it treats other groups of similarly situated investors. These include national treatment,³¹ which requires host governments to treat foreign investors no worse than their own nationals, and most favored nation (MFN),³² which requires states to provide the highest level of treatment offered to the investors of any third-state.

Of course, the substantive rights and standards contained in investment treaties mean nothing if investors cannot effectively enforce them. One of the principal goals of the investment treaty movement was to provide investors with the means to effectively enforce their treaty rights.

II. Investment Treaty Arbitration and Developing Nations

With the proliferation of BITs, an increasing percentage of global FDI is protected by one or more investment treaties and foreign investors have more opportunities to sue governments. This part considers investment treaty arbitration as an innovative form of dispute settlement, the recent sharp rise in investor claims, the actual treaty arbitration process, and the impact of investment treaty arbitration on developing nations.

A. The Rise of Investment Treaty Arbitration

³⁰ See e.g. U.S. Model BIT, *supra* note 28, at Art. 5.

http://www.ustr.gov/assets/Trade_Sectors/Investment/Model_BIT/asset_upload_file847_6897.pdf

³¹ *Id.* at Art. 3.

³² *Id.* at Art. 4.

Prior to the advent of investment treaty arbitration, investors had very limited options for redressing violations of international law that negatively impacted their investments. Since investors had no standing under customary international law to bring a claim directly against a state, their only recourse was to pursue the matter within the host nation's courts or attempt to persuade their own government to espouse their claim directly with the host government.³³

In order to address these limitations, investment treaties contain an investor-State arbitration clause which allows investors to sue States directly to enforce their treaty rights.³⁴ In essence, the arbitration clause serves as a standing unilateral offer by a State to arbitrate any claims arising out of investments made by the nationals of the other State party to the treaty.³⁵ Investors "accept" this offer by initiating arbitration under the relevant arbitration rules.³⁶ This means that foreign investors can directly enforce treaty rights without first having to convince a government bureaucracy to espouse their claim and avoid the risk of their dispute getting swallowed by a larger foreign policy dialogue.³⁷ The significance of this innovation in dispute settlement should not be overlooked. At the World Trade Organization, by way of comparison, only States have a cause of action against other States for violations of trade law.³⁸ This mechanism

³³ See *supra* notes 8-10 and accompanying text.

³⁴ An investor-state arbitration clause became virtually a standard BIT provision during the 1980s and 1990s, the period when the vast majority of BITs were negotiated. See UNCTAD, BITs in the Mid-1990s, *supra* note 5, at 94.

³⁵ Jan Paulsson, *Arbitration without Privity*, 10 ICSID Rev.-Foreign Investment L.J. 232 (1995)

³⁶ *Id.*

³⁷ Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 Fordham L. Rev. 1521, 1538 (2005) [hereinafter Franck, *Legitimacy Crisis*].

³⁸ See e.g. Glen T. Schleyer, *Power to the People: Allowing Private Parties to Raise Claims Before the WTO Dispute Resolution System*, 65 Fordham L. Rev. 2275, 2277 (1997).

provides investment treaties with a practical significance by allowing investors to enforce their treaty rights by initiating compulsory arbitration with a binding, enforceable award.

Investors are increasingly initiating arbitration to redress alleged violations of investment treaty rights by host governments. The number of investment treaty arbitration disputes filed at the World Bank Group's International Centre for Settlement of Investment Disputes (ICSID) and other arbitration fora has exploded in recent years: As of November 2005, the cumulative number of known claims reached 219, compared with just 75 in 2000.³⁹ The vast majority of these arbitrations have been either administered by ICSID or held on an ad-hoc basis under the UNCITRAL rules.⁴⁰

The rise in investment treaty claims can be attributed to several factors. With the long-term rise in FDI and the increasingly dense network of BITs, there are simply more opportunities for disputes to arise that are covered by an investment treaty. As news of some of the larger successful arbitration awards spreads, more investors may be encouraged to utilize investment treaty arbitration clauses.⁴¹ Arbitration practitioners predict the volume of claims to continue to grow as investors and lawyers become more aware of the rights contained in BITs and other investment treaties.⁴² Indeed, many lawyers already advise investors on how to structure their investments to take advantage of one or even multiple investment treaties.⁴³

B. Overview of the Arbitration Process

³⁹ UNCTAD, Latest Developments in Investor-State Dispute Settlement, IIA Monitor No. 4 (2005), p. 1 [hereinafter UNCTAD, Latest Developments] *available at*: http://www.unctad.org/en/docs/webiteit20052_en.pdf

⁴⁰ Of the 219 known investment treaty claims, 132 have been administered by ICSID, 65 under the UNCITRAL Rules, and only 22 under other arbitration rules. *Id.* at 2.

⁴¹ *Id.* at 3.

⁴² See Franck, *Legitimacy Crisis*, *supra* note 37, at 1538-39.

⁴³ *Id.* at 1535.

At the outset of a dispute, most investment treaties present investors with a choice between litigating in the host state's courts or some form of investment treaty arbitration. Given their concern with getting a fair hearing, investors invariably choose to arbitrate the dispute.⁴⁴ Most investment treaties provide investors with a choice between arbitration administered by the World Bank's International Centre for Settlement of Investment Disputes or ad-hoc arbitration under the United Nations Commission for International Trade Law (UNCITRAL) arbitration rules.⁴⁵ There are important differences between these two forms of arbitration with regard to the transparency and supervision of the proceedings. As an institution specifically designed to handle investor-state disputes, ICSID offers facilities to conduct the arbitration proceedings and support during the proceedings from its staff.⁴⁶ Ad-hoc arbitration under the UNCITRAL rules, on the other hand, takes place on a de-localized and unsupervised basis. Investors sometimes prefer ad-hoc arbitration under the UNCITRAL rules because it offers more flexibility to structure the proceedings, enhanced privacy, and the possibility of interim damages.⁴⁷

The arbitration process begins when a foreign investor files a claim with one of the arbitration facilities designated in the investment treaty. Both parties then participate in the selection of the arbitration tribunal, with each party selecting one arbitrator and jointly appointing a third to serve as chairman.⁴⁸ From there, the exact order of the

⁴⁴ *Id.* at 1542.

⁴⁵ See Aspasia A. Paroutsas, Claudia T. Solomon & George M. von Mehren, *Navigating through Investor-State Arbitrations – An Overview of Bilateral Investment Treaty Claims*, 59 APR Disp. Resol. J. 69, 70 (2003).

⁴⁶ See UNCTAD, Course on ICSID Dispute Settlement, Module 2.2: Selecting the Appropriate Forum, p. 15-18, at http://www.unctad.org/en/docs/edmmisc232add1_en.pdf

⁴⁷ See Franck, *Inconsistent Decisions*, *supra* note 33, at 1548-9 (notes and accompanying text).

