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Possible reform of investor-State dispute settlement (ISDS)

Draft legislative guide on investment dispute prevention and mitigation

Note by the Secretariat

Contents

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 noted the general interest in having the Secretariat pursue further work on this topic (A/CN.9/1044, para. 23). After discussion, the Working Group requested the Secretariat to work with interested delegations and organizations to collect and compile relevant and readily available information on best practices (A/CN.9/1044, para. 26). In that regard, it was noted that such work had already been conducted by States, the World Bank Group and other inter-governmental organizations, as well as non-governmental organizations (A/CN.9/1044, para. 24). The Secretariat was thus requested to examine how such best practices could be applied in a more consistent manner and suggest possible means to implement these best practices (A/CN.9/1044, para. 26). A compilation of the best practices and a summary thereof are available on the Working Group webpage.[1]

2. Chapter II of this Note contains a draft legislative guide on dispute prevention and mitigation (the "Guide") with draft recommendations and commentary. Prepared jointly with the World Bank Group, the Guide reflects the common features of approaches developed by States, intergovernmental organizations and non-governmental organizations. As is the case for all working papers, this Note was prepared with reference to a broad range of published information on the topic,[2] and does not seek to express a view on the reform element, which is a matter for the Working Group to consider. The Working Group may wish to also consider the possible form and presentation of the Guide.

II. Draft legislative guide on dispute prevention and mitigation

3. The Guide aims to assist States in setting up and implementing a coherent dispute prevention[3] and mitigation system (referred to as the "system"), the basis of which may be found in a single legislation, or among different legislative instruments (laws, regulations or decrees), depending on the legislative style of each State. For the sake of simplicity, the term "legislation" is used in this Guide to encompass the different possibilities of legislative implementation. The Guide does not address or deal with situations where a claim has been formally lodged before a court or an arbitral tribunal (referred to as a "legal dispute"), although an institution or a mechanism established for the purposes of dispute prevention and mitigation may also manage such proceedings to resolve an investment dispute.

1. Purpose and scope

Recommendation 1: Purpose and scope of the dispute prevention and mitigation system and its legal framework

1. A system shall be established to address grievances and to prevent and mitigate disputes relating to or arising out of an investment.

[1] https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/dispute_prevention_compilation.pdf

[2] This Note was prepared on the basis of the compilation of best practices and with reference to a broad range of published information on the topic, including: Energy Charter Conference, Model Instrument on Management of Investment Disputes, December 2018; Bonnitcha, J. & Williams Z., Investment Dispute Prevention and Management Agencies: Toward a more informed policy discussion, International Institute for Sustainable Development (IISD) Report, January 2022; 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; UNCTAD, Investor-State Disputes: Prevention and Alternatives to Arbitration II, Proceedings of the Joint Symposium on International Investment and Alternative Dispute Resolution, 2011; UNCTAD, Best Practices in Investment for Development - How to prevent and manage investor-State disputes: Lessons from Peru, Investment Advisory Series, Series B, Number 10, 2011; UNCTAD, Investment Policy Framework for Sustainable Development, 2015; World Bank Group, Retention and Expansion of Foreign Direct Investment: Political Risk and Policy Responses, 2019 ('World Bank Retention'); World Bank Group, Managing Investor Issues through Retention Mechanisms (2021 ('World Bank Managing'); World Bank Group, Global Investment Competitiveness Report 2019/2022: Rebuilding Investor Confidence in Times of Uncertainty, 2020 ('World Bank Global').

[3] Referred to in the Guide also as dispute avoidance.

2. A grievance or a dispute may be based on the following instruments:

(a) A treaty providing for the promotion and protection of investments or investors ("investment treaty");

(b) A law or regulation governing investments ("investment laws"); or

(c) An investment contract.

4. Recommendation 1 states that a system shall be in place to address any grievance of investors and to prevent and mitigate disputes relating to or arising out of an investment (referred to in the Guide as "investment disputes"). The Guide does not distinguish between domestic and foreign investments and addresses both. Depending on the policy and needs of a State, the system may be broadened to address retention and expansion of investments.[4] The recommendation also assumes that a legal framework (whether it is a single law or multiple laws and regulations) exists in order for the system to operate properly.

5. Recommendation 1 further notes that a grievance or a dispute may be grounded on investment treaties, domestic investment laws or investment contracts (referred to jointly in the Guide as "investment instruments").

2. Definitions

Recommendation 2: Definitions

For the purposes of the system and the legislation:

(a) "Grievance" means an unattended problem faced by an investor due to the conduct of the State or a governmental body, that has not yet become a dispute;

(b) "Dispute" means a grievance which has devolved into a formal or legally contested disagreement between an investor and a State or a governmental body;

(c) "Legal dispute" means a defined and focused disagreement between an investor and a State or a governmental body framed in legal terms with expectations of relief, which is formally lodged before a court or an arbitral tribunal based on an investment instrument ("legal proceeding");

(d) "Dispute prevention" means measures to avoid a grievance from devolving into a dispute through various means;

(e) "Dispute mitigation" means measures to avoid a legal dispute by resolving a dispute through administrative means and non-binding alternative dispute resolution methods;

(f) "Dispute management" means measures to handle a legal dispute and the proceedings relating to that dispute.

6. Recommendation 2 emphasises the need to explain the meaning of key terminology for the purposes of the system and the underlying legal framework. This will assist those implementing the system and its users to have a clear understanding. The definitions in recommendation 2 are largely based on the definitions used by the World Bank Group in its work on dispute prevention.[5] The terms reflect the different phases of grievances, disputes and legal disputes (which often overlap and can be blurred) as well as the measures to address them. The terms and their definition would need to be adapted to the practices of each State.

