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This document is a revised draft of A/CN.9/WG.III/WP.235 prepared by the secretariat for the forty-eighth session of Working Group III (New York, 1-5 April), including comments received so far on A/CN.9/WG.III/WP.235. The revised draft has been prepared at the request of the Working Group to facilitate its consideration. As work in progress, the document does not pertain to reflect the views of the Working Group or the secretariat.

United Nations Commission on International Trade Law
Fifty-seventh session
New York, 24 June–12 July 2024

Possible reform of investor-State dispute settlement (ISDS)

Draft guidelines on prevention and mitigation of international investment disputes

Note by the Secretariat

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I. Introduction

1. At its thirty-ninth session in October 2020, the Working Group undertook a preliminary consideration of the topic of dispute prevention and mitigation based on document A/CN.9/WG.III/WP.190 and requested the Secretariat to pursue further work (A/CN.9/1044, para. 26).

2. At the forty-fifth session in March 2023, a draft legislative guide on investment dispute prevention and mitigation (A/CN.9/WG.III/WP.228) was prepared jointly with the World Bank Group and an informal document containing a compilation of the best practices[1] was made available to the Working Group. After discussion, the Working Group requested the Secretariat to revise the draft legislative guide into a non-prescriptive guidance document on means to prevent and mitigate disputes, including examples of best practices, which would aim to mainly assist States (A/CN.9/1131, para. 52).

Note to the Working Group

For the forty-seventh session in January 2024, the draft guidelines on prevention and mitigation of international investment disputes (A/CN.9/WG.III/WP.235) was prepared. However, in view of the limited time and the need to proceed with deliberations on other reform elements, the Working Group tasked the Secretariat with updating the draft guidelines based on written comments received from delegations and inputs received during the inter-sessional meeting scheduled on 7 and 8 March 2024 in Brussels. The Secretariat was further requested to provide an informal document for consideration by the Working Group at its next session, based upon which the Working Group would decide whether to present the document for adoption by the Commission at its fifty-seventh session in 2024 (A/CN.9/1161, para. 112). Accordingly, this Note contains the revised draft guidelines on prevention and mitigation of international investment disputes for consideration by the Working Group as well as comments based on which the draft guidelines were revised.

II. Draft guidelines on prevention and mitigation of international investment disputes

Comments

United States: *While we welcome the revised scope and approach, we are concerned that, as drafted, it is still too focused on a particular approach and does not adequately reflect the variety of approaches that can be productively pursued. As such, we think that this topic, which is an essential one for ISDS reform, is better suited to future work by the advisory centre once established, or perhaps an inter-governmental forum roundtable session before the advisory centre is established, so that Members can exchange experiences and a more thorough and multifaceted set of practices can be identified for States that are seeking guidance on mitigating disputes. In that context, it does not seem useful to present the guideline for Commission consideration at this time.*

Additionally, rather than submit the guidelines in their current summary form, we believe it could be more useful to States that are seeking guidance on structuring their dispute mitigation and prevention approach for the Secretariat to further develop the informal compilation of best practices on investment prevention and mitigation. We suggest that the Secretariat send the document to the States whose practice is described for their review, make any adjustments based on the input received, and then provide a brief summary of the practices, which could largely draw on the summary categories in WP.235. In this context, the reference material currently outlined in Section F of WP.235 would be useful and appropriate. The practices

[1] Available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/wg_iii_compilation_on_dispute_prevention_and_summary.pdf.

compilation could be a summary document that could be submitted to the Commission for consideration in 2025 but would not require substantial Commission time because it would be a factual summary rather than a set of policy recommendations.

***Poland**: The document lacks specific legislative proposals that could be the subject of greater analysis in the current state. The may be whether some of the topics should be included in the guidelines at all due to the level of generality, the scope of regulatory powers of States and differences between jurisdictions. The document does not yet operate at the level of specific regulations, but basically only at the level of "ideas" for regulations. However, the document in its current form may constitute at least a valuable starting point for further work and a source of information (however, it is still far from being a ready-made official WG III document that would shape international practice in the subject matter). The document contains a collection of good practices / sources regarding good practices, which may be a source of reflection for some entities directly related to the topic of foreign investments and the resolution of related disputes. Regardless of the above, the materials seem to have been collected in a rather random way - it is impossible to consider the document as ready-made guidelines, but this does not deprive it of its informative value regarding the current state of the issue of avoiding disputes. We share in particular the position expressed by the USA above. If the document is to achieve its purpose as guidance on the prevention of investment disputes based on best practices, the document should present a broader approach/more perspectives/specific methodology. The proposal to postpone work on this document could be justified. The proposal of a more comprehensive set of best practices is also justified. The current collection, although undoubtedly valuable at this stage, is also simply insufficient considering the goals of the document.*

A. Introduction

4. The Guidelines on Prevention and Mitigation of International Investment Disputes (the "Guidelines") set out various strategies and measures that may be adopted by States to prevent and mitigate investment disputes involving foreign investors. "International investment disputes" refer to a wide range of disputes between a foreign investor and a State or any constituent subdivision of a State or any agency of a State arising out of a treaty providing for the protection of investments or investors, legislation governing foreign investments or an investment contract (referred to collectively as "investment instruments").

5. Dispute prevention refers to the handling of a grievance of a foreign investor before it devolves into a disagreement framed in legal terms. As such, it includes the handling of grievances, which may be expressed as disagreements in non-legal terms, for example, through media coverage or other informal complaints. A disagreement is usually framed in legal terms when the investor expresses its intent to seek recourse to arbitration or litigation. This is when dispute mitigation begins, which may also involve amicable settlement including through mediation. If the dispute is not settled and the investor escalates the disagreement into a "legal" dispute by formally seeking recourse to arbitration or litigation, dispute mitigation gives way to dispute management. The Guidelines focus on the dispute prevention and mitigation phase.[2]

Comments

***Republic of Korea:** The Working Group should consider the de facto timeframe of the dispute and advantages and disadvantages that would follow therefrom. While the current draft defines dispute prevention as "handling of a grievance of a foreign investor before it devolves into a disagreement framed in legal terms", a great number of disputes "devolve into a disagreement" framed not only in legal terms but also in non-legal terms, for instance, in the form of media coverage, various complaints and actions. Therefore, the current draft should reflect such possibilities and opt for a*

[2] See World Bank, Managing Investor Issues through Retention Mechanisms (2021), p. 8.

broader definition to include diversified methods to effectively mediate and prevent possible arbitration.

6. The Guidelines are intended to guide States and regional economic integration organizations (REIOs) that wish to set up and implement a coherent and effective dispute prevention and mitigation system (reference to "States" in the Guidelines shall include REIOs). As a non-prescriptive document, the Guidelines do not contain specific recommendations nor aim to list best practices, because whether and how to implement a dispute prevention and mitigation system falls under the sovereign regulatory powers of States. Accordingly, it is entirely left to Governments to consider and implement the measures listed in the Guidelines, taking into factors such as the organisational structure of the State or government and ways to address investor's rights and obligations. An effective dispute prevention and mitigation system could result in the attraction and retention of foreign investments, as it would demonstrate the State's commitment to risk management, stability and maintaining a healthy relationship with investors.[3]

7. Section A of the Guidelines provides an introduction and explains its purpose and scope. Section B discusses the various strategies and measures adopted by States to improve communication with investors. Section C focuses on the need for coordination among governmental and related agencies, including information sharing and identifying or establishing a coordination body. Section D addresses coordination and cooperation with other governments. Section E deals with issues that arise with regard to dispute prevention and mitigation and finally, Section F contains a list of reference material, in particular, those prepared by international organizations.

