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Large Corporations and Investor-State Arbitration

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In May 2023, more than thirty members of the U.S. Congress sent a letter to the Biden administration, arguing that "[l]arge corporations have weaponized [investor-state dispute settlement (ISDS)] to benefit their own interests" and that "the broken ISDS system has time and time again worked in favor of big business interests." This criticism against ISDS is not new. ISDS has often been perceived as a system primarily utilized by large corporations to serve their interests, despite evidence to the contrary. This perception is driven by some high-profile victories secured by large corporations (*e.g.*, *Occidental v. Ecuador*), as well as significant cases brought by large corporations that challenged public health or environmental regulations of host countries (*e.g.*, *Philip Morris v. Australia*; *RWE v. Netherlands*), which led to concerns of "regulatory chill." Partly due to such concerns, several countries have terminated their bilateral investment treaties and international investment agreements that contain ISDS provisions. Despite such criticism and backlash, we still know relatively little about the users of the system, let alone which users are more likely to win cases or to use the system to chill regulations. This post summarizes the key findings of a recent article (the "Article") that introduces a new dataset on the characteristics of claimants in ISDS cases up to 2020, focusing on the users and beneficiaries of ISDS, and the implications of these findings for ongoing ISDS reform.

The Users of ISDS

The raw data introduced in the Article sheds light on the users of ISDS. 84.2% of cases are brought by firm (as opposed to individual) investors. Based on the claimant firm's number of employees, sales volume, listing status, or number of affiliates, a typical claimant in an ISDS case appears to be a small or medium-sized firm, rather than a large one. Following the OECD's approach, the Article categorizes firms with more than 250 employees as large firms. The data reveals a significant increase in cases brought by small or medium-sized firms since the mid-2000s. By 2019, small or medium-sized firms had brought almost twice as many cases as large firms have.

The Winners of ISDS cases

To understand the beneficiaries of ISDS, the Article first examines who is more likely to "win" ISDS cases, defined as obtaining financial compensation awarded by arbitral tribunals. By 2019, small or medium-sized firms accounted for over half of the total "wins" secured by claimant

investors, nearly twice the number for large firms. As a group, small or medium-sized firms have been awarded a similar sum of damages as large firms. Further regression analyses suggest that there is no evidence that large firms are more likely to win a case than small or medium-sized firms. This holds true after accounting for potential selection effects, the size of the parent company, and the use of alternative measurements of firm size. Hence, there is no evidence that large firms hold an advantage in winning ISDS cases.

Regulatory Chills through ISDS

The Article also examines who is more likely to successfully "chill" the challenged measures after filing an ISDS case. While large corporations may not necessarily have an advantage in obtaining financial compensation from ISDS cases, they might still benefit from these cases by influencing the respondent government to repeal or amend the challenged measures that purportedly harm their business.

It is important to note that the chilling of challenged measures is only one form of regulatory chill that concerns ISDS critics. Regulatory chill can also encompass situations where the host country's government abandons or changes a proposed regulation in the face of threats of ISDS. This other form of regulatory chill and ISDS's impacts on the broader regulatory environment in host countries have been explored elsewhere.

Despite large corporations bringing only half the number of cases compared to small or medium-sized firms, the number of cases in which they have successfully influenced the respondent country to repeal or amend the challenged measures is almost the same for both groups. Further regression analyses consistently suggest that large firms are significantly more likely to get the respondent government to repeal or amend the challenged measures after a case is filed.

Why have large firms seen greater success in influencing the challenged measures? Examining cases brought by large multinational corporations, which resulted in the repeal of the challenged measures, provided some insights. Three case studies reveal that large firms often employ a well-coordinated approach, involving both legal and public relations strategies across multiple jurisdictions, to exert pressure on the host country. In addition to ISDS, large firms also make use of lobbying, domestic litigation, international dispute settlement, and diplomatic solutions. The culmination of these strategies often leaves the respondent government more prone to altering its agenda.

Implications

The empirical findings bear relevance to the ongoing discussion surrounding ISDS reform and the various institutional alternatives. There has been an increasing call from some countries and commentators for the elimination of ISDS, with suggestions to replace it with a multilateral investment court or to resort to domestic litigation or state-to-state dispute settlement. However, such changes could potentially deprive small or medium-sized firms—who, as the data indicates, are the primary users of ISDS and use it primarily to obtain financial compensation—of an important avenue for redress.

The proposed institutional alternatives, which require significant political capital and connections, may not offer greater accessibility for these smaller firms compared to the existing ISDS system. Instead, these changes may compromise small or medium-sized firms' abilities to recover damages for their incurred losses.

On the other hand, eliminating ISDS may not effectively address the regulatory chill concern. Large multinational corporations, with their long-term interests in host countries and stronger incentives to fight for the "rules of the game," may not be dissuaded by such changes. The proposed institutional alternatives may do little to address the regulatory chill problem. Large corporations can continue to use these alternatives, in conjunction with other means at their disposal, to exert pressure on the host country government.

Hence, reformers should proceed with caution before fully embarking on a systematic overhaul of ISDS. It is important to assess the effectiveness of the proposed alternatives in addressing criticisms related to regulatory chill and large corporations, while also considering the benefits that the existing system offers to small or medium-sized firms.

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