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Possible reform of investor-State dispute settlement (ISDS)

Draft toolkit on prevention and mitigation of international investment disputes

Note by the Secretariat

Contents

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Introduction

1. At its thirty-ninth session in October 2020, Working Group III undertook a preliminary consideration of the topic of dispute prevention and mitigation based on document A/CN.9/WG.III/WP.190 and requested the Secretariat to pursue further work (A/CN.9/1044, para. 26). At the forty-fifth session in March 2023, a draft legislative guide on investment dispute prevention and mitigation (A/CN.9/WG.III/WP.228) was prepared jointly with the World Bank Group along with an informal document containing a compilation of the best practices.[1] The Secretariat was requested to revise the text into a non-prescriptive guidance document on means to prevent and mitigate disputes, including examples of best practices, which would aim to mainly assist States (A/CN.9/1131, para. 52).

2. At its forty-seventh session in January 2024, Working Group III considered the draft guidelines on prevention and mitigation of international investment disputes (A/CN.9/WG.III/WP.235). In view of the limited time, the Secretariat was tasked with updating the draft guidelines based on written comments as well as inputs received during the seventh intersessional meeting of Working Group III (7–8 March 2024, Brussels, A/CN.9/WG.III/WP.242) (A/CN.9/1161, para. 112).

3. At its forty-eighth session in April 2024, Working Group III considered the revised version of the draft guidelines.[2] After discussion, the Secretariat was tasked to prepare the text as a toolkit compiling different States' practices and reflecting the deliberations of the Working Group (A/CN.9/1167, paras. 80–83). Accordingly, this Note contains in the annex a draft toolkit on prevention and mitigation of international investment disputes for consideration by the Commission.

4. The Commission may wish to take note of the current status of work and provide further guidance. Noting that the draft toolkit might need to be regularly updated to reflect existing and new practices, the Commission may wish to consider the appropriate form of the text and how best to make progress. The Commission may wish to call on all States and other organizations to share information on existing practices for inclusion in the draft toolkit and to verify the correctness of information contained therein (including sources of reference).

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

[2] Available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/wp.235_rev_clean.pdf.

Annex

Draft toolkit on prevention and mitigation of international investment disputes

A. Introduction

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

2. "Dispute prevention" refers to the handling of a grievance of a foreign investor before it devolves into a disagreement framed in legal terms. As such, it includes the handling of grievances, which may be expressed as disagreements in non-legal terms, for example, through media coverage or other informal complaints. A disagreement is usually framed in legal terms when the investor expresses its intent to seek recourse to arbitration or litigation. This is when "dispute mitigation" begins, which may also involve amicable settlement, including through mediation. If the dispute is not settled and the investor escalates the disagreement into a "legal" dispute by formally seeking recourse to arbitration or litigation, dispute mitigation gives way to "dispute management". The Toolkit focuses on the dispute prevention and mitigation phases.[3]

3. The Toolkit illustrates how States and regional economic integration organizations (REIOs) have set up and implemented dispute prevention and mitigation systems (references to "States" hereinafter include REIOs).

4. As a non-prescriptive document, the Toolkit does not contain specific recommendations nor aim to list best practices. This is because whether and how to implement a dispute prevention and mitigation system falls under the sovereign regulatory powers of a State. The Toolkit also does not impose any legal requirements binding upon States. It should not be used to interpret any provision of investment instruments nor should it form the basis of a claim against a State or be used in any way by a claimant in raising such a claim. It is entirely left to States on how to make use of the information in the Toolkit, taking into consideration factors such as the organizational structure of the State or government and ways to address investor's rights and obligations.

5. Investors also have a significant role in preventing and mitigating disputes. However, the primary focus of the Toolkit is to inform States about measures undertaken by other States. By providing insights into their practices in setting up and implementing dispute prevention and mitigation systems, the Toolkit aims to empower governments to proactively address potential conflicts and foster a stable and predictable investment climate. A coherent and effective dispute prevention and mitigation system could result in the attraction and retention of foreign investments, as it would demonstrate the State's commitment to risk management, stability and maintaining a healthy relationship with investors.[4] In other words, the Toolkit may be considered as part of a broader strategy on investment policy. Such strategy usually includes attracting, protecting, expanding and retaining investments, which bring value to the State and contribute to its sustainable development.

