



**MODEL INSTRUMENT ON MANAGEMENT
OF INVESTMENT DISPUTES
(WITH EXPLANATORY NOTE)**

CCDEC2018 26

MODEL INSTRUMENT ON MANAGEMENT OF INVESTMENT DISPUTES

PREAMBLE

Whereas

- I. [x] has entered into international investment agreements that contain international dispute resolution mechanisms, and the government and its agencies may also enter into contracts with foreign investors that contain dispute resolution mechanisms;
- II. Foreign investment disputes, if not addressed early and adequately, may implicate important public policies, political and financial considerations, legislative and regulatory activities, and possibly the international reputation of [x];
- III. [x] is committed to preventing and managing foreign investment disputes before formal dispute resolution becomes necessary, by facilitating efficient and coordinated inter-institutional actions; and to effectively and efficiently resolving such disputes;
- IV. [x] has determined to follow such efficient and coordinated inter-institutional actions, as set out in this Instrument.

I. GENERAL PROVISIONS

[Article 1

Declaration of public interest

The prevention and management of International Investment Disputes involving [x] and any actions necessary to ensure its effective resolution or adequate defence are declared to be matters of public interest.]

Article 2

Scope and purpose

1. This Instrument shall guide [x] in seeking to manage and resolve International Investment Disputes against [x].
2. The terms of this Instrument shall guide any Public Entity as defined in Article 3.
3. This Instrument addresses tasks, powers, decision-making, information-sharing, financial considerations, coordination among State agencies, relevant organisations and individuals, and representation of the State in the resolution of International Investment Disputes, with the following purposes:
 - a) Ensuring the effective and timely managing of the International Investment Disputes by optimising the cooperation and coordination within Public Entities;
 - b) Allowing an early warning mechanism and associated procedure to enable early resolution, where appropriate, of any emerging International Investment Dispute;

- c) Establishing the sole and exclusive representation of the State towards the dispute, the claiming investor, the tribunal, the public opinion and any other related stakeholder of the dispute;
- d) Defining the procedure for coordination between Public Entities involved in resolution of an International Investment Dispute;
- e) Defining the procedures for the preliminary assessment and conduct of negotiation, mediation and conciliation, as well as their interaction with investment arbitration proceedings;
- f) Conducting dispute resolution mechanisms and concluding a settlement agreement if possible;
- g) Defining the procedure for the hiring of external legal counsel and experts;
- h) Setting rules for the expenses involved in an International Investment Dispute and defining a system of financial oversight and payment of associated costs, settlement agreements and awards;
- i) Centralising and dealing with public access to information on concluded international agreements and contracts with investment dispute settlement mechanisms, as well as information on potential, pending and decided International Investment Disputes; and
- j) Addressing questions of confidentiality and dissemination of information, in relation to the existence, resolution, and outcome of an International Investment Dispute.

Article 3 *Definitions*

1. International Investment Disputes according to this Instrument are those disputes derived from:
 - a) [‘Investment Contracts’, entered into between Public Entities and foreign investors, that direct disputes to international dispute settlement mechanisms; and]
 - b) ‘International Investment Agreements’, entered into by [x] with other States or [Regional Economic Integration Organisations / International Organisations] that establish procedures for the settlement of disputes between investors of one Contracting State and the other Contracting State in which an investment is made by such investor.

2. International Dispute Settlement Mechanisms include arbitration, negotiation, mediation, conciliation and other procedures and techniques to which [x] or its Public Entities gave their express consent in the International Investment Agreements and Investment Contracts as defined in paragraph 1 of this Article, or agreed by the parties to the International Investment Dispute.
3. Public Entity includes but is not limited to:
[
 - a) the Government of [x] including its Ministries;
 - b) other [central/federal] public entities;
 - c) the Office of the President;
 - d) the Parliament;
 - e) the courts and the state prosecutors;
 - f) [regional/local] public entities;
 - g) municipalities;
 - h) State owned enterprises.]
4. Involved Public Entities are those Public Entities that (i) have been expressly mentioned in the notification of the dispute; (ii) were involved in the drafting, negotiation, conclusion and/or execution of the International Investment Agreement or Investment Contract of which the dispute derives; or (iii) were directly or indirectly involved in the adoption and/or implementation of the measures that form subject-matter of the dispute.
5. Foreign Investors are legal entities or individuals parties to investment contracts or satisfying the criteria on foreign investors according to [x] law [on Foreign Investment] or International Investment Agreements of which [x] is a contracting party.
6. Responsible Body is¹
 - a) **Option 1:** The Ministry of [...], hereinafter ‘the Ministry’: in case of International Investment Disputes arising out of International Investment Agreements;
Option 2: The Inter-Institutional Commission, hereinafter ‘the Commission’: in case of International Investment Disputes arising out of International Investment Agreements;
Option 3: Other option that better reflects the particularities of the State while providing required coordination.
 - b) The Public Entity that lead the negotiations or signed, on behalf of the Government, a contract with foreign investors: in case of International Investment Dispute arising out of an Investment Contract.

