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## Possible reform of investor-State dispute settlement (ISDS)

### Draft guidelines on prevention and mitigation of international investment disputes

Note by the Secretariat

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## I. Introduction

1. At its thirty-ninth session in October 2020, the Working Group 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).

2. Accordingly, 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 and an informal document containing a compilation of the best practices<sup>1</sup> was made available to the Working Group at its forty-fifth session in March 2023. After discussion, the Working Group requested the Secretariat to revise the draft legislative guide 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).

### [EU and MS comment:

The EU and its Member States thank the UNCITRAL Secretariat for this working paper and wish to clarify that comments in this document are without prejudice to the position that the European Union and its Member States may take in subsequent discussions of Working Group III.

The EU and its Member States suggest to include regional economic integration organisations (REIOs) as possible beneficiaries of this guidance, in addition to States. The necessary adjustments should be made throughout the document.]

3. Accordingly, this Note contains the draft guidelines on prevention and mitigation of international investment disputes. As is the case for working papers, this Note was prepared with reference to a broad range of published information on the topic.<sup>2</sup>

## II. Draft guidelines on prevention and mitigation of international investment disputes

### A. Introduction

4. The Guidelines on Prevention and Mitigation of International Investment Disputes (the “Guidelines”) set out various strategies and measures that may be adopted by States to avoid, prevent and mitigate investment disputes involving foreign investors. “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”).<sup>5</sup> Dispute prevention refers to the handling of a grievance of a foreign investor before it devolves into a disagreement framed in legal terms. 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. Dispute mitigation ends when the investor formally seeks recourse to arbitration or litigation, escalating the dispute into a “legal” dispute. This is typically when dispute management starts. The Guidelines focus on the dispute prevention and mitigation phase.<sup>3</sup>

6. The Guidelines are intended to guide States that wish to set up and implement a coherent and effective dispute prevention and mitigation system. However, as a

<sup>1</sup> Available at [https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/wg\\_iii\\_compilation\\_on\\_dispute\\_prevention\\_and\\_summary.pdf](https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/wg_iii_compilation_on_dispute_prevention_and_summary.pdf).

<sup>2</sup> See chapter II, section F (Reference material).

<sup>3</sup> See World Bank, *Managing Investor Issues through Retention Mechanisms* (2021), p. 8.

non-prescriptive document, the Guidelines do not contain specific recommendations. An effective dispute prevention and mitigation system could result in the retention of foreign investments, as it would demonstrate the State's commitment to risk management, stability and maintaining a healthy relationship with investors.<sup>4</sup>

7. Section A of the Guidelines provides an introduction and explains its purpose and scope. Section B discusses the various strategies and measures adopted by States to improve communication with investors. Section C focuses on the need for coordination among governmental and related agencies, including information sharing and identifying or establishing a coordination body. Section D addresses coordination and cooperation with other governments. Section E deals with issues that arise with regard to dispute prevention and mitigation and finally, Section F contains a list of reference material, in particular, those prepared by international organizations.

## **B. Communication with investors**

8. Effective communication with investors is key to dispute prevention and mitigation. Investors should be able to contact competent governmental or related agencies to address any grievances that arise with regard to their investment. In general, it would be crucial to foresee an effective communication channel with investors throughout the lifecycle of their investment.

9. 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. Paragraph 22.1 of the proposed IFD Agreements suggests the establishment of one or more focal points or appropriate mechanisms to respond to queries from investors and potential investors as well as to assist them in obtaining relevant information from competent authorities.

### **[EU and MS comments:**

*The EU and its Member States suggest to clarify that “the proposed IFD Agreements” refer to the Investment Facilitation for Development Agreement negotiated at WTO.]*

### **1. Easy access to information**

10. Investors should be able to easily access information about investment policy matters, including relevant laws and regulations, which is vital to facilitate their investment and expansion. During the pre-establishment phase, prospective investors need information on how to establish their investment and the regulatory framework that will govern their investment.<sup>5</sup> They need information about the applicable laws and compliance procedures as well as governmental or related agencies that investors may need to interact with throughout the lifecycle of their investment (referred to generally as “competent governmental agency or agencies” in the Guidelines). During the post-establishment phase, investors need to be informed about any changes to the regulatory framework, which would allow them to take decisions on whether to expand or diversify their investment. In case of any complaint, investors would need information on the competent governmental agency and ways to submit such complaints.

