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Investor-State Conflict Management: A Preliminary Sketch

Global Practice on Trade and Competitiveness –
Investment Climate Unit, World Bank Group

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7 Chemin de Balexert, 1219 Geneva, Switzerland
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ABSTRACT

Pointing to the concept of investor-state conflict management and its practical importance, this note sketches the minimum key institutional infrastructure elements that would be required to enable governments to manage investor-state conflicts, and prevent them from unnecessarily escalating to investor-state arbitration. In today's inter-dependent world, the search for alternatives to investor-state dispute resolution entails much more than procedural and institutional solutions and discussions. It raises a profound philosophical question—what should be the parameters of governance orienting the evolution of the international investment regime? The differentiation between power-based, rights-based, and interest-based dispute resolution used in the context of conflict theory is quite useful when translated to the context of the historical evolution of international investment relations, and international investment law in particular. From a trend where investor-state investment disputes used to be predominantly resolved through diplomatic protection, with the proliferation of international investment agreements (IIAs) and the increase in investor-state arbitration, the trend has shifted towards rights-based dispute resolution.

International investment relations have become increasingly "rule-oriented." In general, that should be considered a positive development for both international and domestic investment governance. However, the legalization of international investment relations is also exerting strong pressures over host countries' administrations, leading various political actors to resist those pressures and challenge the legitimacy of the current international investment regime. It is not surprising that a significant share of the literature on international investment law has recently focused on how the international investment regime—and investor-state dispute settlement procedures in particular—should be revisited and adjusted to properly respond to the realities of the 21st century. There are, however, significant disagreements as to what kind of improvements to make and how they should be implemented. Nevertheless, the main point of this note is that any serious attempt to modernize the international investment regime should bear in mind that, to properly perform its function, the regime can no longer afford to leave all problems arising between investors and host states to be exclusively addressed through investor-state arbitration.

After two decades of experience with investor-state arbitration, the time has come for the international investment regime to complement dispute resolution procedures with conflict management mechanisms (CMMs). Two key reasons justify this assertion. First, in principle and from many vantage points, in many circumstances consensual solutions to investor-state conflict would be much more efficient than adjudication. Second, the exclusive reliance on adjudication as a means to manage investor-state conflict is generating such high economic and political costs that the legitimacy of the international investment regime is being corroded. This is a serious problem if we take into account how central relations between investors and host states have become within current international economic dynamics. After evolving from power-based to rule-based dispute settlement, it is time for the international investment regime to evolve once again, now in the direction of incorporating interest-based CMMs within its structure.

CONTENTS

Introduction 1

Background 1

Investor-State Conflict Management: Concept and Advantages 3

Key Features of CMM Protocols 5

- Stocktaking 6
- Lead Agency 6
- Information Sharing 7
- Early Alert Mechanisms 7
- Problem-Solving Techniques 7
- Political Decision-Making and Enforcement 7

Investor-State Conflict Management: Next Steps for an International Agenda 8

Conclusion 8

References 10

LIST OF FIGURES

Figure 1: The Conflict Continuum in the Investment Context

Figure 2: Institutional Investor-State Conflict Management Mechanisms

LIST OF ABBREVIATIONS

ADR	alternative dispute resolution
BITs	bilateral investment treaties
CMMs	conflict management mechanisms
ICSID	International Centre for Settlement of Investment Disputes
IIAs	international investment agreements
UNCTAD	United Nations Conference on Trade and Development

INTRODUCTION

With the proliferation of international investment agreements (IIAs) in the 1990s and the significant escalation in the use of investor-state arbitration a decade later, the international investment regime has become increasingly "rule-oriented" rather than "power oriented", in the sense it has become increasingly governed by rules and principles included in conventional instruments of international law rather than by political and economic might (Jackson 1997). Despite the many systemic advantages that such "legalization" of the international investment regime may entail, the significant increase in the use of investor-state arbitration over the last decade has revealed a series of shortcomings.

Among other limitations, investor-state arbitration has turned out to be a longer, more costly, and unpredictable process that can, in certain circumstances, leave investors and host states dissatisfied with both the process and outcome (Coe 2009a: 73). Within this context, numerous stakeholders have advocated a more frequent use of non-litigious means of dispute resolution between investors and host states, such as negotiation, fact-finding, conciliation, and mediation between host states and foreign investors (for instance, Welsh and Schneider 2012; Joubin-Bret 2013). However, despite the widely held view that having parties mutually agree to a solution to a dispute is more advantageous than relying on adjudication (Coe 2009b: 339; Salacuse 2007), in practice, recourse to mediation or conciliation to resolve international investment disputes has been quite limited.[1] Many experts have attempted to identify the factors behind that trend (Onwuamaegbu 2005; Clodfelter 2011; Wälde 2004; Weiler and Baetens 2011). In any case, practice clearly shows that negotiation as a means to resolve investor-state disputes is already happening. Paradoxically, negotiations are not taking place in an amicable setting, but rather framed within the litigious context of international investor-state arbitration once many of the political and economic costs of litigation for the parties have already been inflicted.[2]