7. While the distinction between a grievance, a dispute and a legal dispute aims to differentiate the functioning of dispute prevention, mitigation and management, it is particularly useful when different governmental bodies are tasked with the different

[4] See World Bank Global, p.128, which suggests that dispute prevention and mitigation measures are closely linked with the retention and expansion of investments.

[5] World Bank Retention, pp. 41-43 and World Bank Managing, pp. 8, 9.

phases and there is no single agency responsible for inward communication with governmental bodies and outward communication with investors.

8. Dispute prevention is defined as the handling of "grievances" before the disagreement between the investor and the State or governmental body is framed in legal terms. A disagreement is usually framed in legal terms when an intent to have recourse to arbitration or litigation is expressed. After such an intent is communicated, the dispute mitigation phase begins. Dispute mitigation ends when the investor formally files a request for arbitration or lodges the claim before courts, which escalates the dispute into a "legal dispute" and this is when the dispute management phase starts.

9. States may wish to consider providing definitions of other terminology, such as on "investor", "investment", "governmental body, agency or entity", and "investment contracts", which could provide clarity to stakeholders.

3. Effective communication with investors

Recommendation 3: Effective communication with investors

1. The system shall establish an effective communication with investors.

2. The system shall ensure that investors are informed of relevant investment laws as defined in recommendation 1 and of governmental bodies dealing with investments and investors ("competent governmental bodies").

3. The system shall ensure that investors can easily inform the competent governmental bodies about the problem they face without the need to initiate legal proceedings.

10. Recommendation 3 addresses the need for the system to establish a clear and open line of communication with investors to prevent disputes. An investor, as the primary stakeholder in any dispute prevention effort, should be able to contact the governmental body or bodies that are competent to address its grievances. Effective communication channels should be secured before making a new investment (pre-establishment phase) and should continue throughout the lifecycle of the investment.

11. During the pre-establishment phase, prospective investors should have access to information about how to establish their investment and be able to inquire about the regulatory framework governing investments. Such information and assistance are usually provided by an investment promotion agency (IPA). An IPA responds to queries about applicable investment laws and compliance procedures and provides information about competent governmental bodies that investors may need to deal with throughout the lifecycle of their investment. An IPA may facilitate communication by putting the investors directly in contact with the competent governmental bodies or could remain as the point of contact and function as a liaison. The latter approach has the advantage of streamlining communication flows and eliminating the hassle by investors to navigate through complex bureaucratic governmental structures. This is particularly so in highly regulated sectors such as the energy, where there are multiple competent governmental bodies with possibly overlapping mandates.

12. It would be useful to provide updated information on the regulatory framework of the State even after the investment is made (post-establishment phase) to assist investors with possible expansion or diversification. In addition, an effective line of communication should be established to allow the investors to inform the competent governmental bodies of the problems they face (see recommendation 10). This would make it possible to explore solutions to address grievances and to resolve disputes.

13. Information about the problems that an investor faces needs to be shared with the relevant governmental bodies to allow for a coordinated approach. Monitoring of communication and enhancing coordination among competent governmental bodies (referred to as "intra-governmental coordination") provide the opportunity to address a grievance before it escalates (see recommendation 4). Such a mechanism could be hosted by an IPA or an ombudsman, which is responsible for hearing complaints by investors.

4. Intra-governmental coordination

Recommendation 4: Intra-governmental coordination

1. The system shall establish clear communication channels, and ensure coordination and cooperation, among the competent governmental bodies.

2. The system shall ensure that the competent governmental bodies share and exchange information, including those with regard to:

(a) Obligations stipulated in investment instruments;

(b) Prior grievances and disputes based on investment instruments; and

(c) Interpretation rendered by courts and arbitral tribunals on investment instruments and obligations therein.

3. The system should clearly outline the responsibilities of the competent governmental bodies and the allocation of authority among them.

14. Recommendation 4 addresses coordination and cooperation among governmental bodies or intra-governmental coordination, including the establishment of clear communication lines. Depending on the structure of government and the investment, a number of governmental bodies may be involved in dealing with investors, including those with a role in preventing and mitigating disputes (referred to in the Guide as "agency" or "agencies"). Governmental bodies also include those whose measures may affect investors (including those at sub-national level, such as provinces, states and municipalities) and those that are involved in the negotiation and conclusion of investment instruments.

15. For example, if a problem faced by a foreign investor relates to an investment instrument negotiated or concluded by a governmental body, that entity should be involved in the coordination process. The entity'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 since the background and context of the contract negotiations may be crucial. Similarly, the legislative history of investment laws and the negotiation history of investment treaties may allow for a better understanding of the problems and facilitate compromises.

16. Coordination and cooperation may take different forms and happen at various levels, the most common of which is the exchange and sharing of information. Information shared may relate to the problems faced by investors but also those outlined in paragraph 2 of the recommendation. Coordination may be required with regard to investment instruments (see recommendation 8) and when governmental bodies make policy decisions impacting investors possibly across different sectors. This is because inconsistency between policy decisions and investment instruments may often be the cause of grievances and disputes.