### **[EU and MS comment:**

*The EU and its Member States consider that the wording “During the post-establishment phase, investors need to be informed about any changes to the*

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

<sup>5</sup> For instance, Brazil's Direct Investments Ombudsman serves as a first point of contact for prospective investors, where they may inquire about legislation, procedural and regulatory requirements. Available at <https://oid.economia.gov.br/en>.

regulatory framework (...)” could be seen as too prescriptive and could be interpreted as an obligation from States to individually notify investors about any change to the regulatory framework. It is suggested that broader wording be used instead, along the lines of:

*“During the post-establishment phase, ~~investors need to be informed about any changes to the regulatory framework,~~ information about any changes to the regulatory framework should be made publicly available, which would allow them to take decisions on whether to expand or diversify their investment.”]*

11. In some jurisdictions, technology has been utilized to enhance communication with investors.<sup>6</sup> For example, a one-stop online portal has been created to facilitate communication with investors. Such portals allow investors to access information about regulatory requirements, to obtain responses to frequently asked questions, to contact competent governmental agencies and to file grievances and monitor progress. Live chatbots have also been incorporated into the portal to respond to questions or to direct them to the competent governmental agency or officials.

**[EU and MS comment:**

The EU and its Member States agree on the importance of technology and portals to improve and facilitate access to information for investors, in particular from MSMEs. As an example that could be referred to in the text for instance via a footnote, is the EU “Access2Markets” portal (accessible at <https://trade.ec.europa.eu/access-to-markets/en/home>) which provides information to investors on trade, investment and procurement for their activities in third countries.]

12. Paragraphs 6 and 7 of the proposed IFD Agreement lists the type of information to be made available and paragraph 8 encourages the use of a single information portal to do so. It is suggested that the 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 are included in the single information portal.

**[EU and MS comments:**

The EU and its Member States suggest that “paragraphs” be replaced by “articles” in relation to Articles 6, 7 and 8 of WTO IFD Agreement.]

## **2. Engaging investors in policy discussions**

13. Investors may be impacted by changes to the regulatory framework as well as the introduction of specific measures, for example, those relating to emerging policy concerns, such as public health, climate change and sustainable development. Being proactive and involving the investors in the policy discussions leading to the changes in the regulatory framework or introduction of measure are likely to reduce grievances of investors and mitigate claims being raised at a later stage.

14. Some jurisdictions have adopted pre-emptive strategies to avoid grievances of investors by requiring the identification of investors that may have concerns and mandating consultations with them to address the possible concerns. Gradual implementation of new laws or regulations can also pre-empt grievance by providing investors sufficient time to make adjustments.

15. Other jurisdictions have introduced consultation procedures to seek inputs from investors before changes are made to laws or regulations and before introducing

<sup>6</sup> For instance, Greece (Investor’s Support Service, available at [www.enterprisegreece.gov.gr/en/invest-in-greece/investment-support-services](http://www.enterprisegreece.gov.gr/en/invest-in-greece/investment-support-services) and Investor Ombudsman, available at [www.enterprisegreece.gov.gr/en/invest-in-greece/investors-ombudsman](http://www.enterprisegreece.gov.gr/en/invest-in-greece/investors-ombudsman)), Jordan (invest Jordan, available at <https://invest.jo/home-page>), United Kingdom of Great Britain and Northern Ireland (Invest in the UK, available at [www.great.gov.uk/international/investment/](http://www.great.gov.uk/international/investment/)), Republic of Korea (Invest KOREA, available at [www.investkorea.org/ik-en/index.do?clickArea=enmain00002](http://www.investkorea.org/ik-en/index.do?clickArea=enmain00002)), and Qatar (invest Qatar, available at [www.invest.qa/](http://www.invest.qa/)).

