



TRADE,
INVESTMENT AND
COMPETITIVENESS

EQUITABLE GROWTH, FINANCE & INSTITUTIONS NOTES

Managing Investor Issues Through Retention Mechanisms

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Editing: Barbara Balaj

Design and Layout: Amy Quach / FPS Groups



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The authors are grateful for inputs and comments from Lien Anh Pham, NH Quang, Fantu Farris, Hilina Getachew, Addis Barega, Calvin Ganza, Zaid Najada, Ivan Nimac, Daniela Gomez Altamirano, Armando Heilbron, and Gerlin May U. Catangui.



1. Introduction

Investors may experience a multitude of issues or problems in running their operations in countries. Some of these issues, if not addressed in time, can lead to divestment decisions or to legal disputes and thus entail significant risks for host countries¹. Experience and investor surveys show that there are two types of risks that can lead to divestment: political risk and certain operational risks. Political risk arises from government conduct and, besides divestment, it may also lead to legal disputes potentially generating liability of the State. Operational risks are linked to the country's operating environment and can put the survival of the company or of its division in the country at risk and may lead to withdrawal or cancelation of investment. While significant

research has been done on political risks and their impact on investment retention, much less is known on the impact of operational risks on retention of investment². Nonetheless, World Bank Group's experience in country projects indicates that there are certain typical issues that impact retention of investment (Table 1).

Investor surveys consistently rank political risk as the most important foreign direct investment (FDI) constraint when considering investing in developing economies — specifically political risks related to governmental actions, such as adverse regulatory changes, expropriation, breach of contract, and/or transfer and convertibility restrictions (World Bank 2009-13; World Bank 2018).

¹ Some issues that can negatively impact foreign investors are beyond the immediate control or action of governments; for example, interest rate risk, commodity risk, curfews, protest, riots, civil unrest, sabotage, crime, theft and disorder, political instability, pervasive corruption. Yet other issues are within government's immediate control and can be addressed through effective coordination, problem-solving, bridging information asymmetries and advocacy.

² This is an area where further research is being undertaken by the World Bank Group.

TABLE 1 - Risks Within Government's Control that Can Impact Retention of Investment

	Topic	Examples of Investor Issues Potentially Leading to Divestment and/or Investor-State Disputes	
		<p>Political Risk Issues:</p> <ul style="list-style-type: none"> • These put investment at risk of divestment • Can lead to investor-State disputes • Caused by government conduct • Investors protected by domestic or international law. Protection against: <ul style="list-style-type: none"> - expropriation - breach of contract - sudden/arbitrary regulatory changes - lack of transparency 	<p>Other Operational Issues:</p> <ul style="list-style-type: none"> • These do not lead to investor-State disputes but can still put investment at risk of divestment • Caused by a measure under the government's immediate control
1.	Legal and Regulatory Environment	<p><i>Permits/Licenses</i></p> <ul style="list-style-type: none"> • Abusive refusal of renewing permits/licenses <p><i>Contracts</i></p> <ul style="list-style-type: none"> • Major changes in terms of contract • Unjustified termination <p><i>Adoption and Implementation of Laws and Regulations</i></p> <ul style="list-style-type: none"> • Sudden changes in policies, laws and regulations; compliance feasibility • Non-transparent and inconsistent application of laws, regulations, policies • Discriminatory treatment against foreign investors • Any other government policies, laws, regulations and other actions that could lead to investment disputes • Systemic regulatory/policy issues affecting a group of investors or sector 	<ul style="list-style-type: none"> • Unreasonably lengthy delays in processing and renewing permits/licenses, work permits, or visas to expatriates; construction permit; environment permits; operational permits/licenses, or inspection processes • Systemic regulatory/policy issues³ affecting a group of investors or sector (e.g., local content requirements) • Compliance feasibility
2.	Infrastructure /Utilities/inputs	<ul style="list-style-type: none"> • Government actions that could lead to a breach of contract • Unpredictable and arbitrary change in policy/law affecting the continuity of the infrastructure project • Non-transparent awarding or termination of contract • Expropriation 	<ul style="list-style-type: none"> • Serious infrastructure/utility quality or consistency issues (transformer blown, disconnection) affecting investment sustainability • Change in infrastructure/utility rates that renders the project unfeasible
3.	Labor	<ul style="list-style-type: none"> • Discriminatory, unreasonably burdensome or improperly implemented labor rules 	<ul style="list-style-type: none"> • Difficulty in getting urgent access to foreign workers (due to limitation on number/quota, visa issuance, speed, transparency, lack of information on available skills) • Labor/social unrest, strikes, road blockages • Inadequate skills
4.	Finance	<ul style="list-style-type: none"> • Freezing of bank accounts 	<ul style="list-style-type: none"> • Difficulty in finding access to affordable rescue finance⁴

5.	Capital transfer	<ul style="list-style-type: none"> • Restrictions on international transfers, repatriation (ad hoc arrangements leading to discrimination) 	<ul style="list-style-type: none"> • Delays or burdensome restrictions on international transfers, repatriation (weekly limits for Banks for foreign currency transfers) Sudden currency restrictions/availability
6.	Taxes/Incentives	<ul style="list-style-type: none"> • Unpredictable changes • Retrospective taxation • Non-transparent awarding of incentives • Abusive penalties • Undue and persistent targeting and harassment of particular investment projects and/or sector by the tax administration 	<ul style="list-style-type: none"> • Taxes and incentives predictability, transparency • Sudden and excessive tax increase for a sector • Inspection processes
7.	Customs	<ul style="list-style-type: none"> • Unpredictable changes of duties • Retrospective application of duties • Discriminatory, unreasonable requirements • Persistent harassment/abusive penalties 	<ul style="list-style-type: none"> • Customs lockdowns, trucking/port/customs strikes causing significant delays for imports and export • Customs clearance (speed of import of inputs and capital goods, issuance of tax/duty exemptions for investors in special regimes, transparency at customs clearance)
8.	Land	<ul style="list-style-type: none"> • Unilateral cancelation or change of terms of a land lease contract • Taking away land of an investor or making it unusable (amounting to expropriation) 	<ul style="list-style-type: none"> • Title security and speed • Lease process speed • Clearance, transparency
9.	Courts		<ul style="list-style-type: none"> • Access to mediation/arbitration/dispute resolution • Speed, predictability, transparency, enforcement
10.	Crisis/Force Majeure	<ul style="list-style-type: none"> • Contract non-performance due to crisis/force majeure • Sudden regulatory and policy changes due to crisis/force majeure 	<ul style="list-style-type: none"> • Issues stemming from the global, country or sector crisis affecting investment sustainability • Delays in approving emergency licensing, permitting or registration to rapidly change line of business (personal protective equipment (PPE), health supplies or medical devices)
11.	International Policies (external)		<ul style="list-style-type: none"> • Sudden trade restrictions, sudden capital or exchange/currency restrictions/availability
12.	Market dynamics		<ul style="list-style-type: none"> • Consumer preferences change, disposable income goes down, competition increased, technological innovation leading to competitive disadvantage
13.	Firm Circumstances		<ul style="list-style-type: none"> • Change in direction of corporate strategy (e.g., nearshoring), weaker performance than sister affiliates, limited embeddedness in the host economy

Source: World Bank Group.

³ Such systemic concerns could arise from both political risk issues and operational issues.

⁴ Financing needed for urgent or emergency situations – such as to remedy default under debt financing agreement or supporting liquidity needs.