Within this context, this note purports to advocate the need to develop investor-state conflict management mechanisms (CMMs) that can enable governments and investors address their grievances well before they escalate into full-blown legal disputes. In particular, this note argues that the need for CMMs stems from a more fundamental philosophical and yet practical question—the need for international investment law to enable host governments and investors to maintain a productive relationship in the long term.

For such purpose, this note attempts to address three key issues. First, it aims to clarify the concept of conflict management and contrast it with the notion of dispute resolution. Second, the note seeks to explain why it is so important to develop CMMs both to ensure the long-term stability of the international investment regime as well as to practically enable governments to use in a preventive way, as alternatives to dispute resolution techniques such as mediation. Third, the note also draws a preliminary sketch of the key institutional infrastructure elements that are necessary to enable governments to manage investment-related conflicts.

In addition to this introduction, this note includes five sections. Section 2 provides the background necessary to frame the discussion on the need for conflict management mechanisms. Section 3 focuses on the clarification of the concept. Section 4 presents a preliminary sketch of the key elements to enable governments to operate CMMs. Section 5 suggests some basic points that an international agenda could address to enable CMMs to further develop, and Section 6 presents some final reflections and conclusions.

PROBLEM/OPPORTUNITY

In addition to the shortcomings regarding time and cost of invoking investor-state dispute settlement regimes, from a systemic perspective, there is a more important negative consequence, which should not be overlooked. Increased litigation undermines the development of long-term harmonious relationships between foreign investors and host states. Such an outcome is contrary to one of the key objectives that IIAs should promote, that is, contribute towards creating an investment climate favouring the growth of investment inflows. This latter point is more than a philosophical one, and has very concrete practical implications, in particular for developing countries.

Surveys show that among the key constraints for increasing investment in many developing countries are investors' perception of high political risk, in particular risks derived from governments' sovereign conduct. In particular, data shows that over the last five years in developing countries one of four investors has either refrained from expanding

1 To illustrate this trend, since its inception and until December 2012, there have been only nine conciliation cases submitted to the International Centre for Settlement of Investment Disputes (ICSID). Seven were registered under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (opened for signature on 18 March 1965, entered into force on 14 Oct 1966) (ICSID Convention). Two were registered with the ICSID Additional Facility. See ICSID Caseload Statistics 2013-1; https://icsid.worldbank.org/ICSID/FrontServlet#.

2 For a detailed analysis on this point, see Echandi and Kher (Forthcoming).

their investments or even withdrawn their business due to government conduct related to breach of contract, expropriation, transfer of payments, and adverse regulatory changes.[3] Without questioning the undeniable need for states to have policy space to regulate in the public interest, these trends suggest that many governments still have a long way to go in exercising their regulatory powers according to the principles of transparency, predictability, and due process of law.

In this context, the surveys referred to show that investment protection guarantees granted by IIAs, in particular the prospect of obtaining effective redress if they are not respected, operate as risk management tools for investors. From this point of view, IIAs may contribute to increase investors' confidence to undertake investments in environments they perceive as risky, in particular in countries where they may not be able to easily predict government conduct. This is exactly the function that capital-exporting countries assigned to bilateral investment treaties (BITs) when they started to promote them in the 1960s. During that period, economic nationalism was rife, developing countries were asserting their sovereignty over their natural resources, and nationalizations were not uncommon in many countries. Governments promoted BITs, together with political risk insurance instruments, to protect their investors against political risks.[4]

International investment law, however, should entail much more than investor-state disputes, it should be an instrument for governance. In a globalized world where patterns of international production are leading every day to a higher level of interaction among foreign and local investors, governments, and civil society, there is an evident need for an international investment regime promoting the maximization of the positive impact of foreign investments in host countries as well as the mitigation of any potential negative effect.[5]

In particular, among other functions, international investment law should be used to respond to the real social need of finding effective ways to enable investors and host states to address their problems—the number of which may naturally arise from their increasing interaction—in an efficient manner, without necessarily incurring the costs associated with litigation. How to better adjust those problem-solving techniques to the particular context of investor-state disputes is an important ongoing discussion in many academic and policy circles. However, a key point already recognized by experts is that regardless of which particular alternative dispute resolution (ADR) technique may be explored, given the complex political economy of investor-state disputes, the best chance to resolve a dispute between a foreign investor and a host government is likely before the investment conflict escalates into a legal dispute under an IIA (Legum 2006: 1–3). This raises the question as to how this can be achieved.