¹ Another possibility is to put the same Responsible Body in charge of all International Investment Disputes without making a distinction on whether they arise out of International Contracts or International Investment Agreements.

Article 4

General Principles of Coordination

1. **Efficiency.** The Responsible Body and other Involved Public Entities shall coordinate their efforts in management of International Investment Disputes proactively, adequately, timely, efficiently as prescribed in this Instrument to protect the rights and interests of [x].
2. **Comprehensiveness.** Coordination for the prevention and management of International Investment Disputes shall be continuously provided at all stages of the International Investment Dispute, in particular the notification of the potential dispute, cooling off or amicable settlement period, arbitration, potential negotiation, mediation and conciliation (prior to, during or after the arbitration), resolution and enforcement.
3. **Inclusiveness.** The coordination shall include both current public employees of the Involved Public Entities and those who are no longer actively employed by the Involved Entities. Their attendance may be required at different stages of the proceedings, including participation in the capacity of witnesses. [Delay or refusal to cooperate by a current public employee may be subject to administrative sanction under the Law on ...].
4. **Cooperation.** All Public Entities are subject to a general cooperation duty.

Article 5

Content of Coordination

The coordination between Public Entities and the Responsible Body includes, but is not limited to the following:

- a) Centralisation of information as stated in Article 6.
- b) Consistency of Dispute Settlement Provisions as stated in Article 7.
- c) Early Alert Mechanism as prescribed in Article 8.
- d) Coordination at all stages of the management of the International Investment Dispute, including amicable settlement, arbitral/conciliation/mediation proceedings and enforcement as described in Chapter II of this Instrument.

Article 6

Centralisation of Information and Transparency

1. The **Ministry / Commission** shall serve as a repository for all concluded International Investment Agreements and Investment Contracts. The conclusion of International Investment Agreements or Investment Contracts shall be notified, together with one signed copy, within the period of [fifteen] working days to the **Ministry / Commission**.
2. The **Ministry / Commission** shall publish the texts of International Investment Agreements [and Investment Contracts] within [fifteen] working days on its website in the public registry subject to the confidentiality requirements of Law on [...].

3. The **Ministry / Commission** shall, to the extent possible and in accordance with the applicable legislation of [x], provide transparent access to the information on concluded and pending international investment disputes.²

Article 7

Consistency

1. The **Ministry / Commission** shall draft and provide a model of the investment dispute settlement clause to be used in negotiations of future international investment agreements and investment contracts with the aim of achieving greater consistency and standardisation.
2. In case of deviation from the model clause referred to in paragraph 1 of this Article, the negotiating Public Entity shall submit the wording of such clause to the **Ministry / Commission** for approval before conclusion of negotiations, together with the reasons for such alternative wording. The **Ministry / Commission** shall issue its [binding opinion/recommendations] [within ... working days].
3. The **Ministry / Commission** shall ensure consistency on the State declarations and defence arguments in different International Investment Disputes.
- [4. The **Ministry / Commission** may establish a set of rules and practices for contracting external legal counsels and other experts.]

Article 8

Early Alert Mechanism

Any Public Entity that is notified or otherwise becomes aware of the existence or likelihood of an International Investment Dispute involving [x] shall notify the Responsible Body in writing immediately. The notification should include all the relevant information and documents in its disposal that are related to the International Investment Dispute.

II. RESPONSIBLE BODY

Article 9

Responsible Body for Resolution of Disputes Arising out of Contractual Obligations

1. The Public Entity that negotiated or signed on behalf of [x] contracts with foreign investors, shall be responsible for the resolution of disputes arising out of those contracts.

² UNCITRAL Rules of Transparency or national transparency rules may apply to a certain extent.

2. In case the Public Entity referred to in the previous paragraph has ceased to exist due to the internal restructuring or any other event, the Public Entity that succeeded it or took over the functions of the Public Entity that has ceased to exist shall be responsible for the resolution of International Investment Disputes arising out of the contracts negotiated or signed by the dissolved Public Entity.
3. In exceptional cases, the **Ministry / Commission**, shall decide on the appointment or designation of the responsible Public Entity.