In the most recent Global Investment Competitiveness Survey for 2019-2020, about two-thirds of the respondents (foreign investors) indicated that when faced with political risk exposure or operational risks linked to permits and approvals, they would consider withdrawing their investment or canceling planned investment (World Bank 2020). At the same time, it should be recalled that investors are also protected against key political risks (such as expropriation, breach of contract, and adverse regulatory changes) in protection guarantees provided in international investment agreements (IIAs) and domestic investment laws (Table 2). Investors are usually reassured by the existence of these protections. In some instances, investors may use these guarantees and sue governments for losses suffered due to political risks (Kher and Chun 2020). The COVID-19 global pandemic has further increased the number of investor's issues, as countries grapple with demand and supply side shocks, adopted sudden regulatory measures in response to the crisis and faced difficulties in fulfilling contractual obligations. Recent surveys conducted by the World Bank Group indicate that during the pandemic, existing foreign investors have been consistently experiencing negative impacts on production, revenues/sales, employment, supply chain flows and investment volumes⁵. Issues have ranged from shortage or delay in receipt of inputs from suppliers to delay in outbound logistics. More broadly, external shocks — whether in the form of a public health crisis, civil unrest, natural disasters or war — and the uncertainties and constraints they generate appear to be the new reality that countries and investors will have to operate in.

Governments make considerable efforts to attract FDI. Thus, the likelihood of the loss of an existing investment, the possible costs of litigation and reputational damage due to investor-State disputes present major risks for host countries (Kher and Chun 2020). Therefore, initiatives to reduce political and operational risks are important for governments, as they help to retain investors, allowing them to expand their businesses and avoid disputes (Figure 1). Furthermore, in a context where attracting new investment is challenging because of the pandemic or conflicts affecting the global economy and global value chains, fostering retention and reinvestment is crucial.

The World Bank Group's Investment Climate team has developed a solution package to help countries retain investment by implementing retention mechanisms to resolve investor issues that are under the control of the government in a timely manner — before they cause any adverse impact or escalate to legal disputes. Such a retention mechanism is meant to address both political risks and operational risks which may lead to withdrawal, closing or cancelation of investment (including pre-approved expansion plans) in the country. The mechanism does not tackle issues which are beyond the immediate control or action of government such as interest rate risks or market conditions. It does not address matters that affect the population at large such as macroeconomic factors. Instead, it is focused on issues specifically affecting investors on a case-by-case basis or at a systemic level which can be addressed through effective coordination, problem-solving, bridging information asymmetries and enhancing advocacy efforts.

TABLE 2 - Political Risks and Investment Protection Guarantees

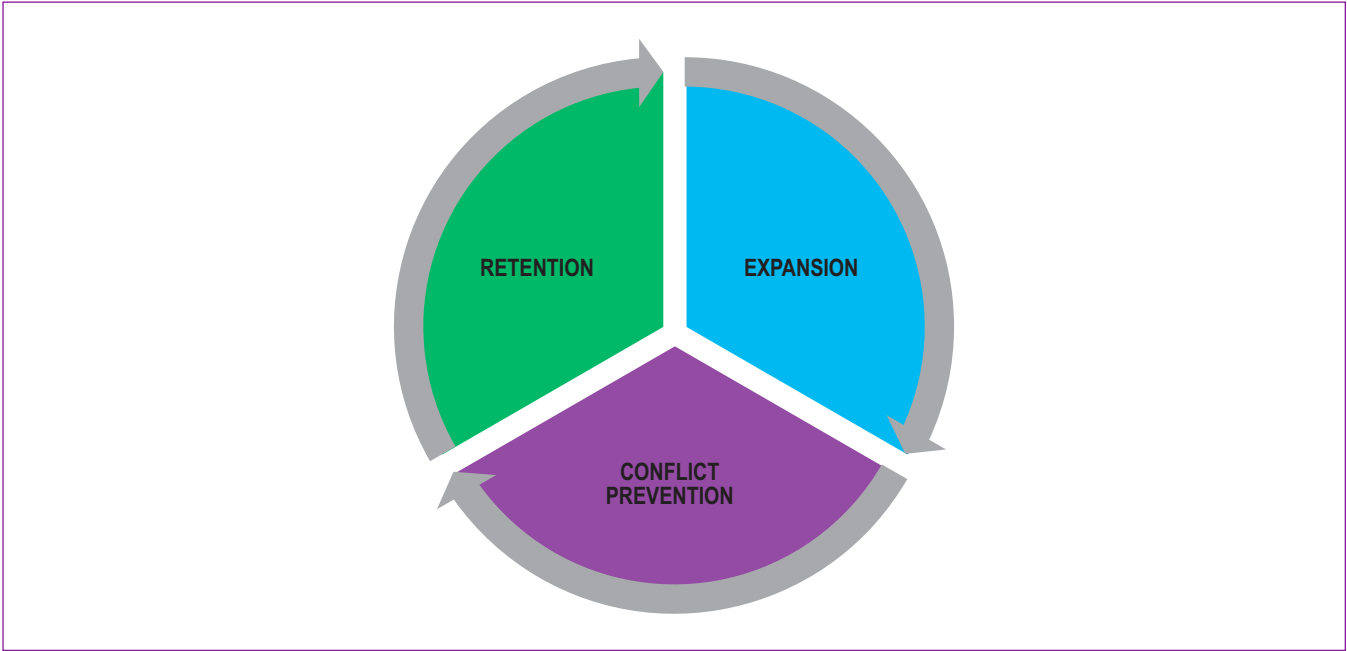
Main Types of Political Risks Resulting from Government Conduct	Main Types of Government Conduct that Investors are Protected Against in IIAs/Investment Laws (Protection Guarantees)
Expropriation	Protection from unlawful expropriation
Breach of Contract	Umbrella clauses/expropriation
Transfer and currency convertibility restrictions	Transfers of funds
Lack of transparency and predictability in dealing with public agencies	Fair and equitable treatment/transparency
Sudden adverse regulatory changes	Fair and equitable treatment

Source: Authors' Analysis

Note: IIA= International Investment Agreement.

5 The World Bank MNE Pulse Survey. <https://openknowledge.worldbank.org/handle/10986/35803>.

FIGURE 1 - Investment Retention Mechanism Goals



Source: World Bank Group.



Source: The Chronicles, Nov. 2, 2020, “World Bank Plans ‘Investor Grievances’ Office for Rwanda”. Picture of Investor Open Day at Rwanda Development Board.



