

Equality of Arms and Investment Disputes along the Belt and Road

The last decades witnessed a considerable increase in foreign investment flows, especially in the Asia-Pacific region. China's Belt and Road Initiative ('BRI') presents additional opportunities to promote economic cooperation and connectivity between countries and investors around the world. Once investments are made, disputes often follow. Over the last years investor-state arbitration has become the busiest method of international adjudication. However, scholars and practitioners have been voicing concerns about several challenges associated with legal representation of respondent states in arbitral proceedings. While developed countries normally have legal expertise in-house to mount a capable defence, developing countries' governmental departments frequently lack the necessary knowledge to defend their interests as vigorously. Unable to afford the often stunning billable hours charged by outside counsel, responding states may have no choice but to turn to government lawyers who are sometimes little more than apprentices in the field of investment law and arbitration. This has in some cases led to appalling inequality in the quality of legal representation between powerful multinational investors and low-income respondent states. Many developing nations decide to retain outside counsel to defend investment treaty claims. However, this option too has its drawbacks. The growing costs of arbitration are a source of concern, and this is particularly true for low-income countries and for small companies that cannot afford being represented by the most experienced and sophisticated law firms in the field.

One way of promoting equality of arms in investment arbitration would be to create a legal assistance centre to provide legal advice and training to developing countries. In 2009, the United Nations Conference on Trade and Development (UNCTAD) proposed the creation of an institution that developing countries could draw on for support in investment law and investor-state disputes. The United Nations Commission on International Trade Law (UNCITRAL)'s Working Group III (Investor-State Dispute Settlement Reform) is currently considering the establishment of advisory centres to support developing countries in investor-

state dispute settlement. While there have been several attempts to establish such centres, namely in South America and in the framework of the Association of Southeast Asian Nations (ASEAN), they have hitherto failed to come to fruition.

The BRI raises important economic and cultural but also legal challenges. The expected surge in economic activity will lead to a growing demand for cross border dispute resolution services, in particular investor-state arbitration. However, differences in the level of legal representation may undermine the fundamental principle of party equality. Equality of arms is a fundamental ingredient of any dispute settlement mechanism and the BRI should also ensure that potential disputes are dealt with in a legitimate and efficient manner. This paper examines the challenges faced by respondent states (in particular, small and developing nations) in securing effective legal representation in investor-state arbitration proceedings, analyses why previous attempts to establish advisory centres have failed, and discusses the desirability of creating such an institution in the framework of the BRI.

Fernando DIAS SIMÕES is Associate Professor at the Faculty of Law of the Chinese University of Hong Kong (CUHK). He holds a PhD from the University of Santiago de Compostela (Spain), an LLM from the University of Glasgow (United Kingdom) and a Bachelor degree from the University of Coimbra (Portugal). Professor Dias Simões also teaches regularly at the Summer Law Institute (Beijing) and the Institute of International Studies, Ramkhamhaeng University (Bangkok). He is Senior Research Fellow at the University Institute of European Studies (Italy); Member of the Scientific Committee and Senior Research Associate at gLAWcal – Global Law Initiatives for Sustainable Development (United Kingdom); member of the Asia WTO Research Network (AWRN); and Rapporteur for the Oxford International Organizations – OXIO (Oxford University Press and Manchester International Law Centre). He has published widely in the fields of commercial arbitration and investor-state arbitration.

email: fdiassimoes@cuhk.edu.hk