6. This Section provides an introduction and explains the purpose and scope of the Toolkit. Section B discusses the various strategies and measures adopted by States to

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

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

improve communication with investors. Section C illustrates States' efforts to ensure coordination among governmental and related agencies, including information-sharing and identifying or establishing a coordination body. Section D describes States' efforts to ensure coordination and cooperation with other governments. Section E deals with other related issues that arise with regard to dispute prevention and mitigation. Finally, Sections F and G contain a list of reference material, including the practices of States as well as guidance material prepared by international organizations.

B. Communication with investors

7. Effective communication with investors can help dispute prevention and mitigation. By maintaining transparent and open lines of communication, potential issues can be addressed early on. Misunderstandings can be avoided and conflicts resolved more smoothly. Additionally, clear communication helps to manage expectations and build trust, which are essential elements for maintaining positive relationships with investors. In general, an effective communication channel with investors throughout the lifecycle of their investment could be useful.

8. Effective communication with investors can be achieved by providing easy access to relevant information, by engaging investors in policy discussions and by operating an investor grievance mechanism. Simply providing information may not always suffice. Policy choices may need to be explained and conveyed in a different manner. For example, a high-level or senior official may be involved in the communication in addition to working-level support, as high-level engagement can enhance the credibility and seriousness of the State's commitment to maintain a constructive relationship with investors.

9. In this context, some States have established one or more focal points, for example, a one-stop online or single information portal.[5] These focal points help address queries from investors and potential investors, aiding them to obtain relevant information from competent authorities. Streamlining communication through focal points has expedited the process and prevented potential confusion caused by multiple responses from different governmental agencies. Such an approach has also promoted clarity and transparency.

1. Easy access to information

10. Information about investment policy, including relevant laws and regulations, could be made easily accessible to facilitate investment and expansion.[6] Prospective investors need information on how to establish their investment and the regulatory framework that will govern their investment. They need information about the applicable laws and compliance procedures as well as governmental or related agencies that investors may need to interact with (referred to generally as "competent governmental agency or agencies" in the Toolkit). During this phase, communication with investors is generally established by investment promotion agencies or as part of promotional activities. For instance, Brazil's Direct Investment Ombudsman serves as a first point of contact for prospective investors, so that they may inquire about legislation, procedural and regulatory requirements.

11. Investors may obtain a better understanding of the regulatory regime and be informed, for example, whether any assurances given by a specific governmental entity are binding under domestic law. Such information can aid investors in making informed decisions throughout the lifecycle of their investment. For example, information about any changes to the regulatory framework can enable investors to assess whether to expand or diversify their investment.

[5] Investment Facilitation for Development (IFD) Agreement, article 22.1.

[6] See IFD Agreement, articles 6 and 7.

12. Contact information of focal points or other appropriate mechanisms to respond to inquiries from investors and to assist them in obtaining relevant information about government measures could be included in a single information portal. In case of any complaint, investors would need information on the competent governmental agency and ways to submit any complaints.

13. However, facilitating access to and providing such information should not form the basis of any expectation of investors, as investors should conduct extensive due diligence prior to making the investment, including on the economic, technical, and legal aspects of the host State.

14. In certain jurisdictions, technology has been employed to improve communication with investors and provide comprehensive information, serving as a valuable resource for businesses. The website "InvestJordan" operated by the Ministry of Investment of Jordan is one example.[7] The European Union also operates a portal providing information to investors on trade, investment, and procurement spanning all EU member States.[8]

15. Such portals allow investors to access information about regulatory requirements, obtain responses to frequently asked questions, contact competent governmental agencies and file grievances and monitor progress. Live chatbots have also been incorporated into the portals to respond to questions or to direct enquiries to the competent governmental agency or officials.

16. Some States have centralized information on their investment obligations (including information about dispute resolution clauses in investment treaties or joint declarations by States). This provides investors with greater transparency and predictability regarding the legal framework in which they operate. Such information can also be helpful to policymakers as they can manage their obligations and take informed decisions. For example, Peru's State Coordination and Response System for International Investment Disputes is responsible for compiling information on investment agreements and treaties that refer to international dispute settlement mechanisms.[9]

2. Engaging investors in policy discussions

17. Investors may be impacted by changes to the regulatory framework as well as the introduction of specific measures. To reduce grievances of investors and mitigate claims being raised at a later stage, some States have taken a proactive approach by involving investors in the policy discussions leading to changes in the regulatory framework or introduction of measures to the extent possible.