Comments

Argentina: *Some of the approaches in the draft guidelines exceed the scope of dispute prevention and mitigation mechanism and touch upon regulatory powers of the States. It would be necessary to take into account the need to consider the particularities of each State's organization, such as the federal character of the State, the appropriate balance between States and investors, as well as the obligation of the latter to comply with the local regulations.*

B. Communication with investors

8. Effective communication with investors is key to dispute prevention and mitigation. Investors should be able to contact competent governmental or related agencies to address any grievances that arise with regard to their investment. In general, it would be crucial to foresee an effective communication channel with investors throughout the lifecycle of their investment.

9. Effective communication with investors can be achieved by providing easy access to relevant information, by engaging investors in policy discussions and by operating an investor grievance mechanism. Simply providing information may not always suffice. For example, political decisions may need to be explained and conveyed differently. It may be necessary for high-level or senior officials to be involved in the communication in addition to working-level support, as high-level engagement can enhance the credibility and seriousness of the Government's commitment to maintain a constructive relationship with investors.

Comments

United States: *It may be useful to note that governments may need to high-level senior engagement in addition to providing communication through the working level*

[3] See World Bank, Retention and Expansion of Foreign Direct Investment, Political Risk and Policy Responses (2019), pp. 41–43.

support. (e.g. simply providing information may not be sufficient; political decisions may be required to effectively communicate.)

**. [Article 22.1 of the Investment Facilitation for Development (IFD) Agreement[4] of the World Trade Organization (WTO) suggests the establishment of one or more focal points or appropriate mechanisms to respond to queries from investors and potential investors as well as to assist them in obtaining relevant information from competent authorities.][It may be useful to establish one or more focal points or appropriate mechanisms to respond to queries from investors and potential investors as well as to assist them in obtaining relevant information from competent authorities.]

Comments

Argentina: *Doubts about including reference to the IFD Agreement since it has yet not entered into force.*

Brazil: *Foreign investors should have easy access to information about States investment legislation and policies, whether in the pre-establishment or post-establishment phase. Furthermore, Brazil would like to emphasize the importance of establishing a one-stop online portal to facilitate communication between States and foreign investors. The single online portal expedites the communication and prevents multiple responses from different governmental agencies that might confuse the foreign investor and may lead to a dispute. Therefore, Brazil considers important the reference made to the IFD agreement in the document, notably the part which encourages the use of a single information portal and suggests "that the contact information of focal points or other appropriate mechanisms to respond to inquiries from investors and to assist them in obtaining relevant information about government measures are included in the single information portal".*

United States: *References to provisions of the Investment Facilitation for Development (IFD) Agreement should be included as support for practices that States currently follow or may adopt in the future. The IFD is a new instrument for which there is no practice. As such, it is premature to use it as an example of an instrument that successfully promotes dispute prevention and mitigation. We believe that references to the Systemic Investment Response Mechanism (SIRM) should be treated similarly, given that it also does not seem to be currently incorporated by States into their practice. UNCITRAL guidelines may be more useful if they reflect concrete examples of demonstrated success, so to the extent these two initiatives represent State practice, that link should be made clearer.*

World Bank*: The inclusion of focal point, and grievance handling lead agency in the IFD is in fact based on the successful experience of many countries in this area. Regarding the comment on SIRM, we suggest removal of the acronym SIRM through the document – and replacing it simply with grievance management/ dispute prevention and/or investment retention mechanisms. The acronym is confusing and somehow suggests a very narrow/limited approach to dispute prevention and investment retention. The important point is, in most cases States are not calling their systems/mechanisms SIRM - they may call it grievance mechanism, aftercare, high-risk issue handling, part of public-private dialogue and so on – but the functions being carried out are towards dispute prevention and investment retention, relying on good practice operating procedures that have been documented in the World Bank publications and reflected in these guidelines.*

Note to the Working Group

Considering that the Investment Facilitation for Development (IFD) Agreement was finalized at the 13th Ministerial Conference of the World Trade Organization (WTO)

[4] Text of the IFD Agreement is available at https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/MIN24/W25.pdf&Open=True.

in late February and added to Annex 4 of the WTO Agreement,[5] *the Working Group may wish to consider whether references to the IFD Agreement is appropriate. Alternatively, it could be included in the reference material to the draft guidelines, while retaining the contents thereof. Recent development can be found here: https://www.wto.org/english/news_e/news24_e/infac_19mar24_e.htm.*

1. Easy access to information

10. Investors should be able to easily access information about investment policy matters, including relevant laws and regulations, which is vital to facilitate their investment and expansion. [During the pre-establishment phase, prospective investors need information on how to establish their investment and the regulatory framework that will govern their investment.[6] They need information about the applicable laws and compliance procedures as well as governmental or related agencies that investors may need to interact with throughout the lifecycle of their investment (referred to generally as "competent governmental agency or agencies" in the Guidelines). During the post-establishment phase, effort should be made to make information about any changes to the regulatory framework publicly available, which would allow investors to take decisions on whether to expand or diversify their investment. In case of any complaint, investors would need information on the competent governmental agency and ways to submit such complaints.] Contact information of focal points or other appropriate mechanisms to respond to inquiries from investors and to assist them in obtaining relevant information about government measures could be included in a single information portal.[7] However, facilitating access to and providing such information should not from any basis for investors' expectations, as they would need to conduct extensive due diligence prior to making the investment, including the economic, technical, legal analysis of the host State.

Comments

Argentina: *It is neither practical nor feasible to identify any public agency in advance whose actions or measures may affect investments or investors. Some of the contents do not necessarily fall within the scope of these guidelines. The available information should not be considered as exhaustive and investors still have a duty to conduct an extensive due diligence as part of the process of economic-technical-legal analysis of the relevant State. Such available information should not be considered as such as a basis of any expectations from investors.*

European Union and its member States: *The fourth sentence could be seen as too prescriptive and could be interpreted as an obligation from States to individually notify investors about any change to the regulatory framework. It is suggested that broader wording be used instead.*

Republic of Korea: *There is the need for access to relevant information by investors for the sake of investor protection and transparency. However, Korea also stresses the need to secure practicality in providing such accessibility and not to excessively*

[5] Ministers representing 123 WTO members issued on 25 February 2024 a Joint Ministerial Declaration marking the finalization of the Investment Facilitation for Development (IFD) Agreement and made it available to the public. Ministers also issued a submission asking for the 13th WTO Ministerial Conference (MC13), taking place in Abu Dhabi on 26-29 February, to incorporate the IFD Agreement into Annex 4 of the Marrakesh Agreement Establishing the WTO. Participants represent three-quarters of the WTO membership, including close to 90 developing economies and 26 least-developed economies. Available at https://www.wto.org/english/news_e/news24_e/infac_25feb24_e.htm.

[6] For instance, Brazil's Direct Investments Ombudsman serves as a first point of contact for prospective investors, where they may inquire about legislation, procedural and regulatory requirements. Available at https://oid.economia.gov.br/en.

[7] Article 6 and 7 of the IFD Agreement lists the type of information to be made available and article 8 encourages the use of a single information portal to do so. It is suggested that the contact information of focal points or other appropriate mechanisms to respond to inquiries from investors and to assist them in obtaining relevant information about government measures are included in the single information portal.

burden relevant authorities in order to ensure effective functioning and governance, especially in the pre-investment phase. With regard to the post-investment phase, Korea is of the view that the obligation to provide information could be unnecessarily burdensome, particularly when governments provide and notify each investor of changes in domestic regulations, policies or guidelines. In this regard, Korea would like to suggest substituting "investors need to be informed…" in paragraph 10 with "States may endeavour to inform investors about…," which would alleviate a possibly excessive burden on the States.