States are complex organizations. Further, given their broad scope of application, norms and disciplines of IIAs may touch upon a plethora of policy matters that are handled by multiple governmental agencies. Such agencies do not have the same policy priorities. Further, not all agencies may be even aware of the existence of IIAs, or may have acting in compliance with such treaties or domestic investment protection laws among their top priorities. Within this context, it may be relevant to note that a majority of the investor-state disputes submitted to international arbitration have involved measures adopted by sub-national or sector-specific regulatory agencies (UNCTAD 2010; Frank 2008: 161).

This note argues that for alternatives to investor-state arbitration to have a better chance of success in the future, it is necessary to provide governments with a minimum institutional infrastructure that can enable them to identify, track, and manage conflicts arising between investors and public agencies as early as possible. Governments need to be able to react in a coordinated manner on a conflict with an investor at a very early stage, well before the aggrieved investor submits a legal claim for compensation under an IIA.

To enable states to promptly assess conflicts, and determine the better course of action to address such conflicts, is the key role that investor-state CMMs purport to perform. Currently, such institutional infrastructure does not exist in many countries. However, as this note will explain in further detail, it is encouraging to see good practices being gradually developed by a number of countries such as Korea, Peru, and Colombia, among others.[6] With the support of the World Bank Group and other institutions, these practices are being used to develop coherent protocols for investor-state conflict management that may be implemented on a wider scale.

3 See World Investment and Political Risk Reports 2013–2009, Multilateral Investment Guarantee Agency (MIGA), World Bank Group; http://www.miga.org/resources/index.cfm?stid=1866.

4 For more on the historical origins of BITs, see, among others, Alvarez (2011); Vandevelde (2010).

5 This point is further developed in Echandi (2011).

6 For more information on these practices, see APEC/USAID (2013); APEC (2012); UNCTAD (2011).

INVESTOR-STATE CONFLICT MANAGEMENT: CONCEPT AND ADVANTAGES

Investor-state CMMs can be defined as institutional or contractual mechanisms that are meant to enable host states and investors to effectively address their grievances at a very early stage, preventing their conflicts from escalating into full-blown legal disputes.[7] As will be further explained, CMMs may enable the use of various preventive ADR techniques—such as mediation, conciliation, or early neutral evaluation—as problem-solving techniques to properly manage a conflict.

The concept of conflict management is rooted in the distinction between the notions of "conflict" on the one hand, and "legal dispute" on the other,[8] and it visualizes a legal dispute as the result of a "continuum". As shown in Figure 1, while a conflict is a problem unattended, a legal dispute is an unattended conflict, which has devolved into a "defined, focused disagreement, often framed in legal terms" (Smith and Martinez 2009).

The distinction between "conflict management" and "legal dispute resolution" in the context of international investor-state litigation becomes particularly relevant because of the peculiar political economy of investor-state disputes. Let us use Figure 1 to illustrate the continuum of a typical investor-state conflict in practice.

Given the highly regulated environment for doing business existing in most countries in the world, the number of problems arising everyday between investors and specific public agencies may be significant. However, not all problems become conflicts, and not all conflicts escalate into legal disputes. Most minor problems may be easily solved by direct interaction between investors and the respective agency. Other problems may remain unresolved over time and become irritants. Depending on the persistence of such irritants over time, and on the severity of the impact of the conflicts over businesses, such conflicts, if unattended to, may escalate into full-blown legal disputes.

Further research is required to properly analyze all the factors that may explain why some conflicts escalate into full-blown international investor-state arbitration while others do not. However, what is clearer from practice and initial research done by the United Nations Conference on Trade and Development (UNCTAD) is that in most countries governments still lack the institutional infrastructure to enable agencies who understand IIAs and which are responsible for their implementation (lead agencies) to address conflicts arising in the interaction between investors and other national and subnational agencies in a coordinated manner at an early stage.[9]

7 For a more detailed discussion on this subject, see Echandi (2013: 270).

8 While conflict is a process, a legal dispute is rather just one of typical by-products of conflict. "Conflict is the process of expressing dissatisfaction, disagreement, or unmet expectations with any organizational interchange; a dispute is one of the products of conflict … whereas conflict is often ongoing, amorphous, and intangible, a dispute is tangible and concrete—it has issues, positions, and expectations for relief" (Costantino and Sickles-Merchant 1996: 5).

9 Many governments have investment promotion agencies providing aftercare services. However, investment aftercare is more geared towards facilitating the establishment and operation of investments by addressing issues related to red tape or infrastructure more than focusing on identifying, tracking, and managing conflicts arising from the application of investment protection guarantees. This point is developed in Section 4.