18. Some States have introduced consultation procedures to seek inputs from interested parties, including investors, before changes are made to laws or regulations and before introducing specific measures that may potentially affect the interest of such parties.[10] Some States emphasize the need to discuss legislation publicly to foster transparency and enhance public engagement in the rule and policymaking process. Such engagement is sometimes facilitated through platforms like the Private

[7] InvestJordan, available at https://invest.jo/. See also Invest KOREA (available at https://www.investkorea.org), InvestQatar (available at https://www.invest.qa/en) and United Kingdom of Great Britain and Northern Ireland platform (available at https://www.great.gov.uk/international/investment/).

[8] Access2Markets portal, available at https://trade.ec.europa.eu/access-to-markets/en/home.

[9] Article 3 of the Law Establishing the Coordination and Response System for International Investment Disputes (No. 28933, 15 December 2006).

[10] For example, article 10.3 of the IFD Agreement suggests that investors should be given a reasonable opportunity to comment on proposed laws, regulations or measures and that comments received should be considered, to the extent practicable and in a manner consistent with the respective legal system.

Sector Feedback Platform[11] and the Public Consultation Platform[12] operated by the National Competitiveness Center of Saudi Arabia.

19. Additionally, some States integrate consultation processes with regulatory impact assessments.[13] For example, the Business Regulatory Review Agency of Zambia has the authority to approve a proposed law or policy based on an assessment of its impact on the business environment.[14]

20. Involving investors in consultations on future policies or regulations may mitigate future disputes as investors would have a forum to voice concerns about how a policy or regulation might affect them negatively. Such a process would not hinder the power to regulate but help make an informed policy choice and consider potential impact. Gradual implementation of new laws or regulations may pre-empt grievances by providing investors sufficient time to make adjustments.

21. This is also embodied in investment agreements. For example, article 340 of the Strategic Partnership, Trade and Cooperation Agreement between the United Kingdom of Great Britain and Northern Ireland and Moldova provides that each Party shall ensure that measures aimed at protecting the environment or labour conditions that may affect trade or investment are developed, introduced and implemented in a transparent manner, with due notice and public consultation, and with appropriate and timely communication to, and consultation of, non-State actors.

3. Investor grievance mechanism

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

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

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

25. An investor may be invited, but not necessarily required, to utilize the grievance mechanism prior to raising a claim or otherwise utilizing the dispute resolution mechanism under the investment instrument. In any case, the grievance mechanism may complement any such dispute resolution mechanism and could be referred to in investment instruments.

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[11] Available at https://www.ncc.gov.sa/en/Visuals/Pages/default.aspx.

[12] Available at https://www.ncc.gov.sa/en/Istitlaa/Pages/default.aspx.

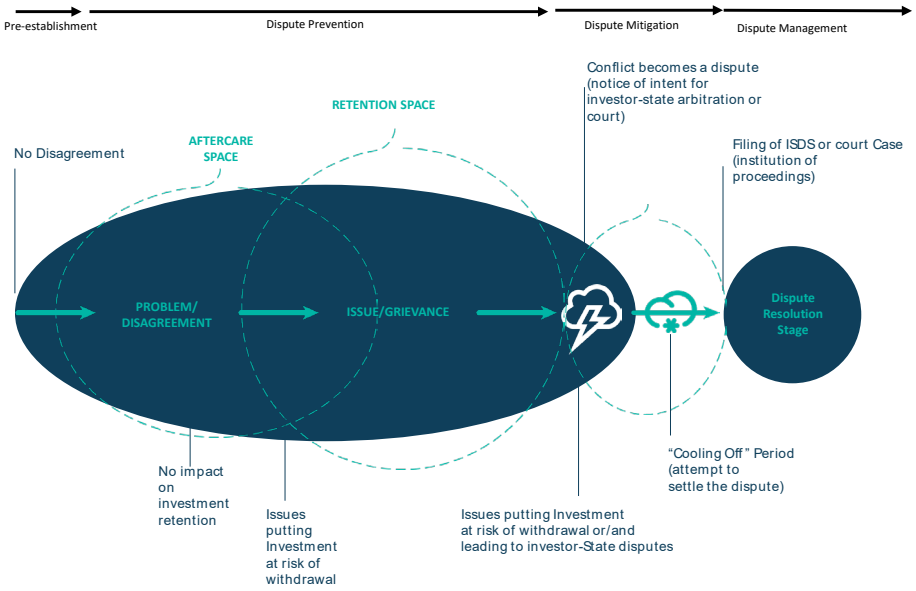
[13] Regulatory impact assessment refers to a systemic approach to critically assessing the positive and negative effects of proposed and existing regulations and non-regulatory alternatives. It encompasses a range of methods and is an important element of an evidence-based approach to policymaking.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

[14] See section 6 of the Business Regulatory Act.