17. For the exchange and sharing of information, it would be useful to designate a body to which the other governmental bodies will provide relevant information. This would allow the designated body to consolidate the information at the national level and to distribute it among the governmental bodies. This will facilitate experience sharing and brainstorming on recurring issues. For instance, those responsible for negotiation of investment treaties will be able to prepare the text more clearly, which can reduce issues of interpretation. The agency responsible for handling grievances will be able to detect grievances more quickly and identify those that present higher risks of becoming a dispute. The agency in charge of dispute management can benefit from information provided by governmental bodies that negotiated the relevant investment treaty and by dispute prevention agencies on how similar disputes were solved or why they could not be solved.

18. Officials of governmental bodies may be hesitant in sharing information with other bodies, which may hamper the coordination process. Therefore, it would be important to oblige governmental bodies to share information with other governmental bodies and when there is a designated body, to submit the information to that body. The designated body should also have the authority to collect such information.

19. While it would be possible to designate different governmental bodies for the coordination of grievances or disputes (possibly with one being designated as the leading coordinator or with agencies taking turns in that role), it may be advisable to task an agency responsible for the prevention and mitigation of disputes to perform such coordination role or, if none exists, to establish one. This is further elaborated in recommendations 5 to 8.

5. Lead Agency and relevant governmental bodies

Recommendation 5: Lead Agency and relevant governmental bodies

1. The legislation shall establish or designate an agency responsible for the prevention and mitigation of disputes (the "Lead Agency").

2. *The legislation shall identify competent governmental bodies responsible for dealing with investments, investors, or investment governance. Such governmental bodies may include, for example, governmental bodies that negotiate investment instruments or whose actions or measures may affect investments or investors.*

20. Recommendation 5 suggests that a governmental body is either established or designated for the purpose of preventing and mitigating disputes (the "Lead Agency"). The mandate and the functions of the Lead Agency are addressed in recommendation 6 and its structure in recommendation 7. One of the main functions of the Lead Agency would be to ensure intra-governmental coordination as mentioned in recommendation 4.

21. There are a number of ways to establish or designate a Lead Agency. In fact, there is no unique nor one-size-fits-all structure for such an agency. The institutional setup will need to be adjusted to the needs of the State and adapted to its government structure. Of upmost importance would be to gain the trust of investors and governmental bodies.

22. Experience shows that there are four possible approaches.

(i) *Single agency* – One approach would be to create a new governmental body or to establish the Lead Agency within a ministry or another governmental body, for instance, an investment promotion agency.

(ii) *Multiple agencies* – Another approach would be to distribute dispute prevention and mitigation functions among a number of existing agencies with each agency designated and empowered to handle certain grievances and disputes. In such a structure, an effective communication channel with investors and for the intra-governmental cooperation would need to be set up and adjusted.

(iii) *Inter-institutional committee or commission* – It would also be possible to establish a committee or commission composed of competent governmental bodies with one of the bodies designated to carry out secretariat functions.

(iv) *Inter-governmental commission* – The Lead Agency may also be set up as an inter-governmental body or a joint commission. Such a structure would need to be provided for in an investment treaty or in a separate agreement between the States concerned. Investors and States will be required to resort to the commission in case of a grievance or a dispute.

23. Paragraph 2 of the recommendation emphasizes the need to identify governmental bodies subject to coordination to facilitate the role of the Lead Agency. While identifying governmental bodies responsible for investment instruments – and with the authority to conclude or issue such instruments – may be relatively easy, identifying governmental bodies whose measures could have an impact on investors may be challenging. This may concern governmental bodies at both national and sub-national levels and involve a myriad of different bodies. For instance, an investor may require a permit by a municipal authority to conduct its operations. If the municipal authority denies the granting of the permit despite national assurances, this may lead to a grievance. It is likely that the municipal authority would be the first to be contacted by the investor and thus aware of a potential dispute.

24. Paragraph 2 suggests that a wide range of governmental bodies (or categories thereof) be identified without necessarily preparing an exhaustive list. It would, however, be advisable to include governmental bodies susceptible of being at the origin of measures affecting investors and those that can become aware of a potential dispute at a fairly early stage.

6. Mandate and competence of the Lead Agency

Recommendation 6: Mandate and competence of the Lead Agency

1. The legislation shall provide that the Lead Agency is tasked with the following functions:

(a) A central repository of investment instruments and qualitative analysis relevant to the prevention and mitigation of investment disputes;

(b) Communication with investors (see recommendation 3) and providing necessary assistance;

(c) Intra-governmental coordination (see recommendation 4);

(d) Investor grievance mechanism (see recommendation 10);

(e) Dispute mitigation (see recommendation 11);

(f) Capacity building (see recommendation 19); and

(g) Inter-governmental coordination (see recommendation 20).

2. The legislation shall provide that in order to perform the tasks mentioned in paragraph 1, the Lead Agency shall be authorized to, among others:

(a) Request and collect information from competent governmental bodies;

(b) Request cooperation from competent governmental bodies and their officials;

(c) Issue [recommendations to][decisions binding on] competent governmental bodies and follow up on their implementation; and

(d) Request information from investors.

25. Recommendation 6 outlines examples of roles that can be carried out by the Lead Agency. The system may prescribe the level of political and legal powers that the Lead Agency may exercise in dispute prevention.

26. Subparagraph (a) refers to the Lead Agency functioning as a repository of information about investment instruments, including dispute settlement clauses therein and legal obligations arising therefrom. Information pertaining to interpretation of those provisions by arbitral tribunals and local courts could also be collected (see recommendation 4(2)). The legislation should also provide for the qualitative analyses relevant to the prevention and mitigation of investment disputes, such as the identification of: (i) economic sectors which are most likely to give rise to disputes; (ii) recurring grievances and disputes; (iii) main legal obligations contained in investment instruments; and (iv) gaps in domestic legislation for compliance with legal obligations contained in investment treaties.