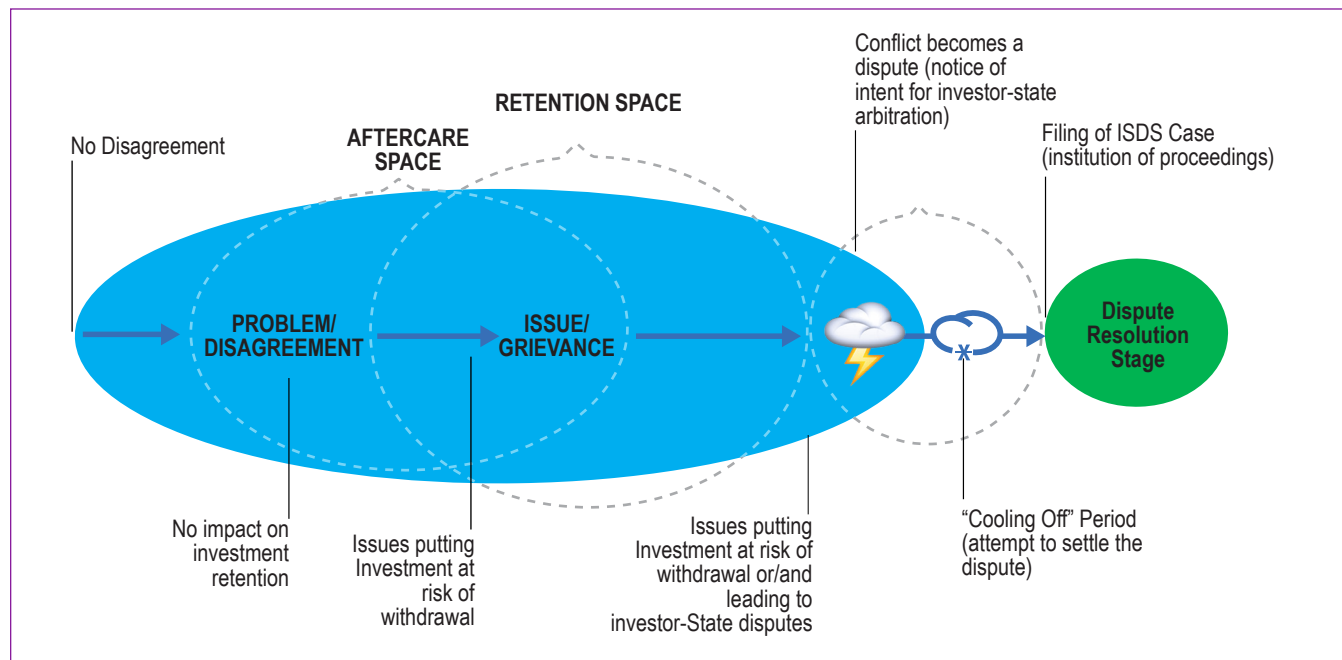
2. Investment Retention Mechanisms

2.1 Definition

A systematic investment retention mechanism (SIRM)⁶ is a practical tool designed to enable governments to identify, track, and resolve investor issues of established investors in a timely manner. Such issues may put investment projects at risk of divestment or entail a risk for host States to be found liable under applicable domestic or international investment rules. The concept of early resolution of investor issues is rooted in the investor-State conflict continuum and the distinction between the notion of an “issue” on the one hand, and “legal dispute” on the other (Figure 2). With respect to the investor-State conflict continuum, countries usually focus on the two extremes. They may focus on the beginning of the spectrum — on problems faced by investors to run their operations. These problems are usually addressed by aftercare programs or units typically located within Investment Promotion Agencies (IPAs) aiming at the operationalization, retention and expansion

of investments. Alternatively, at the other end of the spectrum, countries that have experienced investor-State disputes may focus on international dispute prevention and resolution, specifically inter-institutional coordination efforts to properly respond to and manage investor-State disputes. A SIRM “connects” the two ends of the investor-State continuum (Figure 2). Indeed, retention mechanisms address issues arising from governmental conduct early on that are severely affecting the operations of the investors, thereby allowing for retention and expansion of investment. It also avoids the escalation of an issue into a full-blown dispute. Given the highly regulated environment for doing business that exists in most countries, investors may regularly experience various problems linked to the acts and omissions of specific public agencies. Although not all problems become issues leading to divestment, and not all issues escalate into legal disputes, some persistent problems that remain unattended or unresolved over time may ultimately become more burdensome for the

FIGURE 2 - Investor-State Conflict Continuum



Source: World Bank Group.

⁶ This mechanism was also called Systemic Investment Response Mechanism. Each country may choose a specific name that it finds appropriate and adapted to its political economy. When the mechanism is focused on political risks, several countries have also called it an Investor Grievance Management Mechanism (IGM).

business, escalating into withdrawals and/or legal disputes. Retention mechanisms collect data and identify patterns concerning the source of political and operational risks under the control of the government, affecting investments, and quantify retained, expanded or lost investments as a consequence of addressing or not addressing those risks. Establishment of retention mechanisms entails the empowerment of a reform-oriented government agency (that is, a lead agency) and the establishment of an intra-governmental mechanism to systematically address issues arising from government conduct or under its control. The lead government agency brings to the attention of high levels of government, problems affecting investments, helping to address them before they escalate further.

2.2 Conceptual Distinctions

Retention Mechanisms and Dispute Resolution

Retention mechanisms should not be confused with dispute resolution systems, including alternative dispute resolution methods such as arbitration. Retention mechanisms do not usually deal with disputes. Instead, their scope is earlier in the conflict continuum, specifically in the management of issues. The rationale for this focus is to help countries prevent losing FDI through divestment — which mostly occurs without investors even seeking any legal recourse. Furthermore, retention mechanisms do not involve the issuance of a binding decision that can be enforced, such as a court decision or award. Rather, it is closer to mediation or conciliation in the sense that it uses similar creative and collaborative problem-solving techniques. Retention mechanisms assist public agencies at the source of the problem, in understanding the implications of their actions, while also exploring possibilities to modify or rectify those actions to solve the issue. Above all, it is a coordination mechanism within the multi-layered governance structure of public administrations to induce desired behavior among them, thereby mitigating political and operational risks in cross-border investment transactions.

Retention Mechanisms and Aftercare

Retention mechanisms include part of the tasks usually carried out by aftercare units found in IPAs, but their focus is distinct. While aftercare units typically deal with all sorts of issues to facilitate the operationalization and expansion of projects, retention mechanisms are focused on severe issues which jeopardize the continuation of an investment

project or may trigger the liability of the State (Figure 2). An aftercare issue arises during the operationalization of the investment, as well as when the investment is operational or being expanded.

An aftercare issue often has an ‘inquiry’ nature (information or assistance services) and requires facilitation and follow up to reach resolution. Aftercare units deal with a broad range of issues, including investment facilitation such as licenses, permits, incentives, land, utility connections, and service providers. They may also deal with issues involving living conditions, such as education, banking, health care, visas, or even drivers’ licenses related to the company making the investment and its personnel. These issues may trigger costs and delays, but they usually do not reach the level where the investors would stop their project or raise a dispute. In some situations, such issues can cause divestments and would then be addressed by a retention mechanism.

Another difference lies in the breadth of the legal mandates. Some IPAs may have mandates that exclude some activities or sectors, such as mining, energy, telecommunications, or the environment. In those cases, the aftercare unit would not deal with issues related to matters outside the IPA’s legal mandate. However, a retention mechanism would typically not be limited in its scope. Indeed, it would have the legal mandate and political clout required to deal with all types of issues.

Retention Mechanisms and Ombudsman

Retention mechanisms can overlap with some types of ombudsmen who deal with business regulations and governmental agency conduct. However, the nature of issues dealt with by the ombudsman may be much broader and the institutional set up may differ. The classical ombudsman appointed by a legislative body represents the public with concerns regarding the conduct of governmental agencies. In essence, the ombudsman has a broader mandate that is not limited to or specialized in the investors’ legal protections against political risk or operational risks. Furthermore, the classical ombudsman usually requires the establishment of a separate and neutral institution, whereas retention mechanisms may leverage existing institutions and strengthen them to the extent possible. The institutional set up of a retention mechanism is within the government as opposed to a new organization, and the focus is on using a reformist force within the government to enable effective resolution of

investor issues. Table 3 summarizes the key differences between retention mechanisms, aftercare and the ombudsman.

