

## **Webinar report: Investment dispute prevention and management at the national level**

The 7th public webinar, “**Investment dispute prevention and management at the national level**” held in the framework of the joint ITC/DIE project on Investment Facilitation for Development, took place on 25 February 2021, 15:00-16:15 Central European Time (CET). The webinar hosted about 200 participants.

The webinar included an introduction by Rajesh Aggarwal, Chief Trade Facilitation and Policy for Business, ITC. It was moderated by Axel Berger, Senior Researcher, DIE, and included the following speakers: Priyanka Kher, Private Sector Specialist, Investment Policy and Promotion, World Bank Group, Carlos Jose Valderrama, Attorney at Law, and Valéria Mendes Costa, First Secretary, Ministry of Foreign Affairs, Brazil. Concluding remarks were made by Karl P. Sauvant, Resident Senior Fellow, Columbia University, CCSI.

The webinar programme is annexed to this report.

The webinar focused on investment dispute prevention and management at the national level, including the following issues: the function of dispute prevention and management and the various forms it can take; best practices, including specific country examples of setting up dispute prevention mechanisms; and the importance of conflict prevention and management at the national level and how such mechanisms could be reflected in the WTO investment facilitation framework for development (IFF4D).

### **Main discussion outcomes**

#### **I. The function of dispute prevention and management mechanisms and its various forms**

The cost of investor-state disputes, both economically and reputationally, are substantial. Based on World Bank data, political stability, macro-economic stability and the legal and regulatory environment are the top factors affecting investment decisions. Dispute prevention and management mechanisms are important not only for attracting new investment but also for the retention and expansion of investment.

The main function of effective dispute prevention and management mechanisms is to detect and address investors’ grievances in a timely manner, to prevent the escalation of grievances into legal disputes. Effective dispute prevention and management mechanisms assist with the retention and expansion of investment and ensure effective implementation of investors rights.

The Investment Grievance Mechanism Tool developed by the World Bank focuses on the phase during which an investor’s issue has become a grievance, but has not yet evolved into a legal dispute. The tool aims to enable host governments to set up an institutional infrastructure to identify and detect high-risk investor grievances in a timely manner, to prevent an escalation into legal disputes. The tool assists governments in two areas. The first is in helping public agencies to

understand the implications of their actions for investors and for investment rules. The second area includes the development of inter-agency coordination for responding to investor issues.

From the World Bank's experience working with countries on implementing the tool, a few elements have been shown to be important for its success, including: strong political support; a strong legal system to operationalise the mechanism; a designated lead agency with high-capacity that is well-resourced to operate the mechanism; the use of data collection and analyses, which should include the entity that caused the grievance, the legal implications of the grievance and the economic impact in terms of existing investment and loss of potential investment expansion; a standardised set of operational procedures for the mechanism; and regular monitoring and evaluation.

It was noted that implementation of the tool was not necessarily expensive from previous experience. The idea is not to create a new institution, but to build the capacity of a small set of people to ensure coordination among various governmental agencies, bridge information gaps and define the process to detect and address investors grievances. One of the most important elements is the collection of data on the nature of grievances.

## **II. Investment dispute prevention and the management of best practices**

### *Peru case study – a national state response team*

In Peru, as part of the national investment dispute prevention state policy, a state response team was established. Part of the day-to-day work of the response team included: providing consultations regarding the interpretation of contractual clauses; reviewing the contents of communications received or sent by the state; and attending informal or formal meetings with investors seeking to address grievances.

It is important that the response team, or any specialised unit that is created to manage dispute prevention mechanisms within the state, be created by law and be empowered to carry out the following actions: negotiate on behalf of the state; control and unify public statements related to the dispute; determine responsibility of the involved entities in the dispute; request information from all public entities; and approve funds and hire professionals for the state's defense. The independence of the agency is key, as often it will need to act as a mediator to resolve issues before they evolve into legal disputes.

It is important to develop a process for dialogue within the response team. Once the response team assumes authority for a grievance, it should invite investors to a meeting to elaborate on their position. If the results of the meeting indicate there is a possibility for negotiations, the response team should initiate negotiations, with basic rules such as good faith, confidentiality and barring of future incriminating use of representations made during the negotiations. If the negotiations are successful, settlement documentation should be prepared, confirming the withdrawal of all claims by the investor. The response team is a good option for smaller states with limited economic resources because it allows them to control the relationship within a set budget.

