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Columbia FDI Perspectives

Perspectives on topical foreign direct investment issues
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No. 327 March 21, 2022

A managed dispute-resolution insurance scheme for countries in investor-state arbitration: Ensuring early legal representation of respondents

by
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It is impractical for most governments to maintain a standing team of expert legal representatives focused on international arbitration proceedings with foreign investors, especially when such cases are a rarity for most countries.[1] Consequently, at the onset of many international arbitration proceedings, governments often lose valuable time while decisions are made on whether and how to quickly procure and finance the services of qualified external counsel.[2]

This initial period coincides with the time during which many important procedural deadlines occur, such as those relating to the constitution of the arbitral tribunal.[3] Indeed, within the first 60-90 days of a proceeding, respondents are under significant pressure to meet case deadlines, while contending with procurement and funding issues surrounding the selection and appointment of external counsels and facing an opponent whose team has undergone months or more of preparation.

This uneven start of arbitration proceedings can be harmful to investors and countries alike. It creates an imbalance that may persist throughout the proceedings, sometimes resulting in outcomes that undermine the legitimacy of the investor-state dispute settlement (ISDS) system.

This problem can be addressed through a new form of insurance cover. It would vary in scope according to the needs of client governments and could be based on time or specific proceedings-related milestones. It could, for example, specify a payout of a particular sum or provide for legal representation financing for the first six months, or until tribunals are constituted. Actuaries and other insurance professionals would devise formulae for calculating the pricing of the insurance cover considering, *inter alia*, the level of exposure to risk of the insured country and how likely it is to use the insurance. Real market forces would determine the cost of the insurance coverage. As a result, the prospect of impossibly high premium assessments would help mitigate any possibility of governments becoming emboldened by the availability of legal representation to engage in activities contrary to their stated pro-foreign investment policies. The insurance would, thus, not be a license for host countries to act irresponsibly toward foreign investors.

The payout under an insurance cover would facilitate prompt access to expert legal representation, especially in the early stages of arbitrations. At its most basic, the insurance would simply provide ready funds for governments to pay for services they procure from the open market as and when the covered event occurs.

For still greater efficiency, the insurance could, under a scheme administered by a stand-alone entity or as part of an existing body, enable the prompt recommendation of qualified counsel to governments. In this scenario, the scheme's administrator would promptly assign cases to pre-qualified legal representatives in a regularly updated pool, which could include law firms and individual experts. The pool could also include service providers under the various initiatives offering *pro-bono* or low-cost legal assistance to governments involved in investor-state arbitration, such as the Advisory Centre on International Investment Law currently being considered by UNCITRAL.

Early—and almost "automatic"—activation of the scheme would be essential. This could be achieved by stipulating, in the instrument of consent to arbitration or in the applicable procedural rules, a requirement for early notification of the existence of the dispute to the scheme's administrator. However, governments could decide not to rely on the insurance—they would always retain discretion to accept, reject or discontinue their engagement of any assigned counsel.

If an established organization, such as ICSID, UNCITRAL or UNCTAD, were to administer the scheme, it could, where applicable, devote a minimal percentage of member countries' dues to its administration. Administration by an independent entity could be funded from dues of participating governments and/or the insurance companies that offer coverage. Countries that are unable to easily afford the insurance premium could seek support from their investment treaty partners, for example, as part of the "technical" and other support that have become a regular feature in trade and investment treaties.

Undoubtedly, early and proper representation of each side in investment arbitration proceedings will help ensure that the proceedings are more efficient and result in better quality outcomes, including awards that are less susceptible to successful challenge. The idea of "dispute resolution insurance in ISDS" would thus be beneficial to countries and investors alike.[4]

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[1] Over three quarters of the countries in UNCTAD's investment-treaty-disputes database have either never been involved in any case or have faced only ten or fewer cases.

[2] ICSID Secretariat's records indicate that governments are taking at least three-to-four months after ICSID's registration of an arbitration request to appoint external counsel. Yet, governments would have known about the disputes for months, due to the cooling-off period required in most instruments of consent, and the time ICSID takes to review the request before registration.

[3] See, e.g., ICSID, UNCITRAL and the SCC Rules, which provide for strict deadlines for the constitution of tribunals, the initial procedural session and certain jurisdictional objections.
[4] While this proposal focuses on ISDS, the same mechanism could also apply to other types of cases involving a country as respondent.

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