specific measures that may potentially affect the interests of investors.<sup>7</sup> Grievances may be eradicated if investors are engaged in such discussions. This could be done through a public-private dialogue platform<sup>8</sup> or in conjunction with the performance of a regulatory impact assessment<sup>9</sup> of the proposed law or regulation.<sup>10</sup>

### IEU and MS comment:

In relation to the first sentence of paragraph 15, the EU and its Member States note that the language used implies that consultation procedures have been introduced in certain jurisdictions to specifically engage investors before regulatory changes. Nevertheless, the texts referred to in footnote 7 do not refer to investors explicitly but include a broader category of “interested parties” or “non-State actors”. We would suggest to clarify this sentence, and a possibility would be to amend the text as follows:

*“Other jurisdictions have introduced consultation procedures to seek inputs from investors **interested parties, including investors**, before changes are made to laws or regulations and before introducing specific measures that may potentially affect the interests of **such interested parties** investors.”*

16. Paragraph 10.3 of the proposed 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.

### 3. Investor grievance mechanism

17. 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 that 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 about possible negative consequences of proposed changes to a regulation.

18. In some jurisdictions, grievance mechanisms are established by law or regulation,<sup>11</sup> while in others, they are established by less formal instruments, such as an administrative instruction or as an internal government procedure.<sup>12</sup> The relevant instruments establishing the mechanism often specify the scope of grievances to be

<sup>7</sup> See, for instance, the Law on the Business Ombudsman of Georgia (2016), article 9 (Analysis of the legislation of Georgia), available at [www.ilo.org/dyn/natlex/docs/ELECTRONIC/104528/127562/F-2073887338/ombudsman.pdf](http://www.ilo.org/dyn/natlex/docs/ELECTRONIC/104528/127562/F-2073887338/ombudsman.pdf); and Strategic Partnership, Trade and Cooperation Agreement between the United Kingdom and Moldova (2021), article 340 (Transparency), available at <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/6069/download>.

<sup>8</sup> For instance, the Private Sector Feedback Platform and the Public Consultation Platform operated by the National Competitiveness Center in the Kingdom of Saudi Arabia, available at [www.ncc.gov.sa/en/Visuals/Pages/default.aspx](http://www.ncc.gov.sa/en/Visuals/Pages/default.aspx) and [www.ncc.gov.sa/en/Istitlaa/Pages/default.aspx](http://www.ncc.gov.sa/en/Istitlaa/Pages/default.aspx).

<sup>9</sup> 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 policy making. 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](http://www.oecd.org/gov/regulatory-policy/regulatory-impact-assessment-7a9638cb-en.htm).

<sup>10</sup> For instance, the Business Regulatory Review Agency in the Republic of Zambia has the mandate to perform regulatory impact assessment of the proposed policies on how they affect the business environment (Business Regulatory Act No. 3 of Zambia (2014), section 6), available at [www.parliament.gov.zm/sites/default/files/documents/acts/Business%20Regulatory%20Act%20No.%203%20of%202014.pdf](http://www.parliament.gov.zm/sites/default/files/documents/acts/Business%20Regulatory%20Act%20No.%203%20of%202014.pdf).

<sup>11</sup> See, for instance, the Rules on Handling Complaints of Foreign-Invested Enterprises of the People’s Republic of China (2020), Chapter IV (Administrative System of Complaint Handling), available at <https://fdi.mofcom.gov.cn/EN/complaintsDetail.html?id=21> and Coordination and Response System for International Investment Disputes, Law No. 28933 of Peru (2006), available at <https://docs.peru.justia.com/federales/leyes/28933-dec-15-2006.pdf>.

<sup>12</sup> See World Bank, *supra* note 3, p. 12.

handled,<sup>13</sup> the process for submitting a grievance, the internal procedure for handling them, and the time frames for the overall process.<sup>14</sup> 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 are informed about the expected time frame and given regular updates.