27. Compiling and mapping out such information will minimize the instances of grievances and disputes as competent governmental bodies (particularly, sub-national bodies and specialized entities) would be aware of the obligations and the possible consequences of a breach. It is often the absence of knowledge that leads to a breach. For instance, an investment contract may contain a fiscal stabilization clause,[6] which might be repudiated by subsequent regulation issued by the tax authorities out of ignorance of the existing contractual obligation. The continuous monitoring may allow the Lead Agency to be quickly aware of any grievances

28. Subparagraphs (b) and (c) foresee two main competencies of the Lead Agency, i.e., communication with the investors as well as intra-governmental coordination.

[6] Such clauses provide that the tax rates or exemptions granted to the investor will not be changed for a fixed duration.

These are the foundations of the grievance mechanism and dispute mitigation, which are mandated in subparagraphs (d)-(e).

29. Subparagraphs (f) and (g) foresee a role of the Lead Agency in capacity building and inter-governmental coordination.

30. Paragraphs 2 outlines the powers needed for the Lead Agency to fulfil its mandate under paragraph 1.

7. Operational structure of the Lead Agency

Recommendation 7: Operational Structure of the Lead Agency

The legislation shall set forth the operational structure of the Lead Agency among others:

(a) Its [independent] status within the government and its relationship with other competent governmental bodies;

(b) The organizational structure, including who the head of the Lead Agency is and how it will be staffed;

(c) Budget and the source of such financial resources;

(d) Establishment of headquarters and regional branches;

(e) The mechanism to report and monitor the activities of the Lead Agency regularly (quarterly or annually), including to which governmental body; and

(f) Legal liability and protection of the Lead Agency and its staff.

31. While the institutional setup of the Lead Agency may vary from one State to another (see paras. 21 and 22 above), it is important for the legislation to clearly set out the operational structure of the Lead Agency. This would ensure the effective operation of the Lead Agency and its activities.

32. Examples of aspects to be addressed in the legislation are listed in recommendation 7. For example, the legal status of the Lead Agency within the government including its independence from other governmental bodies will need to be stipulated. The organizational structure of the Lead Agency, including the position of its head in the government hierarchy as well as the staffing structure, will need to be provided. The budget required for a smooth and continued operation and the sources of funding will also need to be set forth in the legislation, which will ensure effective functioning of the system as a whole. The legislation should further contemplate a reporting mechanism to enhance the legitimacy of the Lead Agency and the transparency of its activities. In addition, the legislation may provide that the Lead Agency and its staff members are not liable for fulfilling their functions except in the case of wilful misconduct or gross negligence (see recommendation 14).

33. It is indeed crucial that the system as a whole earn trust and confidence of the stakeholders, which is why the Lead Agency should have mechanisms in place to address potential conflict of interests and accountability systems to ensure this trust. The concern regarding potential conflict of interests and lack of accountability is partly premised upon the centralisation of power and authority in a single entity. Such risk may be lessened by establishing the Lead Agency in the form of an inter-institutional commission instead of an entity comprising staff of one institution, thus dispersing the seats of power and authority. Another option is to put in place a reporting mechanism where the Lead Agency reports to an inter-institutional or inter-ministerial body as foreseen by recommendation 7(e).

8. Ensuring a harmonized approach to investment instruments

Recommendation 8: Ensuring a harmonized approach to investment instruments

1. The system shall ensure a harmonized approach in the negotiation and conclusion of investment treaties and investment contracts. That approach should also be reflected in the drafting of investment laws to foster harmonization among investment instruments.

2. The legislation shall provide for the preparation of a model investment treaty, which shall be updated on a regular basis. In preparing and updating the model investment treaty, there shall be coordination among the competent governmental bodies with regard to the contents of the treaty taking into account their experience with investors, difficulties encountered and disputes that have arisen.

3. The legislation shall provide for the preparation of standard contract clauses by governmental bodies responsible for negotiating and concluding investment contracts, which shall be updated on a regular basis.

4. [The legislation shall provide that a governmental body responsible for negotiating and concluding an investment contract is required to inform and involve the Lead Agency in any such negotiations.] or [The legislation shall provide that approval should be sought from the Lead Agency prior to the conclusion of an investment contract and that the Lead Agency be involved in the revision or renegotiation thereof with an investor.]

5. The legislation shall provide that clauses regarding dispute prevention and mitigation as well as dispute settlement are harmonized in investment instruments.

34. Recommendation 8 suggests that there is merit in taking a harmonized approach when negotiating and preparing different types of investment instruments.

Model investment treaty

35. The preparation of a model investment treaty would make it possible for the State to align its treaty language with the investment policy objectives of that State. In case the State has a model investment treaty, the governmental body negotiating the treaties will attempt to ensure that negotiations lead to an instrument closest to the provisions set out in the model. A model treaty may therefore significantly facilitate the preparation of negotiation of subsequent treaties. If an investment treaty contains clear and well-circumscribed provisions, it will be less prone to disputes that fall outside of its scope or that relate to governmental conduct that is not protected by the guarantees it contains. In addition, in case of a legal dispute, there might be less issues of interpretation.