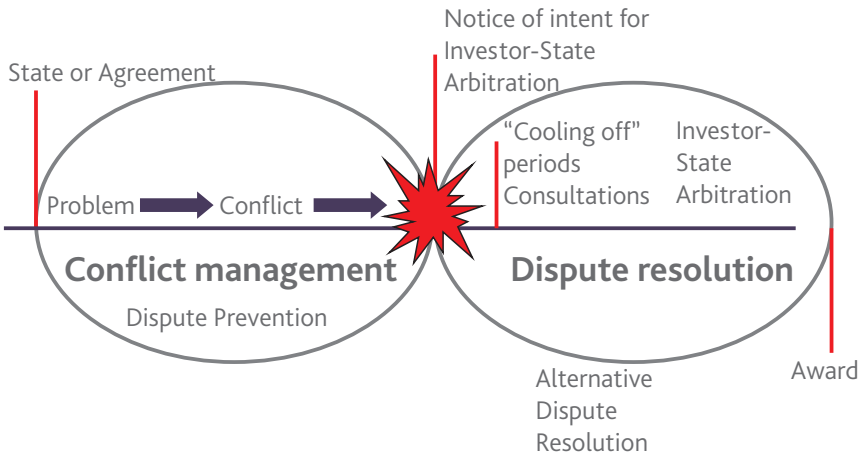

FIGURE 1:

The Conflict Continuum in the Investment Context

In many countries, a typical trend is that during the conflict continuum, the lead agency—if it exists in the first place—may not be informed about the existence of an investor-state grievance until the moment a notice of intent for arbitration is filed. In other situations, the lead agency may learn about the existence of a conflict, and yet lack the legal attributions to step in and intervene with the parties to address the matter. Within this context, many investor-state conflicts tend to remain unattended to until they escalate into legal disputes, submitted to either domestic or international adjudication.

Once a conflict is allowed to escalate into a legal dispute, in most cases, political variables tend to close the window of opportunity for investors and governments to prevent litigation. As empirical evidence demonstrates, amicable settlements may still be reached in the context of international arbitration. Yet, by that time, the parties will already have suffered significant economic and political costs, which could have been prevented had the conflict been properly managed in the first place. We will develop this point that when a conflict escalates into a full-fledged dispute, it becomes difficult to prevent litigation.

From the perspective of the host state, when a foreign investor submits a legal claim to investor-state arbitration, that very action may entail sensitive political implications. Such political variables may reduce the political space that a government may have to amicably settle the dispute outside the context of international arbitration proceedings. Empirical evidence shows that a high number of non-litigious resolutions to investor-state disputes paradoxically occur in the context of investor-state arbitration. Why are the chances of finding a non-litigious solution to an investor-state dispute outside the context of arbitration reduced after the submission of intent? Experts agree that are many reasons.

First, the submission of a claim to arbitration represents an open challenge against a government measure that may be pursuing legitimate public policy objectives. This may generate a reaction from constituents who may not only be interested in defending the contested measure, but may also reject the very idea of having a foreign investor challenging domestic legislation in foreign arbitration tribunals. Conversely, if the investor-state conflict is properly managed at an early stage, there will be no legal international challenge to domestic laws and no political effects derived from such a challenge, creating a space for the parties to address the problem in a non-litigious way. Interest-based processes could create value for both parties, and potentially enable investors and public authorities to focus the discussion on how the application of the measure could pursue its public policy objectives and yet simultaneously prevent inconveniences to investors.

Second, an investor-state claim also entails the public allegation by the claimant that the host state is violating its international obligations. Such an allegation may be a sensitive issue for any sovereign state acting as a defendant. This often leads to defensive attitudes by government officials who may find it politically impossible to openly recognize the existence of any treaty breach—even if it actually exists and is privately acknowledged. Again, if an investor-state conflict is properly managed—even if it is the result of negotiations on the shadow of the law—the investor would never submit a claim to arbitration, and, thus, a public allegation of a breach to any international obligation will never arise.

Third, and more important, an investor-state claim also entails a private investor requesting a public authority to compensate it for damages. Claims submitted to investor-state arbitration usually entail significant amounts. The prospect of facing an adverse award entails a double potential liability for the respondent state. First, there is the economic and opportunity cost as any potential payment to compensate damages will divert fiscal resources that could be better spent in public development projects. Second, there is a high political cost to the very notion of a foreign investor—often a transnational corporation—being paid large sums of cash from the treasury of a developing country, no matter how justified such a payment may be.