⁴⁸ *Id.* at 1543.

process will depend on the relevant arbitration rules and the parties' preferences.⁴⁹

Typically, the parties submit memorials setting out their case, exchange evidence, make further written submissions, debate issues of law and fact during oral hearings, and the tribunal ultimately issues an award.⁵⁰ The written submissions are generally the most influential part of the record and tribunals place a premium on well-researched, organized, and clear pleadings.⁵¹ The oral hearings are comparatively short and primarily offer an opportunity to present witnesses and respond to the arbitrators' main concerns.⁵² Opportunities to challenge tribunal awards are very limited: the investment treaty arbitration system has no appellate review and there are very limited grounds for annulment.⁵³

C. The Impact of Investment Treaty Arbitration on Developing Nations

As net importers of global capital, developing nations have borne the brunt of the burden of defending the growing number of investment treaty claims. According to UNCTAD data, nearly two-thirds of the 219 known investment treaty claims have been filed against developing nation governments.⁵⁴ 37 different developing nations are known to have been defendants in investment treaty arbitration, with several facing

⁴⁹ At the outset of the dispute, the parties and the tribunal chairman generally hold a procedural meeting where the parties have broad flexibility to determine the format of the proceedings, including the timing and number of pleadings and whether to dispense with oral hearings. *See, e.g.*, International Centre for Settlement of Investment Disputes, ICSID Convention, Regulations, and Rules, Rule 20 [hereinafter ICSID Rules] at www.worldbank.org/icsid/basicdoc/partDhtm

⁵⁰ Frank, *Inconsistent Decisions*, *supra* note 37, at 1544-5.

⁵¹ Lucy Reed, Jan Paulsson & Nigel Blackaby, *Guide to ICSID Arbitration*, 83-84, Kluwer Law International (2004).

⁵² *Id.*

⁵³ A party's options for challenging an award after vary depending on whether it was rendered under ICSID Convention or under another set of arbitration rules. However, none of the available methods generally permit review of the merits or correction of legal errors. Instead, opportunities for annulment are generally limited to a handful of procedural deficiencies. *See* Franck, *Inconsistent Decisions*, *supra* note 37, at 1545-1557.

⁵⁴ *See* UNCTAD, *Latest Developments*, *supra* note 39, at 9-10.

multiple claims.⁵⁵ Argentina has faced an incredible 42 claims, with Mexico a distant second at 17. Developing nations' experience with investment treaty arbitration is almost exclusively as defendants: there are only 11 known instances where developing nation firms have filed investment treaty claims.⁵⁶ Due to the confidentiality surrounding non-ICSID arbitrations, the actual number of claims against developing nations is likely to be significantly higher.⁵⁷

Defending investment treaty arbitration claims poses a number of challenges for developing nations, including the cost of litigation, the possibility of a large adverse award, and even new limitations on its freedom to implement government policies deemed inconsistent with treaty obligations. While information on the size of investor claims is often sporadic, some of the known awards against developing nations involve substantial sums. For example, the Czech Republic was ordered to pay \$270 million plus substantial interest to a Dutch-based broadcasting firm after the tribunal found the media regulatory authorities had violated the terms of the Netherlands-Czech Republic BIT.⁵⁸ In 2002, Ecuador was ordered to pay \$71 million to Occidental, a U.S.-based energy company, after a tribunal found an administrative change in its tax code violated the U.S.-Ecuador BIT.⁵⁹ More recently, an ICSID tribunal awarded a U.S. energy company

⁵⁵ *Id.* at 3.

⁵⁶ See UNCTAD, Investor-State disputes and policy implications, Note by the UNCTAD Secretariat, January 14, 2005, at 4. [hereinfter UNCTAD, Policy Implications] Available at: http://www.unctad.org/en/docs/c2d62_en.pdf

⁵⁷ UNCTAD, Latest Developments, *supra* note 39, at 3.

⁵⁸ *CME Czech Republic B.V. v. Czech Republic*, UNCITRAL, Final Award, March 14, 2003. Available at: http://ita.law.uvic.ca/documents/CME-2003-Final_001.pdf

⁵⁹ *Occidental Exploration and Production Company v. Ecuador*, LCIA Case Number UN3467, Final Award, July 1, 2004. Available at: http://ita.law.uvic.ca/documents/Oxy-EcuadorFinalAward_001.pdf

\$133 million in 2005 after finding Argentina in breach of the BIT as a result of measures taken by the Argentine Government in response to that country's financial crisis.⁶⁰

The wave of investor lawsuits has far-reaching implications for developing nations' freedom to regulate in the public interest. Investors have turned to investment treaty arbitration to challenge a wide variety of government measures in a number of sensitive areas, including the provision of water, electricity, waste disposal, and sanitation services to the public. In at least nine cases, foreign investors who have been awarded concession contracts to provide water and sewage services in developing countries have run into conflict with state and local regulatory authorities and filed investment treaty claims to resolve their differences.⁶¹ Other treaty-based investor lawsuits have challenged the denial of a permit to operate a waste disposal facility,⁶² the decision of the tax authorities⁶³ regarding a value-added tax formula,⁶³ the revocation of a permit to operate an industrial factory near protected wetlands,⁶⁴ and the licensing of cellular telecommunications.⁶⁵

III. The Case for Reform: Ensuring the Full Participation of Developing Nations in Investment Treaty Arbitration

Given that the vast majority of investment treaty claims are filed against developing nations, it is critical that they be able to actively participate in the dispute

⁶⁰ *CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No. ARB/01/8, Final Award, May 12, 2005. Available at: http://ita.law.uvic.ca/documents/CMS_FinalAward_000.pdf

⁶¹ Luke Eric Peterson, International Institute for Sustainable Development, *Bilateral Investment Treaties and Development Policy-Making*, November, 2004, p. 16, [hereinafter Peterson, BITs and Policy-Making] at http://www.iisd.org/pdf/2004/trade_bits.pdf

⁶² See *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, Case No ARB(AF)/00/2, May 29, 2003, Award. Available at: http://ita.law.uvic.ca/documents/Tecnicas_001.pdf

⁶³ See *Occidental v. Ecuador*, *supra* note 59.

⁶⁴ See *Lucchetti S.A. and Lucchetti Peru, S.A. v. Republic of Peru*, Case No. ARB/03/14), Award on Jurisdiction, February 7, 2005. Available at: <http://ita.law.uvic.ca/documents/luchetti.pdf>

⁶⁵ See Press Release, France Telecom, Award of the Arbitration Tribunal on the dispute with the Republic of Lebanon, (Feb. 22, 2005). Available at: http://www.francetelecom.com/en/financials/journalists/press_releases/CP_old/cp050222.html

settlement process. In reality, developing nations face a network of barriers that discourage their full participation in the treaty arbitration process. This section examines three barriers to the effective participation of developing nations in the treaty arbitration process: a lack of affordable access to legal expertise, a lack of transparency in the arbitration process, and uncertainty over the meaning of key treaty rights.

A. Access to Legal Expertise

In any form of litigation, the level of expertise possessed by a party's lawyers will likely be a decisive factor in the outcome of the dispute. The importance of having access to legal expertise is only magnified in a specialized area of the law like investment treaty arbitration with which most lawyers have little familiarity. Expertise in this field is generally limited to a close-knit community of lawyers and arbitrators who work for one of a handful of major international law firms with specialty practices in this area.⁶⁶

Hiring one of these firms offers a number of significant advantages: First, lawyers in these firms litigate investment treaty arbitration cases more frequently than other parties, gaining valuable experience and professional contacts in the process. Second, the firm offers significant "institutional memory" with regard to past arbitration awards, the relevant arbitration rules, arbitrator selection, and general litigation tactics.⁶⁷ Some partners and lawyers in the major international firms have served as arbitrators in other

⁶⁶ Some of the major global law firms with specialty practices in this field include: Freshfields Bruckhaus Deringer (Paris), Allen & Overy (London), White & Case (Washington DC), and Covington & Burling (Washington DC).

