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Abstract

Countries compete with each other to attract foreign investment for a number of reasons. In addition to the economic benefits that an infusion of new capital brings into the country's economy and the prospect of new employment opportunities, foreign investment also results in the introduction of new technology and with it increased competition into and out of the economy. Prior to the 1994 WTO Agreements, cross-border investment was mainly by developed world capital exporting countries such as the United States, United Kingdom, Germany, France, and Japan. Their main concern was protection of the capital investments made by their multinational entities from expropriation, as well as their ability to repatriate profits against laws enacted by developing country host nations. Partly prompted by this, the WTO agreements provide for dispute settlement through a process of consultation, mediation, and arbitration outside the framework of home and host country laws. Alongside the WTO agreements, developing countries also entered into many regional trade agreements at the behest of the advanced western economies. These new regional trade agreements also provided for trade disputes to be settled through the arbitration process outside of national courts. However, the accompanying benefits of trade have at the same time enabled larger developing world economies such as Brazil, Russia, India, and China (BRIC) to also become capital exporters, some of it into developed economies, thereby making inflows and outflows of foreign investment a two-way process. The latter, alongside the realisation that multinational entities of whatever ilk can effectively challenge laws enacted by a host nation for the welfare of its citizens, has caused developed and developing nations to rethink their strategy of dispute settlement systems outside the national legal system. This paper evaluates this journey in foreign investor dispute settlement.