26. The grievance mechanism would usually require the outcome to be communicated to the investor and the competent government agency to follow-up and implement any decision or recommendation resulting therefrom. If the investor is not satisfied with the outcome, there may be a possibility to appeal. If the grievance cannot be handled effectively, for example, due to the lack of cooperation among the governmental agencies or the political sensitivity of the issues at stake, it may be brought to the attention of a higher political authority (for example, an inter-ministerial committee or the office of the prime minister or the president).

27. An investor grievance mechanism, like dispute prevention or mitigation more broadly, is not intended to address grievances arising out of the conduct of the judiciary, but is instead focused on the conduct of the executive branch, whether central or decentralized. The mechanism may also address grievances arising from legislative activities resulting in the enactment of laws and regulations.

28. The experience of the World Bank in supporting governments set up investor grievance mechanisms may be useful. The World Bank suggests that a minimum institutional infrastructure be in place to enable governments to identify, track and manage grievances as early as possible.[15] It further suggests the empowerment of a government agency and the establishment of an intergovernmental mechanism for systematically addressing grievances. The government agency would be responsible for bringing grievances to the attention of high-level government bodies to address the issues before they escalate further.[16] The World Bank also suggests the establishment of an early alert mechanism for the government body to become aware of grievances as soon as they arise and a tracking tool to monitor whether the grievance is resolved. It further suggests problem-solving methods (leveraging information-sharing tools, analysis of legal and economic implications of grievances and standard coordination/operating procedures) and in case a solution cannot be reached at a technical level, a mechanism to elevate the issues to higher political levels.



29. States where the World Bank Group assisted in establishing investor grievance mechanisms include Brazil, Ethiopia, Georgia, Jordan, Rwanda and Viet Nam.[17]

30. For example, the competencies of the Direct Investment Ombudsman of Brazil include providing support and guidance to investors by recommending solutions to

[15] See World Bank, supra note 4, pp. 39–45.
[16] Ibid., p. 43.
[17] See World Bank, supra note 4, pp. 15–18.

grievances and proposing improvements to legislation or administrative procedures.[18] In Ethiopia, the Investment Proclamation outlines the right of any investor who has grievance to lodge a complaint (art. 25) and further sets forth the procedure for submitting complaints with regard to decisions of any federal government executive body (art. 27) and decisions of the Ethiopian Investment Commission (art. 26). Issues not solved by the Ethiopian Investment Commission are escalated to the Ethiopia Investment Board, an interministerial body.

31. In Georgia, the Business Ombudsman acts as a moderator to resolve grievances between businesses and government entities. It investigates complaints, facilitates dialogue and proposes solutions to promote transparency and fairness in business-government relations, ultimately fostering a better environment for business growth and investment. Similarly, the Jordan Investment Commission administers the investor grievance mechanism.[19]

32. In Rwanda, the Private Investment Committee is tasked with discussing investors' issues and proposing acceleration measures for resolution.[20] An investor grievance mechanism is administered by the Reinvestment and Aftercare Department of the Rwanda Development Board.[21] In Viet Nam, grievances are resolved at a technical level through discussions between a pilot task force team (led by the Director General of the Foreign Investment Agency) and relevant agencies.[22] If the grievance cannot be resolved, then the task force team reaches out to the Office of Government (Prime Minister's Office) for a political decision.

C. Coordination among governmental and related agencies

33. Effective communication as well as coordination among governmental and related agencies can assist with dispute prevention and mitigation. Depending on the government structure and the type of investment at stake, a number of governmental and related agencies (including those at subnational level, such as provinces, states, and municipalities) may be involved in the coordination. This would include agencies that negotiate and conclude investment instruments, those whose measures may have an impact on investors, and those with a role in preventing and mitigating disputes.

34. This may be challenging for States with large economies and different levels of government approval and would likely require additional efforts, for example, leveraging technology for information-sharing, training and capacity-building to facilitate inter-agency understanding and cooperation.

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

[18] See Decree on the Creation, Structure and Attributions of the Direct Investment Ombudsman. See also the Brazilian Cooperation and Facilitation Agreement (CFIA) Model, article 23.