It is important to understand these conceptual distinctions, especially since these concepts and terms are often

used interchangeably. However, it should be noted, that in practice when implementing retention mechanisms, aftercare or ombudsman programs –institutional set ups are often connected and may have overlaps. Therefore, in project design and implementation it is important to clarify and connect the various related initiatives that may have been implemented in the country.

TABLE 3 - A Comparative View of the Retention Mechanism, Aftercare and Ombudsman

	Aftercare	Retention Mechanism	Ombudsman
Objective	Attract, retain and expand investment	Retain and expand investment, as well as conflict prevention	Representative power to manage conflicts
Scope	Any issues (mostly operational) affecting the establishment, operations and expansion of an investment	Political risks and operational risks leading to divestment and/or legal disputes	A number of varied issues based on the type of ombudsman (for example, corruption prevention, government malpractice, violations of legitimate interests)
Institutional setup	Usually, part of the Investment Promotion Agency	Typically, strengthen and leverage existing institutions (See next section)	Generally, establishment of a new and neutral institution
Problem-solving techniques	Information sharing, networking, partnerships, advocacy, and negotiation	Systemic coordination, bridging information asymmetries, advocacy and escalation mechanism based on a legal and economic analysis	Use political authority to recommend a resolution

Source: World Bank Group.



3. Retention Mechanisms: Design and Implementation

Design and implementation of retention mechanisms should be adapted to the needs of the client. It can be implemented in three different ways:

- (i) addressing political risks only,
- (ii) addressing operational risks only and
- (iii) addressing both types of risks.

In all cases, the design and implementation of a retention mechanism in client countries include three components: an institutional setup, operating procedures and monitoring and evaluation.

3.1 Designing the Institutional Setup

Having the right institutional frameworks is essential for attracting and retaining FDI (Heilbron and Whyte). Specifically, retention mechanisms and the services they provide, focus on enabling retention and expansion of investment. A key component of each mechanism is the design of specific intra-governmental coordination protocols among agencies dealing with investors to address issues. A retention mechanism should be designed to reflect each country's specific political, economic, legal and institutional framework. In order to customize the mechanism to the country context, the first step is to conduct a diagnostic to: (i) review the basic indicators of the host country, especially on reinvestments, divestments, and related to political risk and governance; (ii) consider the particular political-economy dynamics within the host country; (iii) review the existing FDI regulatory framework; (iv) examine the type of FDI-related issues and actors involved; and (v) assess the tools being used to track and resolve investment problems. The output is an overview report of the FDI performance, legal and political economy situation pertaining to investor issues and investor-State grievances, the impact those issues may be having, the network of public and private sector actors involved, how such issues are handled, and the state of existing tools to collect data about investor issues. The second step is to design a pragmatic proposal for the institutional

set up, which should be validated by the governmental authorities after consultation with private sector and civil society representatives.

The institutional set up includes three core elements: a lead agency in charge of coordinating the proper functioning of the mechanism, an empowering instrument clarifying the mandate for the lead agency, and an escalation mechanism for political decision making or advocacy for reforms, as and when required.

Lead Agency: The establishment of an effective retention mechanism entails the empowerment of a lead agency within the government to identify, track, and manage operational issues under the immediate control of the government as well as issues arising between investors and public agencies as early as possible. It is the core element of the mechanism. It can be a small unit, but it should consist of well-trained staff with understanding of investment operations, negotiation skills to deal with peer agencies, advocacy skills in particular for systemic issues and knowledge of investment law for political risk issues. At the same time, the team must have the full trust and support of the office of the head of government. This support will provide the team with the required political clout to discipline the agencies causing the issue or advocate for reforms. There are two options for establishing the lead agency (Table 4); both depend on the political economy and institutional reality of the country. The first option is to establish a new, independent lead agency; as such, it would be relatively detached from the government bureaucracy. Such a set up can accommodate the combination of the ombudsman and the retention mechanism. The other option is to leverage existing institutions, such as an IPA, and strengthen them to the extent possible. In this case, the focus would be on using a reformist force to resolve issues. Within the IPA, different set ups are possible. For instance, the IPA can establish a unit dedicated to retention, or it may extend its Aftercare unit to also include the right legal and administrative skills to deal with high-risk issues

potentially leading to divestment or disputes. If the retention mechanism and aftercare units are separate, there should be a synergy between them in collecting cases and engaging with investors, as well as with the entities that cause the issues. In this context, it should be noted that although the lead agency may be housed in a single agency, the functioning of retention mechanisms will typically involve the participation of many agencies playing a variety of roles. When it comes to systemic issues arising from a specific entity, the lead agency may enter into a partnership/collaboration agreement to facilitate the handling of those recurring issues. Once the lead agency has been determined, much emphasis should be placed on building the capacity of its staff to detect and resolve risky investor issues. This includes building capacity on detection and analysis of investor issues, communication and problem-solving techniques, investment law and policies, use of monitoring and evaluation tools and techniques.

Empowering Instrument: In order to deal with the challenges of intra-governmental coordination, the lead agency should be empowered through an instrument. It can be a legal instrument such as a law, regulation or other binding instrument. It may also be a less formal instrument such as an internal government procedure

or other administrative instruction or guidelines. This instrument would provide the lead agency with the mandate and authority to carry out its work. By their nature, retention mechanisms entail the involvement of many governmental agencies that have regulatory powers impacting investors. Therefore, a proper instrument is critical to ensuring clarity about the role of the lead agency, enabling information sharing and coordination and ensuring collaboration amongst the various stakeholders. It also helps to convey the government's political commitment to ensure that the mechanism works properly.

Escalation Mechanism: Equally important is the setting up of an escalation mechanism, that can be used for political decision-making to resolve issues and to facilitate advocacy efforts. Such a mechanism allows for the escalation of issues to an authority with high political clout. This would occur when the lead agency is unable to reach a solution or to discipline a peer agency. Even if the lead agency has succeeded in resolving an issue at a technical level, it may still be necessary for the proposed solution to receive the approval of the appropriate political authority to ensure effective implementation. Such a political decision-making body may already exist (for example the Cabinet). Alternatively, a special inter-

TABLE 4 - Options for Establishing a Lead Agency

	New Agency	Within Investment Promotion Agency (IPA)
Type	Independent / new lead agency (for example, a Business Ombudsman)	Lead agency within an Investment Promotion Agency (for example, a grievance management unit or expanded aftercare unit)
Escalation Mechanism	Independent platform → Prime Ministerial or Inter-Ministerial Meeting	Discussion in IPA units → High level management of the IPA → Prime Ministerial or Inter-Ministerial Meeting
Pros	<ul style="list-style-type: none"> • Strong authority (including on issues outside the scope of the IPA) • Focus on high-risk cases 	<ul style="list-style-type: none"> • Easy access to investors • Easy issue collection process
Cons	<ul style="list-style-type: none"> • New institution: new resources • Slow progress • Low capacity 	<ul style="list-style-type: none"> • Mandate can be limited • Confusion between retention mechanism and broader aftercare • Difficulties in focusing on high-risk cases
Conditions for success	<ul style="list-style-type: none"> • No IPA or a weak IPA • Adequate resources commensurate with volume of work brought by the task • Strong political support from the top to create a new agency 	<ul style="list-style-type: none"> • Strong empowerment of the IPA for coordination • Adequate resources commensurate with volume of work brought by the new task • Need for an efficient filtering and escalation mechanism

Source: World Bank Group.