⁶⁷ *See, e.g.*, The Arbitration Practice web-site of Freshfields Bruckhaus Deringer, a leading international firm for investor-state arbitration: "Our international arbitration practice consists of over 80 practitioners worldwide with an unrivalled track record of conducting international arbitrations under all major institutional rules to the highest professional standards, no matter where or under what law or language - from French to Mandarin - they are conducted...Our arbitration practice is also at the vanguard in representing private investors and governments in arbitrations under bilateral investment treaties." Available at: <http://www.freshfields.com/practice/arbitration/en.asp>

cases, providing unique insight into the process.⁶⁸ Knowledge gained from participating in past arbitrations, including those that go unpublished or settle before an award, can provide extra leverage in persuading governments—particularly those with minimal experience in the arbitration process – to settle investor claims.⁶⁹ Lastly, a firm will have the best possible access to both published and unpublished sources of legal authority via in-house law libraries, support staff, and informal professional networks.

The foreign investors who initiate investment treaty arbitration claims invariably hire one of the major international law firms with specialty practices in investment treaty arbitration.⁷⁰ Developed nations tend to have the resources and legal expertise in their government ministries to ably defend themselves in investment treaty arbitration.⁷¹ Due to a lack of expertise and resources within their own government service, many developing nations are forced to hire outside counsel to defend investment treaty claims. These firms may demand fees matching those charged to their other clients, including private corporations, wealthy individual investors, and more prosperous governments. Hourly rates for these elite firms can range from \$400-\$600 or more an hour per lawyer.⁷² Considering a claim is likely to be handled by a team of lawyers and the arbitration

⁶⁸ See, e.g., The International Arbitration practice web-site of Covington & Burling: “Our lawyers also frequently serve as arbitrators, either on an *ad hoc* basis or pursuant to their recognition by leading institutions as qualified tribunal members. For example, three of our lawyers have been appointed by Presidents of the United States to the ICSID Panels of Arbitrators and Conciliators – appointments that mirror the fact that we have handled investor-state disputes under many of the bilateral investment treaties (BITs) in force in the world today.” Available at: <http://www.cov.com/practices/oid14787/description.html>

⁶⁹ See Peterson, BITs and Policy-Making, *supra* note 61, at 26.

⁷⁰ In an informal review of the 79 arbitration awards posted on the Investment Treaty Arbitration web-site, the investor claimant was always represented by outside counsel. Available at: <http://ita.law.uvic.ca/>

⁷¹ For example, the Office of the Assistant Legal Adviser for International Claims and Investment Disputes is the largest department within the U.S. Department of State's Office of the Legal Adviser, which is comprised of approximately 130 permanent attorneys and about 70 support staff. The United States has faced nine different investment treaty arbitration claims brought under NAFTA's investment chapter, but has not lost a claim to date. See “Practicing Law in the Office of the Legal Adviser”, U.S. Department of State Office of the Legal Adviser web-site, available at: <http://www.state.gov/s/l/3190.htm>.

⁷² See *infra* note 109.

process frequently takes 2 or more years to complete, the legal bill can be staggering. One study found that average legal costs for governments range between \$1 to 2 million per year.⁷³ Meanwhile, the average cost for hiring a 3 judge panel of arbitrators runs \$400,000 or more.⁷⁴ The Czech Republic is reported to have spent \$10 million to defend against two treaty claims related to the regulation of its media sector.⁷⁵ More recently, the Czech Republic announced it would spend \$3.3 million in 2004 and \$13.8 million in 2005 to defend against more than a half-dozen investor claims.⁷⁶ Clearly, the cost of treaty arbitration is beyond the means of many developing nations, particularly the Least-Developed Countries (LDCs). A group of developing nations has already raised this concern to the ICSID Secretariat, suggesting the development of a fund to offset part of the cost of using the ICSID facility for qualified developing nations.⁷⁷

Not all developing nations hire outside counsel, whether for financial or tactical reasons. This may mean that the task of defending an investment treaty claim falls to government attorneys without the experience or resources to mount a vigorous defense. In some cases, this can lead to shocking disparities in the quality of legal representation between investor claimants and developing nation defendants. For example, the Seychelles' Attorney General, who had no prior experience with investor-State

⁷³ UNCTAD, Policy Implications, *supra* note 56, at para. 14.

⁷⁴ In 2005, ICSID increased the daily fee payable to ICSID arbitrators from \$2,000 to \$3,000. This figure is exclusive of additional costs for travel, meals, lodging, and administrative expenses. See ICSID Schedule of Fees at: <http://www.worldbank.org/icsid/schedule/fees.pdf>

⁷⁵ Luke Eric Peterson, "Czech Republic hit with massive compensation bill in investment treaty dispute," *INVEST-SD News Bulletin*, March 21, 2003, at: http://www.iisd.org/pdf/2003/investment_investsd_march_2003.pdf

⁷⁶ Luke Eric Peterson, "Croatian firm invokes investment treaty to challenge Czech eviction notice," *INVEST-SD News Bulletin*, Oct. 1, 2004, at: http://www.iisd.org/pdf/2004/investment_investsd_oct1_2004.pdf

⁷⁷ South Centre, Analytical Note, Developments for Discussions for the Improvement of the Framework for ICSID Arbitration and the Participation of Developing Countries, February 2005, para. 43-44. [hereinafter South Centre] at: http://www.southcentre.org/tadp_webpage/research_papers/investment_project/icsid_discpaper_feb05.doc

arbitration, reports defending a recent ICSID claim without access to a reliable internet connection, Westlaw or Lexis-Nexis, or basic treatises on ICSID or investment arbitration.⁷⁸ Likewise, when Argentina first began defending investment treaty claims, the Solicitor General's office did not have access to fundamental substantive law or arbitration doctrine.⁷⁹ During its first investment treaty cases, Argentina's attorneys had to fly to Washington DC ahead of ICSID arbitration hearings to conduct the necessary legal research and even spent their own money to buy copies of key arbitration treatises.⁸⁰

Over the course of time, some developing nations have been able to build up considerable expertise in defending against investment treaty arbitration claims. Argentina, for example, has defended many of the claims filed against them without resort to outside counsel, building up substantial expertise in defending treaty claims in the process.⁸¹ Building up that expertise, however, takes time and may require the diversion of resources from other pressing legal and regulatory matters.⁸² Smaller, poorer developing nations are far less likely to have the financial or human resources to build the in-house capacity to defend investment treaty claims. What's more troubling, the efforts of developing nation lawyers to acquire the requisite expertise "on the job" are frustrated by the lack of transparency surrounding the treaty arbitration process.