Article 10

Responsible Body for resolution of Disputes Arising out of International Investment Agreements

Option 1 (a single unit, department or person)

1. The Ministry of [...] shall be responsible for representing [x] in case of International Investment Disputes arising out of International Investment Agreements.
2. It shall expressly appoint a specific unit, department or person within it to carry out all the functions and responsibilities entrusted to the Ministry according to this Instrument.
3. The Ministry of [...] shall act as legal representative of [x] for the purposes of this Instrument.

Option 2 (an inter-institutional commission)³

The Inter-Institutional Commission for the Settlement of International Investment Disputes, the Commission, is hereby created to coordinate, prevent and manage dispute settlement proceedings initiated against [x] pursuant to International Investment Agreements.

Option 3: other option that better reflects the particularities of the State while providing required coordination

Article 11

Functions of the Responsible Body

The Responsible Body shall have the following functions:

- (a) To coordinate the management of International Investment Disputes against [x], including amicable dispute resolution proceedings.
- (b) Elaboration and completion of documents for submission to the international arbitration or competent international tribunals.

³ For more detailed provisions on how the commission could work, see annex at the end.

- (c) Elaboration of Strategy on Resolution of International Investment Disputes, as stipulated in Article 12 of this Instrument.
- (d) To ensure effective defence of [x] interests (as defendant or claimant).
- (e) To coordinate the process of contracting legal counsel, experts and external advisers, where needed.
- (f) In charge of communication with investors and replying to the notice of arbitration,
- (g) To request cooperation and support from the different governmental entities and agencies whose assistance is required for the preparation of the case, along with provision of information, documents and assistance. Such information shall be provided within the deadlines, with the representative of the entity assuming liability for compliance with such deadlines.
- (h) To act as the sole official institutional channel for notification of progress reports and results of proceedings in accordance with the legislation in force governing confidentiality.
- (i) To appoint arbitrators, mediators or conciliators as may be the case in accordance with the dispute settlement mechanism in place.
- (j) To represent [x] in International Investment Disputes, to participate in hearings of international arbitration or competent international tribunals, including assistance to the legal counsel (if any) to represent [x].
- (k) To assume the prime responsibility for, and coordinate with competent Public Entities in relation to the enforcement of awards, decisions of international arbitration tribunals or competent international tribunals.
- (l) To coordinate the compliance with awards and other decisions by international arbitration or competent international tribunals.
- (m) To make proposals to the [Ministry of Finance] on the allocation of the additional resources for the purposes of dispute settlement proceedings with foreign investor.
- (n) To coordinate and conduct settlement negotiations, as well as to draft, negotiate and conclude settlement agreements.
- (o) Any other functions that may be necessary and appropriate to address matters relating to International Investment Disputes involving [x] or for the prevention of future disputes.

Article 12

Elaboration of a Strategy for Resolving International Investment Disputes

1. Within [thirty] working days after receiving notice of a dispute or a similar notice from foreign investor, the Responsible Body shall coordinate with Public Entities, organisations, relevant agencies and legal experts (if any) to elaborate an early assessment of the dispute and a strategy for resolving the International Investment Dispute. All of them will take close note of all deadlines and timings and make every effort to ensure that all submissions and other communications are filed within such limits, unless extensions of time can be and have been arranged.
2. The strategy for resolving International Investment Disputes shall include provisions on amicable dispute settlement and an assessment of the benefits of an amicable settlement of the dispute.
3. [In case of International Investment Disputes arising out of Investment Contracts, the Public Entity responsible for the resolution of a dispute, shall send the proposed strategy for resolving the International Investment Dispute to the **Ministry / Commission** for consultation. The **Ministry / Commission** shall give its opinion and advice with respect to the draft strategy within [ten] working days after its receipt. The Public Entity in charge shall take into consideration the opinion and advice given by the **Ministry / Commission**.]
4. During the implementation of the strategy, the Responsible Body shall assume the prime responsibility for revising such strategy, in coordination with any relevant Public Entity, individual and legal expert.
5. [In case of amendments to the strategy, the Public Entity responsible for the resolution of a dispute arising out of Investment Contracts, shall submit any such amendments to the **Ministry / Commission** for consultation. The **Ministry / Commission** shall give its opinion and advice with respect to the amendments to the strategy within [five] working days after its reception.]