Standard contract clauses

36. As for investment contracts (in particular, those involving public-private partnerships (PPPs)), engaging with entities that can conclude such contracts will facilitate the dissemination of good practices for the drafting of these agreements and avoid the incorporation of provisions that can be prejudicial to the State. Harmonizing the drafting of the substantive guarantees and dispute settlement provisions would enable consistency with investment treaties and domestic legislation and potentially reduce the risk of disputes. In this context, one possibility would be for States to develop model investment contracts containing options for dispute settlement clauses which are aligned with the model investment treaty. Indeed, research shows that a significant share of grievances come from investors involved in PPPs or other governmental contracts and that legal disputes tend to arise in services where PPPs are typical as well as in the natural resources industries where concession and investment contracts are common.[7] Coordination in the drafting and renegotiation of investment contracts can help reduce the number of disputes.

37. Depending on the expertise of the Lead Agency, the review of the contract may also help in identifying overpromising commitments from the State, prejudicial provisions, and any inconsistencies. If the Lead Agency is hosted within an agency which also deals with PPPs, it may be mandated to keep track of such PPPs and monitor their performance.

[Note to the Working Group: The Working Group may wish to consider whether the approval of investment contracts by the Lead Agency should be mandatory. The objective of this recommendation is to ensure that the Lead Agency is properly consulted. However, this may add a layer to an already complex contract negotiation

[7] World Bank Retention, p.60.

process to the dissatisfaction of the investors. If maintained, the recommendation can stipulate that the approval process is expeditious.]

38. These harmonization efforts would facilitate the introduction of new investment policies in a consistent manner across the various legal instruments and agreements. However, for this harmonization to be fully beneficial, it should be accompanied by the strengthening of the capacity of government entities implementing those instruments (recommendations 9 and 19). Such strengthening would limit disputes arising from the wrongful implementation of existing obligations and contradictory governmental actions.

Model dispute settlement clauses in investment instruments

39. Investment instruments usually contain dispute settlement clauses, which should be standardized.

40. Such a clause could include, among others: (i) contact details of the Lead Agency or any other governmental body to be contacted for any grievance to ensure that the grievance is handled from the beginning by the competent body, (ii) submission of a grievance or a dispute to the Lead Agency; (iii) if submission to a different dispute resolution forum, notification to the Lead Agency/relevant authority; (iv) definition of the range of disputes that can be subject to arbitration; (v) the scope of arbitration; (vi) the cooling-off period and the use thereof to conduct non-adversarial alternative dispute resolution (ADR) methods such as mediation; (vii) the use of ADR and its availability throughout the investment lifecycle, i.e. before, during and after adversarial proceedings; (viii) the local litigation or exhaustion of local remedies requirement as a precondition to arbitration (or the absence thereof); (ix) the advance consent to arbitration or a case-by-case consent; (x) description of the arbitral process; and (xi) confidentiality and transparency.

9. Ensuring consistency in implementation

Recommendation 9: Ensuring consistency in implementation

1. The legislation shall ensure consistent application of investment instruments and policies.

2. The system shall establish a proper knowledge management system which ensures the transfer and preservation of knowledge of public officials dealing with investor issues and keeping track of solutions used to solve grievances as well as arguments made in prior disputes.

3. The system shall inform investors of any relevant changes in investment instruments and policies, the rationale for the changes, and the effect of the changes on the investors' rights.

41. Recommendation 9 deals with consistent implementation. Given that the average lifetime of an investment project is 20 to 30 years, consistent application of laws and regulation is crucial to preventing disputes. Consistency may be difficult to achieve due to changes in government or turnover or retirement of government officials. Changes are inevitable but frequent changes may result in higher political risks. A robust knowledge management system to keep track of how grievances were handled and of the arguments made in previous disputes is also critical for the Lead Agency.

42. By avoiding political appointments and providing bureaucratic structures with technical appointments in competent government bodies, sudden or arbitrary changes triggering disputes may decrease.

43. Political changes may entail a different approach towards investors, in particular foreign investors. Bureaucratic structures would protect the Lead Agency and the competent governmental bodies from politicization. For instance, personnel working in the Lead Agency may be appointed from a pool of bureaucrats rather than being appointed politically. Long-term appointments, as well as knowledge management systems, are conducive to preserving the institutional memory of any body. Furthermore, when handling grievances or disputes, the Lead Agency may, if needed,

call upon retired employees – who were involved in the transaction at the origin of the grievance/dispute – to cooperate in the resolution of the grievance/dispute.

44. Consistency can be further ensured by keeping track of all arguments made in prior disputes, also via the knowledge management system. This would allow the State to maintain a consistent policy (including consistent treaty interpretation) and to establish its position with clarity. Past arguments can inform future decisions and decrease the chances of investors alleging bias or discrimination. This will also facilitate the establishment of a clear strategy by evaluating the strength of past arguments, the identification of contentious policy decisions, and accordingly the tailoring of future dealings with investors.

45. A similar approach may be followed for the handling of grievances: keeping track of the grievances and the solutions proposed may facilitate the handling of future grievances, identify recurring issues and prevent future similar grievances.

46. As for changes in investment policies and laws, they should be communicated with clarity to investors. If the rights of investors are affected, the communication should make reference to any prior commitments or previous laws that have been modified or nullified. The rationale for such new laws should be openly communicated to eliminate allegations of bias or discrimination and to remove any doubts about creating hidden barriers to investors (see recommendation 17).

10. Investor grievance mechanism

Recommendation 10: Investor grievance mechanism

1. The system shall provide a mechanism whereby investors can communicate their grievances to the Lead Agency.

2. The legislation shall provide that the Lead Agency may liaise between aggrieved investors and the competent governmental body.