B. Lack of Transparency

Investment treaty arbitration is characterized by a lack of transparency at every stage of the arbitration process. Without the consent of the parties to the arbitration – the investor and the state – there is generally no public access to the pleadings, evidence,

⁷⁸ See *Seychelles v. CDC*, Part IV, *infra*.

⁷⁹ See Argentina, Part IV, *infra*.

⁸⁰ See Argentina, Part IV, *infra*.

⁸¹ See Argentina, Part IV, *infra*.

⁸² See Argentina, Part IV, *infra*.

hearings, or even the tribunal award.⁸³ This section looks at how two aspects of this opacity – problems with finding past arbitral awards and the lack of third party participation – hinder developing nations’ full participation in the arbitration process.

1. Access to Arbitral Case Law

Developing country counsel seeking to find relevant precedent are forced to engage in a kind of legal scavenger hunt through scattered and incomplete sources for past arbitral awards. While there is no formal rule of precedence in investment treaty arbitration, lawyers and arbitrators often consider and cite prior arbitral awards as a form of authority when confronted with similar issues of law or fact.⁸⁴ Access to this arbitral case law is particularly vital in a field like public international investment law where there are relatively few decided cases and every decision draws new lines.

The first barrier to finding relevant precedent is a lack of public knowledge that an investment treaty dispute exists: of the major arbitral fora, only ICSID maintains a public registry of claims.⁸⁵ The UNCITRAL Secretariat does not even maintain internal records of the cases brought under the UNCITRAL rules.⁸⁶ Even when the existence of a claim is made public, the tribunal award may not be published. Despite their importance as a source of law, none of the investment treaty arbitration fora publish awards without

⁸³ See Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 575 U.N.T.S. 159, 4 ILM 524 (1965), Art. 48(5) [hereinafter ICSID Convention] (prohibiting the publication of an award without the consent of the parties); UNCITRAL Arbitration Rules, Art. 32(5) (same); see also ICSID Rules, *supra* note 49, Rule 32(2) (requiring consent of parties to third party participation in oral hearings); UNCITRAL Arbitration Rule 25(4) (noting all hearings are held *in camera* unless parties agree otherwise).

⁸⁴ See David A. Gantz, *The Evolution of FTA Investment Provisions: From NAFTA to the United States-Chile Free Trade Agreement*, 19 Am. U. Int’l L. Rev. 679, 689 (2004) (noting that private investors and governments cite prior investment tribunal decisions that appear to favor them and that tribunals interpreting similar provisions of BITs will consider and sometimes follow the reasoning of prior awards)

⁸⁵ ICSID maintains a public registry of cases on its web-site at <http://www.worldbank.org/icsid/cases/pending.htm>

⁸⁶ IISD, Guide, *supra* note 13, at 4-5.

the consent of both parties.⁸⁷ While many awards are eventually made public by one or both of the parties, some nonetheless remain unpublished.⁸⁸

Meanwhile, at least some of the unpublished awards are informally traded within a “magic circle” of law firms and arbitrators that work in this field.⁸⁹ The existence of these “hidden” awards provides arbitration insiders – the firms and practitioners within this informal professional network – with the unfair advantage of having access to a wider array of authority to fight and win their cases.⁹⁰ At the same time, those without the resources to hire one of the major multinational firms are deprived of relevant authority to defend against investor claims.⁹¹ As outsiders, developing nations are faced with scattered and incomplete sources of authority, raising the difficulty and risk of litigating without assistance from outside counsel.

2. Third Party Participation

Given its origins in international commercial arbitration, it is not surprising that investment treaty arbitration has not traditionally welcomed the participation of outside parties. Tribunal hearings under ICSID and the other arbitral institutions remain private unless both parties consent to the presence of a third party.⁹² Access to the pleadings,

⁸⁷ See e.g. ICSID Convention, *supra* note 82, Art. 48(5) (prohibiting the publication of an award without the consent of the parties); UNCITRAL Arbitration Rules, Art. 32(5) (same). It should be noted that ICSID Arbitration Rule 48(4) allows ICSID to publish excerpts from the legal holdings of awards when the consent of the parties cannot be obtained and the award is unavailable from another source. However, these excerpts are a poor substitute for access to the full text of an award because it is often difficult to assess the significance of an isolated statement of the law or passage when removed from its factual context. See ICSID Rules, *supra* note 49, Rule 48(4).

⁸⁸ *Id.*

⁸⁹ Nigel Blackaby, Public Interest and Investment Treaty Arbitration, Oil, Gas and Energy Law Intelligence, Volume I, Issue #02, March, 2003, at http://www.gasandoil.com/ogel/samples/freearticles/article_56.htm

⁹⁰ *Id.*

⁹¹ Peterson, BITs and Policy-Making, *supra* note 61, at 26.

⁹² See ICSID Rules, *supra* note 49, Rule 32(2) (requiring consent of parties to third party participation in oral hearings); UNCITRAL Arbitration Rule 25(4) (noting all hearings are held *in camera* unless parties agree otherwise).

evidence, and awards is therefore limited to the parties to the dispute. None of the major arbitral institution rules explicitly allow for the submission of amicus briefs from third parties. In one instance, an UNCITRAL tribunal concluded it had the authority to accept amicus briefs from several NGOs.⁹³

While greater third party participation in investment treaty arbitration has been justified by noting the public interest in the issues in dispute, it also has the potential to indirectly promote developing nations' participation in the dispute settlement process. As the Seychelles' experience shows, we cannot assume that developing nations have access to the relevant legal authority and expertise necessary to mount a vigorous defense. Amicus briefs from NGOs and other informed parties may be able, in certain cases, to supplement a developing nation's defense, ensuring that the tribunal has all of the relevant arguments and precedent before it to make an informed decision.

Some have raised concerns that allowing amicus participation and access to hearings could overwhelm the resources of the tribunal, increasing the costs of the dispute and the breadth of issues that each party must address in its arguments.⁹⁴ While these are legitimate concerns, tribunals have methods at their disposal to limit third party participation before it becomes too burdensome. NAFTA tribunals, for example, consider a number of factors before accepting an amicus brief, including the degree to

⁹³ In *Methanex v. United States*, a NAFTA-based claim under UNCITRAL arbitration rules, a Canadian Corporation sued the United States to recover profits lost as the result a California statute banning MTBE, a gasoline additive shown to pollute the groundwater and linked to cancer in laboratory animals. Three NGOs, two from the U.S. and one based in Canada, petitioned the tribunal for amici status to argue that the California ban was not tantamount to expropriation or in violation of other NAFTA investment protection standards. In deciding to accept the amicus briefs, the tribunal reasoned: "There is definitely a public interest in this case. The substantive issues extend far beyond those raised by the usual transnational arbitration between commercial parties." See *Methanex v. United States*, Decision of the Tribunal on Petitions from Third Persons to Intervene as Amici Curiae, January 15, 2001 at <http://ita.law.uvic.ca/documents/Methanex-AmiciCuriae.pdf>

