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Research Report

Investment dispute management: The importance of the domestic dimension

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Investment dispute management: The importance of the domestic dimension

by

Alejandro Carballo Leyda and Frauke Nitschke *

Independently of any reform of the investor-state dispute-settlement (ISDS) mechanism, governments need to establish *domestic* policy and organizational mechanisms to effectively manage investment disputes.¹ Specifically, two aspects should be considered:

- *Create a domestic legal framework for effective amicable dispute-settlement processes.* While recent international agreements contain detailed provisions on amicable dispute-settlement processes,² countries should also provide a clear legal basis for domestic dispute management. It should provide for amicable dispute settlement, expressly endorsing it as a viable tool. Importantly, this would also mitigate potential concerns, such as the possible liability of public officials involved in negotiations or mediation with foreign investors. Ideally, this framework would furthermore identify who, within a country, has the ultimate authority to sign off on any settlement, or the process pursuant to which such authority is determined.
- *Establish a domestic (lead) entity responsible for investment-dispute management.* Disputes are often complex and typically involve multiple public entities. One of the stated obstacles to effective investment-dispute management is the absence of a responsible/lead entity that centralizes and coordinates a country's activities. While the lead entity does not need to also have the ultimate authority to decide on settlements, it should streamline the decision-making process among the responsible domestic institutions. At the same time, countries should clearly identify which entity or entities should retain the power to make final decisions regarding ISDS-related issues.

The organizational structure of these (governmental) entities can differ from country to country, depending on specific administrative needs, budgetary constraints, experience, frequency of ISDS disputes, and cultural and legal particularities. The entity could be an

autonomous unit, a unit within a ministry or an inter-ministerial commission consisting of government officials already in charge of handling disputes in various ministries. The entity may either (i) be responsible only for coordinating formal and informal dispute-settlement efforts, or (ii) also cover the period prior to such proceedings (i.e., facilitating the resolution of investment grievances informally or amicably when they first arise).³ The two approaches have been implemented in different jurisdictions, such as the Dominican Republic and Costa Rica.

Regardless of the organizational form, to be effective, the lead/responsible entity should be vested with the following functions:

- serve as the first contact in case of ISDS disputes;
- handle all communications with the investor(s);
- coordinate public statements, ensure governmental compliance with public disclosure obligations and implement a strategic communication plan;
- coordinate among government entities to gather facts, share knowledge and provide technical advice;
- help manage civil society/local community concerns about the dispute;
- gather data to identify governmental conduct generating political risks,⁴ which can also serve as an early warning mechanism;
- provide information as to where capacity building is needed;
- conduct a comprehensive assessment of the dispute and identify the most effective course of action, including amicable settlement processes such as mediation;
- lead negotiations, represent and prepare the country's defensive strategy or line of approach during all the phases of the dispute settlement;
- have the authority to negotiate and a clear line of communication to the body with settlement authority;
- be vested with the ability to approve funds for dispute-settlement proceedings and hire professional support (external experts, counsel);
- conduct training for all public officials involved in investment matters, to minimize recurrence of such disputes;
- maintain a centralized data repository on investment disputes, the process followed, outcomes, and economic impact.

Such a domestic legal framework increases stakeholders' confidence in a country's effective management and resolution of investment disputes. It should therefore strengthen and possibly increase FDI retention. It also enables countries to proactively manage ISDS disputes, create in-house expertise and save resources. The usefulness of such a domestic legal framework depends not only on its design, but also on its effective implementation at all governmental levels. Capacity building and awareness raising for public officials regularly interacting with foreign investors is therefore vital.

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¹ Alejandro Carballo Leyda, "Model instrument for management of investment disputes", in Julien Chaisse *et al.*, eds., *Handbook of International Investment Law and Policy* (Singapore: Springer, 2019).

² See ICSID's Overview of Mediation Provisions in Investment Treaties.

³ Priyanka Kher and Dongwook Chun, "Policy options to mitigate political risk and attract FDI" (Washington D.C.: WBG, 2020), p. 17; Alejandro Carballo Leyda, "Preventing and managing investor-state conflicts and disputes in the energy sector", *University of St. Thomas Law Journal*, vol. 17 (2021), p. 470.

⁴ "Political risk" is understood as defined by the World Bank: *World Bank, Retention and Expansion of Foreign Direct Investment, Political Risk and Policy Responses* (Washington D.C.: WBG, 2019), pp. 10, 12.

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