

**Comments on Working Paper 235**  
**“Draft Guidelines on Prevention and Mitigation of International  
Investment Disputes”**

**Centre for International Law, National University of Singapore**

1. This submission provides line comments from the Centre for International Law at the National University of Singapore on Working Paper A/CN.9/WG.III/WP.235 (20 November 2023) on “Draft Guidelines on Prevention and Mitigation of International Investment Disputes” (hereinafter abbreviated as WP). The WP is appended in this submission.

**Comment on paragraph 4 of the WP**

2. Paragraph 4 of the WP states that the Guidelines set out strategies and measures “that may be adopted by States to *avoid*, prevent and mitigate investment disputes. . . .” (Emphasis added.) We note that the avoidance of disputes is not mentioned in the title of the Guidelines nor in any subsequent part of the WP (and most notably not in paragraph 5 where “prevention” and “mitigation” are defined) as a core aim of these Guidelines. We would therefore recommend deleting the word “avoid” here so that the new sentence would read “. . . that may be adopted by States **to prevent and mitigate** investment disputes. . . .”

**Comment on paragraph 13 of the WP**

3. We suggest the following technical edit to the second sentence of paragraph 13 beginning with “Being proactive. . . .”: deletion of the word “the” in the phrase “. . . policy discussions leading to the changes. . . .”, so that the new sentence would read “. . . policy discussions leading **to changes**. . . .”

**Comments on paragraph 14 of the WP**

4. We do not think that the first sentence of paragraph 14 makes entirely clear the nature of the mechanism or process under reference. We would therefore suggest a clarification to be made and a footnote example to be included.

5. We suggest the following technical edit to the second sentence of paragraph 14 beginning with “Gradual implementation. . .”: using the plural “grievances”, so that the new sentence would read “. . . pre-empt **grievances** by providing. . . .”

#### **Comments on paragraph 15 of the WP**

6. It does not appear immediately clear to us how the procedures referred to in the first sentence of paragraph 15 differ from the strategies that are described in paragraph 14 of the WP.
7. Further, we suggest reconsideration of the word “eradicated”, used in the second sentence of paragraph 15, which does not seem to us to be the right choice in this context. Alternative options to consider could be the words “ameliorated” or “resolved”.

#### **Comment on paragraph 16 of the WP**

8. We note our view, expressed in greater detail elsewhere,<sup>1</sup> that there are synergies between dispute prevention and mitigation and aspects of the WTO’s forthcoming Investment Facilitation for Development Agreement (IFDA). We are encouraged therefore that this synergy is recognised in the WP. We suggest, however, that when the IFDA is referenced language be included to clarify this synergy. Thus, in paragraph 16, we suggest including language at the beginning to indicate the paragraph’s purpose. For example: “In this respect, measures adopted for dispute prevention may be complementary to paragraph 10.3 of the proposed IFD Agreement which suggests that. . . .”

#### **Comment on paragraph 17 of the WP**

9. We suggest the following technical edit to the third sentence of paragraph 17 beginning with “A grievance mechanism. . .”: inserting the phrase “believe themselves to” between the words “investors that” and “have been”, so that the new sentence would read “A grievance mechanism provides investors that **believe themselves to** have been negatively affected. . . .”

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<sup>1</sup> N.J. Calamita, [“Unexpected Opportunities to Support Investor-State Dispute Prevention through the WTO Investment Facilitation for Development Agreement”](#), Columbia FDI Perspectives No. 370 (13 November 2023).

### **Comment on paragraph 19 of the WP**

10. We suggest the following technical edit to the first sentence of paragraph 19 beginning with “An investor may. . .”: using the plural “procedures”, so that the new sentence would read “. . . to utilize other administrative **procedures** prior to. . . .”

### **Comments on paragraph 20 of the WP**

11. We suggest the following technical edit to the first sentence of paragraph 20 beginning with “The grievance mechanism. . .”: the addition of the word “therein” as the final word of that sentence seems unnecessary.
12. We further suggest the following technical edit to the third sentence of paragraph 20 beginning with “If the grievance cannot be handled appropriately. . .”: as the word “appropriately” carries a connotation of normative judgment, we would suggest a more neutral adverb be used instead, for example, “effectively”.