19. An investor may be required to utilize other administrative procedure 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.

20. 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 therein. If the investor is not satisfied with the outcome, there may be a possibility to appeal. If the grievance cannot be handled appropriately, for example, due to the lack of cooperation among the governmental agencies or the political sensitivity of issues, 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).<sup>15</sup>

21. The Systemic Investment Response Mechanism (SIRM) developed by the World Bank Group may assist governments that wish to establish a grievance mechanism. The SIRM suggests a minimum institutional infrastructure that would enable governments to identify, track and manage grievance as early as possible.<sup>16</sup> It entails the empowerment of a government agency and the establishment of an inter-governmental mechanism for systematically addressing grievances. The government agency is responsible for bringing grievances to the attention of high-level government bodies to address the issues before they escalate further.<sup>17</sup> The SIRM also suggests 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 and how much investment is retained and expanded as a result. It further suggests problem-solving methods and in case a solution cannot be reached at a technical level, a mechanism to elevate the issues to higher political levels.<sup>18</sup>

22. Paragraph 22.3 of the proposed IFD Agreement states that the focal point or appropriate mechanism could also assist in resolving problems of investors or potential investors and recommend measures to improve the investment environment.

### C. Coordination among governmental and related agencies

23. Effective coordination among governmental and related agencies is key to dispute prevention and mitigation. Depending on the government structure and the type of

<sup>13</sup> See Section V of the Law of Egypt No. 72 (2017), available at <https://investmentpolicy.unctad.org/investment-laws/laws/167/egypt-investment-law->, which establishes the grievance committee to examine complaints with regard to issuance of approvals, permits and licences.

<sup>14</sup> For instance, Resolution No. 146 adopted by the Council of Ministers of Belarus (2012), available at <https://investmentpolicy.unctad.org/investment-policy-monitor/measures/383/adopts-a-procedure-for-early-settlement-of-investment-disputes->; Rules on Handling Complaints of Foreign-Invested Enterprises of the People's Republic of China (2020), Chapter III (Complaint Handling) available at <https://fdi.mofcom.gov.cn/EN/complaintsDetail.html?id=21>; and the Model Cooperation and Facilitation Investment Agreement of Brazil (CFIA) (2016), article 23 (Dispute Prevention), available at <https://investmentpolicy.unctad.org/investment-policy-monitor/measures/383/adopts-a-procedure-for-early-settlement-of-investment-disputes->.

<sup>15</sup> The Ethiopian system serves as an example. Issues not solved by the Ethiopian Investment Commission are escalated to the Ethiopia Investment Board, an inter-ministerial body. See articles 25 to 27, Proclamation No. 1180/2020 (2020), available at <https://investmentpolicy.unctad.org/investment-laws/laws/318/ethiopia-investment-proclamation-no1180-2020>. See also World Bank, *supra* note 3, p. 16.

<sup>16</sup> See World Bank, *supra* note 4, pp.39–45.

<sup>17</sup> *Ibid.*, p.43.

<sup>18</sup> See World Bank, *supra* note 3, p.12.



investment at stake, a number of governmental and related agencies (including those at sub-national level, such as provinces, states, and municipalities) may need to be involved in the coordination, including those that negotiate and conclude investment instruments (see para. 4 above), those whose measures may have an impact on investors, and those with a role in preventing and mitigating disputes.

24. For instance, an investor may apply for a permit to a municipal authority to conduct its operations. If the municipal authority rejects the application despite central government's assurances, this may lead to a grievance. 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.

25. The following outlines means to ensure effective coordination among governmental and related agencies mainly by sharing of information and identifying or establishing a coordination body.

### **1. Information sharing among governmental and related agencies**

26. Sharing of information among governmental and related agencies is a key aspect of dispute prevention and mitigation. It not only ensures that the relevant agencies are informed of the circumstances and underlying issues, but also ensures consistency and coherence at the different levels of investment policy making.<sup>19</sup>

27. Information about model investment treaties, standard investment contracts and model dispute settlement clauses<sup>20</sup> should be shared among the agencies to ensure consistent approaches with regard to investment instruments, including substantive guarantees therein. This could potentially reduce the risk of disputes as inconsistent investment instruments may be the cause of grievances.