⁹⁴ See South Centre, Developments on Discussions for the Improvement of the Framework for ICSID Arbitration and the Participation of Developing Countries, February, 2005, para. 37, at http://www.southcentre.org/tadp_webpage/researchpapers_list_webpage.htm

which the submission would offer a perspective or knowledge on a factual or legal issue relevant to the arbitration that is different from the parties to the dispute, whether it addresses matters within the scope of the dispute, and the third party's and public's interest in the dispute.⁹⁵ The prospect of a tribunal facing an overwhelming number of relevant third-party briefs is remote at best. WTO panels, where amici briefs are now permitted, have not reported problems with an overwhelming number of amici submissions.⁹⁶ This is unlikely because potential amici often realize that their influence is maximized when they unite to produce a single brief clearly stating their concerns.⁹⁷

C. Uncertainty over the Meaning of Key Treaty Standards

Key provisions of investment treaties are often written in deliberately vague language in an effort to capture FDI in all its forms. This open-ended approach can be an asset in a field like foreign investment where it is impossible to predict what new investment vehicles and structures investors will utilize in tomorrow's business world. However, too much indeterminacy can be a burden for both foreign investors and States, who cannot anticipate how to comply with the law. Only with the recent rise in investment treaty claims have tribunals begun to further define the meaning of key BIT standards. Adding to the confusion, in several instances investment treaty tribunals have come to different conclusions over the meaning and application of these standards even when confronted with the same set of facts.⁹⁸

⁹⁵ Statement of the Free Trade Commission on non-disputing party participation, October 7, 2003, *at* <http://www.dfait-maeci.gc.ca/nafta-alena/Nondisputing-en.pdf>

⁹⁶ IISD, Comments on ICSID Discussion Paper "Possible Improvements of the Framework for ICSID Arbitration," December, 2004, p. 9, *at* http://www.iisd.org/pdf/2004/investment_icsid_response.pdf#search=%22iisd%20%22Comments%20on%20ICSID%20Discussion%20Paper%22%22

⁹⁷ *Id.*

⁹⁸ See Franck, *Legitimacy Crisis*, *supra* note 37 at 1558-82.

While the uncertainty surrounding BIT standards affects both investors and States, developing nations are less well-equipped to mitigate the risks of litigating in such a challenging environment. Developing nations who cannot hire outside counsel may not have access to the “hidden awards” and other forms of legal authority that may be able to provide valuable guidance on how a treaty provision has been applied in similar factual settings. From a strategic point of view, the uncertainty over treaty standards may make developing nations more prone to settling even spurious investor claims rather than bear the expense of litigation and the risk of a financially devastating award.⁹⁹

IV. Tales from the Front: Developing Nation Experiences

To date, at least 37 developing nations have faced investment treaty arbitration.¹⁰⁰ During research for this article, I had the privilege of interviewing current and former government officials in Argentina and the Republic of the Seychelles with first-hand experience in defending their respective countries in ICSID arbitrations. Their stories reveal the difficulties developing nations may experience locating relevant precedent and other basic forms of legal authority. The Seychelles’ experience¹⁰¹, in particular, is an alarming illustration of how smaller developing nations who cannot afford outside counsel may defend themselves without access to basic legal authority, with potentially disastrous results. Taken together, these disturbing reports show that the barriers discussed in Part III and not merely theoretical and call for some response from the international community.

⁹⁹ See Peterson, BITs and Policy-Making, *supra* note 61, at 28.

¹⁰⁰ See *supra* note 55.

¹⁰¹ The investor claim against the Seychelles was based on a contract ICSID arbitration clause, not a bilateral investment treaty. It is nevertheless relevant because the problems the Seychelles encountered in finding legal expertise and authority would have existed regardless of the basis for the investor claim. In fact, defending a treaty-based claim is likely to be more demanding because it requires an understanding of current trends in public international investment law.

A. *CDC v. Seychelles*

On August 22, 2002, the Commonwealth Development Corporation (CDC), a UK-owned development finance company, lodged a Request for Arbitration with ICSID against the Republic of the Seychelles¹⁰² (the Republic) under a contract-based ICSID arbitration clause. The request alleged the Republic had failed to honor two loan guarantees it had given as security for a loan to its Public Utility Corporation (PUC) to purchase electric generators.¹⁰³ Both loan guarantees provided any dispute arising from the contract would be settled according to UK law.¹⁰⁴

CDC was represented by a team of lawyers from Allen & Overy, a major international law firm based in London with a specialty practice in investor-State arbitration.¹⁰⁵ Seychelles was represented solely by its Attorney General, Mr. Anthony Fernando.¹⁰⁶ The Republic had never been sued by a foreign investor before, and Mr. Fernando had no prior experience litigating ICSID or other investor-State claims.¹⁰⁷ His office had an unreliable internet connection, no access to Westlaw or Lexis-Nexis, and no treatises on ICSID or investment arbitration.¹⁰⁸ Though several major international law firms offered to represent the Republic,¹⁰⁹ at \$400-600 per hour per lawyer their fees would have exhausted his office budget in just weeks.¹¹⁰ In the end, Mr. Fernando, a civil law lawyer by training whose daily work typically involves criminal, constitutional,

¹⁰² The Republic of the Seychelles is an Indian Ocean archipelago with a population of roughly 80,000 located northeast of Madagascar.

¹⁰³ *CDC v. Seychelles*, Award, ICSID Case No. ARB/02/14, December 17, 2003, at para. 7-9. Available at: http://ita.law.uvic.ca/documents/CDCvSeychellesAward_001.pdf [hereinafter *CDC v. Seychelles*, Award]

¹⁰⁴ *Id.* at para. 4.

¹⁰⁵ *Id.* at 1.

¹⁰⁶ *Id.*

¹⁰⁷ Telephone interview with Anthony Fernando, Attorney General of the Seychelles (Mar. 25, 2005).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

and administrative law, defended the Republic with only his wits, a copy of the ICSID Convention and Rules, and two outdated English contract law treatises.¹¹¹

On December 17, 2003, the tribunal, composed of a single arbitrator, found Seychelles had no valid defense to CDC's default claim under UK contract law.¹¹² In the award, the tribunal noted that Seychelles' counter-memorial failed to comply with the tribunal's initial directions¹¹³ and one of its principal defenses relied on a long-since overruled case in English contract law.¹¹⁴ The tribunal awarded CDC the full outstanding principal, interest, and eighty percent of its legal costs for a total of £2,446,701, or roughly \$4.6 million.¹¹⁵ It also held that, under the terms of the 1990 and 1993 loan agreements, interest would continue to accrue at 9 percent per annum or a total of roughly \$1000 per day.¹¹⁶

On March 30, 2004, the Republic filed for annulment of the award under ICSID Article 52(1), arguing that the tribunal had manifestly exceeded its powers, that it had seriously departed from a fundamental rule of procedure, and that the Award failed to state the reasons on which it was based.¹¹⁷ On June 29, 2005 an Annulment Committee composed of three arbitrators rejected all three of the Republic's grounds for annulment, concluding in harsh tones that the claim was "fundamentally lacking in merit."¹¹⁸

Despite expressing reservations about the effect that the ruling might have on the

¹¹¹ *Id.*

¹¹² *CDC v. Seychelles*, *supra* note 103, at para. 61.

¹¹³ *Id.* at para. 26.

¹¹⁴ *Id.* at para. 59.

¹¹⁵ *Id.* at para. 62.