11. In some jurisdictions, technology has been utilized to enhance communication with investors.[8] For example, a one-stop online portal has been created to facilitate communication with investors.[9] Such portals allow investors to access information about regulatory requirements, to obtain responses to frequently asked questions, to contact competent governmental agencies and to file grievances and monitor progress. Live chatbots have also been incorporated into the portal to respond to questions or to direct them to the competent governmental agency or officials.

12. [Paragraphs 6 and 7 of the proposed IFD Agreement lists the type of information to be made available and paragraph 8 encourages the use of a single information portal to do so. It is suggested that the contact information of focal points or other appropriate mechanisms to respond to inquiries from investors and to assist them in obtaining relevant information about government measures are included in the single information portal.]

Comments

United States: *It may be possible to combine paragraphs 10 and 12 (see footnote 7).*

2. Engaging investors in policy discussions

13. Investors may be impacted by changes to the regulatory framework as well as the introduction of specific measures. Being proactive and involving the investors in the policy discussions leading to changes in the regulatory framework or introduction of measures to the extent possible are likely to reduce grievances of investors and mitigate claims being raised at a later stage.

Comments

Republic of Korea: *Korea is hesitant on paragraph 13 relating to emerging policy concerns such as public health, climate change and sustainable development as these areas are closely related to the exercise of sovereignty. In this sense, governments have discretion on how to formulate their policies and prioritize their nationals' interests and concerns. For instance, in a crisis such as the Covid-19 pandemic, governments might need to be able to utilize their power to the extent possible to rapidly and effectively respond to the situation and to suspend rights of investors under certain circumstances. In this regard, Korea is of the view that whether to include this obligation in the draft is a matter which should be accorded careful consideration.*

World Bank: *Many of the comments suggest some misunderstanding on the legal implications of these guidelines. These are not generating obligations – and this would be important to clarify upfront in these guidelines. The point on early*

[8] For instance, Greece (Investor's Support Service, available at www.enterprisegreece.gov.gr/en/invest-in-greece/investment-support-services and Investor Ombudsman, available at www.enterprisegreece.gov.gr/en/invest-in-greece/investors-ombudsman), Jordan (invest Jordan, available at https://invest.jo/home-page), United Kingdom of Great Britain and Northern Ireland (Invest in the UK, available at www.great.gov.uk/international/investment/), Republic of Korea (Invest KOREA, available at www.investkorea.org/ik-en/index.do?clickArea=enmain00002), and Qatar (invest Qatar, available at www.invest.qa/).

[9] See the European Union "Access2Markets" portal (available at https://trade.ec.europa.eu/access-to-markets/en/home), which provides information to investors on trade, investment and procurement for their activities in third countries.

engagement is merely a suggestion on practice to follow where feasible- it is by no means intended to limit the State's sovereign right to regulate.

14. Some jurisdictions have adopted pre-emptive strategies to avoid grievances of investors by identifying investors that may have concerns and consulting them to address any possible concerns. Gradual implementation of new laws or regulations can also pre-empt grievances by providing investors sufficient time to make adjustments.

Comments

Argentina*: It is neither practical nor feasible to identify in advance investors and investments that may be affected by certain national policies. More generally, the guidelines address the regulatory powers of the States, exceeding the scope of the prevention and mitigation of disputes.*

15. Other jurisdictions have introduced consultation procedures to seek inputs from interested parties, including investors before changes are made to laws or regulations and before introducing specific measures that may potentially affect the interests of such interested parties.[10] This is because such an inclusive process, which also fosters transparency and enhances public engagement in the rule and policy-making process, can address grievances. This could be facilitated through a public-private dialogue platform[11] or in conjunction with the performance of a regulatory impact assessment[12] of the proposed law or regulation.[13]

Comments

United States: *While it is important to engage investors when policy changes are considered and made, as drafted, paragraphs 14 and 15 suggest that investors should have some kind of special or privileged access to policy making. It seems more appropriate to promote more transparency and public engagement by all interested parties in the general regulatory or policy-making process, including appropriate notice of changes and opportunities to comment.*

European Union and its member States: *In relation to the first sentence of paragraph 15, the language used implies that consultation procedures have been introduced in certain jurisdictions to specifically engage investors before regulatory changes.*

[10] Article 10.3 of the IFD Agreement, which suggests that investors should be given a reasonable opportunity to comment on proposed laws, regulations or measures and that comments received should be considered, to the extent practicable and in a manner consistent with the respective legal system. See, for instance, the Law on the Business Ombudsman of Georgia (2016), article 9 (Analysis of the legislation of Georgia), available at www.ilo.org/dyn/natlex/docs/ELECTRONIC/104528/127562/F-2073887338/ombudsman.pdf; and Strategic Partnership, Trade and Cooperation Agreement between the United Kingdom and Moldova (2021), article 340 (Transparency), available at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/6069/download.

[11] For instance, the Private Sector Feedback Platform and the Public Consultation Platform operated by the National Competitiveness Center in the Kingdom of Saudi Arabia, available at www.ncc.gov.sa/en/Visuals/Pages/default.aspx and www.ncc.gov.sa/en/Istitlaa/Pages/default.aspx.

[12] Regulatory impact assessment refers to a systemic approach to critically assessing the positive and negative effects of proposed and existing regulations and non-regulatory alternatives. It encompasses a range of methods and is an important element of an evidence-based approach to policy making. See OECD, Regulatory Impact Assessment, OECD Best Practice Principles for Regulatory Policy (2020), available at www.oecd.org/gov/regulatory-policy/regulatory-impact-assessment-7a9638cb-en.htm.

[13] For instance, the Business Regulatory Review Agency in the Republic of Zambia has the mandate to perform regulatory impact assessment of the proposed policies on how they affect the business environment (Business Regulatory Act No. 3 of Zambia (2014), section 6), available at www.parliament.gov.zm/sites/default/files/documents/acts/Business%20Regulatory%20Act%20No.%203%20of%202014.pdf.

Nevertheless, the texts referred to in footnote 7 do not refer to investors explicitly but include a broader category of "interested parties" or "non-State actors".

16. [In this respect, measures adopted for dispute prevention may be complementary to article 10.3 of the IFD Agreement, which suggests that investors should be given a reasonable opportunity to comment on proposed laws, regulations or measures and that comments received should be considered, to the extent practicable and in a manner consistent with the respective legal system.]