Note: IPA= Investment Promotion Agency

ministerial commission can also be established. For systemic issues, it is crucial to put into place an advocacy process or framework — such as an inter-institutional forum — that will address those issues at large and push for systemic reforms. An escalation mechanism can often assist in speeding up the advocacy process.

3.2 Operating Procedures to Manage Investor Issues

Once the institutional set up has been validated, it is crucial to develop standard operating procedures incorporating detailed information. Such procedures will help government staff and officials, in particular the lead agency staff, follow the appropriate steps and requirements of the process. Formulating such guidelines and distributing them to staff can be a simple and useful way to capture the “institutional knowledge” of the most experienced decision-makers in an organization. It can also help to capture and cement the process. The operating procedures should reflect the overall strategy and goal of the retention mechanism—for example, saving investment projects and jobs in general, or in specific sectors, segments, and/or regions at risk, or focusing on specific types of issues, supporting early detection of common or systemic issues. At this early stage, aspects such as key beneficiaries of the mechanism, resources, tools and partnerships required, as well as performance indicators of the mechanism should be determined.

The typical process of a good practice retention mechanism involves six steps:

Issue recording: This entails the registration of an issue in a database (using Excel or an automated tracking tool, such as the IPA Investor Relationship Management System). Information about the issue received in writing, in person, on the phone, online or during site visits, is recorded. In terms of detecting issues, the lead agency may either reach out to investors and other agencies to collect issues (that is, a proactive approach) or may just respond to issues reported by other agencies or investors (that is, a reactive approach). The most suitable approach can be determined based on the country context, resources and capacity.

Filtering: Once the issue is received, staff from the lead agency should filter it – based on a broad review of the issue – to determine whether it falls within the scope of the retention mechanism, that is, if the source of the issue is under immediate control of the government and if it

places the investment project at high risk of cancellation or entails possible liability for the host state. For instance, this would allow for the transfer of business-to-business issues to other units or agencies since they are not under the control of the State and are not investor-State issues. Furthermore, the filtering process would make the distinction between general aftercare issues that are not within the scope of the retention mechanism and high-risk issues which are impacting retention of investment. The purpose of this filtering is to allow the lead agency to focus on high-risk issues, and not to be overburdened by other issues. Once an issue has passed the initial filter, a further assessment is undertaken.

Legal and economic assessment: The issue should be analyzed from an economic and legal perspective before the lead agency coordinates with other agencies to resolve it. The economic assessment estimates the potential impact of the issue in terms of the amount of investment and the number of jobs at risk. It can also estimate the other potential economic impacts, such as the costs in terms of potential taxes lost — or even fiscal costs related to international legal fees and possible compensation, should the issue escalate to a dispute. The assessment may also include estimates of any social and environmental impact as a result of the investor’s contemplated action, for example, a disruption of public service or a multiplier economic effect resulting from the loss of service. Depending on the nature of the issue, the economic assessment is complemented by a legal analysis to determine the likelihood of liability of the host State should the issue escalate into a full-blown investor-State dispute or to propose legal or regulatory reforms. This analysis is based on the domestic legislation or the international obligations of the country under its IIAs. In case of potential liability of the State, the purpose of the analysis is to determine if the action (or inaction) of the relevant governmental agency that caused the issue could be deemed a breach of domestic legislation or an international obligation or both. For issues that may lead to divestment but not to potential dispute, the main purpose of the analysis is to ensure that the proposed solutions comply with the existing law. This overall assessment is not meant to be a rigorous analysis. Rather, it provides the arguments and evidence for the lead agency to more effectively engage and coordinate with other sector or specialized agencies to resolve the issue. This assessment helps the lead agency explain to the agency causing the issue the impact of its actions or measures. The expectation is that by becoming aware of

the consequences of its actions, the agency concerned may be more open to collaborating with the lead agency to solve the issue. In sum, the assessment provides the lead agency with the requisite data and evidence to be used in the problem-solving phase.

Problem-solving: The problem-solving process in resolving issues begins with direct interaction between the lead agency and its peers, based on the economic and legal analysis. Solutions to issues vary by case, and may require different problem-solving techniques, such as peer pressure, rule-based negotiations, interest-based negotiations, power-based negotiations, mediation, fact-finding, or obtaining an early neutral evaluation. The goal is to convince the agency causing the issue to take a corrective measure or to negotiate a solution with the investor based on interests rather than positions. Keeping the process within the government provides some degree of discretion, allowing the agency that caused the issue to save face and rethink its conduct. For effective problem-solving, the staff of the lead agency need to be trained in problem-solving methods, as well as on leveraging the information generated by the retention mechanism to induce the agency causing the issue to collaborate. Usually, the effects of noncompliance — losing investment and jobs or exposure to liability — are persuasive. If this approach does not work, escalating issues can play a critical role.

Escalating to political decision making: If the lead agency is unable to resolve the issue due to a lack of cooperation by other agencies or because the underlying issue is too politically sensitive, then the lead agency will escalate the issue to a higher political level. This higher level is typically a political authority that allows for political decision-making where needed, such as by the Ministerial Councils. High-level political endorsement and support would guarantee that any solution to the issue would be effectively implemented. This escalation mechanism also helps the top political authority to make an informed decision considering all aspects of the impact of certain governmental conduct. It may also lead to a broader reform agenda when the issues impact a group of investors and are deemed to be more systemic in nature.

Communication and follow-up on implementation: In all situations — whether the issue is registered, a solution is found, or an escalation occurs — it is important to communicate clearly and substantively with the investor.

Letting investors know about the progress and outcome of the process is key. Independently of the outcome, the investors must also feel that their issues have been heard and that they have been given due consideration. For this purpose and to track the services provided, the lead agency must monitor the situation to ensure effective implementation of the agreed solutions. Furthermore, the lead agency should create a feedback loop mechanism to check the investor's satisfaction and measure the impact of the service through a phone call or an online survey or both.

To enable the lead agency to perform the steps involved in the process, a core part of project implementation will be capacity-building programs for the staff of the lead agency, as well as for other stakeholders that may be involved at the subnational and sector levels.

3.3 Impact Monitoring and Evaluation

Monitoring the performance of the lead agency and its staff is important to determine whether the mechanism that has been put into place is in fact effective. The impact is measured using key indicators calculated from the data captured by a tracking tool.

Impact indicators: The key impact indicator for retention mechanisms is “investment retained”, which can be calculated based on the following formula: The difference between investment at risk⁷ at the time of registration of the issue (that is, ex ante) and the investment canceled (that is, ex post), amounts to investment retained⁸. Other key indicators to measure performance are the number of issues resolved and the number of jobs retained. For the lead agency, to easily calculate these indicators, it is important to have a tracking tool to capture the necessary data. The lead agency should closely monitor these indicators and include them as part of its overall strategy.

Tracking tool: This tool helps governments to monitor and track investor issues, as well as the associated amount of investment and number of jobs at risk due to those issues. The tracking tool is a customized technology application, which can be as sophisticated or as simple as the host country wants. It can vary from a simple Excel sheet to a highly sophisticated, customized software. The tool should be used to comprehensively document key information about every issue registered with the retention mechanism. Typically, the tracking tool is populated by the staff of the lead agency.

⁷ That is, at risk of cancellation.

⁸ Subject to specific conditions stipulated under the World Bank's methodology note. ⁸ Subject to specific conditions stipulated under the World Bank's methodology note.