28. Information sharing could also ensure coherence in measures taken by the agencies as well as in handling grievances. 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, a knowledge management system has been established in some jurisdictions to ensure the transfer and preservation of knowledge of public officials dealing with investors and to keep track of solutions to resolve prior grievances. Under the SIRM, information sharing 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.<sup>21</sup>

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

<sup>19</sup> See Islamic Development Bank – UNCTAD Guiding Principles for Investment Policies, Principle 1, available at <https://investmentpolicy.unctad.org/publications/1276/islamic-development-bank---unctad-guiding-principles-for-investment-policies>.

<sup>20</sup> See article 7(1) of the Energy Charter Conference: Model Instrument on Management of Investment Disputes (available at [https://www.energychartertreaty.org/fileadmin/Documents/Media/Model\\_Instrument/Model\\_Instrument.pdf](https://www.energychartertreaty.org/fileadmin/Documents/Media/Model_Instrument/Model_Instrument.pdf)), which states that a model of the investment dispute settlement clauses should be drafted and provided for in negotiations of future investment agreements and contracts with the aim of achieving greater consistency and standardization. Peru sets out criteria for the formulation of dispute settlement clauses (Law No 28933, article 13, available at <https://docs.peru.justia.com/federales/leyes/28933-dec-15-2006.pdf>); the Dominican Republic provides that the lead agency has the power to propose and review dispute settlement clauses or provisions to be included in prospective investment instruments (Decree No.303-2015, article 4, available at <https://studylib.es/doc/5157825/decreto-sistema-de-prevenci%C3%B3n-de-controversias-no.-303-15>).

<sup>21</sup> See World Bank, *supra* note 4, p. 66.

where public officials involved in foreign investments share information on investment policies, developments and current disputes.<sup>22</sup> Through these means, public officials could become 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

30. Identifying or establishing a body that is tasked with coordination among the governmental and related agencies is important for preventing and mitigating disputes. Referred to as the lead agency, a coordination body is also a core component of the SIRM.<sup>23</sup>

31. In identifying or establishing a coordination body, jurisdictions have generally taken the following three approaches. One approach is to create a new autonomous agency responsible for coordination or to establish it within a ministry or a governmental agency (for instance, within the investment promotion agency<sup>24</sup>). Under this approach, the coordination body may also function as the channel of communication with investors. Another approach is to distribute dispute prevention and mitigation functions among a number of agencies with each agency designated a different role or empowered to handle certain grievances. In such a structure, it would be prudent to designate the agency responsible for the communication with investors and the intra-governmental cooperation. A hybrid approach is to establish a committee or commission composed of governmental and related agencies, including ministries and specialized entities, with one of the agencies performing the secretariat function.

32. As mentioned, information sharing is one of the functions to be carried out by the coordination body. It would facilitate communication and cooperation among governmental and related agencies. The coordination body may also act as a central repository of investment instruments and relevant court or arbitral decisions interpreting such instruments. Such a function would 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.<sup>25</sup>

33. The coordination body may also be tasked with providing advice to governmental and related agencies on how to handle grievances of investors. This would ensure that agencies faced with investor grievances have a constant communication channel with the coordination body, which may suggest different problem-solving methods. For example, a municipal authority faced with a grievance for the first time would be able to rely on the coordination body to recommend ways to handle the grievance.

34. In order to perform its functions, the coordination body may be authorized to collect information from competent governmental agencies (as well as from

<sup>22</sup> Experiences from Korea and Thailand highlight the usefulness of handbooks and booklets to complement lectures and trainings (see A/CN.9/WG.III/WP.147, paras. 24–25 and A/CN.9/WG.III/WP.179, p. 5).

