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Host countries versus foreign investors

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Claims made by investors before the International Centre for Settlement of Investment Disputes (ICSID) against host countries are increasing both in terms of numbers and types. But there are only a handful of claims made by host countries against foreign investors (counter-claims or any annulment proceedings initiated by host countries). As of early July 2014, of 476 settled and pending arbitration cases with the ICSID, just three have been filed by host countries (including state entities or provincial authorities) against foreign investors. Interestingly, in all these cases claims made by host countries have been based on contracts.

The primary reason for this disparity in the number of claims by and against host countries may be that states can only bring claims against investors for breach of contractual provisions. International investment agreements (IIAs) do not confer on states the right to bring claims (of course, excluding the right to bring counter-claims) against foreign investors. States may get around this problem by requiring investors to agree from the outset to put any disputes to arbitration (IIAs confer this right-but only on investors) and that such agreements can be a precondition for investors' rights under the framework of any IIAs. It may well be that claims against foreign investors in the ICSID are rare, because investors conduct their businesses in such a way that there would rarely be a reason for host countries to pursue an ICSID claim. Or, perhaps more realistically, infractions by foreign investors have not been so severe that they would warrant a state to bring a legal claim. However, given the diversity of foreign investors and their operational practices, it is implausible to assume that it is sound and ethical business practices that have been the decisive factor for foreign investors not being subjected to ICSID or ICSID is not their preferred venue for bringing claims against investors. Host countries may not have approached the ICSID dispute settlement procedure as claimants because state officials who are responsible for protecting the interests of their respective countries have not always pursued legal claims as vigorously as their counterparts representing the interests of foreign investors.

It is also possible that host countries have a greater array of avenues to deal with errant foreign investors. After all, instead of proceeding with a potentially tedious and costly dispute settlement procedure, host states may withdraw a concession, take administrative measures, regulate, or pursue a legal claim in the domestic legal system or settle a dispute through negotiations. It is also possible that states avoid arbitration simply because they prefer to avoid delaying projects. Again, a lack of expertise in foreign investment law or inadequate financial means may also be potential stumbling-blocks for many poor countries in protecting the public interest.

In many cases, a host country would probably be better off pursuing an ICSID claim against foreign investors than withdrawing a concession or taking administrative measures that could run the risk of exposing the host country to a hefty award in a claim for expropriation. In such a case, the associated reputational hazard as a safe destination for foreign capital can create problems for

countries that want to attract foreign direct investment (FDI) to promote economic development. A judicial award rendered by a domestic court may be harder to enforce in another state in comparison to an arbitral award by an ICSID tribunal. Even in the case of an unsuccessful ICSID claim, the host country might only be responsible for defraying the costs of the legal proceedings.

If the lack of resources is a constraint for many host countries to pursue ICSID claims, it might be appropriate to establish an institution similar to the Advisory Centre on WTO Law (ACWL). The ACWL provides legal assistance to least developed and developing countries on WTO law and supports them in WTO dispute settlement proceedings at concessionary rates. Such a centre would not be able to address issues, if government officials do not want to obtain help from a centre on international investment law, but it could play a role in protecting the legitimate interests of those governments that seek its help. Such a centre may also be able to help least developed and developing countries as respondents. Funding for such a centre may be an issue. Nonetheless, if ICSID members decide to establish an advisory centre on ICSID law, budgetary challenges should not be insurmountable.

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