4. Country Examples

4.1 Overview

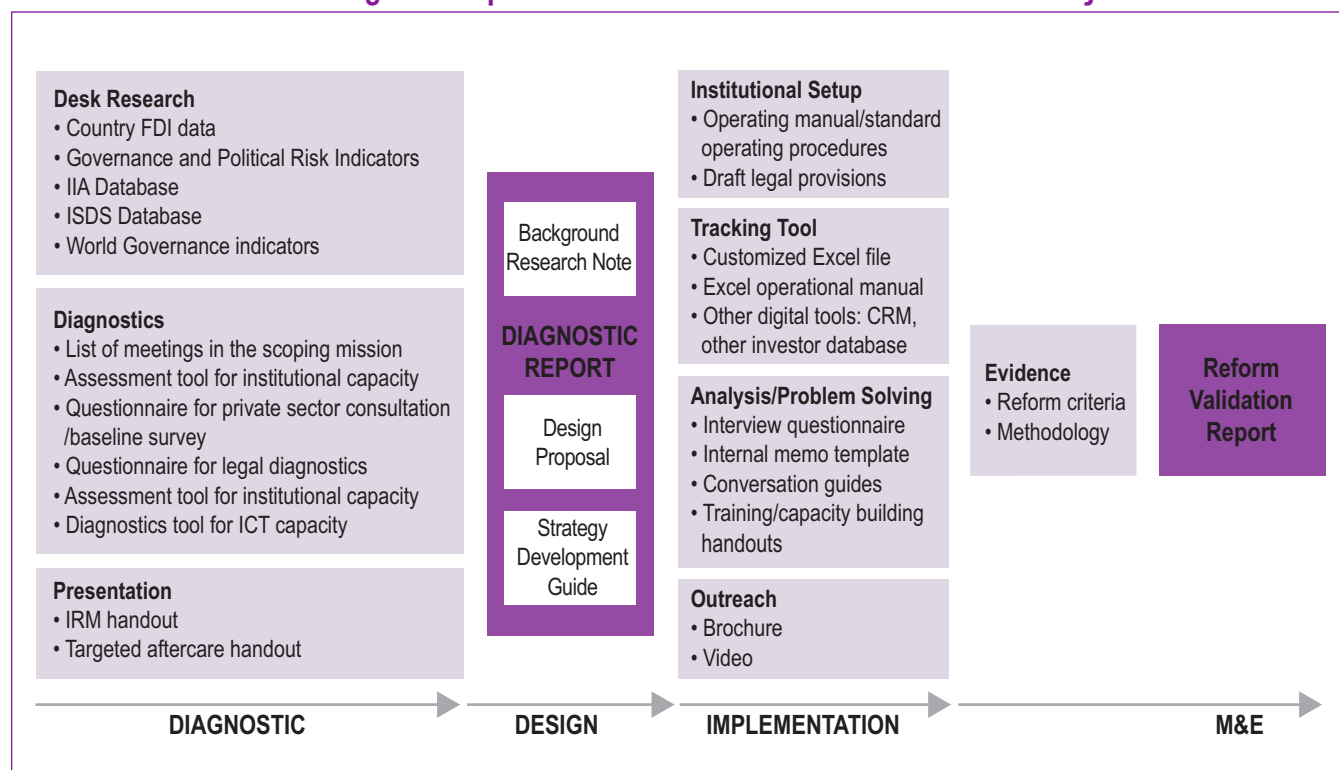
The World Bank Group (WBG) has supported projects in countries from Central Asia, East Africa, Eastern and Southern Europe, the Middle East, North and Southeast Asia and South America. A set of tools has been developed to customize and apply across four project stages, namely: diagnostics, design, implementation and monitoring and evaluation. Figure 3 shows the project stages and the tools to be used for each stage. Retention mechanisms focused on political risks were piloted in eight projects. Data from these projects shows that there were 39 grievances where investments were at risk (World Bank 2019). The most common cause of grievances is sudden/arbitrary regulatory changes (60 percent), followed by

breach of contract (22 percent) and expropriation (18 percent). Regarding the types of agencies generating grievances, specialized and subnational regulatory agencies generate most of the problems. Among the 39 cases, specialized agencies caused 64 percent of the grievances (25 cases), and subnational agencies caused 15 percent of the grievances (6 cases)⁹. This section presents the experience of Ethiopia, Rwanda and Vietnam which are three most recent country projects.

4.2 Experience from Ethiopia, Rwanda and Vietnam

The experience of Ethiopia, Rwanda and Vietnam allows to draw helpful lessons for implementation of projects in other countries.

FIGURE 3 - Tools Customized for Specific Client Conditions in World Bank Projects



Source: World Bank Group.

Note: IRM= Investment Retention Mechanism

⁹ The remaining grievances were caused by national agencies or ministries.

4.2.1 Ethiopia

Ethiopia's motivation in establishing a retention mechanism, called investor grievance management mechanism (IGM) was driven by two factors. First, Ethiopia wanted to retain the sizeable investment attracted from 2013 onwards through reduction in post-establishment cancellation that is, after registration with the Ethiopian Investment Commission (EIC)¹⁰.

Second, investors were reporting issues to multiple places, from the Prime Minister's Office to line ministries and agencies, leading to institutional inefficiencies. To manage this challenge, a Grievance Management Unit comprised of three staff was established within the Ethiopian Investment Commission, reporting directly to the Commissioner. The Ethiopian Investment Commission is Ethiopia's Investment Promotion Agency and is very well empowered with regulatory and policy-making functions. The IGM unit has its legal foundation in the newly adopted Investment Proclamation¹¹. Sections 25-27 of the Investment Proclamation allow investors to lodge complaints, laying down the grievance management process. It also clarifies that the Ethiopia Investment Board, which is an inter-ministerial body, will serve as the escalation mechanism. In addition, the Federal Democratic Republic of Ethiopia Civil Service Commission confirmed the establishment of the Investor Grievance Management Unit as part of the official organogram of the Ethiopian Investment Commission, under the official notification of January 16, 2019¹². As of December 2020, the IGM unit has registered twelve grievances and resolved five. The timely resolution of grievances has led to the retention of about US\$ 231.8 million in investment and 590 jobs. The process followed to resolve grievances is the same as outlined in section 3.2 of this note. Ethiopia's federal structure and unique political economy presented some challenges during implementation. To garner the support of the whole government, extensive consultations were conducted from the start of implementation. A diverse group of stakeholders were involved in the systematic capacity-building activities during the implementation period. Other factors that proved to be very helpful in

the effective resolution of issues included: (i) the direct reporting of the Unit to the Commissioner, which allowed for the high-level engagement with other agencies; and (ii) the delineation of aftercare and grievance management functions, with regular communication between the units in charge of these separate functions.