Article 13

Elaboration and Completion of Documents for Submission to International Arbitration or Competent International Tribunals

1. The Responsible Body shall coordinate with relevant Public Entities, individuals, legal counsels and experts (if any) in drafting and completing documents for submission to the international arbitration or competent international tribunals.
2. In case the documents are prepared by external counsels or experts, the Responsible Body shall approve these documents before submission to international arbitration or competent international tribunals.

3. Relevant public entities, individuals, legal counsels and experts (if any) shall provide their comments in writing to the drafts of documents to be submitted to international arbitration or competent international tribunals within [seven] working days after receiving written request from the Responsible Body, unless the Responsible Body sets another deadline for reply.
4. All of them will take close note of all deadlines and timings and make every effort to ensure that all submissions and other communications are filed within such limits, unless extensions of time can be and have been arranged.

Article 14

Representation of the Government in International Arbitration Proceedings or Competent International Tribunals

1. The Responsible Body represents [x] in International Investment Disputes, and participates in hearings of international arbitration or competent international tribunals.
2. The Responsible Body shall, in coordination with relevant Public Entities, decide on the participation of other Public Entities, individuals and legal counsels (if any) in the hearings before international arbitration or competent international tribunals.

Article 15

Recognition and Execution of Settlement Agreements or Awards, Decisions and Orders of International Arbitral Tribunals or Competent International Tribunals

1. The recognition and execution in [x] of settlement agreements or awards, decisions of international arbitral tribunals or competent international tribunals shall be carried out in compliance with the relevant international treaties to which [x] is a contracting party and [x] legislation.
2. The Responsible Body shall coordinate with the competent Public Entity in handling the execution in [x] of settlement agreements, awards, decisions and orders of international arbitration tribunals or competent international tribunals.

Article 16

Enforcement in Foreign Countries of Awards, Judgments, Decisions and Orders of International Arbitral Tribunals or Competent International Tribunals

The Responsible Body shall assume the primary responsibility for, and coordinate with the Ministry of [Foreign Affairs] and other competent Public Entities regarding, the enforcement in foreign countries of awards, judgments, orders and decisions of international arbitral tribunals or competent international tribunals.

Article 17

Hiring of Legal Counsel

1. The Responsible Body may contract external legal counsel and other legal experts. It should assess as soon as possible after notice of a potential dispute whether such external support is needed.
2. The Responsible Body shall elaborate criteria, terms of cooperation and conditions of contract with the external legal counsel and other legal experts.
3. The Responsible Body shall analyse the candidates and sign the contract with the selected legal counsel and other legal experts.

Article 18

Hiring of Technical Experts and Invitation of Witnesses

Depending on the nature of the International Investment Dispute, the Responsible Body shall coordinate with the relevant agencies, individuals, and legal counsel (if any) in deciding on the hiring of technical or legal experts and inviting fact witnesses.

III. FINANCIAL ISSUES

Article 19

Allocating Expenses for the Resolution of International Investment Disputes

1. The general budget of [x] shall establish the budgetary items to cover the expenses generated by preventive and defence proceedings of [x].
2. If the Responsible Body is the **Ministry/ Commission** or any other central State body, the expenses for the resolution of International Investment Disputes shall be covered from the central budget.
3. If the Responsible Body is a local public body, the expenses for the resolution of International Investment Disputes shall be covered from the local budget according to regulations on budget decentralisation.
4. The Responsible Body shall use the regular funding allocated for the resolution of existing [and expected] International Investment Disputes in the beginning of the financial year. If new International Investment Disputes arise following the allocation of budget or in other exceptional cases, at the proposal of the Responsible Body, the Ministry of [Finance] shall decide on additional funding not contemplated in the general budget of [x] in force.
5. The Public Entity or agency responsible for the measure, action or omission giving rise to the potential conflict or dispute shall be liable for the costs relating to the prevention and defence proceedings of [x].

IV. CONFIDENTIALITY AND DISSEMINATION OF INFORMATION

Article 20

Confidentiality

Representatives and employees of Public Entities in the exercise of their functions prescribed by this Instrument shall at all times comply with the obligation of confidentiality and due diligence, whether legal or contractual, regarding the use of information they may have access to relating to the different proceedings, especially information corresponding to cases to which they are parties. The above obligations shall also apply to public employees that no longer actively exercise their functions.

Article 21

Information to Third Parties

The Ministry / Commission, shall be responsible for communicating information to third parties, whether physical or legal, which are not parties to preventive or defence proceedings involving the State. The Ministry / Commission shall act as the sole official channel of [x] for provision of information to the public and coordination in oral, written and electronic media of the institutional position of [x] regarding International Investment Disputes within the constraints of any legal or contractual obligation [x] or its representatives have entered into.

