

Can Investment Treaties Make Foreign Investment Safe?

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More Arbitrations between Investors and Host Governments

- 1. More bilateral and regional treaties
- 2. Arbitration at ICSID
 - 1972-1982 10 cases
 - 1982-1992 18 cases
 - 1992-1996 8 cases
 - 1997 -2004 71 cases
- 3. Why?
 - Increased private FDI in infrastructure/currency crises
 - Increase in raw material prices

Notable Absences and Hesitancies

- 1. Absent: Investors with other interests in host country
- 2. Hesitant: Investors with strong interest in continuing in industry elsewhere in developing world
- 3. Japanese investors or Japanese-led consortia
 - Bitterness, reputation, culture?

Resistance on State Side

- 1. Indonesia: court battles for 8 years
- 2. Argentina challenging judgments
- 3. Venezuela/Bolivia/Ecuador threatening partial or complete withdrawal

Problems (1)

- 1. Rigid view of contract
 - Much more so than in investors' home countries
 - Reluctance to consider
 - Crises
 - Other changed circumstances
 - Corruption/incompetence in contracts
 - Environmental protection, labor standards, etc.

Problems (2)

- 2. Conflicting decisions => unpredictability
 - Examples
 - Frequently cited: *Lauder in Czech Republic*
 - Current: Argentine cases on “necessity”
 - Award standards: *KBC vs Argentine cases*
 - No process to resolve conflicting decisions

Problems (3)

- Lack of sympathy with national goals (environment, labor rights, etc.)

Problems (4)

- 4. Asymmetry (company has right to go to arbitration; host government does not)
 - Who initiates renegotiation demands?
 - Relation to bidding

Problems (5)

- 5. Bitter, long, and expensive process with damages orientation
 - Legal bills
 - Years to complete
 - No future of business in country

Changes to System

- 1. Appeals process
 - Resolve conflicting decisions => common law
 - Broadly representative => less rigid interpretation, evolving standards for environmental regulations, etc.
- 2. Symmetry
 - Perception of fairness
 - Less rigid interpretation of contract
- 3. Encourage settlement

Investment Treaties Can Improve FDI Safety, But Reform will be a Difficult Task

- 1. Importance of property rights
- 2. Failure of multilateral negotiations
- 3. Existence of 2,000+ bilateral agreements
- 4. Entrenched interests in place