Avoiding the economic and political costs entailed by investor-state arbitration is one of the most attractive potential advantages of developing CMMs, both for investors and governments. An early management of the conflict will likely prevent any measure from inflicting significant damage on any of the parties involved in it, thus erasing any potential claim for compensation. Further, a conflict can be resolved through solutions that may not entail the use of any public resources at all. For instance, an agency may simply implement a measure addressing the issue that motivated the conflict in the first place.

From the outset, it is important to clarify that CMMs cannot—nor should they—guarantee that all investment-related conflicts will be prevented from escalating into investor-state disputes. CMMs presuppose the use of interest-based techniques—such as preventive mediation or early neutral evaluation—rather than adjudication (see Ury et al. 1993; Crespo 2011: 55). Interest-based techniques may not be adequate to deal with certain kinds of conflicts. For instance, where the parties need to clarify the interpretation of a legal obligation, or where the host state may be interested in setting a public policy precedent for the future, adjudication may turn out to be necessary.

The main objective of CMMs is not to avoid investor-state litigation at all costs. Rather, their rationale is to enable the parties the possibility to select the best problem-solving technique to manage their conflicts—be it direct negotiation, mediation, early neutral evaluation, or any other, including arbitration when it is the best option (see Frank 2007). Providing the parties with such a possibility may not only reduce transaction costs, but also, more important, lead to a more stable and harmonious environment where investors

and host states can focus their attention on maximizing the benefits of investments for all the stakeholders involved.

CMMs may be particularly useful to deal with investment-related conflicts stemming from the application of inconsistent policies or lack of coordination among different government agencies—inconsistencies which could entail the liability of the host state under an IIA. In this respect, CMMs may be a vehicle to enable international investment law in general, and IIAs in particular, to play a more constructive role in strengthening the rule of law in host countries. CMMs may promote such an outcome by allowing the lead agency to use international and domestic investment law as a tool to persuade other public agencies generating a conflict with the investor to consider whether their actions are in conformity with the applicable investment frameworks, well before the conflict escalates into a dispute. Further, by opening new additional channels to address conflicts, CMMs may also prevent frivolous claims by investors who may see investor-state arbitration as the only available way to attract the attention of the host state to address a particular problem.

CMMs come with significant advantages that are apparent from those applied by several countries that have been front runners in addressing the prevention of investor-state disputes (APEC/USAID 2013). However, many countries still lack the minimum institutional infrastructure to enable their operation. This situation explains why in practice investors and host states are currently stuck with only a binary choice to address their problems and manage their relationships—direct negotiations or investor-state arbitration—or a combination of both. It is not surprising that alternative approaches such as preventive mediation or early neutral evaluation are not common in the investor-state context. Further, it is not surprising either that a significant number of investor-state disputes that could have been prevented and solved at the earlier conflict stage tend to escalate to investor-state arbitration in the end.[10]

KEY FEATURES OF CMM PROTOCOLS

Investor-state conflict management visualized as a complement, or potential tool, to prevent investor-state dispute settlement is a relatively novel concept. Indeed, it was only when investor-state litigation activity started to increase, and the costs associated with adjudication began to become evident, that stakeholders started to devote greater attention to the need to find alternatives to arbitration.

In searching for alternatives to investor-state arbitration, most of the attention of stakeholders has tended to gravitate around the pros and cons of particular non-litigious ADR methods, such as conciliation and mediation. However, discussion on which institutional infrastructure states need to be able to use those ADR methods to manage investor-state conflicts early has been more limited. Because of the novelty of the subject, governments are still identifying and experimenting with already available tools and instruments. In this learning process, two set of experiences are proving useful for many governments. Interestingly, several countries have begun addressing parts of the problem before identifying the need for a more comprehensive and coordinated approach. In this regard, there is first the experience gathered for many years in the context of investment aftercare services.

For many years, investment promotion agencies in many parts of the world have devoted attention to facilitate the establishment and operation of key foreign investments. Although management of conflicts associated with investment protection guarantees of IIAs was not visualized as part of their mandate, some of these agencies have played an important role in managing investor-state conflicts, and preventing them from escalating into full-blown legal disputes. A well-known experience in this regard is the case of the Office of the Foreign Investment Ombudsman in the Republic of Korea, established in 1999, which has served as a precedent for many other countries (UNCTAD 2010).

Second, in addition to investment aftercare, another set of practical experiences shedding light on the key steps necessary to enable governments to properly manage investor-state conflicts are the lessons learned in the context of getting organized to face investor-state disputes. Procedures promoting better intra-governmental information, coordination, and decision-making on the handling of international investor-state arbitrations are some of the practices that would also be very useful to establish protocols enabling CMMs to properly operate (UNCTAD

10 For a detailed analysis on this point, see Echandi and Kher (Forthcoming).

2010, 2011; Pawlack and Rivas 2008). In this regard, it is not surprising that many of the good practices that have begun to be developed have been in Latin America, a region that has been more frequently hit by investor-state arbitration claims.[11]

Various institutions and scholars have started to compile and describe the different practices that various countries in different parts of the world have started to implement.[12] On the basis of an overview of such literature, this note takes an additional step and distills the essential elements that a standard protocol for the establishment and operation of CMMs should contain.