¹¹⁶ *Id.*

¹¹⁷ *CDC v. Seychelles*, Annulment Proceeding, ICSID Case No. ARB/02/14, June 29, 2005, para. 15 at <http://www.investmentclaims.com/decisions/CDC-Seychelles-Annulment-Decision.pdf>

¹¹⁸ *Id.* at para. 89.

Seychelles economy,¹¹⁹ the Committee awarded CDC the full costs of its counsel (£83,345) and held that the Republic should bear the all of the costs associated with ICSID and the Committee, as well as its own expenses.¹²⁰

B. The View from Argentina

Perhaps more than any other nation, Argentina understands the financial and administrative challenge of defending investment treaty arbitration claims. In January of 2002, facing an imminent default on its massive foreign debt, Argentina passed emergency economic legislation that, among other things, ended parity between the U.S. dollar and Argentine peso, converted dollar deposits and loans to pesos, and removed the right of public utilities to raise rates or charge in dollars.¹²¹ These measures have resulted in massive losses for foreign investors who hold the majority of Argentina's public debt and own many of the privatized utility companies.¹²² In 2003 alone, 20 transnational corporations filed suit against Argentina alleging violations of Bilateral Investment Treaties.¹²³ As of December 2004, Argentina was a defendant in an unprecedented 37 pending investor-state arbitration claims – 32 of which are filed at ICSID – worth over \$16 billion dollars.¹²⁴

Ignacio Suarez worked for Argentina's Solicitor General's office from 2000-2003.¹²⁵ He became interested in the field while completing his LLM from Harvard Law School and later working for a French law firm on a number of investor-state arbitration

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ See Freshfields, Bruckhaus, and Deringer, "The Argentine crisis- foreign investors' rights" January, 2002 at <http://www.freshfields.com/places/latinamerica/publications/pdfs/2431.pdf>

¹²² *Id.*

¹²³ See UNCTAD, Policy Implications, *supra* note 56, at 5.

¹²⁴ *Id.*

¹²⁵ Telephone Interview with Carlos Ignacio Suarez Anzorena, Latin America Specialist Advisor, Clifford Chance (March 23, 2005)

cases.¹²⁶ When he started in 2000, Argentina was a defendant in only one ICSID proceeding and he was the sole lawyer with any experience in the investor-state arbitration field.¹²⁷ Having come from working for a major international law firm, the lack of access to legal resources was a real surprise: the office did not have a subscription to Westlaw, Lexis-Nexis, or any of the major arbitration reporters.¹²⁸ To prepare for his first ICSID cases, he would fly to Washington, DC three to five days before a hearing just so he could conduct the necessary legal research at ICSID and local law schools.¹²⁹ On one trip, he spent over \$1000 of his own money to buy hard copies of the most important arbitration treatises to take back to the Solicitor General's office.¹³⁰ Hiring outside counsel was not a viable option due to their high fees and the overriding importance that Argentina adopt a consistent, unified position on key issues likely to arise in all the arbitration cases arising out of the emergency economic measures.¹³¹

Three years later, with the experience of litigating several ICSID cases under its belt, Argentina's Solicitor General's office looked more like an investor-State arbitration practice you might find at one of the major international law firms: In 2003, the office had at least 10 lawyers working on investment treaty arbitrations, many with substantial experience in international commercial litigation, degrees from top law schools, and ready access to all the necessary legal materials.¹³² Yet, even with the added legal

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

firepower, the Solicitor General's office is overwhelmed by the unprecedented number of investment treaty claims filed by foreign investors.¹³³

V. The Solution: A Legal Assistance Center for Developing Nations in Investment Treaty Arbitration

No system of dispute resolution is perfect. Quite frequently, there are significant differences in the level of resources and legal talent available to parties in any form of litigation. In the world of international commercial arbitration, the quality of each party's representation is not a major concern, since the consequences are generally limited to the private parties involved. However, the situation is quite different in investment treaty arbitration, where a state is the defendant and an adverse award has the potential to affect the lives of millions of citizens. This is why it is essential that the international community establish some mechanism to ensure that developing nations have, at a minimum, affordable access to the legal authority and expertise necessary to mount a competent defense to investor claims. Drawing from the success of a similar effort at the WTO, this Part argues for the creation of a legal assistance center ("Center") for developing nations in investment treaty arbitration and reviews the spectrum of services it might provide.

A. Potential Benefits of a Legal Assistance Center

How would a legal assistance center for developing nations benefit the practice of investment treaty arbitration? First and foremost, it would bolster the legitimacy of the investment treaty arbitration process by ensuring that developing nations have, at a minimum, access to fundamental legal authority and some basic level of legal expertise. Without access to these fundamental resources, a party cannot fully present its case and

¹³³ *Id.*

the tribunal is deprived of all the information it needs to make an informed and just ruling. A dispute resolution process that is seen to be unfairly tilted toward investors in this manner undermines the legitimacy of investment treaty arbitration process and perhaps developing nations' willingness to enter into future BITs.

A legal assistance center would not only promote fairness for developing nations, but also lead to a more efficient and effective arbitration process. Better informed developing nation counsel will make more cogent legal arguments, enhancing the quality of the arbitration process and the ultimate result. Developing nation counsel who understand the real legal issues at stake are less likely to make irrelevant or frivolous arguments, saving the tribunal, opposing counsel, and investors' time and money. For example, in *CDC v. Seychelles*, the tribunal found the Seychelles' initial pleadings were confusing and failed to comply with its instructions, forcing it to grant an extension for clarification.¹³⁴ Moreover, the tribunal strongly hinted that the Seychelles' application for annulment bordered on the frivolous, reflected in its decision that the Seychelles pay all of the CDCs costs associated with the annulment process.¹³⁵ If the Seychelles had access to affordable outside legal advice, it is entirely possible these costly errors could have been avoided.

Even if a legal assistance center would enhance the legitimacy, efficiency, and effectiveness of investment treaty arbitration, is it a practical or realistic proposal? How should it be funded? What services should it offer? For some guidance on these questions, we can look to international trade law and recent efforts to provide developing

¹³⁴ See *supra* note 117 and accompanying text.

¹³⁵ See *supra* note 120 and accompanying text.

nations with enhanced access to the World Trade Organization's dispute settlement process.

B. The Advisory Centre on WTO Law

The international community recently confronted the question of how to provide developing nations with effective access to international dispute mechanisms with regard to the World Trade Organization's dispute settlement process. One of the developing nations' chief complaints that emerged from the failed 1999 Ministerial Talks in Seattle was unequal access to the WTO dispute settlement mechanism.¹³⁶ The substance of the complaints related to two familiar issues: a lack of WTO trade law expertise within their own governments and no mechanism to help offset the prohibitive cost of obtaining private legal counsel.¹³⁷ These charges were taken seriously because they implied the dispute mechanism was tilted toward wealthier developed nations, undermining a basic sense of fairness that is at the heart of the legitimacy of any dispute resolution mechanism.¹³⁸

In 1999, at the WTO Ministerial meeting in Seattle, a coalition of developed and developing nations¹³⁹ signed the Agreement Establishing the Advisory Centre on WTO Law (ACWL)¹⁴⁰, which entered into force in July of 2001. The ACWL was established in Geneva in July 2001 as a unique inter-governmental organization, independent of the

¹³⁶ John H. Jackson, Perceptions About WTO Trade Institutions, Keynote Address at the Inauguration of the Advisory Centre for WTO Law, Oct. 5, 2001 at http://www.acwl.ch/e/tools/news_e.aspx

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ Founding members of the ACWL include: Bolivia, Canada, Colombia, Denmark, Dominican Republic, Ecuador, Egypt, Finland, Guatemala, Honduras, Hong Kong, Ireland, Italy, Kenya, Netherlands, Nicaragua, Nigeria, Norway, Pakistan, Panama, Paraguay, Peru, Philippines, Sweden, Thailand, Tunisia, the United Kingdom, Uruguay, and Zimbabwe.