[19] See Investment Environment Law (2022), article 44 and Investment Environment Regulation (2023) articles 181–186. Additional information available at www.jic.gov.jo/en/investors-grievance-scope/.

[20] Article 15(3) of the Law on Investment Promotion and Facilitation.

[21] Article 7(l) of the Law governing Rwanda Development Board.

[22] Law on Investment and Regulation on coordination in resolution of international investment disputes.

36. The following outlines possible means to ensure effective coordination among governmental and related agencies, namely by sharing information and identifying or establishing a coordination body.

1. Information-sharing

37. Sharing of information among governmental and related agencies can prevent and mitigate disputes. It ensures that the relevant agencies are informed of the circumstances and underlying issues. It can build consistency and coherence at the different levels of investment policymaking.[23]

38. Information to be shared among the agencies would usually relate to investment treaties, investment contracts, dispute settlement clauses and models thereof. Such information would assist in avoiding having inconsistent investment instruments that is the cause of many grievances. Sharing ways to harmonize dispute settlement clauses can already bring a great deal of consistency and standardization. This could be done by providing model clauses ready to be used in negotiations of future instruments.[24]

39. In Peru, the criteria for the formulation of dispute settlement clauses are set forth in a legislation (inclusion of a cooling-off period, use of neutral dispute resolution means, allocation of costs relating to arbitration and conciliation, and obligation of the investor to notify the system coordinator in addition to the counterpart).[25] In the Dominican Republic, the Ministry of Industry, Commerce and MSMEs' Office of Administration of International Commercial Agreements and Treaties (Dirección de Comercio Exterior y Administración de Tratados Comerciales Internacionales, DICOEX) has the power to propose and review dispute settlement clauses or provisions to be included in prospective investment instruments.[26]

40. Information-sharing could further ensure coherence in measures taken by the agencies as well as in handling grievances. An early warning mechanism is a process designed to identify and flag potential issues or risks before they escalate into significant problems or disputes.[27] An example of such a mechanism can be found in the Dominican Republic, whereby any public entity must notify the DICOEX within three days upon being informed or becoming aware of any potential dispute.[28]

41. Given the rather long span of investments, conflicting measures or conduct by governmental or related agencies could be a political risk for investors. To address this problem, some States have established a knowledge management system to ensure the transfer and preservation of knowledge of public officials dealing with investors and to keep track of solutions used to resolve prior grievances. Information sharing thus provides a vehicle for properly informing peer agencies about investment-related issues and for promoting interaction among the staff members whose collaboration may later be sought in the context of handling grievances.[29]

42. There are various means of sharing information among governmental and related agencies, including online platforms, handbooks, and capacity-building events

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[23] See principle 1 of the Islamic Development Bank (IsDB) – UNCTAD Non-binding Guiding Principles for Investment Policies, which states: "All policies that impact on investment should be coherent and synergetic at the national, regional and international levels as well as between these different levels of investment policymaking."

[24] The UNCITRAL Model Provisions on Mediation for International Investment Disputes serves the same rationale, aiming to promote the use of mediation in resolving investment disputes. See also the UNCITRAL Guidelines on Mediation for International Investment Disputes. See also article 7(1) of the Energy Charter Conference, Model Instrument on Management of Investment Disputes.

[25] Article 13 of the Law Establishing the Coordination and Response System for International Investment Disputes.

[26] Article 4 of Decree No. 303-2015.

[27] See article 8 of the Energy Charter Conference, Model Instrument on Management of Investment Disputes.

[28] Article 6 of Decree No. 303-2015.

[29] See World Bank, supra note 4, p. 66.

where public officials involved in foreign investments share information on investment policies, developments and current disputes. In the Republic of Korea, ISDS handbooks and booklets are being published and circulated to provide general information on dispute prevention and the meaning of key provisions of IIAs. Upon request from government agencies, local municipalities or public entities, the Ministry of Justice provides lectures and seminars on ISDS prevention based on those handbooks.[30] Viet Nam has prepared a handbook for implementing international investment commitments, with an aim to assist officials about the practical application of the governments' treaties and related obligations and help them make better use of the government's legal resources.[31]

43. Regional intergovernmental organizations have also provided similar tools, such as the Asia-Pacific Economic Cooperation (APEC). APEC published in 2020 its Handbook on Obligations in International Investment Treaties, which provides an overview of the obligations contained in international investment treaties and the risks that governments face in the event they violate those obligations, potentially triggering investor grievance.[32] Through the dissemination of these tools, public officials may become more aware of the potential consequences of their decisions, understand the underlying investment framework, and build the capacity to better manage investment-related inquiries and grievances.