3. The legislation should specify the procedure:

(a) To communicate the grievance to the Lead Agency;

(b) For the Lead Agency to register, filter and assess the grievance;

(c) For the investor and governmental bodies concerned with the grievance to share information regarding the grievance;

(d) For the Lead Agency to solve the grievance;

(e) For the Lead Agency to escalate the grievance to a higher competent body, if necessary;

(f) For any follow up by the Lead Agency on the implementation of the solution or decision, as the case may be;

(g) If the Lead Agency issues decisions, for an appeal mechanism;

(h) For the monitoring and evaluation of the services rendered by the Lead Agency.

4. The legislation shall provide for the cooperation of competent governmental bodies to share information regarding problems faced by the investors and issues triggered by investment instruments.

5. The legislation shall provide for the procedures to be followed by the governmental bodies to inform the Lead Agency of such grievances early on.

47. Recommendation 10 recommends the establishment of a grievance mechanism, that provides investors with a reliable procedure for voicing their concerns (also referred to as an early alert mechanism). The earlier the problems are addressed, the higher the likelihood for a solution. Such a mechanism could be managed by the Lead Agency or another specialized agency. It could be a point of contact for investors to lodge any grievance that they might have, including with regard to the denial of permits by municipal authorities or negative impact of prospective laws.

48. To make the grievance mechanism effective, the legislation should specify the procedure on how an investor would inform the Lead Agency of the grievance as well as the internal procedures to address those grievances, and more specifically the time-limits for processing complaints. Time-limits may also be prescribed on a case-by-case basis, in light of the complexity of the issue. In this case, investors should be provided with an expected time frame and given status updates. The legislation should also urge governmental bodies concerned with the grievance to share information on such grievance in order for the Lead Agency to make an assessment of the grievance and its implications and to propose adequate solutions.

49. Recommendations or decisions should preferably be communicated in writing and their implementation or enforcement should be monitored. The follow up and implementation efforts may be coordinated by the Lead Agency. In case the investors do not get the desired outcome, they should be provided with the reasoning, which should be objective and impartial. Investors should ideally be allowed to appeal any decisions made by the Lead Agency and the Lead Agency may inform them of alternative recourses. Moreover, lack of information or non-compliance with procedural requirements should not be used by the Lead Agency as a pretext to deny the application in its entirety, unless the investor has failed to do so after being requested to meet the requirements.

50. An escalation mechanism should be established for instances when the Lead Agency is unable to resolve the issue due to a lack of cooperation by other agencies or because the underlying issue is too politically sensitive. In that case, the Lead Agency may escalate the issue to a higher political authority (for example, an inter-ministerial committee or the office of the Prime Minister or the Presidency office).

51. Specific governmental bodies may be requested to provide information on an *ad hoc* basis or be under an obligation to periodically share information about their dealings with investors to identify potential or actual disputes. For instance, governmental bodies that might have recently rejected the granting or renewal of a license or permit to a foreign investor may be required to report it to the Lead Agency.

52. The obligation to inform the Lead Agency in paragraph 4 could be limited to specific sectors which are prone to disputes. A general obligation might indeed be difficult to put into practice on both ends of the spectrum as governmental bodies may not be willing to comply and the Lead Agency may be overwhelmed with the amount of information.

53. In the absence of a Lead Agency, the governmental bodies should be required to follow up on a problem related to investment in accordance with a set of procedure, minimizing instances of such problems being left unaddressed.

11. Mitigation of disputes

Recommendation 11: Mitigation of disputes

1. The legislation shall provide for administrative and non-binding alternative means of dispute resolution (such as negotiation, mediation, early neutral evaluation, or the composition of expert panels) in the investment treaties entered into by States, as a pre-condition for initiating arbitration.

2. The legislation shall set forth in a clear manner the time periods for administrative and non-binding alternative means of dispute resolution.

3. The legislation should identify the government body with the authority to choose and conduct administrative and non-binding alternative means of dispute resolution indicating representatives

4. The Lead Agency shall identify specific sectors which are prone to disputes and make sure that investors are required to notify the Lead Agency of such dispute. The competent governmental body shall [make best efforts to] notify the Lead Agency within 30 days after the date on which it first acquired knowledge of any dispute.

54. Recommendation 11 addresses the possible mitigation of disputes. If the State is aware of the disputes raised by investors at an early stage, attempts can then be made to resolve the dispute without having recourse to investment arbitration.

55. A possible form of such attempt is to resolve the problem by administrative means, where the governmental body concerned makes adjustments to its policy or makes changes to its decision.

56. Besides administrative means, other methods to attempt to resolve the dispute, may also be used, such as negotiation or mediation. It is important that the choice of the dispute resolution method be shared among the Lead Agency and relevant governmental body as well as the investor. Entrusting this matter to the Lead Agency is likely to be most effective.

57. The State may also consider the use of expert panels or early neutral evaluation, if needed for the assessment. Recourse to such methods of dispute settlement could be incorporated in various investment instruments. This would prevent the escalation of nascent disputes to lengthy and expensive adversarial proceedings.

58. In addition, as these methods aim for the settlement of the dispute, the legislation shall determine in advance which government body or official has the power and mandate to represent the government and make settlements on behalf of the government.

59. Settlements reached by way of negotiation or mediation may involve the payment by the State to the investor of a certain amount of money. Uncertainties may arise regarding such payment, and therefore the system should clarify the procedure to access the State's budget, and which governmental body should bear the financial burden of a settlement.