3. Investor grievance mechanism

Comments

United States: *Creating a parallel structure within the government may not always be the most practical way to address grievances. It seems that clear processes and opportunities to appeal a decision generally is important so that a decision is appropriately ripe for review as an international claim. A separate process that may not be able to remedy an improper government measure may not ultimately add any real benefit to dispute mitigation. In other words, it may not simply be ensuring that an investor can voice its grievance, but that public entities are equipped to provide some opportunity to remedy a measure or decision that may be improperly made.*

17. Timing is an important factor in preventing a grievance from escalating into a dispute. The earlier problems are addressed, the higher the likelihood for a solution. A grievance mechanism provides investors who consider themselves to have been negatively affected with a process to voice their concerns. It allows investors to lodge complaints, for example, with regard to the denial of a permit by a municipal authority or about possible negative consequences of proposed changes to a regulation.[14]

Comments

Argentina: *This section should explain how investor grievance mechanisms would be combined with dispute resolution systems provided for in the respective treaties, laws or contracts. Argentina considers that it is necessary to clarify this situation.*

World Bank: *Indeed, the focus of grievance mechanisms from an institutional standpoint, is to boost the capacity of public entities to detect investor grievances and solve them. If the mechanism is not suitably equipped it will not function well- thus the focus is on equipping it and building capacity. It is not a parallel new structure*

[14] Countries where the World Bank Group assisted in the setting up of an investor grievance mechanism include Brazil (Direct Investment Ombudsman within the Foreign Trade Chamber of the Ministry of Economy, Decree 8.863 of 2016, modified by Decree 9.770 of 2019 and GECEX Resolution N. 43 of May 2020, https://oid.mdic.gov.br/en); Ethiopia (Investor Grievance Management unit within the Ethiopian Investment Commission, Articles 25-27 of the Investment Proclamation 2020 and official notification (ኢ/ሰ/ኮ23/m48/6/133) of January 16, 2019, https://investethiopia.gov.et/resources/publications/); Georgia (Business Ombudsman, Law of Georgia on Business Ombudsman of Georgia No. 3612-IIS, 28 May 2015, https://businessombudsman.ge/en); Jordan (Grievance Committee within the Ministry of Investment, Article 44 of the Investment Environment Law 21 of the Year 2022, Articles 181-186 of the Investment Environment Regulation No (7) for the year 2023, https://www.moin.gov.jo/En/List/Laws); Rwanda (Dispute Mitigation Division within the Investor Aftercare Department, Articles 15(3) and 16(4) of the Law on investment promotion and facilitation N° 006/2021 of 05/02/2021 and Article 7(l) of the Law no 057/2023 of 17/11/2023 governing Rwanda Development Board, https://rdb.rw/invest/ and https://www.minijust.gov.rw/index.php?eID=dumpFile&t=f&f=86189&token=db7b7a84e76a6720ea23e2e649b7d90e41f26ed7); and Vietnam (Taskforce team led by the Director General of the Foreign Investment Agency, Part III.4 of Resolution No. 50-NQ/TW regarding the orientation for refinement of institutions and policies on and improvement of quality and efficiency of foreign investment cooperation until 2030, https://lawnet.vn/en/vb/Resolution-50-NQ-TW-2019-improvement-of-policies-to-efficiency-of-foreign-investment-7B188.html). See World Bank, supra note 3, pp. 15-19.

necessarily, but most often a set up within the existing structures, strengthened with capacity, resources and political support. It would be good reinstate some of the language from the earlier drafts to emphasize this point.

We do not suggest combining dispute resolution with grievance mechanisms, primarily to ensure the efficiency, effectiveness and to meet the "preventive" goal of grievance mechanisms. It is up to the state parties to determine the final form. However, ideally any grievance mechanism complements existing dispute resolution mechanisms (in treaties, laws, contracts). States may choose to refer to grievance mechanisms in their treaties, laws and contracts. At institutional level- there may be a single grievance mechanism to handle all these grievances or in some cases an additional specialized one may be set up (e.g., for a specific contract). It is preferable not to make such grievance mechanism a mandatory forum to be "exhausted", but an option that can be utilized by investors.

18. In some jurisdictions, grievance mechanisms are established by law or regulation,[15] while in others, they are established by less formal instruments, such as an administrative instruction or as an internal government procedure.[16] The relevant instruments establishing the mechanism often specify the scope of grievances to be handled,[17] the process for submitting a grievance, the internal procedure for handling them, and the time frames for the overall process.[18] Time frames may be adjusted on a case-by-case basis, taking into account, for example, the complexity of the issues. In this case, investors are informed about the expected time frame and given regular updates.

19. An investor may be required to utilize other administrative procedures prior to accessing the grievance mechanism. The investor may also be requested to provide additional information for the complaint to proceed. If the investor does not comply with the procedural requirements or does not provide the necessary information, the complaint may be dismissed.

20. The grievance mechanism would usually require the outcome to be communicated to the investor and the competent government agency to follow-up and implement any decision or recommendation resulting therefrom. If the investor is not satisfied with the outcome, there may be a possibility to appeal. If the grievance cannot be handled effectively, for example, due to the lack of cooperation among the governmental agencies or the political sensitivity of issues, it may be brought to the attention of a

[15] See, for instance, the Rules on Handling Complaints of Foreign-Invested Enterprises of the People's Republic of China (2020), Chapter IV (Administrative System of Complaint Handling), available at https://fdi.mofcom.gov.cn/EN/complaintsDetial.html?id=21 and Coordination and Response System for International Investment Disputes, Law No. 28933 of Peru (2006), available at https://docs.peru.justia.com/federales/leyes/28933-dec-15-2006.pdf.

[16] See World Bank, supra note 2, p. 12. For example, the Presidential Directive on Investor-State Dispute Prevention and Settlement of the Republic of Korea imposes an obligation on governmental authorities to notify the Ministry of Justice in the case of pending or potential investment disputes. Furthermore, Korea, since 1999, has implemented the Foreign Investment Ombudsman System under the auspices of the Ministry of Trade, Industry and Energy allowing relevant ministries and agencies to work closely together to resolve various grievances of foreign investors and foreign-invested enterprises.

[17] See Section V of the Law of Egypt No. 72 (2017), available at https://investmentpolicy.unctad.org/investment-laws/laws/167/egypt-investment-law-, which establishes the grievance committee to examine complaints with regard to issuance of approvals, permits and licences.

[18] For instance, Resolution No. 146 adopted by the Council of Ministers of Belarus (2012), available at https://investmentpolicy.unctad.org/investment-policy-monitor/measures/383/adopts-a-procedure-for-early-settlement-of-investment-disputes-; Rules on Handling Complaints of Foreign-Invested Enterprises of the People's Republic of China (2020), Chapter III (Complaint Handling) available at https://fdi.mofcom.gov.cn/EN/complaintsDetial.html?id=21; and the Model Cooperation and Facilitation Investment Agreement of Brazil (CFIA) (2016), article 23 (Dispute Prevention), available at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/4786/download.

higher political authority (for example, an inter-ministerial committee or the office of the Prime Minister or the President).[19]

21. The experience of the World Bank in supporting governments set up investor grievance mechanisms may be useful. The World Bank suggests that a minimum institutional infrastructure should be in place to enable governments to identify, track and manage grievance as early as possible.[20] It further suggests the empowerment of a government agency and the establishment of an inter-governmental mechanism for systematically addressing grievances. The government agency would be responsible for bringing grievances to the attention of high-level government bodies to address the issues before they escalate further.[21] The World Bank also suggests the establishment of an early alert mechanism for the government body to become aware of grievances as soon as they arise and a tracking tool to monitor whether the grievance is resolved [and how much investment is retained and expanded as a result]. It further suggests problem-solving methods (leveraging information sharing tools, analysis of legal and economic implications of grievances and standard coordination/operating procedures) and in case a solution cannot be reached at a technical level, a mechanism to elevate the issues to higher political levels.[22]

Comments

***United States**: Reference to the SIRM is interesting but seems aspirational. Is there an example or data that can be provided that shows how SIRM has been used? Other systems for employing political authority to settle or resolve disputes have existed in the past; these might lend themselves to intergovernmental forum roundtable discussions, as to why the need for such political authority has been so challenging to achieve to date.*