2. Identifying or establishing a coordination body

44. As information-sharing can ensure coherent and consistent approaches, a dedicated or coordination body or bodies dealing with investment issues may play a crucial role in preventing and mitigating disputes. While some common features can be drawn among government practices, it is important to note that there is no one-size-fits-all approach and that identifying or establishing such body or bodies may also differ depending on the form or structure of the government.

45. In identifying or establishing a coordination body, States have generally followed three different approaches: (i) creating a single coordination agency; (ii) distributing dispute prevention and mitigation functions among different agencies each having a specific role or handling certain grievances; or (iii) a hybrid approach establishing a committee or commission composed of governmental and related agencies, including ministries and specialized entities, with one of the agencies performing the secretariat function.[33] All approaches have their advantages and disadvantages, which may also differ depending on the economic sectors.

46. A single coordination agency has been established either as an autonomous body or within an existing ministry or a governmental agency. For example, a number of States have assigned the ombudsman to function as a coordination body (for example, Brazil, Georgia, Greece, Kazakhstan,[34] Mongolia,[35] Philippines, Republic of Korea, Russian Federation and Ukraine). Others have a designated investment promotion agency to function as the coordination body (for example, Chile's InvestChile, Georgia's Invest in Georgia). In others, the coordination body has been established under a single ministry. For example, the Litigation Directorate of the Ministry of Finance of Bulgaria coordinates the representation in disputes. In Czechia, prevention and management of investment disputes fall within the competence of the Investment Protection Unit at the Ministry of Finance. In Colombia, the Directorate of Foreign Investment and Services established within the Ministry of Commerce provides the function. In Chile, the Director General of International Economic Relations of the

[30] Submission from the Republic of Korea, 31 July 2019 (A/CN.9/WG.III/WP.179), p. 5.
[31] Association of Southeast Asian Nations, "Viet Nam finalises Handbook for Implementing International Investment Commitments", 9 November 2021, available at https://asean.org/viet-nam-finalises-handbook-for-implementing-international-investment-commitments/.
[32] APEC, Handbook on Obligations in International Investment Treaties, p. 5.
[33] World Bank Group, supra note 4.
[34] Article 12.1 of the Law on Investments.
[35] Investor Protection Council.

Ministry of Foreign Affairs is responsible for coordinating the international dispute settlement procedures.[36]

47. In some States, the coordination is done by a committee composed of several ministries and/or governmental institutions. In Egypt, for instance, the ministerial committee on investment contracts dispute resolution has been established within the Cabinet of Ministers to settle disputes arising from investment contracts.[37] The Committee examines the divergence in views and disagreements arising between the parties to the contract and may settle the dispute with their consent.

48. In China, the Ministry of Commerce, in conjunction with other relevant departments under the State Council, established an interministerial joint meeting system to handle complaints of foreign-invested enterprises. The joint meeting coordinates and facilitates the handling of complaints at the central government level and further guides and supervises the handling of such complaints at the regional level.[38] In Costa Rica, an inter-institutional commission for the resolution of disputes in trade and investment matters was created.[39] In Croatia, a decision was taken in 2013 to create an interdepartment commission to respond to requests from foreign investors in connection with disputes arising from investment treaties.

49. Whether it is a single coordination body, multiple agencies, or an inter-institutional committee, the internal operating procedures (composition of the authority, the monitoring and evaluation systems and to whom the authority is reporting) would need to be adapted for each State with an aim to ensure the efficiency of the authority and its legitimacy as well as to avoid conflicts of interest, lack of neutrality or vested interests. The way the authority is perceived by the investors, governmental officials, and other stakeholders is crucial to its success. Therefore, there could be merit in establishing a system of accountability in the institutional design and operating procedures of the authority.

50. As noted, the operational structure of the coordination body may vary depending on the jurisdiction and the identified needs. However, it is important that its legal status, position in the government hierarchy, staffing structure, budget and reporting mechanism, among others, are set forth in the instrument establishing the coordination body. For example, in Costa Rica, the composition and functions of the coordination body (Comisión Interinstitucional para la Solución de Controversias Internacionales, CISC) are clearly outlined in the regulation.[40]

51. In some jurisdictions, it was found that an independent entity playing an oversight role over the administration, as opposed to a collaborative role with and within the administration, has led to more bureaucracy and confrontation and limited its effectiveness to address the regulatory risks derived from government conduct.[41]

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

[36] Article 7 of the Decree on the Creation of an Inter-ministerial Committee for the Defence of the State in International Investment Disputes and Regulation of Coordination for Resolution of Such Disputes.