<sup>23</sup> See World Bank, *supra* note 3, p. 11.

<sup>24</sup> For Ethiopia, the investor grievance management mechanism is part of the Ethiopian Investment Commission, available at <https://iaip.gov.et/eic/>. In Rwanda, it is part of the Reinvestment and Investor Aftercare Department within the Rwanda Development Board, available at <https://rdb.rw/>. See World Bank, *supra* note 3.

<sup>25</sup> For example, the Dominican Republic established DICOEX as the lead agency, which monitors investor complaints and analyzes disputes to understand which government entities are most frequently implicated. Available at <https://www.iisd.org/system/files/2021-10/investment-dispute-prevention-management-agencies-policy-discussion.pdf>. Colombia established a committee to be responsible for the identification of difficulties in the investment process, the monitoring of different factors that affect the investment climate and the prioritization and analysis of opportunities for improvement. Available at <https://www.iisd.org/system/files/2021-10/investment-dispute-prevention-management-agencies-policy-discussion.pdf>.



investors),<sup>26</sup> request the cooperation of the relevant agencies including their officials, issue recommendations and monitor their implementation. It would be advisable to clearly set forth the competence of the coordination body, whether it is limited to certain types of investors, certain sectors or industries, or certain types of issues (political risks/operational risks, grievances/disputes). Under the SIRM, it is suggested that the lead agency collects data, identifies patterns concerning the sources of political and operational risks affecting investment, and quantifies retained, expanded, or lost investments as a consequence of addressing such risks.<sup>27</sup>

35. As noted, the operational structure of the coordination body may vary depending on the jurisdiction (see para. 31 above). However, it is important that its legal status, position in the government hierarchy, staffing structure, budget and reporting mechanism, among others, are clearly set forth in the instrument establishing the coordination body.<sup>28</sup> In some jurisdictions, it was found that an independent entity playing an oversight role over the administration, rather than collaboration with and within the administration, has led to more confrontation and limited its effectiveness to address the regulatory risks derived from government conduct.<sup>29</sup>

36. A coordination body with centralization of power and authority may raise concerns about conflict of interests and lack of accountability. A reporting mechanism may be put in place to address such concerns and to ensure the transparency of its activities.<sup>30</sup> Such a mechanism could also help avoid the coordination body being perceived as being biased towards government agencies. Establishing the coordination body as an inter-agency committee or commission comprised of staff members from different agencies could additionally help to disperse the power and authority.

37. In some jurisdictions, the coordination body, in addition to facilitating coordination among the government and related agencies, may act 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).<sup>31</sup>

#### **D. Coordination and cooperation with other governments**

38. Establishing and institutionalizing inter-governmental coordination with authorities of other States can help ensure effective cooperation and mutual assistance in dispute prevention or mitigation. One way of achieving such coordination is by setting up a joint committee or commission in investment treaties to promote a regular

<sup>26</sup> See article 6(1) of the Regulation on the Business Ombudsman Council of Ukraine (2014), which provides that the Business Ombudsman Council has the right to request and receive from state authorities and others information and documents and other data necessary for processing complaints. Available at [https://boi.org.ua/wp-content/uploads/2023/08/boi\\_\\_cmu\\_regulation\\_eng\\_.pdf](https://boi.org.ua/wp-content/uploads/2023/08/boi__cmu_regulation_eng_.pdf).

<sup>27</sup> See World Bank, *supra* note 3, p. 9.

<sup>28</sup> See article 4 of the Regulations for the Prevention and Handling of International Disputes in the Field of Trade and Investment of the Republic of Costa Rica, which provides a clear outline on the composition of the coordination body, available at [www.pgrweb.go.cr/scij/Busqueda/Normativa/Normas/nrm\\_texto\\_completo.aspx?param1=NRTC&nValor1=1&nValor2=66133&nValor3=77622&strTipM=TC](http://www.pgrweb.go.cr/scij/Busqueda/Normativa/Normas/nrm_texto_completo.aspx?param1=NRTC&nValor1=1&nValor2=66133&nValor3=77622&strTipM=TC).

