The importance of a well-designed investment protection mechanism

Key business considerations

Domestic investment and foreign direct investment (FDI) are essential for driving economic growth, innovation, trade, competition, job creation and prosperity for economies around the world. Among other issues, a pro-investment environment requires assurance of fair and non-discriminatory treatment of foreign investors, adherence to the rule of law and effective dispute settlement. It should be underlined that FDI benefits both home and host markets. It is therefore important that such investment is protected. Investment protection provided by bilateral and international investment agreements is therefore essential and must include efficient enforcement mechanisms that investors can call upon. Strong core substantive protections must be maintained in existing and new agreements or regimes going forward.

Sectors that engage in long-term projects or that are required to submit to localization requirements of the host country, are particularly vulnerable. Investment protection mechanisms ensure that foreign investments do not experience loss derived from regulatory, tax or other governmental discriminatory or unfair measures without compensation. Importantly, they depoliticize any disputes that may arise. In today’s market, given the number of investors, it is not feasible or practical for a home state government to intervene for each company that is subject to unfair treatment in the host market. Companies must therefore be able to address these matters through an independent mechanism and in a manner that appropriately compensates them for unfair loss.

Business has closely followed developments and recent societal discussions with regard to different types of investment protection mechanisms, and has underlined the importance of objective and fact-based discussion. We reiterate the fundamental importance of a well-designed investment protection mechanism for business, which allows taking investment disputes out of the political arena and into a transparent, rules-based forum of independent and impartial arbitrators. Such a mechanism should protect against discriminatory or arbitrary behavior; ensure the free transfer of capital and the fulfilment of contractual obligations by host countries; and protect against direct/indirect expropriation, expropriation without fair compensation as well as futile requirements. Further, we highlight the importance of properly shaped dispute avoidance mechanisms in international investment arrangements as well as the adoption of adequate dispute prevention policies. While not commenting on specific proposals that are being discussed, this paper includes key principles that should be in place for any investment resolution system. We look forward to remaining actively involved in discussions on this important issue.
Independence and neutrality of dispute settlement mechanisms

- Foreign investors must have access to independent, fact-based, apolitical dispute resolution to address cases where host governments discriminate against or fail to live up to commitments to foreign investors.
- Government control or undue influence over dispute settlement bodies or regimes is not compatible with an independent dispute settlement mechanism and must be avoided.
- Arbitrators, mediators or judges involved in dispute settlement must be truly independent. They should be chosen from a wide range of candidates with various nationalities who are independent of the government that is part of a particular dispute.
- The president shall be a national of a third country.
- Transparency on the appointment of arbitrators by the appointing authorities must be guaranteed and enhanced.

Qualification of experts involved in dispute settlement mechanisms

- Arbitrators, mediators or judges should be selected based on demonstrated expertise in international FDI issues, not political factors.
- They should have expertise in international investment law, international trade law, and resolution of disputes arising under international investment or international trade agreements.
- They must be able to understand business activities. Arbitrators should have specific expertise for specific cases being raised.
- Experts’ opinions on related areas/issues specific to the case should be accessible in the system.
- The system needs to allow claiming investors to appoint some of the arbitrators
- The system needs to allow claiming investors to contribute expertise and to be in position to challenge the appointment of some of the arbitrators who do not meet the selection criteria (e.g. independence).
- Efficiency should be ensured for the appointment of arbitrators.

Securing the enforcement of awards

- Transparency must be provided in the mechanism including awards. Improving the consistency of investment awards will enhance predictability and soundness to investors, leading to many benefits for all the stakeholders.
- Awards rendered must be enforced not only within the parties' territories but also in other countries.
• Mechanisms which secure third countries’ enforcement should be available, such as the New York Convention for the Recognition and Enforcement of Foreign Arbitral Awards or ICSID Convention.

• The States (whether in the territory or in other countries) should be held liable if the awards cannot be enforced within a reasonable time-period and at reasonable cost.

An effective and efficient procedure

• The costs of dispute resolution systems should be minimized to make the system affordable to claimants including private investors and small or medium-sized enterprises.

• The duration of proceedings should be limited in line with the speed of business, and the arbitral award should be enforced. With regard to the proposed appeal mechanisms, due attention must be paid to the impacts on investors due to longer time and higher costs. There must be clear deadlines for the proceedings to render the awards.

• There should be no delays or futile requirements as a condition to the beginning of the arbitration process. Efficiency should also be secured for the appointment of arbitrators. In addition, due attention should be paid to the emergency arbitrator.

• Secretariats should be provided to play a vital role in the functioning of the mechanism, considering the amount of work that arbitrators need to deal with. They should be knowledgeable and experienced in preparing legal documents for cases with respect to the speedy settlement of investment disputes.

• Due attention should be paid to the costs of proposed new dispute resolution systems, especially proposals which would create extensive permanent bureaucracies and shift the cost of dispute resolution systems from the direct participants (as in the current system) onto taxpayers as in some of the proposed reforms.

Fair and equitable treatment

• All industries should be permitted to have access to legal protection of their investments. It is essential to keep up the principle of non-discrimination so that all foreign investors regardless of the sector have equal and uninhibited access to fair dispute settlement procedures.

• There should be no unfair loopholes based on specific categories of regulation.

• Geographically, both disputing parties should have easy access to the venue, which should not give one of the parties an undue advantage.

• Confidentiality of information must be ensured to protect sensitive commercial interests.