[37] Articles 88 and 89 of the Investment Law.

[38] Article 5 of Rules on Handling Complaints of Foreign-Invested Enterprises. The Department of Foreign Investment Administration of the Ministry of Commerce serves as the office of joint meeting and is responsible for the daily work and guiding and supervising the work of the National Center for Complaints of Foreign-Invested Enterprises.

[39] Article 3 of the Regulations for the Prevention and Handling of International Disputes in Trade and Investment Matters.

[40] See articles 4 and 5 of the Regulation for the Prevention and Handling of International Disputes in Trade and Investment Matters.

[41] See World Bank, supra note 4, p. 62.

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

3. Functions of a coordination body

53. The functions of the coordination body may vary. In some instances, the coordination body is responsible for dispute prevention and mitigation only. In other instances, the coordination body is in charge of dispute prevention and management of international investment disputes (including mediation and arbitration proceedings). The coordination body managing the investment disputes may also have the mandate to manage other types of disputes such as trade disputes. In certain cases, the coordination body is responsible for dealing with all investment disputes, whether they involve domestic or foreign investors. In other instances, the coordination body has a broader competence, covering all types of disputes involving the State, including before courts. The following lists some of the common functions of the coordination body.

54. As mentioned, information-sharing is one of the key functions that is often carried out by the coordination body, as it facilitates communication and cooperation among governmental and related agencies. The coordination body may act as a central repository of investment instruments and relevant court or arbitral decisions interpreting such instruments. Such a role contributes to raising awareness and building capacity within the government as well as at the subnational level. It could address the knowledge gaps that often exist among governmental bodies and enhance the capacity of governmental bodies based on accumulated knowledge on the meaning and implications of investment obligations and how they should be implemented.

55. Capacity-building activities could target government officials at various levels including specialized agencies as well as subnational entities such as provinces, federated states and municipalities. The main objective would be to identify potential non-compliant measures and ensure, to the extent possible, that conduct is consistent with investment obligations.

56. The repository function could also allow the coordination body to provide analysis of, for example: (i) economic sectors which are most likely to give rise to disputes; (ii) recurring grievances or disputes; (iii) key legal obligations contained in investment instruments; and (iv) gaps in domestic legislation for compliance with legal obligations contained in investment treaties. In the Dominican Republic, DICOEX monitors investor complaints and analyses disputes to understand which government entities are most frequently implicated.

57. The coordination body may also review the existing stock of investment instruments with the aim of identifying obligations that may potentially lead to disputes (for example, those perceived as being too broad or unclear). It could focus on specific obligations which are often invoked, such as the most-favoured-nation (MFN) clause[42] and possibly assess the need to renegotiate certain provisions that are deemed to be problematic.

58. The coordination body may be vested with the power to analyse and identify inconsistencies or gaps in regulations and laws related to investment. It may also identify problematic interpretation or implementation by other governmental bodies and recommend ways to address such issues. Moreover, the coordination body may have the role of consolidating recommendations from various governmental bodies, including ombudspersons, or regional grievance channels, or public-private dialogue platforms, regarding ways to improve the legislation or its implementation, including administrative procedures.

59. The coordination body could also provide advice to governmental and related agencies on how to handle grievances of investors. This would ensure that agencies

[42] For example, recent treaties limit the scope of MFN treatment. See article 8.7 of CETA.

faced with investor grievances have a constant communication channel with the coordination body, which may recommend ways to handle the grievance.

60. In order to perform its functions, the coordination body may be authorized to collect information from competent governmental agencies (as well as from investors). In Ukraine, the Business Ombudsman Council may request and receive from State authorities and other entities information and documents necessary for processing complaints.[43] The coordination body may request the cooperation of the relevant agencies including their officials, issue recommendations and monitor their implementation. In some States, governing entities must alert and inform the coordination body whenever they become aware of a potential investment dispute. In China, local agencies handling complaints are required to regularly submit records to the coordination agency.[44]

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

D. Coordination and cooperation with other governments

62. Establishing and institutionalizing intergovernmental coordination with authorities of other States may help ensure effective cooperation and mutual assistance in dispute prevention or mitigation.[45] Intergovernmental coordination may also help address any perception of bias in favour of a State that an investor may have when formulating a grievance.