<sup>29</sup> See World Bank, *supra* note 4, p. 62.

<sup>30</sup> See articles 24–28 of the Rules on Handling Complaints of the People’s Republic of China which foresee several reporting mechanisms between local agencies and agencies on a higher level (available at <https://fdi.mofcom.gov.cn/EN/complaintsDetail.html?id=21>); see article 14.4. (f) of the Investment Cooperation and Facilitation Treaty between the Federative Republic of Brazil and the Republic of India (available at <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5912/download>), which states that the national focal point/ombudsman has to report its activities and actions to the joint committee, composed of government representatives of both Parties.

<sup>31</sup> See CFIA (2016), article 17 (Joint Committee for the Administration of the Agreement); see also Vietnam’s Regulation on coordination in resolution of international investment disputes (January 2014), available at <https://vanbanphapluat.co/decision-no-04-2014-qd-ttg-on-coordination-in-resolution-of-international-investment-disputes>

exchange of information for improving the investment environment.<sup>32</sup> Such a committee can play a critical part in preventing grievances from escalating into a dispute. Under paragraph 26.1 of the proposed IFD Agreement, focal points or other mechanisms for communicating with investors may be assigned the function of responding to questions from other governments. Paragraph 26.2 of the proposed IFD Agreements mentions the areas of inter-governmental cooperation as being 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.

**[EU and MS comment:**

In mentioning the benefits of inter-governmental coordination in dispute prevention and mitigation, the EU and its MS are of the view that the notion of perception of bias should also be addressed. The EU and MS submit that, even in domestic settings, having investor grievances addressed by a body autonomous from the state may be important in order to avoid any perception of bias towards the state. That is even more the case in international settings. Providing concurrently for the possibility to domestically address grievances and internationalise these roles, for example via an entity linked to a standing mechanism, would have the advantage of removing any perception of bias towards the State.

The EU and MS suggest that language be added to include a reference to this idea along the following lines:

*“Inter-governmental coordination also stands to help address any perception of bias in favour of the state that an investor may have when formulating a grievance. While in domestic settings any such perception may be addressed by having the grievance handled by a body that is autonomous from the state, in an international investment context this may be addressed by having the grievances handled by a permanent body.”]*

39. Operating at the State-to-State level, joint committees are responsible for monitoring the implementation of investment treaties, sharing of information regarding investment opportunities, facilitating consultations with investors, preventing disputes and enhancing their amicable settlement.<sup>33</sup> Joint committees may also adopt interpretation of provisions in investment treaties, which could be binding on the bodies established under the treaty facilitating a harmonized approach to standards of investment protection.<sup>34</sup> Joint committees create an avenue for effective

<sup>32</sup> See Agreement between Japan and Georgia for the Liberalization, Promotion and Protection of Investment (2021), article 25, available at <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/4962/georgia---japan-bit-2021->; Free Trade Agreement between the United Kingdom and the Republic of Turkey (2020), article 10.1, available at [https://assets.publishing.service.gov.uk/media/60350bd28fa8f543272b402e/CS\\_Turkey\\_1.2021\\_UK\\_Turkey\\_Free\\_Trade\\_Agreement.pdf](https://assets.publishing.service.gov.uk/media/60350bd28fa8f543272b402e/CS_Turkey_1.2021_UK_Turkey_Free_Trade_Agreement.pdf); Israel – United Arab Emirates BIT (2020), article 27, available at <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/6084/download>; Armenia – Singapore Agreement on Trade in Services and Investment (2019), article 6.1, available at <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5886/download>; and Pacific Agreement on Closer Economic Relations Plus, chapter 12, available at <https://www.dfat.gov.au/trade/agreements/in-force/pacer/documents>.

<sup>33</sup> For example, a joint committee may be 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. See CFIA (2016), article 17 (4), available at <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/4786/download>; the functions of a joint committee may also include the consideration of any matters relating to the implementation of the agreement including solving problems, obstacles and dispute resolution before its submission to arbitration. See Israel – United Arab Emirates BIT (2020), article 27.3 (g), available at <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/6084/download>.