***CIL:** The third and fourth sentences of paragraph 21 ("It entails . . . escalate further.") suggest that an appropriately empowered government agency can be responsible for bringing investor grievances to the attention of high-level government bodies. In our view, this statement would benefit from clarification. A question could be raised as to the practical means through which a single government agency could become aware of grievances which may arise in connection with other government agencies, such as line ministries. On the fifth sentence of paragraph 21, we have concerns about the assertion that an early alert mechanism could track "how much investment is retained and expanded". First, it is not clear to us, even on the World Bank's own guidance, how States would be able to do this in a meaningful and accurate way. Research has shown how difficult it is for States, even those with developed economies, to maintain accurate FDI figures for inflows, outflows and stocks. Indeed, there are wide discrepancies in FDI data even among organisations which routinely track FDI (e.g., World Bank, IMF and domestic investment agencies). Second, doubts may be expressed about the methodological basis for correlating the resolution of a grievance — which, even if it had not been resolved, may not have led to a formal dispute — with the investor's decision to remain in the country or expand its investment there. In summary, we would suggest that the claim in the fifth sentence of paragraph 21 lacks empirical basis and is, in any case, not central to the prevention and mitigation of disputes and should, therefore, be dropped.*

***World Bank**: Reference to SIRM should be replaced with investment retention/grievance/dispute prevention mechanism. These terms have been inter-changeably used in countries- but core elements adopted have been the same. Regarding reference to retention/expansion- indeed there are challenges around FDI*

[19] The Ethiopian system serves as an example. Issues not solved by the Ethiopian Investment Commission are escalated to the Ethiopia Investment Board, an inter-ministerial body. See articles 25 to 27, Proclamation No. 1180/2020 (2020), available at https://investmentpolicy.unctad.org/investment-laws/laws/318/ethiopia-investment-proclamation-no1180-2020. See also World Bank, supra note 2, p. 16.

[20] See World Bank, supra note 3, pp.39–45.

[21] Ibid., p.43.

[22] See World Bank, supra note 2, p.12.

statistics as well as establishing correlation and causality with various outcomes. Nonetheless, surveys and research show the factors that affect investment attraction and retention. Experience also shows that incorporating monitoring and evaluation metrics within institutional set ups can improve their performance. Thus, though measurement may not be perfect, it is an important driver to get public agencies aligned on key development objectives (for example, jobs, investment, FDI targets are set up by agencies – not based on causality or even corelation). From the perspective of drafting these Guidelines, if the Working Group prefers to remove the square bracket-ed text (that is, [how much investment is retained and expanded as a result]), this would be acceptable.

22. [In this respect, measures adopted for dispute prevention may be complementary to article 22.3 of the IFD Agreement, which states that the focal point or appropriate mechanism could also assist in resolving problems of investors or potential investors and recommend measures to improve the investment environment.]

4. Early identification of differences with investors and stakeholders through reliance on alternative dispute resolution services other than arbitration

**. Alternative dispute resolution techniques such as mediation can prove very effective in preventing investment disputes. Mediation-based processes are indeed often relied on for the early identification of differences between parties to a transaction or a project and they provide with efficient tools to overcome them.[23]

Comments

Jamaica: *The OHADAC Regional Arbitration Centre (CARO Centre) recently launched a service, the "Conflict Management Committee" (CMC), an innovative dispute prevention and conflict management process. The CMC can be described as a variant of dispute board, which differs from the current use of this mechanism in two ways. First, in addition to the traditional owner/contractor issues (technical and commercial) managed by a dispute board, the CMC also monitors and assists the resolution of stakeholder grievances based on the project's environmental and social impact. For the first time, an ADR Centre proposes a framework incorporating social and environmental considerations, in addition to traditional technical and commercial issues, into the mission of third party-neutrals working on the ground. Also, when implementing its mission, the CMC favours early stakeholder engagement, dispute avoidance planning, horizon scanning, active dialogue and negotiated solutions over traditional decision-making methodology. In practice, the CMC addresses two pressing concerns for States. First, it has the potential of efficiently preventing investor-State arbitration claims from being brought against them by foreign companies in the context of large infrastructure and energy projects. In this context, it should be reminded that the failure to obtain and maintain social acceptance to operate is increasingly at the root of Investor-State disputes. In addition, it ensures that the environmental and social impacts of the project are monitored, while giving a real voice to vulnerable stakeholders, including indigenous communities and workers on construction sites, whose rights are insufficiently taken into account within the ISDS framework. As a Caribbean State, we cannot stress enough the importance of relying on tools that effectively provide for the urgent imperative of fighting climate change, as well as preserving our natural environment and the well-being of our populations.*

[23] The OHADAC Regional Arbitration Centre (CARO Centre) has introduced a service known as the Conflict Management Committee (CMC), aimed at preventing investor-State arbitration claims by foreign companies in large projects and ensuring monitoring of environmental and social impacts while amplifying the voices of vulnerable stakeholders, see https://www.carohadac.org/services/conflict-management-committee.html.

C. Coordination among governmental and related agencies

23. Effective communication as well as coordination among governmental and related agencies are key to dispute prevention and mitigation. Depending on the government structure and the type of investment at stake, a number of governmental and related agencies (including those at sub-national level, such as provinces, states, and municipalities) may need to be involved in the coordination, including those that negotiate and conclude investment instruments (see para. 4 above), those whose measures may have an impact on investors, and those with a role in preventing and mitigating disputes. However, it may be difficult and complicated for States with large economies and different levels of government approval to achieve such coordination and communication. This would likely require extra efforts to overcome such obstacles, for example, the better use of technology for information sharing, training and capacity building to facilitate interagency understanding and cooperation.

Comments

Argentina: *These paragraphs do not take into account the particularities of the state structure. In the case of federal States, each level of government has its level of autonomy for decision making. In that sense, efforts should be made to take into account such particularities.*

United States: *We agree in theory with the general point that officials at different levels of government who deal with foreign investors should be aware of international investment commitments and commitments made by the government to investors and that promoting awareness requires better coordination and communication within the government for agencies or entities that deal with foreign investors. That said, such coordination and communication can be difficult for countries with large economies and different levels of government approval and such complications should be acknowledged.*

24. For instance, an investor may apply for a permit to a municipal authority to conduct its operations. If the municipal authority rejects the application despite central government's assurances, this may lead to a grievance. In that case, the municipal authority would need to be involved in the coordination as it would likely be the first to be contacted by the investor and made aware of a potential dispute. If the grievance relates to an investment instrument, the agency responsible for negotiating the instrument would need to be involved in the coordination because that agency's knowledge about the instrument and the legal obligations therein will be key in assessing the problem and identifying potential solutions. This may be particularly so for investment contracts as the context of the contract negotiations may be crucial in finding a solution.

25. The following outlines means to ensure effective coordination among governmental and related agencies mainly by sharing of information and identifying or establishing a coordination body.

1. Information sharing among governmental and related agencies

26. Sharing of information among governmental and related agencies is a key aspect of dispute prevention and mitigation. It not only ensures that the relevant agencies are informed of the circumstances and underlying issues, but also ensures consistency and coherence at the different levels of investment policy making.[24]

[24] See Islamic Development Bank – UNCTAD Guiding Principles for Investment Policies, Principle 1, available at https://investmentpolicy.unctad.org/publications/1276/islamic-development-bank---unctad-guiding-principles-for-investment-policies.