V. USE OF NEGOTIATION, MEDIATION AND OTHER AMICABLE SETTLEMENT MECHANISMS

Article 22

Alternative Dispute Resolution Methods

1. The importance is hereby recognised of Alternative Dispute Resolution (ADR) methods such as negotiation, conciliation and mediation, which allow a more agile, efficient, and effective resolution of disputes. [x] shall prioritise the use of ADR methods.
2. [x] shall make all reasonable efforts to provide for the use of conciliation, mediation and other ADR methods in its International Investment Agreements and Investment Contracts, as an additional mechanism to be used prior to, during or after the submission of disputes to international arbitration.
3. Any consultations, negotiation, conciliation, mediation, good offices and other ADR methods that may be used to resolve disputes arising in relation to International Investment Agreements shall be managed by the Responsible Body, including matters relating to contracting of legal counsel, experts and external advisers in accordance with the regulations in force governing public procurement, among others. The corresponding expenses shall be met in accordance with the terms of Article 19 of this Instrument.

4. The Responsible Body shall have settlement authority for the purposes of the negotiation and conclusion of settlement agreements with foreign investors on behalf of [x] and foreign investors shall be entitled to rely on the Responsible Body having that authority on behalf of [x].

Article 23

Assessing the Use of Amicable Dispute Settlement Mechanisms

In order to assess the usefulness of amicable dispute settlement mechanisms with foreign investors for a particular dispute, the Responsible Body may consider, among other issues, whether:

- (a) the monetary costs of pursuing international litigation or arbitration are too high in comparison with what a party can expect to recover by a decision in its favour;
- (b) the effect of an international decision against [x] becoming public;
- (c) a fast resolution is of the utmost importance;
- (d) maintaining a relationship is more important than the formal outcome, as well as the likelihood of continuing such relationship in case of settlement;
- (e) matters of fundamental principle are at stake;
- (f) both parties can involve their respective decision-making authorities;
- (g) a foreign investor would seek some non-monetary relief;
- (h) neither side is certain that it will prevail in litigation or arbitration;
- (i) the dispute can have an impact on the reputation of the State; and
- (j) the investment has an important impact on the economy or security of [x].

Article 24

Dispute Resolution Clauses Included in International Investment Agreements and Contracts

All reasonable efforts shall be made to ensure that every dispute resolution clause includes, as a minimum, a period for consultation, negotiation, mediation or any other amicable dispute settlement mechanism between the parties before the dispute may be submitted to international arbitration or a competent international tribunal.

VI. FINAL AND TRANSITIONAL PROVISIONS

Article 25

Implementation provisions

1. All Public Entities shall ensure the implementation of this Instrument and timely report to the **Ministry / Commission** about any relevant issues during the implementation of this Instrument.
2. The **Ministry / Commission** may propose any additional legal framework necessary for implementing this Instrument.

[Article 26

Liability

In the event of any omission or breach of the provisions contained in this Instrument by any Public Entity, its representatives and public employees responsible for the breach or omission may become subject of an administrative investigation that could lead to sanction, in accordance with the law on ...]

Article 27

Entry into force

1. This Instrument shall enter into force from the date of its enactment.
2. The **Ministry / Commission** shall also be in charge of International Investment Disputes derived from International Investment Agreements notified prior to the enactment of this Instrument. Public Entities currently handling those International Investment Disputes are required to transfer without delay the case file and other corresponding documentation to the **Ministry / Commission**.

Annex:
Suggested provisions for the potential operation of an inter-institutional commission.⁴

Article 10.2

Composition of the Commission

1. The Commission shall be composed of representatives from the following Ministries and institutions:
 - (a) The Ministry of Justice;
 - (b) The Ministry of Foreign Affairs;
 - (c) The Ministry of Finance;
 - (d) The Ministry of Economy;
 - (e) [Office of the Investment Ombudsman or similar.]
 - (f) [Other]
2. [The members of the Commission shall not receive allowances or remuneration of any kind as consideration for their participation.]
3. The Commission may request the participation of representatives of other Public Entities and agencies to collaborate with the processing or monitoring of any specific case where deemed necessary.
4. Public Entities that are not members of the Commission, but which consider to have a stake in a dispute, may request participation of their representatives, who shall –with the consent of the Chair of the Commission– form part of the Commission for that specific dispute.
5. Without prejudice to the above, the Commission may where it deems appropriate invite officials or public employees of other Public Entities and representatives of other departments with legal autonomy or private physical or legal persons to participate in its meetings.