¹⁴⁰ Advisory Centre on WTO Law, The Agreement Establishing the Advisory Centre on WTO Law at: http://www.acwl.ch/e/tools/doc_e.aspx [hereinafter Advisory Centre Agreement]

WTO.¹⁴¹ It is funded and controlled by the developed and developing countries that co-own and co-administer it.¹⁴²

The purpose of the ACWL is to “provide legal training, support and advice on WTO law and dispute settlement procedures to developing countries.”¹⁴³ The Centre offers members three principal services for free or at subsidized rates:

- 1) legal advice on WTO law, including the compatibility of proposed legislation and government measures;
- 2) support to parties in WTO dispute settlement proceedings;
- 3) and training of government officials in WTO law through seminars and internships.¹⁴⁴

Membership in the ACWL is open to both developing and developed nations.¹⁴⁵ However, the services of the Centre are only available to developing nations, economies in transition, and least-developed countries. The Centre’s fee structure seeks to promote membership in the ACWL, while maintaining access for the poorest nations regardless of membership. Membership incentives include discounts on services and a higher priority access when the Centre is asked to assist multiple parties in a dispute. Fees for services rendered in dispute settlement proceedings are billed at hourly rates on a sliding scale based on the country’s share of world trade and GDP, with least developed nations billed at only \$25 per hour.¹⁴⁶ ACWL members and all least developed countries receive free legal advice on WTO law up to a set number of maximum hours determined by the

¹⁴¹ See ACWL, About Us-Introduction, at http://www.acwl.ch/e/about/about_e.aspx

¹⁴² *Id.*

¹⁴³ Advisory Centre Agreement, *supra* note 140, Art. 2(1).

¹⁴⁴ See ACWL, Introduction to Legal Advice, at http://www.acwl.ch/e/legal/legal_e.aspx

¹⁴⁵ As of May 2005, the Centre has 37 Members: 10 developed country members, and 27 members entitled to the services of the ACWL.

¹⁴⁶ See ACWL, Financial Aspects, at: http://www.acwl.ch/e/about/financial_e.aspx

Management Board.¹⁴⁷ The Centre maintains a roster of external counsel¹⁴⁸ for referrals at points when demand for its services is too high, a conflict of interest exists, or it lacks the necessary expertise in a highly technical case.¹⁴⁹ The current staff of the Centre consists of an Executive Director, Deputy Director, six lawyers, and two support staff.¹⁵⁰

C. A Proposed Legal Assistance Center

To be effective, a legal assistance center does not need to rival the resources, expertise, or services of the major international law firms. Instead, it should aim to provide developing nations with high-quality information, legal advice, and training on an affordable basis. In this manner, the Center will fill a niche by providing developing nations with an option between the risk of relying solely on an in-house defense and the expense of hiring outside counsel.

1. Services

The shape and size of a legal assistance center would of course depend, in part, on the type of services it offers developing nations. A legal assistance center could offer developing nations a spectrum of services, including: 1) a repository for access to all relevant legal authority; 2) training to enhance the capacity of developing nations to negotiate future BITs and defend themselves against investor claims; 3) legal advice or representation on a range of matters, including the compatibility of proposed legislation with BIT obligations and assistance in defending actual investor claims. A closer look at each of these potential services will help clarify their relative costs and purpose.

¹⁴⁷ See ACWL, Annex IV of the Agreement Establishing the Centre, Schedule of Fees for Services Rendered by the Centre, at http://www.acwl.ch/e/tools/doc_e.aspx

¹⁴⁸ See ACWL, Roster of External Legal Counsel, at http://www.acwl.ch/e/tools/doc_e.aspx

¹⁴⁹ See Friedrich Roessler, Executive Director of the ACWL, Speech Delivered at Inauguration of the ACWL (Oct. 5, 2001) at http://www.acwl.ch/e/tools/news_detailsphoto_e.aspx?id=7e0114b4-1819-45ab-9cce-494179ace633

¹⁵⁰ See ACWL, About Staff, at: http://www.acwl.ch/e/about/staff_e.aspx

i. Repository for legal authority

At a minimum, a legal assistance center should serve as a repository for relevant legal authority, including published and unpublished tribunal awards, arbitration treatises and journals, and other academic commentary. A facility like this could serve as a “one-stop” library for developing nations, greatly simplifying the task of finding relevant legal authority and ensuring, at a minimum, that all parties have access to basic legal authority. Library staff might also maintain a list of qualified counsel who have expressed an interest in assisting developing nations on a pro-bono basis or at a reduced rate.

ii. Training to enhance capacity

A long term goal of a legal assistance center should be to build developing nations’ in-house capacity to negotiate BITs and defend investment treaty claims. The potential benefits of training programs are twofold: First, they will allow developing nation counsel to develop at least some expertise with emerging developments in public international investment law and the relevant arbitration rules. Secondly, they will provide a forum where developing nation counsel can share experiences and strengthen professional relationships with Center staff. In this manner, training will serve a preventative function, ensuring that developing nations are not totally unfamiliar with treaty arbitration and can make informed decisions on whether they should settle or litigate an investor claim.

There appears to be great demand for training programs from developing nations who have faced investment treaty claims. UNCTAD, together with Organization of American States and the Canadian Agency for International Development, recently held a seminar on managing investment disputes in Washington, DC, for several countries from

Latin America who are facing investment treaty claims.¹⁵¹ The course examined the substantive treaty-based standards that give rise to most investment treaty disputes, as well as key jurisdictional concepts, through case studies and insights from experienced arbitration practitioners. The course was well-received, with participants from Central America calling upon the UNCTAD Secretariat to set up a facility to assist in the actual management of investor-state disputes for the region, through capacity-building, supply of information and research, and institutional support.¹⁵² The legal assistance center could build on this success, partnering with UNCTAD and other organizations to organize future training sessions.

A legal assistance center also might consider paid internships as an innovative way to provide developing nation lawyers with invaluable practical experience in the investment treaty arbitration process. The ACWL recently launched a Secondment Programme for Trade Lawyers, a program where government trade lawyers from least-developed countries and eligible ACWL Members join the staff of the ACWL as paid trainees for a period of nine months.¹⁵³ The Programme aims to provide the participants with both theoretical training and practical experience in WTO law and an opportunity to participate actively in WTO dispute settlement proceedings.¹⁵⁴ There has been an

¹⁵¹ United Nations Conference on Trade and Development (UNCTAD), “Advanced Seminar of Managing Investment Disputes,” Final Report (November 3-11, 2005) at

http://www.unctad.org/sections/dite_pcbb/docs//dite_pcbb_ias42_en.pdf

¹⁵² *Id.* at p. 3.