27. Information about [model] investment treaties, [standard] investment contracts and [model] dispute settlement clauses[25] should be shared among the agencies to ensure consistent approaches with regard to investment instruments, including substantive guarantees therein. This could potentially reduce the risk of disputes as inconsistent investment instruments may be the cause of grievances.

Comments

Argentina: *It is not fully clear how the circulation of Model BITs or standard investment contracts and the model clauses, which may be far from what was finally agreed upon, would contribute to the mitigation of disputes. On the contrary, since perhaps these model texts or standardized are not the ones that are finally adopted, perhaps the opposite effect will occur.*

28. Information sharing could also ensure coherence in measures taken by the agencies as well as in handling grievances. Given the rather long span of investments, conflicting measures or conduct by governmental or related agencies could be a political risk for investors. To address this problem, a knowledge management system has been established in some jurisdictions to ensure the transfer and preservation of knowledge of public officials dealing with investors and to keep track of solutions to resolve prior grievances. Information sharing provides a vehicle for properly informing peer agencies about investment-related issues and for promoting interaction among the staff members whose collaboration may later be sought in the context of handling grievances.[26]

29. There are various means of sharing information among governmental and related agencies, including online platforms, handbooks, and capacity building events where public officials involved in foreign investments share information on investment policies, developments and current disputes.[27] Through these means, public officials may become aware of the potential consequences of their decisions, understand the underlying investment framework, and build the capacity to better manage investment-related inquiries and grievances.[28]

CIL: *With respect to the first sentence of paragraph 29 ("There are . . . disputes."), we suggest that a better reference for footnote 27 would be with respect to concrete State practice involving the adoption of a handbook, such as the recent adoption by the Viet Nam of a handbook on investment treaty obligations for government officials.*

2. Identifying or establishing a coordination body

30. Identifying or establishing a dedicated unit within an existing body or creating a new entity tasked with coordinating governmental and related agencies is crucial for preventing and mitigating disputes. [Referred to as the lead agency, a coordination body is also a core component of the dispute prevention mechanism.[29]]Moreover,

[25] See article 7(1) of the Energy Charter Conference: Model Instrument on Management of Investment Disputes (available at https://www.energychartertreaty.org/fileadmin/DocumentsMedia/Model_Instrument/Model_Instrument.pdf), which states that a model of the investment dispute settlement clauses should be drafted and provided for in negotiations of future investment agreements and contracts with the aim of achieving greater consistency and standardization. Peru sets out criteria for the formulation of dispute settlement clauses (Law No 28933, article 13, available at https://docs.peru.justia.com/federales/leyes/28933-dec-15-2006.pdf); the Dominican Republic provides that the lead agency has the power to propose and review dispute settlement clauses or provisions to be included in prospective investment instruments (Decree No.303-2015, article 4, available at https://studylib.es/doc/5157825/decreto-sistema-de-prevenci%C3%B3n-de-controversias-no.-303-15).

[26] See World Bank, supra note 3, p. 66.

[27] Experiences from Korea highlight the usefulness of handbooks and booklets to complement lectures and trainings (see A/CN.9/WG.III/WP.179, p. 5). For the experience of Viet Nam, see https://asean.org/viet-nam-finalises-handbook-for-implementing-international-investment-commitments/.

[28] See APEC Handbook on Obligations in International Investment Treaties (2021).

[29] See World Bank, supra note 2, p. 11.

optimizing communication within existing government structures could also streamline processes.

Comments

Republic of Korea: *Korea recognizes the need for efficient management of the dispute prevention framework and inter-governmental cooperation. For reference, Korea has implemented the Foreign Investment Promotion Act, establishing the Foreign Investment Committee under the Ministry of Trade, Industry and Energy to deliberate on matters concerning integration and coordination of the measures by competent Ministries to enhance the environment for foreign investment, and an inter-governmental Task Force, comprising the Ministry of Justice, Ministry of Foreign Affairs, Ministry of Trade, Industry and Energy, and other relevant authorities to effectively and substantially manage pending or potential investment disputes. Yet, the details regarding how to establish and operate the mechanism should be at the discretion of governments.*

United States: *It is unclear why creating a separate coordination body for investments is better than having better communication within the existing government structures. Additional layers can lead to additional bureaucracy. Ensuring exchanges across agencies may be more appropriate in particular economic sectors in which there is much foreign investment but the authority for regulating the sector may be diffuse.*

CIL: *The SIRM is not the only approach that States can rely upon. Other organisations, for example, the Energy Charter Secretariat and UNCTAD among others, also provide relevant guidance for States, yet we note that these approaches are not mentioned in the text at all but only listed in the reference materials in the end. This seems to us an unfortunate omission and places undue weight on the World Bank's SIRM approach.*

World Bank: *Fully agree with the Korean delegation. The details of the mechanism should be left to the States. Experience of UNCITRAL, World Bank - are merely suggestions and meant to inform States.*

The World Bank's experience on grievance management/investment retention/dispute prevention is certainly not the only approach. The guidelines extensively refer to approaches of several organizations.

31. In identifying or establishing a coordination body, jurisdictions have generally taken one of the following three approaches. One approach is to create a new autonomous agency responsible for coordination or to establish it within a ministry or a governmental agency (for instance, within the investment promotion agency[30]). Under this approach, the coordination body may also function as the channel of communication with investors. Another approach is to distribute dispute prevention and mitigation functions among a number of agencies, with each agency designated a specific role or empowered to handle certain grievances. In such a structure, it would be prudent to designate the agency responsible for the communication with investors and the intra-governmental cooperation. A hybrid approach is to establish a committee or commission composed of governmental and related agencies, including ministries and specialized entities, with one of the agencies performing the secretariat function.

32. As mentioned, information sharing is one of the functions to be carried out by the coordination body. It would facilitate communication and cooperation among governmental and related agencies. The coordination body may also act as a central repository of investment instruments and relevant court or arbitral decisions interpreting such instruments. Such a function would allow the coordination body to provide analysis of, for example: (i) economic sectors which are most likely to give rise to

[30] For Ethiopia, the investor grievance management mechanism is part of the Ethiopian Investment Commission, available at https://iaip.gov.et/eic/. In Rwanda, it is part of the Reinvestment and Investor Aftercare Department within the Rwanda Development Board, available at https://rdb.rw/. See World Bank, supra note 2.

disputes; (ii) recurring grievances or disputes; (iii) key legal obligations contained in investment instruments; and (iv) gaps in domestic legislation for compliance with legal obligations contained in investment treaties.[31]

33. The coordination body may also be tasked with providing advice to governmental and related agencies on how to handle grievances of investors. This would ensure that agencies faced with investor grievances have a constant communication channel with the coordination body, which may suggest different problem-solving methods. For example, a municipal authority faced with a grievance for the first time would be able to rely on the coordination body to recommend ways to handle the grievance.