In addition to the response team, Peru's policy on the prevention of investor disputes includes the following guidelines: public officials should exercise daily care in their dealings with foreign investors; contracts should be carefully drafted, using reliable attorneys to advise on contract preparation and negotiations rather than using contract templates; and a defense strategy should be maintained for international disputes. A well-prepared defense team paying immediate attention

to threats of disputes can prevent those disputes from escalating into legal claims. It was noted that sometimes other government officials are not willing to respond to investor claims due to corruption allegations. In those cases, a legal team can meet with both parties and help them reach an agreement, by providing assessments of the legal implications and an opinion regarding an agreement by the parties.

#### *Brazil case study - ombudsperson mechanism*

The Brazilian ombudsperson is an intergovernmental body. It acts as a focal point network comprised of 37 representatives from different agencies at the national and sub-national levels. The functions of the ombudsperson include: centralising response to investors through one focal point; providing recommendations to the relevant agencies regarding possibilities for improvements of their regulatory conduct; and disseminating information and investment opportunities. There are two main communications with investors that are done through the ombudsperson: requests to clarify questions regarding regulatory aspects, and requests to assist investors with problems that arise. The ombudsperson does not cover disputes that are brought to court. The total amount of foreign direct investment (FDI) that was covered in cases involving the Brazilian ombudsperson has been around \$900 million.

### **III. Reflecting investment dispute prevention and management mechanisms in an IFF4D**

*Designating a lead agency:* Members could commit themselves to setting up a conflict prevention mechanism by designating a lead agency, which beyond providing information to investors would assist in solving problems and communicating with various agencies that are related to investors' issues. A lead agency could coordinate the dialogue among the various governmental agencies. It was noted that investment promotion agencies (IPAs) are not always the investors' contact point and therefore they do not always know about grievances that occurred. In addition, IPAs do not always have the political mandate to coordinate responses by the different agencies. The lead agency must have political support to implement solutions, especially when responses require the involvement of other agencies.

*Investment concern mechanism:* Establishing a mechanism similar to the practice that has been developed under the WTO Sanitary and Phytosanitary Measures (SPS) agreement and the Technical Barriers to Trade (TBT) agreement is another option. The specific trade concern (STC) mechanisms that exist in the WTO SPS and TBT Committees were not foreseen in the SPS or TBT Agreements but were developed with practice. Any WTO Member that has a SPS or TBT issue with another Member, may raise the issue at the respective committee and try to resolve the issue there. Statistics show that there are hundreds of STCs brought to these Committees annually and that a large percentage of them are resolved and never go to a formal dispute. Additional alternative dispute mechanisms can be established prior to launching a formal dispute, such as a mediation process. The WTO can provide such an institutional framework.

*Awareness raising:* Members can undertake awareness raising actions on dispute prevention. Such actions could be designed to foster a new culture domestically of more dialogue and better interaction with investors—and not only for the settlement of formal disputes.

*WTO investment facilitation committee:* The WTO investment facilitation committee can act as a venue for investors' concerns. The committee should publicise the benefits of conflict prevention

mechanisms. It can also work together with a training division and provide capacity building to members to establish their own conflict management mechanisms.



**Invitation webinar: Investment dispute prevention and management at the national level,  
25 February 2021, 15:00-16:15 Central European Time (CET)**

Dear Colleague,

On behalf of the International Trade Centre (ITC) and the German Development Institute/ Deutsches Institut für Entwicklungspolitik (DIE), we cordially invite you to a webinar on:

**Investment dispute prevention and management at the national level, 25 February 2021,  
15:00-16:15 Central European Time (CET)**

This is the 7<sup>th</sup> of a webinar series on investment facilitation for development, held in the framework of a joint ITC/DIE project on Investment Facilitation for Development.

**To register for the event and receive the meeting link details please [click here](#).**

The webinar will focus on **investment dispute prevention and management at the national level**. During the webinar, the following issues will be addressed:

- The function of dispute prevention and management and the various forms it can take.
- Best practices, including specific country examples of setting up dispute prevention mechanisms.
- The importance of conflict prevention and management at the national level and how such mechanisms could be reflected in an investment facilitation framework for development.

The webinar will be conducted in an interactive manner and allow for questions by participants.

The webinar will have the following agenda and speakers:

**Introduction: Rajesh Aggarwal**, Chief Trade Facilitation and Policy for Business, ITC

**Moderator: Axel Berger**, Senior Researcher, DIE

**Speakers:**

**Priyanka Kher**, Private Sector Specialist, Investment Policy and Promotion, World Bank Group – *“The function of dispute prevention and management and the various forms it can take”*

**Carlos Jose Valderrama**, Attorney at Law – *“Best practices, including specific country examples of setting up dispute prevention mechanisms”*

**Valéria Mendes Costa**, First Secretary, Ministry of Foreign Affairs, Brazil – *“The importance of conflict prevention and management and how such mechanisms could be reflected in an investment facilitation framework for development”*

**Concluding remarks: Karl P. Sauvant**, Resident Senior Fellow, Columbia University, CCSI

If you would like to send written questions or comments during the webinar, please feel free to type them into the chat window by clicking on the “chat” button on the middle-bottom pane of the Zoom window.