<sup>34</sup> See for instance Free Trade Agreement between the United Kingdom and the Republic of Turkey (2020), article 10.1 (4), which foresees that joint committees may adopt interpretations of the provisions of the agreements, available at [https://assets.publishing.service.gov.uk/media/60350bd28fa8f543272b402e/CS\\_Turkey\\_1.2021\\_UK\\_Turkey\\_Free\\_Trade\\_Agreement.pdf](https://assets.publishing.service.gov.uk/media/60350bd28fa8f543272b402e/CS_Turkey_1.2021_UK_Turkey_Free_Trade_Agreement.pdf).

application of the investment treaty by facilitating the exchange of best practices in order to adapt to evolving policy concerns through periodic reviews.<sup>35</sup> In order to undertake these functions, joint committees may also establish sub-committees or working groups and invite the private sector to participate in those meetings.<sup>36</sup>

## **E. Related issues**

### **1. Financial and human resources**

40. When designing and implementing a dispute prevention and mitigation system, special arrangements may need to be made for prompt access to funding and resources. Establishment and operation of a coordination body would likely incur financial costs and human resources. As a result of settlement, 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. There may be different methods of allocating the 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**

41. 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.

42. 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**

43. For the successful handling of grievances, parties involved (investors and competent agencies alike) may need to be reassured that information exchanged during the process is not made public, unless agreed otherwise. Therefore, it would be necessary to find a balance between information that can be made available to the public (including within the government agencies) and information that must be kept confidential.

## **F. Reference material**

### **Academic Forum on ISDS**

<sup>35</sup> See Agreement between Japan and Georgia for the Liberalization, Promotion and Protection of Investment (2021), article 25, available at <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/4962/georgia---japan-bit-2021->; China – EU Comprehensive Agreement on Investment (2021), section VI. Institutional and Final Provisions, subsection 1. Institutional Provisions; Turkey – United Kingdom FTA (2020), chapter 10, available at [www.gov.uk/government/publications/ukturkey-free-trade-agreement-cs-turkey-no12021](http://www.gov.uk/government/publications/ukturkey-free-trade-agreement-cs-turkey-no12021). Administrative and Institutional Provisions; Brazil – India BIT (2020), articles 13 and 18, available at <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/4910/brazil---india-bit-2020->; Israel – United Arab Emirates BIT (2020), article 27, available at <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/4964/israel---united-arab-emirates-bit-2020->; and Armenia – Singapore Agreement on Trade in Services and Investment (2019), chapter 6, available at <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/treaties-with-investment-provisions/4906/armenia---singapore-agreement-on-trade-in-services-and-investment-2019->. Institutional, General and Final Provisions.

<sup>36</sup> See CFIA (2016), articles 17 (5) and 17 (6).

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#### **Centre for International Law (CIL), National University of Singapore**

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#### **Energy Charter Conference**

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#### **International Institute for Sustainable Development (IISD)**

Investment Dispute Prevention and Management Agencies: Toward a more informed policy discussion, IISD Report (2022) available at [www.iisd.org/system/files/2021-10/investment-dispute-prevention-management-agencies-policy-discussion.pdf](http://www.iisd.org/system/files/2021-10/investment-dispute-prevention-management-agencies-policy-discussion.pdf)

#### **National Centre of Competence in Research (NCCR) – Trade Regulation**

Towards a New Approach to Address Investor-State Conflict: Developing a Conceptual Framework for Dispute Prevention, Working Paper 2011/46 (2011), available at [www.wti.org/media/filer\\_public/9a/ff/9aff3b9e-50e9-4aa6-af06-49edf2b2c904/wp\\_2011\\_46\\_echandi.pdf](http://www.wti.org/media/filer_public/9a/ff/9aff3b9e-50e9-4aa6-af06-49edf2b2c904/wp_2011_46_echandi.pdf)

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