34. In order to perform its functions, the coordination body may be authorized to collect information from competent governmental agencies (as well as from investors),[32] request the cooperation of the relevant agencies including their officials, issue recommendations and monitor their implementation. It would be advisable to clearly set forth the competence of the coordination body, whether it is limited to certain types of investors, certain sectors or industries, or certain types of issues (political risks/operational risks, grievances/disputes). The lead agency collects data, identifies patterns concerning the sources of political and operational risks affecting investment, and quantifies retained, expanded, or lost investments as a consequence of addressing such risks.[33]

35. As noted, the operational structure of the coordination body may vary depending on the jurisdiction (see para. 31 above). However, it is important that its legal status, position in the government hierarchy, staffing structure, budget and reporting mechanism, among others, are clearly set forth in the instrument establishing the coordination body.[34] In some jurisdictions, it was found that an independent entity playing an oversight role over the administration, as opposed to a collaborative role with and within the administration, has led to more confrontation and limited its effectiveness to address the regulatory risks derived from government conduct.[35]

36. A coordination body with centralization of power and authority may raise concerns about conflict of interests and lack of accountability. A reporting mechanism may be put in place to address such concerns and to ensure the transparency of its activities.[36] Such a mechanism could also help avoid the coordination body being perceived as biased towards government agencies. Establishing the coordination body

[31] For example, the Dominican Republic established DICOEX as the lead agency, which monitors investor complaints and analyzes disputes to understand which government entities are most frequently implicated. Available at https://www.iisd.org/system/files/2021-10/investment-dispute-prevention-management-agencies-policy-discussion.pdf. Colombia established a committee to be responsible for the identification of difficulties in the investment process, the monitoring of different factors that affect the investment climate and the prioritization and analysis of opportunities for improvement. Available at https://www.iisd.org/system/files/2021-10/investment-dispute-prevention-management-agencies-policy-discussion.pdf.

[32] See article 6(1) of the Regulation on the Business Ombudsman Council of Ukraine (2014), which provides that the Business Ombudsman Council has the right to request and receive from state authorities and others information and documents and other data necessary for processing complaints. Available at https://boi.org.ua/wp-content/uploads/2023/08/boi__cmu_regulation_eng_.pdf.

[33] See World Bank, supra note 2, p. 9.

[34] See article 4 of the Regulations for the Prevention and Handling of International Disputes in the Field of Trade and Investment of the Republic of Costa Rica, which provides a clear outline on the composition of the coordination body, available at www.pgrweb.go.cr/scij/Busqueda/Normativa/Normas/nrm_texto_completo.aspx?param1=NRTC&nValor1=1&nValor2=66133&nValor3=77622&strTipM=TC.

[35] See World Bank, supra note 3, p. 62.

[36] See articles 24–28 of the Rules on Handling Complaints of the People's Republic of China which foresee several reporting mechanisms between local agencies and agencies on a higher level (available at https://fdi.mofcom.gov.cn/EN/complaintsDetial.html?id=21); see article 14.4. (f) of the Investment Cooperation and Facilitation Treaty between the Federative Republic of Brazil and the Republic of India (available at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5912/download), which states that the national focal point/ombudsman has to report its activities and actions to the joint committee, composed of government representatives of both Parties.

as an inter-agency committee or commission comprised of staff members from different agencies could additionally help to disperse the power and authority.

37. In some jurisdictions, the coordination body, in addition to facilitating coordination among the government and related agencies, may act as the focal point for communicating with investors and providing necessary assistance, including through an investor grievance mechanism (see section B above) and for cooperation with other governments (see section D below).[37]

D. Coordination and cooperation with other governments

Comments

Argentina*: The role of any joint committee or commission between States would differ depending on the treaty in question so a case-by-case analysis would be required.*

United States*: This section should be deleted as the committees established under these treaties are not designed to address investor grievances. To the extent that these paragraphs are aimed at the benefits to having clearer treaty standards and obligations, that seems to be a different topic and not directly related to dispute prevention and mitigation.*

CIL*: In this connection, we would note that there are additional avenues that States can pursue in their investment agreements. One such avenue is leveraging the use of economic cooperation support programs that may have been included in existing investment agreements or will be included in future ones (e.g., see Chapter 12 of ASEAN-Australia-New Zealand Free Trade Agreement (2009)). Such programs could be designed or adapted to not only improve the business environment but also to support measures that would help prevent or mitigate investment disputes. Additionally, reference could be made to the proposed Advisory Centre for International Investment Dispute Resolution, whose functions currently include serving as a forum of exchange of information and training on matters of dispute prevention (draft Article 6 of the advisory centre's draft statute).*

38. Establishing and institutionalizing inter-governmental coordination with authorities of other States can help ensure effective cooperation and mutual assistance in dispute prevention or mitigation. Inter-governmental coordination also helps address any perception of bias in favour of the State that an investor may have when formulating a grievance. While in domestic settings any such perception may be addressed by having the grievance handled by a body that is autonomous from the State, in an international investment context, this may be addressed by having the grievances handled by a permanent body.

Comment

European Union and its member States*: In mentioning the benefits of inter-governmental coordination in dispute prevention and mitigation, the notion of perception of bias should also be addressed. Even in domestic settings, having investor grievances addressed by a body autonomous from the State may be important in order to avoid any perception of bias towards the State. That is even more the case in international settings. Providing concurrently for the possibility to domestically address grievances and internationalise these roles, for example via an entity linked to a standing mechanism, would have the advantage of removing any perception of bias towards the State.*

**. One way of achieving such coordination is by setting up a joint committee or commission in investment treaties to promote a regular exchange of information for

[37] See CFIA (2016), article 17 (Joint Committee for the Administration of the Agreement); see also Vietnam's Regulation on Coordination in Settlement of International Investment Disputes (2020).

improving the investment environment.[38] Such a committee can play a critical part in preventing grievances from escalating into a dispute. [Under article 26.1 of the IFD Agreement, focal points or other mechanisms for communicating with investors may be assigned the function of responding to questions from other governments. Article 26.2 of the IFD Agreement mentions the areas of inter-governmental cooperation as being exchange of information and sharing of experiences, exchange of information on domestic investors and the promotion of facilitation agendas with a view to increasing investment for development, including investment in and by micro, small and medium-sized enterprises.]

Comments

Brazil*: It is extremely important to establish and institutionalize intergovernmental coordination with authorities of other States to ensure effective cooperation and mutual assistance in dispute prevention or mitigation. The first avenue to be pursued in this sense is through the designation of focal points or ombudspersons in each State to provide a single interstate channel to exchange information and resolve doubts, questions, complaints, or grievances about the investment framework of each State. As stated beforehand, a single channel of communication provides a fast, coherent, and consistent exchange of information which helps governmental agencies to better understands how the legal system of another State works, preventing misunderstandings about the legislation and operation of measures that might lead to conflict or a dispute. Therefore, Brazil considers relevant the reference made to the IFD Agreement in the document which states that "focal points or other mechanisms for communicating with investors may be assigned the function of responding to questions from other governments" fostering interstate cooperation to prevent potential disputes.*

Another important avenue of intergovernmental cooperation can be achieved through the establishment of a Joint Committee. This mechanism is an effective tool to prevent disputes that might arise out of investment agreements, considering that Joint Committees supervise and monitor the execution of such agreements, addressing any issues or differences that might come out of their application. The joint committee could also consult with the private sector and civil society to hear their views on specific issues related to its work. Therefore, a potential grievance of the investor could be resolved early on, avoiding the emergence of a dispute.