Article 10.3

Chair of the Commission

A representative of [...] shall assume the role of the Chair of the Commission, which include the following responsibilities:

- (a) To convene the meetings of the Commission.

⁴ In case a State opts for the commission, these provisions could be included in the instrument adopted or in an additional implementation document.

- (b) To propose to the Commission options for negotiations and defence.
- (c) To cast the deciding vote for decisions of the Commission in the event of a draw among its members.
- (d) Any other functions assigned by the Commission.

Article 10.4

Secretariat of the Commission

1. The department/unit of [...] of the Ministry of [...] shall assume the role of the Secretariat of the Commission for processing matters arising in relation to International Investment Disputes.
2. The Secretariat shall have the following functions:
 - (a) To provide technical support to the Commission on matters arising in relation to international investment disputes initiated against [x].
 - (b) To organise all the information, evidence and general documentation for proceedings.
 - (c) To prepare the documents necessary for meetings of the Commission.
 - (d) To execute and monitor the decisions adopted by the Commission for processing matters or for the prevention of future cases.
 - (e) To perform periodical monitoring of matters relating to International Investment Disputes initiated against [x].
 - (f) To request the Chair of the Commission to convene extraordinary meetings if necessary.
 - (g) To inform during ordinary and extraordinary meetings regarding the status of current disputes, possible future disputes that must be addressed and any other matter that the Commission or any of its members request in the exercise of their powers.
 - (h) To coordinate the actions considered necessary in relation to a specific case with other public entities and agencies, government employees or advisers determined by the Commission or related with a matter within their competence.
 - (i) To propose to the Commission, as deemed necessary, contracting of external advisers to carry out representation or defence and/or provide advice with respect to a specific case; to propose the terms and conditions for their contracting.
 - (j) To manage with the Commission the process of contracting of legal counsel and

technical experts if recommended by the Commission.

- (k) To prepare reports regarding the courses of action and strategies to be adopted and any other reports necessary to exercise the functions of the Commission.
- (l) To draft and maintain the minutes of the meetings of the Commission.
- (m) Any other functions assigned by the Chair of the Commission.

Article 10.5

Meetings of the Commission

1. The Commission shall hold ordinary meetings at least once every [three months] when there are specific disputes pending and once a year if there are no disputes pending. Extraordinary meetings may also be convened by the Chair upon threat or notification of a new International Investment Dispute.
2. The quorum for the meetings shall be at least [three] members of the Commission. If the necessary quorum is not reached for the meeting, the Chair shall convene a new meeting.
3. The Chair presents the agenda and chairs meetings of the Commission, gives explanations in connection with the work of the Commission, prepares the Commission's draft decisions and conclusions.
4. The Chair may invite to the meeting representatives of other bodies or external specialists with the aim of obtaining specific opinions and explanations about particular matters if required.
5. The Commission may invite to its meeting an investor whose request is being handled if this is considered necessary in order to clarify the subject of the request, and to discuss the possibility of commencing dispute settlement negotiations.
6. Minutes will be kept of each meeting of the Commission. The minutes will contain important details of the work and activities of the Commission. The minutes of the meeting will be delivered to all Commission members. Each member of the Commission shall have the right to submit their comments before the minutes are adopted.

Article 10.6

Decisions of the Commission

1. The Commission works and takes decisions in its meetings, and, in exceptional cases, it may take its decisions by correspondence.
2. The Commission shall make every effort to reach agreement by consensus. In the absence of consensus, decisions shall be taken by absolute majority. In the event of a draw, the Chair of the Commission shall have the decisive vote.

EXPLANATORY NOTE

In 2017 the Energy Charter Secretariat conducted a survey and analysed the domestic legislation of several Contracting Parties and Observers to identify potential obstacles that may still hinder the effectiveness of investment mediation. The main findings of the research showed that most government officials were concerned by the lack of a clear domestic legal framework resulting in ambiguous authority to settle an International Investment Dispute (or even to enter into discussions with foreign investors), fears of potential allegations of corruption and abuse of power leading to potential liability and lack of funding for the process. The research also pointed out the lack of an early, independent assessment of the dispute to ascertain the best (most effective) course of action (including the possibility of solving the dispute by negotiation or mediation).