60. To further ensure the existence of a legal basis to use alternative dispute resolution methods, the Lead Agency may also recommend or even request the inclusion of such methods in the model dispute settlement clause to be used in the legal instruments (see recommendation 8).

12. Effective management of disputes

Recommendation 12: Effective management of disputes

The system shall provide for procedures to effectively manage legal disputes, including providing for an early assessment of the legal dispute to formulate a sound strategy, determination of the financial implications, constitution of a legal team composed of government officials and internal and external legal counsel (including their procurement), selection of adjudicators, if needed.

61. Despite best efforts for dispute prevention, disputes are inevitable. Consequently, it is necessary to prepare for such circumstances.

62. Dispute management may also be handled by the Lead Agency in charge of dispute prevention and mitigation. However, the combination of management and prevention functions might be detrimental to the prevention functions, if insufficient resources are allocated to dispute prevention.

63. The role of the Lead Agency in the management of disputes may include analysing the implications of the dispute, its size, complexity, and resources required. The Lead Agency may coordinate the State's response and a team should be composed to include relevant government officials, and internal and external legal counsel. This is especially necessary when there are strict deadlines. Therefore, the earlier the team is appointed, the better. Similarly, having a permanent negotiating team to pursue alternative forms of dispute resolution with the investor may be highly advantageous.

13. Financial resources and costs of proceedings

Recommendation 13: Financial resources and costs of proceedings

1. The legislation should provide for a budget which would allow the bodies within the system to gain prompt access to funding and resources for prevention and mitigation of disputes.

2. Financial resources to cover costs of legal proceedings may be allocated to the budget of the responsible governmental body, or the Lead Agency may be provided access to State budget.

64. Recommendation 13 is meant to ensure prompt access to funding. Should a State decide to set up a Lead Agency, this would incur costs in relation to its establishment and functioning (see recommendation 7). Costs may also include any possible sums of compensation that may be owed to an investor as the result of a settlement. These costs may be incurred on an *ad hoc* basis and would not necessarily follow the budgetary cycles of States. Therefore, it is advisable that special arrangements are made for access to funding and resources.

65. A possible method of financing dispute prevention may be to allocate the costs to the budget of the governmental body that is responsible for the grievance or dispute. Such allocation may be done if it is found that the grievance or dispute resulted from its action or inaction. Alternatively, a budget may be allocated to the Lead Agency.

14. Exoneration of liability of government officials

Recommendation 14: Exoneration of liability of government officials

The legislation shall provide that officials of competent governmental bodies (including the Lead Agency) are not held responsible for any act performed or omission made in connection with dispute prevention and mitigation, except in the case of willful misconduct or gross negligence.

66. Recommendation 14 accounts for the key role of State officials in the process of dispute prevention. Their involvement may range from providing witness testimonies to informal mediation. However, the fear of incurring liability for their actions, such as charges of corruption, may impede their full participation. In order to avoid legal repercussions, State officials may refrain from making any decisions and thus delay any attempts to prevent disputes.

67. Therefore, offering protection from liability for statements made within the scope of dispute prevention should be reassuring and facilitate public officials' cooperation. On the contrary, the option of threatening State officials with the risk of incurring liability for non-cooperation, may not incentivise necessary action. For instance, being forced to provide testimonies might cause State officials to provide limited information to protect themselves.

68. The protection from liability should be extended to situations where State officials provide statements or offer their cooperation in the context of alternative means of dispute resolution such as negotiation, consultation or mediation used for dispute prevention.

15. Confidentiality

Recommendation 15: Confidentiality

The legislation shall provide that information exchanged during the dispute prevention and mitigation process shall be confidential.

69. For handling grievances and disputes successfully, the investor and the State must be reassured that the information exchanged will not be made public, unless they agree otherwise.

16. Incorporating technology and a tracking tool

Recommendation 16: Incorporating technology and a tracking tool

The system shall utilize technology to streamline and optimize the dispute prevention and mitigation process. This includes providing a single portal with multiple functions which allows investors to access information about regulatory requirements including for registering companies, file grievances, obtain responses to frequently asked questions, contact relevant governmental bodies and officials and monitor progress of any requests on grievances.

70. Recommendation 16 suggests that technology should be embraced to increase the overall efficiency of the dispute prevention and mitigation system.

71. For example, a one-stop portal, such as an application or website could be created. It could function as an e-kiosk, for instance, to be used by investors to submit

requests using e-forms and documents (including authenticated digital copies of documents instead of original documents). If there is a grievance channel in place, investors should be able to submit their grievances through the e-kiosk and track the progress of their grievance application. Live chatbots can be incorporated to respond to investors' frequently asked questions or direct them to relevant governmental bodies or officials.

72. Data collected through investors' usage of the e-kiosk can be used to further develop dispute prevention strategies. Data can be used to measure the performance of the Lead Agency through the tracking of the number of grievances received, handled, successfully addressed, the time required, and the results of investors satisfaction surveys. The tracking tool may also measure data on investments and jobs retained, based on information provided by the investors.

17. Engaging investors in policy discussions

Recommendation 17: Engaging investors in policy discussions

1. The system shall identify investors and investments that may be affected by the adoption of laws or regulations related to emerging policy concerns, such as public health, climate change, sustainable development, and the development of preemptive strategies to prevent grievances or disputes.

2. The system shall introduce a consultation procedure to obtain inputs from investors before making changes to the laws or regulations and before introducing specific measures that may potentially affect the rights of investors.