To join the meeting, kindly click on the link that will be sent to you shortly before **15:00 pm CET on 25 February** and follow the instructions. If you are not able to connect online, you could connect using the dial-up options provided in the email that you will receive after completing the registration.

We look forward to welcoming you to the webinar!

With kind regards,

Rajesh Aggarwal, Chief Trade Facilitation and Policy for Business, ITC

Axel Berger, Senior Researcher, DIE

Karl P. Sauvant, Resident Senior Fellow, Columbia University, CCSI

## **Background material**

Karl P. Sauvant, Matthew Stephenson, Khalil Hamdani, and Yardenne Kagan, *“An Inventory of Concrete Measures to Facilitate the Flow of Sustainable FDI: What? Why? How?”* (Geneva and Bonn: International Trade Centre and German Development Institute / Deutsches Institut für Entwicklungspolitik, Nov. 2020), [available here](#).

## **Bios:**

### **Rajesh Aggarwal**

Rajesh Aggarwal is Chief of the Trade Facilitation & Policy for Business Section of the International Trade Centre (ITC), Geneva. He is leading a program of assisting the private sector in developing countries to be the change agent for trade policy reform and to engage in business advocacy with their governments in design and implementation of trade policies and negotiating positions that reflect the business interests. Before joining the ITC, he worked for the Indian

Government and participated in WTO Doha Round of trade negotiations. He has published papers in the area of trade negotiations, including a paper titled “Dynamics of Agriculture Negotiations in WTO” in the Journal of World Trade.

### **Axel Berger**

Axel Berger is a Senior Researcher at the German Development Institute / Deutsches Institut für Entwicklungspolitik (DIE). He works on the design, effects and diffusion patterns of international trade and investment agreements, with a focus on emerging markets and developing countries. Other areas of current research include the effects of an international investment facilitation framework, the impact of free trade agreements on upgrading within global value chains and the role of the G20 in global governance. He teaches international political economy at the University of Bonn and regularly advises developing countries, development agencies and international organisations on trade and investment matters.

### **Valéria Mendes Costa**

Valéria Mendes Costa is a diplomat at the Brazilian Ministry of Foreign Affairs. She currently works in the Services and Industry Promotion Department, dealing with investment issues. Previously, she served in the Brazilian Mission to the WTO, where she was in charge of dispute settlement. She has a Bachelor's degree in law from the Catholic University of São Paulo, a Master Degree in Political Science from Sciences Po - Paris and a Master Degree in International Dispute Settlement from the Graduate Institute - Geneva.

### **Priyanka Kher**

Priyanka Kher is a Private Sector Specialist in the Investment Climate Unit of the World Bank Group. She leads research and policy advisory projects in developing countries in Asia and Africa on investment climate reforms, dispute prevention, investment retention and expansion and international trade and investment law. Prior to joining the World Bank Group, she practiced law at law firms in India and Singapore. She has also worked with UNCTAD and the Commonwealth Secretariat on investment policy. She holds a master's degree in law from Harvard Law School and is a dual qualified attorney admitted to practice in New York and India.

### **Karl P. Sauvant**

Karl P. Sauvant introduced the idea of an International Support Program for Sustainable Investment Facilitation in the E15 Task Force on Investment Policy in 2015. From there, the proposal was taken forward in the WTO. He has written extensively on this subject (see <https://ssrn.com/author=2461782>), participated in various events relating to it and currently assists the ITC and DIE on a project on Investment Facilitation for Development. He retired in 2005 as Director of UNCTAD's Investment Division and established, in 2006, what is now the Columbia Center on Sustainable Investment (CCSI). He stepped down as the Center's Executive Director in 2012, to focus his work, as a CCSI Resident Senior Fellow, on teaching, research and writing.

## **Carlos José Valderrama**

Carlos José Valderrama is an independent counsel working on international dispute prevention and resolution matters, focusing on international investment disputes under investment treaties and government contracts. He chaired for several years the Republic of Peru's inter-agency commission representing the state in international investment disputes. He oversaw Peru's defense in investment treaty arbitrations amounting to nearly US \$50 billion in claims, all of which resulted in favorable outcomes for the State. He managed complex negotiations to resolve a number of international investment disputes, advised different state agencies on treaty and contract provisions related to dispute resolution, and assisted such agencies in evaluating risks and avoiding disputes.