In additional workshops and seminars, as well as in further discussions with government officials, it was mentioned that the lack of a clear domestic legal framework referred, in many cases, to the overall management of International Investment Disputes and not only to its amicable settlement. Most International Investment Contracts and International Investment Agreements entered into by States contain specific international dispute resolution provisions that usually are not well known and familiar to those public entities directly involved in potential disputes arising out of them. Furthermore, International Investment Disputes are typically complex and rarely affect a single Public Entity, so proper internal coordination is crucial to managing those disputes effectively.

Therefore, the Energy Charter Secretariat was requested to draft a Model Instrument that could be used by States for implementing their own domestic framework or as a guidance in relation to legal and practical issues that need to be considered for an effective and comprehensive management of International Investment Disputes (including an effective use of negotiation, mediation and conciliation). The Model Instrument is intended to be useful both to States that currently do not have an effective framework for dealing with the management of investment disputes and to States that already have such framework but wish to update it.

The Model Instrument has been developed with the support of the Investor-State Mediation Task Force of the International Mediation Institute (IMI) based on existing documents (Chile, Costa Rica, Croatia, Dominican Republic, Latvia, Peru, Poland, Slovak Republic and Vietnam), as well as on discussions with international institutions and government officials dealing with investment dispute resolution.

The explanatory note aims to explain briefly the motivation of each provision of the Model Instrument and the different options provided by it (e.g. the responsible body or the possibility of including a declaration of public interest) assisting States in making their own choices. It is primarily directed to the executive and legislative branches of governments considering reform or introduction of an instrument to deal with the management of investment disputes. However, the explanatory note may also provide useful insights to other users of the text, such as government officials implementing an instrument based on the Model.

While parts of the Model Instrument may seem too detailed, the aim has been to cover as many practical issues as possible based on the experiences and needs of consulted government officials dealing with investment disputes. It is for the State implementing the Model

Instrument to decide the level of detail needed and whether some issues should be better developed by an ancillary implementing document (e.g. while the instrument dealing with the management of investment disputes may establish an inter-institutional committee, details of how such committee should work could be developed in a different document).

In implementing the Model Instrument, the State should take into account its specific administrative needs and particularities to make the Model work adequately. Therefore, in some cases, the State will need to modify or leave out some of the provisions of the Model Instrument while in others, the State may need to consider whether complementary amendments to other domestic laws or regulations are required in order to ensure overall coherence of its national law. Also, enacting States will need to take into account transition issues and capacity building programs for government officials.

The Energy Charter Secretariat stands ready to provide technical assistance and capacity building for Governments preparing an implementing document based on the Model Instrument. The Secretariat also welcomes comments concerning the Model Instrument and the Explanatory Note, as well as information regarding implementation of the Model Instrument.

Preamble

The preamble is an optional section that usually lists the reasons and purpose of the enacted instrument. It, therefore, may differ from State to State, though the underlying principle may be the same: adequate preparation, management and internal coordination are crucial to managing International Investment Disputes effectively. The preamble can help explain government officials not familiar with International Investment Disputes why the enacted document is needed and relevant.

I. GENERAL PROVISIONS

Article 1

Declaration of public interest

Article 1 contains an optional provision, the use of which will depend on the legal system and legislative tradition of the enacting State. Some States may want to underline the particular importance they attach to the settlement of international investment disputes by declaring it as a matter of ‘public interest’ since the State’s public policies, reputation and political/financial factors are at stake. However, for other States, such declaration may have no particular use.

Article 2

Scope and purpose

The Model Instrument aims to cover a wide scope of aspects related to the management of International Investment Disputes and only briefly touches on the prevention of such disputes (which will be addressed in a different Model Instrument, allowing States more flexibility in deciding whether to address prevention and management of investment disputes jointly or separately).

Also, the Model Instrument does not deal with trade or other types of disputes (e.g. State to State) since they are of a different nature and may involve different Responsible Bodies and procedures. However, some countries may decide to have one single instrument to deal with investment and trade disputes (e.g. Dominican Republic).

On the other hand, there is a specific section on alternative dispute resolution methods such as mediation and conciliation.⁵ It was considered essential to facilitate their effective use in case an early assessment of the potential dispute shows its usefulness for that particular dispute.

Article 3 *Definitions*

The Model Instrument covers International Investment Disputes arising out of both International Investment Agreements (IIAs) and investment contracts since those disputes involve similar complexities and concerns (although the State may decide to designate different Responsible Bodies).

International Dispute Settlement Mechanisms are defined by the pre-agreed procedures included in the IIAs or the investment contracts, but also by any other dispute resolution mechanism agreed by the parties to a dispute before or after the dispute emerge.