¹⁵³ See ACWL, Secondment Programme for Trade Lawyers at

http://www.acwl.ch/e/pdf/secondment_programme_05.pdf

¹⁵⁴ *Id.*

overwhelming response to the program, with 52 applications received from ACWL members and LDC non-members.¹⁵⁵

iii. Legal Representation

Access to legal authority is an important first step, but legal expertise is required to interpret that authority and marshal the relevant facts into an effective defense. Likewise, training programs can be an effective way to build long term capacity, but they are no substitute for actual legal assistance in defending a concrete, pending investor claim. Developing nations with no prior experience in investment treaty arbitration or the means to afford outside counsel may need some form of subsidized legal representation to effectively defend an actual investor claim. A legal assistance center has several options to provide developing nations with access to affordable legal expertise.

As a first step, the Center could provide developing nations with forms of legal advice short of full representation. For example, the Center could offer legal opinions on the text of a proposed BIT, the compatibility of a proposed law with a current investment treaty, or a preliminary analysis of the merits of a potential investor claim. With the uncertainty surrounding the meaning of key investment treaty provisions, developing nations may need assistance in clarifying whether proposed or current government measures may expose them to liability. Likewise, the Center might offer expert legal opinions on proposed treaty language to ensure that developing nations are aware of the full implications of specific treaty provisions. In this manner, the Center will serve an important preventative function, allowing developing nations to steer clear of disputes in

¹⁵⁵ See ACWL, News, “LDCs and ACWL Members respond positively to launch of Secondment Programme for Trade Lawyers,” at http://www.acwl.ch/e/tools/news_detailsphoto_e.aspx?id=cd657f31-5594-47f4-a9a7-937a354cba49

the first place rather than litigating after the fact. A similar service offered by the ACWL has been used extensively by member nations.¹⁵⁶ In the same vein, the Center could offer a preliminary analysis of the legal merits of an investor's claim at the outset of a dispute, allowing developing nations to make an informed decision whether to settle or hire outside counsel.

At the most ambitious end of the spectrum, the Legal assistance center could provide developing nations with direct legal representation during the arbitration proceedings. Borrowing from the successful ACWL dispute settlement assistance program,¹⁵⁷ lawyers from the Center could work alongside developing nation counsel on everything from drafting effective pleadings to presenting oral arguments before the tribunal. The involvement of Center staff would vary with the needs of each client, but always seek to merely assist developing nation counsel as opposed to replacing them during the proceedings. Offering this kind of full, direct legal representation would provide developing nations with a true low-cost alternative to hiring one of the major international firms. However, it would also be very resource intensive, limiting the number of clients the Center could realistically serve at any given time.

2. Location

At first glance, the most obvious location for the Center might appear to be ICSID, the institution that facilitates the majority of investment treaty arbitrations. As a World Bank institution, ICSID already has a development orientation and a talented,

¹⁵⁶ ACWL members have made liberal use of the Centre's legal opinions on compatibility of government measures with WTO law, with over 50 requests since 2001. *See* ACWL, Legal Advice Provided Since 2001 at http://www.acwl.ch/e/legal/legal_advice_e.aspx

¹⁵⁷ The ACWL has provided direct legal representation to developing nations in at least 14 different WTO disputes, at both the Panel and Appellate level. *See* ACWL, Dispute Settlement, at http://www.acwl.ch/e/dispute/dispute_e.aspx

multilingual staff of lawyers and support personnel familiar with investment treaty arbitration. However, ICSID is not well-suited to play host to a legal assistance center due to limitations related to its core mission as a neutral dispute settlement facility: investors would question its objectivity and developing nations would be unlikely to seek advice from an institution whose core mission prevents it from being an advocate for their interests. Due to these limitations, it is difficult to see ICSID hosting anything more ambitious than a repository for legal authority or perhaps a legal referral center.

A different, more plausible home for the Center is with the United Nations Conference on Trade and Development (UNCTAD). Established in 1964, UNCTAD promotes the development-friendly integration of developing countries into the world economy.¹⁵⁸ UNCTAD already sponsors seminars for developing nations on effective BIT negotiation tactics, the management of investment treaty arbitration disputes, and an on-line guide to ICSID arbitration.¹⁵⁹ However, UNCTAD has some limitations of its own. As a United Nations organization, it may be susceptible to political pressure from the wealthier nations who fund most of its programs. Hosting a legal assistance center that provides direct legal representation to developing nations may attract opposition from developed nations if they perceive it as a threat to their investors.

Rather than seeking to fit within another organization's mandate, a legal assistance center could be created as a wholly new, independent inter-governmental institution. Of course, this would require leadership in getting the organization off the ground and locating sources of funding. Financial support from sympathetic industrial

¹⁵⁸ See UNCTAD, *About UNCTAD at*
<http://www.unctad.org/Templates/Page.asp?intItemID=1530&lang=1>

¹⁵⁹ See UNCTAD, *Course on Dispute Settlement at*
<http://www.unctad.org/templates/Page.asp?intItemID=2102&lang=1>

nations and private foundations may be necessary to raise the initial pool of capital needed to launch the Center and sustain it during its first years.¹⁶⁰ Sustaining the Center over the long term will likely require some combination of grants, fees for legal services, and possibly membership contributions. The Centre might consider soliciting donations for an endowment to ensure its long-term financial stability and independence.¹⁶¹

Conclusion

Even as the popularity of investment treaty arbitration has grown, its legitimacy is threatened by reports from developing nations of a lack of affordable access to the legal authority and expertise needed to defend investor claims. Due to a lack of relevant legal expertise within their own government ministries, many developing nations are forced to hire one of a handful of international law firms at a cost of millions per year. Meanwhile, those who cannot afford outside counsel face scattered, incomplete sources of precedent and nowhere to turn for affordable legal assistance. Given that even a single lost claim could wreak havoc on a developing nation's economy, something must be done to fill this void in legal services. A legal assistance center would bolster the legitimacy of investment treaty arbitration by providing developing nations with an alternative, low-cost option for obtaining legal assistance. Better prepared developing nation counsel will make more cogent legal arguments, allowing the tribunal to clearly identify the issues in the case and produce a well-informed award. By ensuring that developing nations have affordable access to legal authority and expertise, investment treaty arbitration will more

¹⁶⁰ The financial support of the 9 developed nations who signed the "Agreement establishing the Advisory Centre on WTO Law" was critical to creating the \$8 million fund used to launch the ACWL. See Andrea Greisberger, *Enhancing the Legitimacy of the World Trade Organization: Why the United States and European Union Should Support the Advisory Centre on WTO Law*, 37 Vand. J. Transnat'l L. 827, 840 (2004).

¹⁶¹ Part of the ACWL annual operating budget comes from its \$20 million endowment created through donations by founding member-States. *Id.*

perfectly fulfill its mission of providing a truly neutral and just form of dispute settlement.