It should be stressed that this sketch does not purport to represent a design of a particular form of CMM. The design of a specific conflict management system is an exercise that has to be undertaken, on a case-by-case basis, by the relevant investment stakeholders in a particular country. CMMs may have different scopes of application. Some may apply only to a particular sector, or agency, while others may apply on a cross-sector basis. Thus, the idea of presenting the sketch is to provide stakeholders with a list of the core elements required to build the necessary infrastructure to enable CMMs to operate regardless of their scope of application.

As illustrated in Figure 2, we propose that a basic protocol for implementation of institutional CMMs should comprise at least seven fundamental elements.

STOCKTAKING

First, the preparation of a comprehensive investment stocktaking process represents the point of departure of any well-conceived national strategy for investor-state conflict management. The purpose of such a stocktaking process would be to allow government authorities to have a clear diagnosis of at least three fundamental aspects. First, there should be a clear understanding of the concrete international legal obligations undertaken by the country through different IIAs and whether there is any gap between them and domestic legislation. The investment policy legal framework in every country should be coherent and apply both to domestic and foreign investors alike. Second, the stocktaking process should enable generating a clear profile of the different categories of investors existing in the host country and the amount of investment at risk as a result of potential disputes. Third, and most important, the stocktaking analysis should assess the different kinds of problems, conflicts, and disputes known to have arisen between investors and governmental authorities, and whether a particular agency tends to be frequently involved in those conflicts. Thus, a complete investment stocktaking process should comprise at least three key components—a regulatory audit, an empirical analysis of investment stock and flows into the country, and a record of the investor-state conflict history of the country.

LEAD AGENCY

Second, there should be a government agency with power and attributions conferred by law and/or regulations that is responsible for implementing CMMs. There is a clear consensus among experts on the importance of having a lead agency within the government with the competence to coordinate

11 See ICSID Caseload Statistics 2013-1; https://icsid.worldbank.org/ICSID/FrontServlet#.

12 In addition to the sources cited in Echandi (2013: 270), useful documents describing practices developed by many countries can be found in UNCTAD (2010).
For additional materials on the experiences of Costa Rica, Colombia, Dominican Republic, Japan, Korea, and Malaysia, see presentations submitted at the workshop on Dispute Prevention and Preparedness, APEC/UNCTAD, Washington, DC, July 2010, http://mddb.apec.org/pages/search.aspx?setting=listmeeting&daterange=2010/07/01%2C2010/07/end&name=workshop%20on%20dispute%20prevention%20and%20preparedness%202010f.

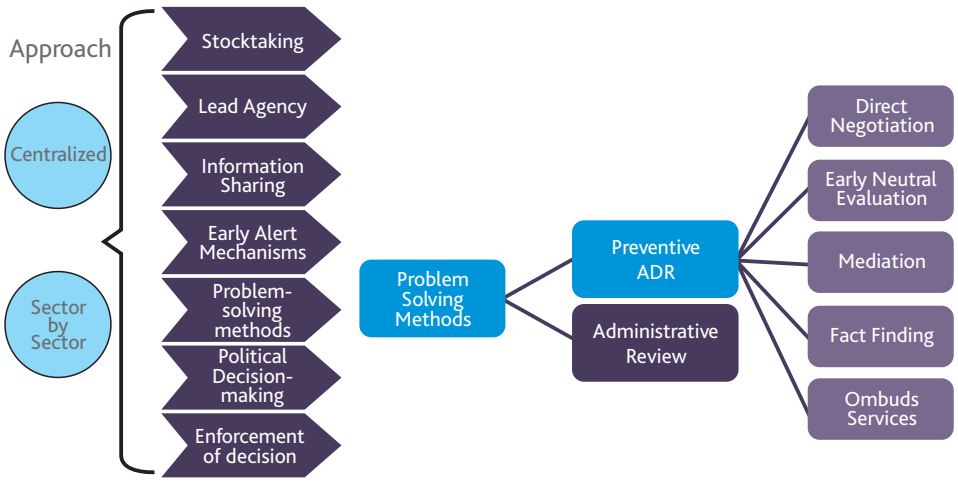

FIGURE 2:

Institutional Investor-State Conflict Management Mechanisms

the management of investor-state conflicts and disputes. Further, experts agree that it is critical that such a lead agency be provided with the necessary resources and political and legal authority to fully engage with the affected investor in conflict management processes. In this regard, the experiences of many Latin American countries, in particular Peru and Colombia, in establishing a lead agency by law with clear powers and attributions to deal with investor-state conflicts may be illustrative (UNCTAD 2011, 2010).