Brazil*: It is important to mention the Joint Committee function to mitigate a dispute under a specific agreement. If there is any grievance or dispute about the application or interpretation of any provision of the agreement, the Joint Committee may prepare a report to resolve the issue indicating if any specific measure adopted by the State was in breach of the agreement. This mechanism, since it is provided by both Parties of the agreement, could avoid a litigation about the issue. Furthermore, the private sector and other agencies can be invited to speak out in this procedure, expanding the scope of the discussion to those directly interested in resolving the dispute to achieve a fair and balanced decision making.*

Republic of Korea*: The current draft suggests establishing and institutionalizing inter-governmental coordination to ensure coordination and cooperation with other governments. Korea supports in principle the need for an effective solution. As the draft does not provide specific details on the Joint Committee (such as its composition*

[38] See Agreement between Japan and Georgia for the Liberalization , Promotion and Protection of Investment (2021), article 25, available at https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/4962/georgia---japan-bit-2021-; Free Trade Agreement between the United Kingdom and the Republic of Turkey (2020), article 10.1, available at https://assets.publishing.service.gov.uk/media/60350bd28fa8f543272b402e/CS_Turkey_1.2021_UK_Turkey_Free_Trade_Agreement.pdf; Israel – United Arab Emirates BIT (2020), article 27, available at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/6084/download; Armenia – Singapore Agreement on Trade in Services and Investment (2019), article 6.1, available at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5886/download; and Pacific Agreement on Closer Economic Relations Plus, chapter 12, available at https://www.dfat.gov.au/trade/agreements/in-force/pacer/documents.

or legal basis), Korea is of the view that the draft text may only include general ideas such as information sharing and cooperation in dispute prevention and mitigation between governments without necessarily referring to a Joint Committee.

Viet Nam: *Dispute prevention and mitigation is very country-specific, therefore, it would be better to establish a forum for States to exchange information and best practices on the issue (possibly to be operated under the Advisory Centre) rather than a joint committee or commission.*

Note to the Working Group

In light of the comments received, the Working Group may wish to consider whether reference should be made to the establishment and role of the joint committees in the Guidelines.

39. Operating at the State-to-State level, joint committees are responsible for monitoring the implementation of investment treaties, sharing of information regarding investment opportunities, facilitating consultations with investors, preventing disputes and enhancing their amicable settlement.[39] Joint committees may also adopt interpretation of provisions in investment treaties, which could be binding on the bodies established under the treaty facilitating a harmonized approach to standards of investment protection.[40] Joint committees create an avenue for effective application of the investment treaty by facilitating the exchange of best practices in order to adapt to evolving policy concerns through periodic reviews.[41] In order to undertake these functions, joint committees may also establish sub-committees or working groups and invite the private sector to participate in those meetings.[42]

E. Related issues

Note to the Working Group*: The Working Group may wish to consider whether the draft guidelines should be expanded to address, for example, improving legal system to be in light with State's commitments in IIAs; enhancing the capacity of officials*

[39] For example, a joint committee may be responsible for consulting with the private sector and civil society, when applicable, on their views on specific issues related to the work of the joint committee. See CFIA (2016), article 17 (4), available at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/4786/download; the functions of a joint committee may also include the consideration of any matters relating to the implementation of the agreement including solving problems, obstacles and dispute resolution before its submission to arbitration. See Israel – United Arab Emirates BIT (2020), article 27.3 (g), available at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/6084/download.

[40] See for instance Free Trade Agreement between the United Kingdom and the Republic of Turkey (2020), article 10.1 (4), which foresees that joint committees may adopt interpretations of the provisions of the agreements, available at https://assets.publishing.service.gov.uk/media/60350bd28fa8f543272b402e/CS_Turkey_1.2021_UK_Turkey_Free_Trade_Agreement.pdf.

[41] See Agreement between Japan and Georgia for the Liberalization, Promotion and Protection of Investment (2021), article 25, available at https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/4962/georgia---japan-bit-2021-; China – EU Comprehensive Agreement on Investment (2021), section VI. Institutional and Final Provisions, subsection 1. Institutional Provisions; Turkey – United Kingdom FTA (2020), chapter 10, available at www.gov.uk/government/publications/ukturkey-free-trade-agreement-cs-turkey-no12021. Administrative and Institutional Provisions; Brazil – India BIT (2020), articles 13 and 18, available at https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/4910/brazil---india-bit-2020-; Israel – United Arab Emirates BIT (2020), article 27, available at https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/4964/israel---united-arab-emirates-bit-2020-; and Armenia – Singapore Agreement on Trade in Services and Investment (2019), chapter 6, available at https://investmentpolicy.unctad.org/international-investment-agreements/treaties/treaties-with-investment-provisions/4906/armenia---singapore-agreement-on-trade-in-services-and-investment-2019-. Institutional, General and Final Provisions.

[42] See CFIA (2016), articles 17 (5) and 17 (6).

involving in foreign investment management to ensure compliance with State's commitments in IIAs and developing a foreign investor screening mechanism.

1. Financial and human resources

40. When designing and implementing a dispute prevention and mitigation system, special arrangements may need to be made for prompt access to funding and resources. Establishment and operation of a coordination body would likely incur financial costs and human resources. As a result of settlement of a grievance, a sum of compensation may be owed to an investor. These costs are usually incurred on an ad hoc basis and do not necessarily follow the budgetary cycles of governments. There may be different methods of allocating the resources, for example, to the coordination body, if so established, or to the governmental or related agency that is responsible for the grievance or dispute.

Comments

Argentina: *In general terms, it is not practical or feasible to include sums of compensation in advance in budget estimates. Furthermore, it would be difficult to determine in advance which body would be responsible for an eventual grievance or controversy, given that this must be analysed on a case-by-case basis.*

United States: *This paragraph highlights that a separate coordination process, as opposed to promoting better understanding of treaty obligations at different levels of government and different agencies, may not be a good use of scarce government resources. While ensuring that the source of funds for a settlement are clear, again this does not seem to clearly be a matter that relates to dispute mitigation and prevention but dispute settlement itself. It seems unlikely that a settlement would be at issue unless there was a legal claim involved.*

2. Exoneration of liability of government officials

41. Government officials may play a key role in preventing and mitigating disputes. However, the fear of incurring liability for their action (for example, charges of corruption) may impede their engagement in full. They may refrain from taking necessary decisions and attempting to prevent disputes.

42. In some jurisdictions, government officials are not held accountable for any act performed or omission made in connection with dispute prevention and mitigation, except in the case of wilful misconduct or gross negligence. Offering such protection reassures their cooperation and full engagement in dispute prevention and mitigation.

Comments

Argentina: *Considering the divergence in jurisdictions, it might not be possible to agree on a general exemption of liability independent of the system in place in each State.*

United States: *Exoneration of liability of government officials is a critical element and impediment to current efforts at prevention and mitigation. This section could usefully be the focus of a revised set of guidelines, including a forum roundtable dialogue on examples of effectively mitigating or 'settling' disputes absent such exoneration, or how it has otherwise been achieved.*

Note to the Working Group

It would be appreciated if States that have implemented measures relating to sections 1 and 2 share their experience <Comment from Viet Nam>.

3. Confidentiality

43. For the successful handling of grievances, parties involved (investors and competent agencies alike) may need to be reassured that information exchanged during the process is not made public, unless agreed otherwise. Therefore, it would be necessary to find a balance between information that may need to be made

available to the public including within the government agencies (for example, due to public interest, social impact or domestic regulations requiring disclosure) and information that must be kept confidential.

Comments

Republic of Korea*: Korea generally supports these issues - however, there may be various factors to be considered, including extraordinary situations requiring transparency (such as public interest, social impact, and relevant domestic regulations). Additionally, Korea is of the view that agreements between the relevant parties could be an additional exception to confidentiality.*

F. Reference material

Academic Forum on ISDS

Preventing, mitigating and managing investor-State disputes, ISDS concept paper (2021), available at www.jus.uio.no/pluricourts/english/projects/leginvest/academic-forum/papers/preventing-mitigating-and-managing-investor-state-disputes..pdf

Asia-Pacific Economic Cooperation (APEC)

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