63. One example of achieving such coordination is by setting up a joint committee or commission in investment treaties to promote a regular exchange of information for improving the investment environment and monitoring the implementation of investment treaties.[46] Joint committees create an avenue for effective application of the investment treaty by facilitating the exchange of best practices in order to adapt to evolving policy concerns through periodic reviews.

64. Some investment treaties envisage that such a body can play a role in preventing grievances from escalating into a dispute by facilitating consultations with investors. For example, article 4(4)(d) of the Morocco-Nigeria BIT notes that the joint committee shall seek to resolve any issues or disputes concerning the parties' investment in an amicable manner. Similar wording is found in article 17(4)(e) of the Brazil-Ethiopia BIT. Article 27(3)(g) of the Israel-United Arab Emirates BIT (2020) lists as one of the functions of the joint committee on investments the consideration of issues or matters related to the implementation of the agreement, including solving problems, obstacles and dispute resolution before its submission to arbitration. Article 18 of the Brazil-India BIT (2020) envisages a dispute prevention procedure within the joint committee established in accordance with article 13.

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[43] Article 6(1) of Resolution on the Establishment of the Business Ombudsman Council.

[44] Article 25 of the Rules on Handling Complaints of Foreign-Invested Enterprises.

[45] Under article 26.1 of the IFD Agreement, focal points or other mechanisms for communicating with investors may be assigned the function of responding to questions from other governments. Article 14.4(f) of the Brazil-India BIT (2020) provides that the national focal point or ombudsman is to report its activities and actions to the joint committee, when appropriate.

[46] See article 25 of Japan-Georgia BIT (2021); article 10.1 of UK-Turkey FTA; article 6.1 of Armenia-Singapore BIT; and chapter 12 of the Pacific Agreement on Closer Economic Relations Plus. Article 26.2 of the IFD Agreement mentions the areas of intergovernmental cooperation. They include exchange of information and sharing of experiences, exchange of information on domestic investors and the promotion of facilitation agendas with a view to increasing investment for development, including investment in and by micro, small and medium-sized enterprises.

65. As such, a joint committee may function to mitigate a dispute under a specific agreement. If there is any grievance or dispute about the application or interpretation of a provision of the agreement, the joint committee may prepare a report to resolve the issue indicating if a specific measure adopted by the State was in breach of the agreement. This mechanism, since it is provided by both Parties of the agreement, could avoid a litigation about the issue. Furthermore, the private sector, civil society and other agencies can be invited to share their views in the procedure. For example, under article 17(4)(d) of the Brazil-Ethiopia BIT and article 18(4)(d) of the Ecuador-Brazil BIT, the joint committee is responsible for consulting with the private sector and civil society, when applicable, on their views on specific issues related to the work of the joint committee.

E. Other related issues

1. Financial and human resources

66. When designing and implementing a dispute prevention and mitigation system, special arrangements may need to be made for prompt access to funding and resources.[47] Establishment and operation of a coordination body would likely incur financial costs and human resources. As a result of settlement of a grievance, a sum of compensation may be owed to an investor. These costs are usually incurred on an ad hoc basis and do not necessarily follow the budgetary cycles of governments.

67. There may be different methods of allocating resources, for example, to the coordination body, if so established, or to the governmental or related agency that is responsible for the grievance or dispute.

2. Exoneration of liability of government officials

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

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

3. Confidentiality

70. For the successful handling of grievances, parties involved (investors and competent agencies alike) may need to be assured that confidential information exchanged during the process is not made public, unless agreed otherwise.[48] Therefore, it is necessary to find a balance between information that may need to be made available to the public including within the government agencies (for example, due to public interest, social impact or domestic regulations requiring disclosure) and information that must be kept confidential.

F. Practice by States

Brazil

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[47] See, for example, articles 11 and 12 of the Dominican Republic's Presidential Decree No. 303-2015 addressing the budget and expenses. Article 12 provides that the entity responsible for actions or omissions leading to the claim shall be responsible for covering the expenses.

[48] See articles 20 and 21 of the Energy Charter, Model Instrument on Management of Investment Disputes. See also articles 13 and 14 of the Dominican Republic's Presidential Decree No. 303-2015.

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