4.2.2 Rwanda

Rwanda has made significant efforts to improve its investment climate. However, it can still increase its performance in terms of investment attraction and retention. The country faces investment-related issues, particularly with respect to transparency, predictability and contract enforcement. To increase investment attraction and retention, the Rwanda Development Board (RDB), the country's investment promotion agency, hosted the SIRM. The aftercare division became the Reinvestment and Investor Aftercare Department. It expanded its mandate to include issues of established investors arising from government conduct, particularly those with a high risk of investors leaving or potential state liability for the violation of laws or contracts. The legal foundation of the retention mechanism is based on the preexisting law relating to investment promotion and facilitation of 2015¹³, which was confirmed by the new investment law of 2021¹⁴. Art. 14(5) of Chapter II of the new law provides that "[RDB] facilitates in [...] any other investment-related support that may be required". Art. 16(4) of Chapter II reads as follows: "[RDB must] facilitate amicable settlement of disputes that may arise between an investor and a State organ". If the issue cannot be solved at the level of the Aftercare Department, then it is escalated through several different levels. First, it would go to the investment committee chaired by the Chief Investment Officer and comprising the heads of the Investment Office within the RDB. Second, it would move to the RDB CEO (which is a cabinet-level appointment). Third, it would go to the Private Investment Committee, comprised of the RDB CEO, the Minister of Finance and a representative of the Office of the President. Art. 15(3) of the new investment law specifies that the Private Investment Committee may "discuss investors issues and propose acceleration measures to resolve them."

10 Data compiled by the EIC showed the cancellation of at least 101 registered projects in the post-establishment phase, roughly accounting for the loss of at least US\$ 148 million (or US\$ 1.47 million per investment), as well as at least 132,177 jobs (of which 6,808 are permanent and 125,369 temporary).

11 This became effective as of April 2, 2020.

12 [h/t/h?23/m48/6/133](#)

13 Law No. 06/2015 of March 28, 2015.

14 Law No. 006/2021 of February 5, 2021 on Investment Promotion and Facilitation.

Finally, it would be presented to the Cabinet. As of April 2021, the Aftercare Department registered seventeen high-risk issues and resolved eight of them. The issues arose in different sectors (including agriculture, energy, food manufacturing, health, ICT, services, and tourism). Eight issues fall within the category of breach of contract – principally because of the absence of payment by the relevant government agency – the nine others are linked to sudden or arbitrary regulatory changes. In most cases, the issues were resolved by agreeing on new payment modalities. The total amount of investment retained for the eight solved issues is US\$ 26.5 million. The number of jobs retained is 761. The data is extracted from a CRM which has been developed for the whole Investment Office of RDB.

4.2.3 Vietnam

Vietnam has successfully attracted FDI as an important source of economic growth for over 30 years. However, the lack of understanding and enforcement of the legal framework has consistently been reported as a significant issue by the business community¹⁵. In 2018, Vietnam also decided to move to a next-generation FDI strategy in the context of implementing the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) and the European Union Free Trade Agreement (EU FTA). To better implement these agreements, the Government of Vietnam established a pilot Taskforce (T/F) team led by the Director General of the Foreign Investment Agency (FIA) to pilot SIRM to draw lessons before formally setting up the mechanism. Focusing on

BOX 1 - Retaining Foreign Investment in Brazil

Although Brazil receives the largest foreign direct investment (FDI) flows of any country in the region, investments are mostly directed toward exploiting natural resources or setting up subsidiaries to serve the domestic market and are geographically concentrated in large and developed states. Efficiency-seeking FDI to establish stages of production in regional value chains remains limited. In order to increase efficiency-seeking FDI and address bottlenecks faced by foreign investors – which included increased operational costs, corruption, frequent changes in laws and regulations as well as issues with the implementation of such investor rules – Brazil established the Direct Investment Ombudsman (DIO) with the support of the World Bank Group and the UK-funded Improving Business Environment for Prosperity Program. Access to the DIO was broadened to include investors from all countries even in the absence of a ratified Cooperation and Facilitation Investment Agreement with a particular country. In April 2019, the Brazilian government issued Decree No. 9770 establishing the DIO covering all investors regardless of their nationality. DIO's two main functions are to address (i) inquiries to provide information to potential and existing investors concerning legal and regulatory procedures to enter and operate in the country and (ii) investors' grievances. Both inquiries and grievances are jointly addressed with the public agency responsible for the specific matter at the federal, state or municipal level with the help of a Network of Focal Points designated across the government. The DIO also benefits from a grievance tracking tool and external website. Through this website and tool, officials can receive, track and follow up on all investors' grievances from the time they are submitted by investors to their resolution – capturing all actions taken by the government towards the resolution of each grievance. The platform also allows the government to obtain aggregate data on the most recurring types of grievances, the agencies involved, the time it takes to solve grievances, and other measures.

Between April 2019 (launch of the DIO portal) and November 2021, a total of 25 cases were received (13 consultations for information and 12 investors' grievances). According to the government, as of March 2020, 13 cases had been solved amounting to US\$ 591 million in FDI, with the expectation of approximately 3,400 new jobs generated.

The development of an institutional mechanism such as the DIO is complex, especially in a federal country with a large economy such as Brazil. Challenges still remain for the effective implementation of the DIO to ensure that this reform is translated in more and better investment, particularly in the lagging regions of the country.

Source: World Bank Group.

15 In a 2017 report on the business environment, the American Chamber of Commerce observed that its members faced significant challenges with inconsistent regulatory interpretation, irregular enforcement, and unclear laws. The report also noted that American companies' perception of the lack of fair enforcement of laws in Vietnam was higher than any of the other Association of Southeast Asian Nations (ASEAN) countries.

political risks, the Taskforce comprised of eight members from the FIA, and other departments of the Ministry of Planning and Investment, the Ministry of Justice, and the Office of Government. Resolution 50 of the Politburo of the Communist Party adopted in August 2019 provided the overall direction for establishment of the SIRM¹⁶. In June 2020, Vietnam passed its new Investment Law which also included a reference to SIRM. The Government is now working on an implementing decree for the law which will provide more details on the Retention Mechanism. A detailed report on the pilot SIRM was also submitted to the Prime Minister in November 2020, paving the way for scaling up the pilot once the legal framework is in place. The inclusion of SIRM in Resolution 50 and subsequently in the Investment Law has solidified the basis for its establishment. Through the initial pilot, the T/F tested and gained experience in data collection and analysis of grievances. FIA is particularly well positioned to coordinate the retention mechanism. It is able to leverage its role as the coordinator for Vietnam Business Forum (VBF), the public-private dialogue (PPD) between the FDI community and the Government of Vietnam. The operating procedures followed by the T/F align with the standardized procedures discussed in earlier sections — including data collection assessment from a legal and economic perspective, preparation of a recommendation. If the grievance is not resolved at the technical level through a discussion between the T/F team and relevant agencies, then the T/F team drafts a consolidated report on the cases (including a legal and economic assessment, T/F team recommendations, and the position of the relevant ministry), and reaches out to the Office of Government (Prime Minister's Office) for a political decision. All activities of the taskforce are recorded in a log sheet, allowing for easy follow up and preventing duplication of activities. Between December 2018 to May 2020, 31 grievances have been recorded in the tracking tool. To date, three grievances have been resolved, affecting investment worth US\$ 260 million as well as 314 jobs that were at risk.