73. Recommendation 17 addresses the fact that investors may be impacted by changes in the legal framework and the introduction of specific measures, in particular those relating to emerging policy concerns, such as public health, climate change, and sustainable development. Those investors need first to be identified and then be consulted so that pre-emptive strategies to address potential concerns are developed. Such strategies may include the progressive implementation of the new law or regulation to give sufficient time to the investors to make adaptations. If that is not possible, negotiations can be initiated for settlement through compensation.

74. Being proactive in this regard will limit the negative impact of disputes on States and a settlement may be of benefit to both the investor and the State, avoiding a costly and lengthy litigation process.

75. As one preventive measure, the recommendation foresees a consultation procedure to engage investors in policy discussions, as investor grievances may be weeded out at the root if investors are engaged in those discussions. This is often organized by the IPA of the State through its department in charge of advocacy services and/or investment climate reforms. It may also be done through the establishment of a public-private dialogue platform linked to the IPA.

76. The Working Group may wish to consider whether the entity in charge of organizing the consultations should also systematically carry out a regulatory impact assessment (RIA) of the proposed law or regulation. Such RIA could inform the discussions and decisions as to the final text.

18. Public policy space

Recommendation 18: Public policy space

The system shall recognize the need for a State to regulate in the public interest.

77. Recommendation 18 highlights the need to respect the pursuit of legitimate policy objectives. By involving the investors into the policy discussions early on and by taking simple steps at an early stage (see recommendations 10 and 17), a State may avoid aggrieved investors filing suits, while preserving the policy objectives.

78. The resolution of a dispute might involve a governmental body making administrative adjustments or making changes to administrative decisions. This is likely to raise concerns about why the governmental body made those changes or adjustments. The governmental body concerned should clearly communicate the rationale for the policy reversal.

79. The sole goal of dispute prevention and mitigation should not be to avoid disputes (A/CN.9/1044, para. 23). Informed and aware of the problems faced by foreign investors as a result of the intra-governmental coordination and policy dialogues with investors, the Lead Agency will be able to conduct an analysis of the problem by weighing multiple interests and pursue a range of aims broader than the avoidance of disputes.

19. Capacity building

Recommendation 19: Capacity building

The legislation shall provide for the consolidation and dissemination of information relevant to the prevention and mitigation of investment disputes.

80. Recommendation 19 sets forth capacity building, by stating that the legislation should provide not only for the consolidation of information relevant to the prevention and mitigation of investment disputes (see recommendation 6, para. 26), but also the distribution of such information to various government bodies. Indeed, the repository functions contribute to the accumulation of investment-related knowledge. Nevertheless, knowledge gaps that exist among entities need to be narrowed.

81. Information can be shared in various ways. It can be sent from various entities to the Lead Agency for consolidation; it can be gathered by the Lead Agency directly from the investors; and it can be disseminated from the Lead Agency to various entities through, for instance, capacity building programs.

82. With the information gathered, the Lead Agency should carry out capacity building programmes, which can consist of training programs or the dissemination of periodic publications such as handbooks and the maintenance of a web page containing current and relevant information.

83. It is particularly important that sub-national entities such as provinces, states and municipalities take part in capacity building activities. Engaging sub-national entities is crucial as inconsistent action by sub-national entities is one of the primary driver for disputes. Similarly, government officials at various levels – central, provincial, municipal need to be aware of the commitments taken by the States in investment instruments. This would allow them to identify potential non-compliant measures and ensure that government conduct is consistent with its investment obligations.

84. Additionally, the Lead Agency may assist the relevant governmental body carrying out a due diligence on the investors and investments. This due diligence should not be a screening process but rather an assessment of the seriousness and capacities of the investor. Besides reviewing the business plan and the reasons to invest, due diligence may involve assessing the legitimacy of investments.

85. Capacity building may be provided for the negotiations of investment contracts and PPPs. A dispute may arise from the fact that governments make commitments which it cannot comply with on the long term. Capacity building for the negotiations would decrease the risks of future grievances or disputes. However, this requires specific expertise and experience that may not be readily available in the State concerned.

20. Inter-governmental coordination

Recommendation 20: Inter-governmental coordination

1. The system shall establish and institutionalize coordination with authorities of other States to ensure effective cooperation and mutual assistance in dispute prevention or mitigation.

2. The system shall provide that one way of achieving such coordination is by setting up a joint commission under each investment treaty, which may undertake the following functions:

(a) Issuing interpretative statements of the investment treaty;

(b) Facilitating the mitigation of disputes through non-binding alternative means of dispute resolution (such as negotiation, consultation, mediation and early neutral evaluation), whether provided for in the investment treaty or not;

(c) Exchanging information and best practices [with States Parties]; and

(d) Engaging in periodic review of the investment treaty [with States Parties].

86. Recommendation 20 accounts for the importance of inter-governmental coordination to prevent and mitigate disputes, with regard to which the Lead Agency may have a role to play (see recommendation 6(1)(g)).

87. As a way of ensuring coordination, paragraph 2 suggest the setting up of joint commissions in the context of investment treaties. A joint commission may facilitate the harmonization of standards of investment protection and other treaty provisions by issuing interpretative statements. It would also create an avenue for effective application of the investment treaty by facilitating the exchange of information and best practices in order to adapt to evolving policy concerns through periodic reviews.

88. A joint commission can foster State-to-State communication and dispute resolution between the States Parties as well as between an investor and the host State.