Third-Party Funding:

Advancing or Undermining the Object and Purpose of Investment Treaties?

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Third-Party Funding in ISDS: Is it a good idea?

- Third-party funding in ISDS is on the rise, raising a host of questions relating to
  - Ethics, incl. conflicts of interest (e.g., for lawyers, arbitrators, and intra-firm players)
  - Costs
  - Incentives
- A number of initiatives are underway to consider whether/how to (self-)regulate the practice, focusing in particular on addressing conflicts-of-interest
- But it is important to also consider the desirability of third-party funding from a broader policy perspective.
  - Assuming the existence of ISDS, is third-party funding of ISDS claims something law should permit? Under what terms?
  - What are the measurements by which we should go about trying to answer those questions?

Framework for Analysis: Object and Purpose of Investment Treaties

Basic Principle:

- Trade and Investment Agreements are instruments designed to advance sustainable development in the host state (not just protect investors);
- Investment protection is a means to an end, not an end in and of itself.

Framework for Analysis: Object and Purpose of Investment Treaties

The notion that IIAs are a means to an end is not a new concept:

- Netherlands-Bangladesh (1994), recognizing that "agreement upon treatment to be accorded to [covered] investments will stimulate the flow of capital and technology and ***the economic development of the Contracting Parties***";
- Rep. of Korea-Paraguay (1992), "recognizing the ***important complementary role of foreign investment in the economic development process***."

Framework for Analysis: Object and Purpose of Investment Treaties

Does third-party funding advance or undermine the objective of advancing the host state's development?

- How does the availability of third-party funding impact dynamics regarding types of claims, claimants, and respondents?
- How does third-party funding impact decisions to invest?
- How does third-party funding affect transfers of wealth?
- How can/should regulation of third-party funding impact those outcomes?

Potential channels:

- Incentives affecting conduct of firms
- Incentives affecting firm owners, managers, and funders
- Incentives affecting conduct of governments

Conduct of Firms

Why are host countries signing investment treaties?

- Generally, to get FDI
- What is FDI?
- Importance of "stickiness" and long-term relationships

How does third-party funding affect whether investments are sticky, relationships are lasting, and benefits are mutual?

- May encourage exit and discourage non-cash-payout settlements that would otherwise enable continuation of the investment
- May enable more marginal claims to be brought
- May incentivize large claims/recoveries

Conduct of Owners, Managers, and Funders

- Shareholders v Management
- Shareholders v. Creditors
- Creditors v. Creditors

Conduct of Government

- May increase asymmetries in bargaining power
- May overdeter
  - Governments may be more exposed to suits
  - Applicable law may have shifted

David L. Chen, examining whether funded cases spurs the establishment of precedent and development of the law:

"Funded cases are cited over twice as frequently, cite substantially more cases than unfunded cases, and are less likely to be reversed upon appeal."

(Chen, Can Markets Stimulate Rights? On the alienability of frivolous claims)

What are real world implications?

Without Third-Party Funding, Impacts on Access to Justice?

Without third-party funding, do investors feel unnecessarily exposed? Does it enable access to justice?

- What claims are third-party funders funding?
- What other mechanisms are there?
  - Corporate loans
  - PRI
  - Limiting the duration and costs of cases
- What are comparative advantages and disadvantages of different options in light of the object and purpose of investment treaties?

Key Questions

It is important to have a better understanding of how third-party funding is being used, and its impacts on incentives and conduct.

- In what types of cases are third party funders becoming involved? What effects are they having on outcomes? On intra-firm and firm-host government relationships?
- Are there other, more inclusive, ways to address the "access to justice" problem?
- Who is tracking the issues? Who is shaping the law? What considerations are influencing legal developments?

Thank you!

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