INFORMATION SHARING

Third, protocols for the development of institutional CMM should also include efficient intra-governmental information sharing techniques. Information sharing should enable the lead agency to coordinate the diffusion of relevant information to those agencies more likely to generate or become involved in investment-related conflict. Information sharing may involve substantive information on the contents and breadth of the obligations included in different IIAs. Further, it should also entail informing the highest possible number of governmental departments about the existence and purpose of the institutional CMMs existing in the host state, so that they know who to call in case they have a doubt regarding the consistency of their measures with IIAs or if a conflict with a foreign investor arises. In this regard, the role of the lead agency becomes critical, as it would act as the focal governmental contact point for the other agencies for all matters related to the application and implementation of IIAs. In this regard, the experience of Mexico, the United States, and Canada is particularly illustrative (APEC 2012).

EARLY ALERT MECHANISMS

Fourth, protocols for the development of CMMs should also include early alert mechanisms to enable the lead agency to learn about the existence of an investment-related conflict as early as possible. As previously explained, timing is a key variable in preventing a conflict from crystallizing into a dispute under an IIA. Indeed, only by detecting the conflict early enough will CMMs have a chance to operate. Early alert mechanisms may vary in degrees of sophistication. Countries such as Peru (APEC 2012), and pilot projects or the World Bank Group have developed information technology tools to identify, monitor, and track grievances. There may be other relatively simpler solutions to enable investors themselves to alert the lead agency of the existence of a conflict. This could be achieved by having a single specialized window within the lead agency to receive grievance information. In many countries, investment ombudsman offices have played that role. In others, this role is undertaken by investment promotion agencies. Another possibility would be to engage private sector associations as main points of contact to receive and then follow up the management of the conflict with the government on behalf of the investor.

PROBLEM-SOLVING TECHNIQUES

Fifth, CMMs must also envisage different problem-solving methods for the parties to seek an interest-based solution to the conflict. Although the difference may be quickly solved by direct negotiation or by administrative review, protocols on CMMs should also provide for the possibility of the affected investor and the host state using preventive ADR techniques to manage their conflict. Mediation, fact-finding, early neutral evaluation, or ombudsman services are just some of the possible preventive ADR techniques that are being considered by some governments. Even in the conflict management phase, government officials may still require the "political cover" that only the participation of an independent expert third party may provide. Indeed, to be able to find any amicable solution to a conflict, governments may always be asked to clearly and objectively demonstrate to their political constituencies that solving the conflict is a better alternative for the host state than proceeding to litigation. The opinion of an independent expert may be critical to achieve this result.

POLITICAL DECISION-MAKING AND ENFORCEMENT

Sixth, once the problem-solving process has enabled the parties to find a solution to the conflict, it is paramount that such a solution receives the approval of the political authority of the host state and the investor. To achieve this goal, alternatives currently being considered in various countries entail the establishment of political bodies such as ministerial councils to monitor the effective implementation of solutions agreed to by the lead agency, which will be an administrative body. This is an approach being implemented in many Latin American countries such as Colombia, Peru, and Costa Rica (APEC 2012). High-level political endorsement would guarantee that a measure providing a solution to a problem will be effectively implemented. If such mechanisms are not clearly included in the protocols for institutional CMMs, there is the risk that the consensual solution to the conflict agreed to by representatives of governments and investors may subsequently be ignored or disrespected by one of the many other agencies of the government or even by higher hierarchical levels of the enterprise involved in the conflict.

Last but not least, and closely related to the aspect referred to above, the seventh essential element is that a standard protocol for the development of institutional CMMs should include effective enforcement mechanisms to enable the decision solving the conflict to actually stick, and be effectively implemented. This function could be performed by a political body such as a ministerial council. Its effectiveness would be crucial to prevent a conflict that in principle was solved to later escalate into a full-blown dispute as a result of the lack of compliance with the terms of the solution agreed to by the parties.

INVESTOR-STATE CONFLICT MANAGEMENT: NEXT STEPS FOR AN INTERNATIONAL AGENDA

Establishing the necessary institutional infrastructure to enable governments to properly operate CMMs is a domestic endeavour. However, the CMM agenda also has an international dimension. The success of investor-state CMMs is to a great extent based on the notion of enabling both states and investors to negotiate on the shadow of the law. From this point of view, this approach is based on the idea that the prospects of facing international responsibility for an unlawful act—and the associated pecuniary consequences for the budget of the agency violating an obligation—would act as a deterrent to adopting a measure inconsistent with domestic and international law. Clearly, for such an assumption to operate in practice, two conditions would be necessary.