### **Comments on paragraph 21 of the WP**

13. We suggest technical edits to the second sentence of paragraph 21 beginning with “The SIRM suggests. . .”:
  - a. First, we note that it is not the “SIRM” itself which suggests, but rather the World Bank which suggests in the SIRM, that an early alert mechanism for grievances be established; and
  - b. Second, as there are no guarantees that a government decision-making system will function as designed or actually achieve its anticipated outcomes, we would also suggest replacing the phrase “would enable” by the more conditional “can enable”.

Consequently, we suggest that the revised sentence should read “The **World Bank** suggests **in the SIRM** a minimum institutional infrastructure that **can enable** governments to. . . .”

14. The third and fourth sentences of paragraph 21 (“It entails . . . escalate further.”) suggest that an appropriately empowered government agency can be responsible for bringing investor grievances to the attention of high-level government bodies. In our view, this statement would benefit from clarification. A question could be raised as to the practical means through which a single government agency could become aware of grievances which may arise in connection with other government agencies, such as line ministries.

15. We suggest for the fifth sentence of paragraph 21, beginning with “The SIRM also suggests. . .”, that the same technical edit be made as suggested under paragraph 13(a), above.
16. On the fifth sentence of paragraph 21, we have concerns about the assertion that an early alert mechanism could track “how much investment is retained and expanded”. First, it is not clear to us, even on the World Bank’s own guidance, how States would be able to do this in a meaningful and accurate way. Research has shown how difficult it is for States, even those with developed economies, to maintain accurate FDI figures for inflows, outflows and stocks. Indeed, there are wide discrepancies in FDI data even among organisations which routinely track FDI (e.g., World Bank, IMF and domestic investment agencies).<sup>2</sup> Second, doubts may be expressed about the methodological basis for correlating the resolution of a grievance — which, even if it had not been resolved, may not have led to a formal dispute — with the investor’s decision to remain in the country or expand its investment there. In summary, we would suggest that the claim in the fifth sentence of paragraph 21 lacks empirical basis and is, in any case, not central to the prevention and mitigation of disputes and should, therefore, be dropped.

#### **Comment on paragraph 22 of the WP**

17. We suggest that linking language be included at the beginning of this paragraph to indicate its purpose. For example: “In this respect, measures adopted for dispute prevention may be complementary to paragraph 22.3 of the proposed IFD Agreement which states that. . . .”

#### **Comments on paragraph 29 of the WP**

18. With respect to the first sentence of paragraph 29 (“There are . . . disputes.”), we note that the Kingdom of Thailand’s submission, cited in footnote 22, does not refer to actual Thai practices in this regard. It rather speaks more generally of steps that might be taken. Only the submission from the Republic of Korea refers to concrete State experience with handbooks and other means of information sharing. In replacement, or in addition, we suggest that a better reference for footnote 22 would be with respect to concrete State practice involving the adoption of a handbook, such as the recent adoption by the Socialist

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<sup>2</sup> In this respect, see an informative study by Jason Yackee: “Do Investment Treaties Work – In the Land of Smiles?” in J. Chaisse and L. Nottage (eds), *International Investment Treaties and Arbitration Across Asia* (Leiden: Brill/Nijhoff, 2018) 83–114.

Republic of Viet Nam of a handbook on investment treaty obligations for government officials.<sup>3</sup>

19. With respect to the second sentence of paragraph 29 (“Through these means . . . grievances.”), we would offer the following remarks:
- a. We think that a footnote to the APEC Handbook would be useful here as it is currently the only existing international handbook tool available for governments and, moreover, is a tool with which many delegations in the Working Group will have familiarity.
  - b. We suggest using the word “can” instead of “could” for consistency with the voice used throughout the WP, so that the new sentence would read “. . . public officials **can** become aware. . . .”