4.3 Lessons Learned

First, the country projects have shown that if the retention mechanism is hosted by the IPA, it is critical to clarify the different types of problem-solving services available

to investors. Typically, aftercare primarily focuses on cases with no potential State liability. In addition, there is usually no risk of losing the investment or cancellation of expansion plans. However, a retention mechanism would focus on cases where there is a risk of investors leaving or canceling expansion plans, or where there is a potential violation of protection guarantees in domestic laws or treaties. It is therefore recommended to establish a separate unit within the IPA, distinct from the aftercare unit. If the IPA lacks the required resources to hire additional staff, it can — at least in the short term — assign some of its existing staff to deal with high-risk issues when they arise as long as they have the adequate skills. If in a country's specific context, the aftercare unit is considered the most suitable host for the retention mechanism, it must be ensured that adequate resources are dedicated to identifying and resolving issues that can lead to loss of investment or potential liability for the state. **Second**, it should not be assumed that a single lead agency should undertake all the stages of the SIRM process, nor that the lead agency will act merely as the point of contact with investors. Country projects show that most issues arose due to actions or inactions of regulatory agencies other than the lead agency. Thus, it is essential to empower the lead agency and to ensure an effective coordination mechanism. To that end, the different elements of the institutional design and implementation of a retention mechanism are crucial. It is particularly important to have a legal instrument empowering the lead agency. Furthermore, the involvement of senior management is key, and the escalation mechanism can play a critical role. Standard operating procedures are also crucial for harmonizing the quality of the service and creating institutional memory to ensure the sustainability of the mechanism. **Third**, although a tracking tool is critical to the functioning of the lead agency, it is a supporting tool — not the main aspect of the mechanism. The idea of having one single integrated tracking system to centralize all the stages of the FDI cycle is clearly attractive. However, developing a single comprehensive tracking system for all FDI transactions entails significant efforts and may be expensive. The country projects have shown that it is usually faster and more economical to adopt tracking approaches limited to the retention mechanism. These

16 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, Part III.4. It provides: "Developing a mechanism for prevention and settlement of grievances, complaints and lawsuits of investors. Improving quality and efficiency of dispute resolution and enforcement institutions. Refining the laws to efficiently resolve issues related to projects with commitments to transfer assets of foreign investors without reimbursement to the State or Vietnamese party upon termination of operation, and settlement of cases foreign investors were absent or fled during the course of their investments in Vietnam".

should be focused on identifying investment projects at risk of withdrawal or cancellation of expansion plans, thereby ensuring the ability to measure investments and jobs retained. Of course, where country capacity and resources allow, more comprehensive end to end IT tools can be implemented. **Fourth**, the capacity of the lead agency staff is key to the sustainable operation of the tool. They should have the right skill set, including the ability to undertake legal and data analyses. Thus, a key aspect of implementation entails the development of a systematic and consistent capacity-building program for the lead agency, as well as other involved agencies. The capacity-building and information-sharing activities should properly inform peer agencies about the importance of investment retention, the content of IIAs, investment protection, and other issues with which they may not be familiar. In addition, these activities could be used as part of a communications campaign to promote greater interaction between the lead agency and their peer professionals,

whose collaboration may later be sought in the context of subsequent issues. **Finally**, retention mechanisms can be useful for promoting broader investment climate reform, through systematic advocacy efforts. Although a retention mechanism follows a firm-level approach, the tracking of issues over time will enable the lead agency to identify and facilitate resolution of systemic issues that may be impacting a broad group of investors. In this sense, the SIRM is also intended to identify patterns of conduct across institutions, re-incidences by “offending” institutions, or any other recurring problem placing FDI at risk. As such, it develops an evidence-based, systematic approach to forge a reform agenda and discuss issues with a variety of investment stakeholders. One example entails integrating a retention mechanism with a PPD platform. Because the PPD establishes systemic communications between the relevant stakeholders, it can be tailored to improve the investment climate of a country by addressing issues that hinder investment retention and expansion.

BOX 2 - The IGM and its Advocacy Role in Jordan

Jordan has experienced a general decrease in FDI inflows since 2006, including a drastic drop in 2018. The Government is embarking on efforts to ensure the sustainability of investments and attract new, diversified long-term investments that generate beneficial spillovers. As part of this effort, a retention mechanism focused on political risks, called IGM, was established within the Jordan Investment Commission (JIC), which is now part of the Ministry of Investment (MOIN). A Grievance Committee composed of five staff from different units was formed to manage and track investors grievances.

The IGM was formalized by two legal instruments, namely: Regulation No. 163 of 2019 on the Investors Grievance Mechanism, issued in accordance with Articles 43 and 46 of the Investment Law No. 30 of 2014, and the Grievance Hearing Instructions No. 1 of 2020, Issued Pursuant to Article 7(A)(3) and Article 10 of Regulation No. 163. The IGM came into force on January 24, 2020.

The main mandate of the Grievance Committee is to address issues faced by an investor due to government conduct that potentially impacts the investor’s rights or guarantees contained in a domestic law, IIAs, or contracts between the investor and the government entity. As part of this mandate, the Grievance Committee assists the government in effectively attempting to reach a settlement agreement when a dispute is brought to court or arbitration.

Investors based in Jordan have indicated that one of the most recurring issues is the lack of regulatory predictability. Investors consider regulatory changes to be frequent and abrupt. Changes often take place without any warning or transition period —and without proper consultation with the private sector. In this context, the Grievance Committee is also competent to study the obstacles faced by economic sectors, taking the necessary measures to address them.

The Grievance Committee was established to include links to the PPD platform. As such, it will coordinate with the PPD platform regarding any systemic issues and concerns received from investors. The platform is particularly relevant to lead in policy advocacy to ensure proper consultations of the private sector for new regulations or laws affecting investors.

The PPD platform needs to be set up. However, the standard operating procedures established for the Grievance Committee already include the processes to follow to liaise with the future PPD platform. In the meantime, the operating procedures contain an interim process for the Grievance Committee to deal, to the extent possible, with these types of systemic issues. To that effect, the Grievance Committee can leverage the escalation protocols put into place for non-systemic issues. When an issue cannot be solved at the level of the Grievance Committee, it is then escalated to the Minister of Investment and on to the Council of Ministers.

Source: World Bank Group.



5. Conclusion

Retention mechanisms serve as concrete tools to address investment retention and expansion in policy making, which is critical for governments. The COVID-19 pandemic crisis, followed by other global shocks has only amplified the need for governments to systematically focus on existing investors by encouraging them to stay and expand their investments in the country. By inducing the desired behavior among domestic regulatory agencies, retention mechanisms can also serve as a tool for properly implementing investment laws and IIAs on the ground. This can be achieved in a way that is more in tune with the IIAs' original intent of mitigating political risks in cross-border investment transactions and overall facilitation of investment. At the same time, by improving the domestic institutional framework and inducing positive changes in the investment climate, retention mechanisms would equally benefit domestic investors. The design of retention mechanisms and the positive performance of the country projects demonstrate the merits of including FDI retention and expansion within the broader discussion in various international fora. One such forum is the World Trade Organization (WTO) in the context of discussions on investment facilitation. Indeed, a retention mechanism can contribute to investment facilitation by responding to the needs of investors and of governments, helping them to quickly

establish the institutional infrastructure to coordinate statewide responses to investor-State issues. Another forum is the African Continental Free Trade Area whose Investment Protocol is being negotiated. This instrument would benefit from including the notions of investment retention and expansion with a retention mechanism as an implementing tool.

Finally, in the context of the current pandemic and more generally conflicts with worldwide impacts, retention mechanisms have become even more relevant. On the one hand, investors are facing challenges around recovering revenue, rebuilding operations and rethinking their organization due to supply and demand side disruptions. On the other hand, countries are facing contract non-performance issues and are taking measures to allow for flexibilities. Countries have also taken emergency measures affecting investors. As countries adopt measures — and the uncertainty around contract performance and policy unpredictability persists — the likelihood of disputes only increases. In this context, a well-functioning retention mechanism is key to facilitating the retention and expansion of investments, strengthening investor confidence, and ultimately preventing investment disputes.



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