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Which host country government actors are most involved in disputes with foreign investors?

by
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Foreign direct investors increasingly use investment dispute-settlement mechanisms to resolve investment disputes and reduce political risk.[1] Using data from the International Centre for Settlement of Investment Disputes (ICSID), the major forum of international investment arbitration, we cataloged the government actors involved in disputes and the actions that led to arbitration. Existing case-based studies of investment arbitration have provided general inferences about the actors involved, but we contribute to the literature in political science and economics by systematically documenting these patterns of behavior.

As of September 2013, ICSID tribunals had concluded a total of 264 investment disputes. Using ICSID case records, Lexis-Nexis news archives and other resources, we found sufficient descriptions of case facts to code the host country government actors and the alleged violations for 163 of the 264 concluded ICSID cases.[2] The remaining cases were either dropped by the parties or there were insufficient published facts for us to identify government actors.

Our main finding is that the majority of government decisions that lead investors to seek arbitration are associated with actions taken by the executive branch, which is consistent with theories on the role of the executive in disputes with foreign investors. We also show that there are fewer arbitrations in response to legislation or court decisions. This speaks to concerns that investment arbitration infringes on the sovereignty of host country governments.[3]

Investment disputes arise for a number of reasons and result from the actions of many different government actors. Strikingly, there are only 14 cases of legislatures taking actions leading to disputes, many of which are initiated by the same legislatures engaging in multiple disputes in a single year. Jamaica's decision to change tax rates for aluminum manufacturers is an example of one legislative change leading to multiple disputes.

A larger percentage of the disputes are related to the executive branch of government. There were 18 cases of heads of state or government engaging in actions that led to investment disputes, and 60 cases of ministry-originated conflicts with foreign investors. Given the strong relationship between heads of state or government and ministries in most countries, these were all coded as executive-branch disputes. Together, 48% of these disputes (and 47% of expropriations) were associated with the executive branch.

The remaining disputes involved other government actors. In 14 cases, subnational actors (provinces, states, municipalities) were directly engaged in disputes, often by canceling contracts with multinational enterprises. Another 24 cases involved agencies that do not have ministry-level status. State-owned enterprises and courts are also active in a handful of disputes.

Table 1. Distribution of disputes as of September, 2013

	All claims		Expropriation claims	
Government actor	**Number**	**Percent**	**Number**	**Percent**
Head of state or government	18	11	9	10
Ministry	60	37	33	37
Total executive branch	**78**	**48**	**42**	**47**
Legislature	**14**	**9**	**12**	**13**
Subnational	14	9	11	12
State-owned firm	19	12	7	8
Other agency	27	17	9	10
Court	12	7	8	9
Total	**163**		**89**	

Source: ICSID.org. Claims sum to >100% due to rounding.

The evidence yields two important insights for policymakers seeking to reduce risk for foreign investors. First, the most common actor associated with disputes is the executive.[4] Thus, reforms that limit the discretion of the executive to interfere with foreign investment are likely to reduce investor-state claims and, more generally, may reduce political risk.[5] Second, this prevalence of disputes originating from executive activity suggests that investor-state arbitration can serve as an additional external check on executive discretion, particularly where domestic checks are weak. Given the low rate of disputes involving legislative branch activity, arguments that investor-state arbitration may encroach on the legitimate prerogatives of domestic governments appear to be overstated. Instead, democratic legislatures should embrace investor-state arbitration as an additional check on executive branch misbehavior.

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[1] *See* Clint Peinhardt and Todd Allee, "Different investment treaties, different effects," *Columbia FDI Perspectives*, No. 61, February 20, 2012, and Joachim Karl, "Investor-state dispute settlement: A government's dilemma," *Columbia FDI Perspectives*, No. 89, February 18, 2013.

[2] The primary actor was coded as the host country government actor whose discretionary actions were most represented in the investor's allegations. The causes of action were coded based on the causes of action put forth by the investor. We include more coding details on the authors' websites (http://pages.wustl.edu/nathanjensen/replication-data or http://www.jeremycaddel.com/research/).

[3] Stephan W. Schill, "The public law challenge: Killing or rethinking international investment law," *Columbia FDI Perspectives*, No. 58, January 30, 2012.

[4] Clearly, investment disputes often involve multiple actors and causes of action. However, our coding rules ensure that discretionary executive branch actions had the strongest relation to the allegations in these cases.

[5] For an overview, *see* Nathan M. Jensen, "Political regimes and political risk: Democratic institutions and expropriation risk for multinational investors," *Journal of Politics*, vol. 70 (2008), pp. 1040-1052.

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