#### **Comment on paragraph 30 of the WP**

20. We would observe, more generally, that, while the WP relies quite heavily on the World Bank’s SIRM approach, the SIRM is not the only approach that States can rely upon. Other organisations, for example, the Energy Charter Secretariat and UNCTAD among others, also provide relevant guidance for States, yet we note that these approaches are not mentioned in the text at all but only listed in the reference materials in the end. This seems to us an unfortunate omission and places undue weight on the World Bank’s SIRM approach.

#### **Comment on paragraph 31 of the WP**

21. We suggest the following technical edit to the first sentence of paragraph 31 beginning with “In identifying. . .”: inserting for clarity the phrase “one of” between the words “taken” and “the following”, so that the new sentence would read “. . . jurisdictions have generally taken **one of** the following three approaches.”

#### **Comment on paragraph 34 of the WP**

22. In connection with the final sentence of paragraph 34 (“Under the SIRM, . . . such risks.”), we would incorporate by reference our comments in paragraph 16 above regarding this aspect of the SIRM approach.

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<sup>3</sup> See <https://asean.org/viet-nam-finalises-handbook-for-implementing-international-investment-commitments/>.

### **Comment on paragraph 35 of the WP**

23. We suggest the following technical edit to the third sentence of paragraph 35 beginning with “In some jurisdictions. . .”: replacing for clarity the phrase “rather than collaboration” with the phrase “as opposed to a collaborative role”, so that the new sentence would read “. . . playing an oversight role over the administration, **as opposed to a collaborative role** with and within the administration, . . . .”

### **Comment on paragraph 36 of the WP**

24. We suggest the following technical edit to the third sentence of paragraph 36 beginning with “Such a mechanism. . .”: deletion of the word “being” in the phrase “being biased”, so that the new sentence would read “. . . avoid the coordination body being perceived **as biased** towards government agencies.”

### **Comment on paragraph 37 of the WP**

25. Our comment pertains to footnote 31 and the reference made therein to Viet Nam’s 2014 Regulation. We note that this regulation was replaced in 2020 by Decision 14/2020/QĐ-TTg of the Prime Minister on “Promulgation of Regulation on Coordination in Settlement of International Investment Disputes, 8 April 2020”. For more information on that regulation, as well as on the dispute prevention and mitigation practices of other Asian States, we would refer to N.J. Calamita and A. Berman (eds), *Investment Treaties and the Rule of Law Promise: An Examination of the Internalisation of International Commitments in Asia* (Cambridge: Cambridge University Press, 2022).

### **General comment on Section D of the WP**

26. We note that Section D of the WP underscores the importance of inter-governmental coordination and cooperation for dispute prevention and mitigation, by putting emphasis on State-to-State level joint committees existing under current international investment agreements. In this connection, we would note that there are additional avenues that States can pursue in their investment agreements to which the WP could refer. One such avenue is leveraging the use of economic cooperation support programs that may have been included in existing investment agreements or will be included in future ones (e.g., see Chapter 12 of ASEAN-Australia-New Zealand Free Trade Agreement (2009)). Such

programs could be designed or adapted to not only improve the business environment but also to support measures that would help prevent or mitigate investment disputes.<sup>4</sup>

27. Additionally, the WP could also make direct reference to the proposed Advisory Centre for International Investment Dispute Resolution, whose functions currently include serving as a forum of exchange of information and training on matters of dispute prevention (draft Article 6 of the advisory centre's draft statute).

28. This concludes the submission by the Centre for International Law at the National University of Singapore.

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<sup>4</sup> For example, Viet Nam's creation of a handbook on investment treaty obligations for government officials was carried out under the ASEAN-Australia-New Zealand Free Trade Area Economic Coordination Support Programme (AECSP). See <https://asean.org/viet-nam-finalises-handbook-for-implementing-international-investment-commitments/>.



**United Nations Commission on  
International Trade Law  
Working Group III (Investor-State Dispute  
Settlement Reform)  
Forty-seventh session  
Vienna, 22–26 January 2024**

## 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).

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”).

5. 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 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

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<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.

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

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.

### **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.

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.

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

<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>.

<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/)).

relevant information about government measures are included in the single information portal.