First, countries require technical assistance in setting up their institutional or contractual CMMs. Second, to foster negotiations on the shadow of the law, there is a need to continue promoting greater clarity regarding the contents of international investment law. Both of these approaches could be promoted through international cooperation. The World Bank Group has recently started to develop a programme specifically directed to assist developing countries in setting up CMMs. It is a new initiative being piloted in some developing countries, which could be further expanded.

Further, state-to-state cooperation could also promote initiatives to foster greater clarification of key elements of international investment law. Negotiation of interpretative declarations and/or inclusion of specific clauses in IIAs providing for clarification of the scope and content of substantive provisions of these agreements are also other specific steps which could be undertaken in this direction. For instance, certain IIAs establish joint administrative commissions comprising government authorities of the contracting parties with the capacity to enact jointly agreed interpretative notes clarifying particular provisions of the IIAs. Further, states could also agree on other initiatives geared at promoting, to the extent possible, greater coherence in the interpretation of IIAs, such as establishing a mechanism of preliminary rulings, or alternatively, mechanisms of appellate review. Another approach would be to promote the inclusion in the texts of IIAs of more effective incentives inducing both investors and governments to undertake real, serious, and good faith attempts to effectively explore interest-based conflict management processes before any notice of intent for arbitration can be submitted by the foreign investor.[13]

CONCLUSION

After introducing the concept and practical importance of investor-state conflict management, this note has drawn a sketch of the minimum key institutional infrastructure elements that would be required to enable governments to manage investor-state conflicts, and prevent them from unnecessarily escalating to investor-state arbitration. Clearly, research and policy on conflict management within the context of international investment law is just beginning.

In the current inter-dependent world, the search for alternatives to investor-state dispute resolution entails much more than procedural and institutional solutions and discussions. It raises a profound philosophical question—what should be the parameters of governance orienting the evolution of the international investment regime? The differentiation between power-based, rights-based, and interest-based dispute resolution used in the context of conflict theory is quite useful when translated to the context of the historical evolution of international investment relations, and international investment law in particular. From a trend where investor-state investment disputes used to be predominantly resolved through diplomatic protection (an approach that in practice led to power-based dispute resolution), with the proliferation of IIAs and the increase in investor-state arbitration, the trend has shifted towards rights-based dispute resolution.

International investment relations have become increasingly "rule-oriented." In general, that should be considered a positive development for both international and domestic investment governance. However, the legalization of international investment relations is also exerting strong pressures over host countries' administrations, leading various political actors to resist those pressures and challenge

13 An example illustrating this approach is the text of the Investment Chapter of the Canada-Colombia Free Trade Agreement, which explicitly mandates in Article 821 that a notice of intent shall be notified in writing to the authorities of the host state at least six months prior to submitting the claim to arbitration. Further, it is stated that as condition precedent to submit a claim to arbitration, within 30 days of the notice of intent, the disputing parties shall hold consultations and negotiations unless the disputing parties otherwise agree. Consultations and negotiations may include the use of non-binding, third-party procedures, and the place of consultations shall be the capital of the disputing party, unless the disputing parties otherwise agree.

the legitimacy of the current international investment regime. In this context, it is not surprising that a significant share of the literature on international investment law has recently focused on how the international investment regime—and investor-state dispute settlement procedures in particular—should be revisited and adjusted to properly respond to the realities of the 21st century.

No one could argue that the current international investor-state arbitration mechanisms in IIAs do not need to be improved. There are, however, significant disagreements as to what kind of improvements to make and how they should be implemented. Nevertheless, and regardless of this discussion, the main point of this note is that any serious attempt to modernize the international investment regime should bear in mind that, to properly perform its function, the regime can no longer afford to leave all problems arising between investors and host states to be exclusively addressed through investor-state arbitration.

After two decades of experience with investor-state arbitration, the time has come for the international investment regime to complement dispute resolution procedures with CMMs. Two key reasons justify this assertion. First, in principle and from many vantage points, as explained in this note, in many circumstances consensual solutions to investor-state conflict would be much more efficient than adjudication. Second, the exclusive reliance on adjudication as a means to manage investor-state conflict is generating such high economic and political costs that the legitimacy of the international investment regime is being corroded. This is a serious problem if we take into account how central relations between investors and host states have become within current international economic dynamics.

It is time to conceive the application of international investment law as going beyond litigation. After evolving from power-based to rule-based dispute settlement, it is time for the international investment regime to evolve once again, now in the direction of incorporating interest-based CMMs within its structure.

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