## 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 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>

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

<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/Istitlea/Pages/default.aspx](http://www.ncc.gov.sa/en/Istitlea/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

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 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.

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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.

<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/asures/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/international-investment-agreements/treaty-files/4786/download>.

<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.

## 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 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

<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>).

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 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

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

<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 Reinvention 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>.

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 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>

<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>

## 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 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.

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 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

<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).

<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->



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**

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Preventing, mitigating and managing investor-State disputes, ISDS concept paper (2021), available at [www.jus.uio.no/pluricourts/english/projects/leginvest/academic-forum/papers/preventing-mitigating-and-managing-investor-state-disputes..pdf](http://www.jus.uio.no/pluricourts/english/projects/leginvest/academic-forum/papers/preventing-mitigating-and-managing-investor-state-disputes..pdf)

### **Asia-Pacific Economic Cooperation (APEC)**

Handbook on Obligations in International Investment Treaties (2021), available at [www.apec.org/publications/2020/09/handbook-on-obligations-in-international-investment-treaties](http://www.apec.org/publications/2020/09/handbook-on-obligations-in-international-investment-treaties)

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

Report: Survey on Obstacles to Settlement of Investor-State Disputes, NUS-CIL Working Paper 18/01 (2018), available at <https://cil.nus.edu.sg/wp-content/uploads/2018/09/NUS-CIL-Working-Paper-1801-Report-Survey-on-Obstacles-to-Settlement-of-Investor-State-Disputes.pdf>

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[and-investment-2019-](#). Institutional, General and Final Provisions.

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

**Energy Charter Conference**

Model Instrument on Management of Investment Disputes with Explanatory Note (2018), available at [www.energychartertreaty.org/fileadmin/DocumentsMedia/Model\\_Instrument/Model\\_Instrument.pdf](http://www.energychartertreaty.org/fileadmin/DocumentsMedia/Model_Instrument/Model_Instrument.pdf)

**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)

**Organisation for Economic Co-operation and Development (OECD)**

Report: Investment Dispute Management and Prevention (2018), available at [www.oecd.org/mena/competitiveness/REPORT-Regional-seminar-investment-disputes-Cairo-062018.pdf](http://www.oecd.org/mena/competitiveness/REPORT-Regional-seminar-investment-disputes-Cairo-062018.pdf)

Stocktaking of Investment Dispute Management and Prevention in the Mediterranean Region (2018), available at [www.oecd.org/mena/competitiveness/BN-Stocktaking-of-Investment-Dispute-Cairo-062018.pdf](http://www.oecd.org/mena/competitiveness/BN-Stocktaking-of-Investment-Dispute-Cairo-062018.pdf)

**United Nations Conference on Trade and Development (UNCTAD)**

Investor-State Disputes: Prevention and Alternatives to Arbitration, UNCTAD Series on International Investment Policies for Development (2010), available at [https://unctad.org/en/Docs/diaeia200911\\_en.pdf](https://unctad.org/en/Docs/diaeia200911_en.pdf)

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**World Bank Group**

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Global Investment Competitiveness Report 2019/2022: Rebuilding Investor Confidence in Times of Uncertainty (2020), available at [www.worldbank.org/en/topic/competitiveness/publication/global-investment-competitiveness-report-2019-2020](http://www.worldbank.org/en/topic/competitiveness/publication/global-investment-competitiveness-report-2019-2020)

Managing Investor Issues through Retention Mechanisms (2021), available at <https://documents1.worldbank.org/curated/en/978811614610086665/pdf/Managing-Investor-Grievances-Through-Retention-Mechanisms.pdf>

**World Trade Organization (WTO)**

The outcome of the conclusion of negotiations on the text of the Investment Facilitation for Development Agreement (6 July 2023) (the “proposed IFD Agreement”)  
Factsheet: Investment Facilitation for Development in the WTO (2023), available at [www.wto.org/english/tratop\\_e/invfac\\_public\\_e/factsheet\\_ifd.pdf](http://www.wto.org/english/tratop_e/invfac_public_e/factsheet_ifd.pdf)

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