The Model Instrument also gives a non-exhaustive list of Public Entities, which will inevitably differ from State to State taking into account their own needs and administrative organisation. E.g. some countries would prefer/be required to involve regional or local authorities, while others would consider only their central authorities.

Involved Public Entities are those who have a direct link to the subject matter of a dispute (e.g. they are in charge of the sector in which the dispute arose), which were involved in the measure or act that triggered the conflict, or which possess information relevant for its resolution. The definition of Involved Public Entities is inclusive and dynamic as each dispute may have different Public Entities involved.

Foreign investors are the individuals or legal entities that are either considered as such by the IIA on which they rely or are a party to the Investment Contract.

The Model Instrument provides different options to be considered about the Responsible Body. As a suggestion, the Model opted for having different responsible bodies to deal with disputes arising out of IIAs and contracts, while some States may prefer to have a single responsible body dealing with all the disputes. The latter option has some advantages as it would enhance centralising practices and information; consistent practice; accumulation of experience within one Ministry; more efficient decision-making process and better coordination inside the government. Furthermore, having a single centralised office would facilitate the identification of the Responsible Body by the private sector.

⁵ *Guide on Investment Mediation*, CCDEC2016 (12) available at <https://energycharter.org/fileadmin/DocumentsMedia/CCDECS/2016/CCDEC201612.pdf>

For the disputes arising out of IIAs, the Model Instrument further suggests three options:

Option 1: Competent Ministry

This option enables the designated Ministry to create a team of qualified and experienced lawyers who can either defend the State in case of smaller, manageable claims or work as a focal point between the external counsel and other concerned public entities in case of larger, complex claims.

Option 2: Specialised Body (the Inter-Institutional Commission)

Another option is to create a new body, the sole purpose of which is to represent the State in international investment disputes. This body could be a standalone entity with legal capacity or a Commission composed of representatives of different ministries (as suggested by the Model Instrument).

[Option 3: *Ad hoc* Ministry]

The State is represented by the legal department of the relevant ministry with competence over the subject matter of the dispute. This *ad hoc* approach might appear as cost-efficient since the ministry is knowledgeable about the substance of the dispute. However, this option entails some risks, since there would not be an internal legal team specialised in investment arbitration or mediation.]

For the disputes arising out of Investment Contracts:

The Model Instrument envisages those disputes to be handled by a specific department of the Public Entity that negotiated and concluded the contract. This approach is more suitable for small-scale disputes, which could be settled without involving a centralised body, and ensures that the Responsible Body is the more knowledgeable about the subject matter of the case.

Article 4

General Principles of Coordination

Efficiency is critical for coordination. During investment arbitration proceedings, States are bound by strict deadlines imposed by the tribunal. Therefore, it is advisable that the composition of the team dealing with the dispute should take place at the very beginning when the Responsible Body is notified or otherwise becomes aware of the likelihood of the dispute. If the Responsible Body starts determining the team after a notice of arbitration is received, it may miss some important deadlines and reduce any potential window for negotiation or mediation with the foreign investor.

It is useful that the Responsible Body designates one person within it as the coordination point. Thus, any notice of dispute would go immediately to that person, and he/she would have the authority to (i) compose the team dealing with the dispute at stake and (ii) appoint, or recommend an external counsel (if needed). The team should include one ultimate decision maker to whom the external counsel, if engaged, will have direct access when a quick decision has to be made.

The principle of comprehensiveness stipulates that coordinated actions are required at all phases of the dispute settlement (cooling-off period, litigation, enforcement...).

International Investment Disputes may be triggered by events that took place years ago. Institutional memory is therefore crucial. When the dispute arrives, employees of the Involved Public Entities may have retired, moved or changed office. Hence, it is important to envisage the principle of inclusiveness calling former employees for cooperation in the resolution of a dispute, including the provision of evidence.

However, acting as a witness usually is not a mandatory activity. Therefore, to ensure public officials' full cooperation in dispute settlement proceedings, they should be assured that none of their statements will be used against them. Furthermore, the imposition of any liability on public officials for non-cooperation may produce adverse effects: public officials called to give testimony will want to reduce their own risk (giving reduced evidence) rather than collaborate with the defence. Therefore, the provision on liability is optional.

Article 5

Content of Coordination

Even if some States have the coordination duty embedded in their domestic law, it might not apply to the settlement of International Investment Disputes. For the purpose of this Model Instrument, coordination includes: (i) centralisation of information (Article 6), (ii) Consistency of dispute settlement provisions (Article 7), (iii) early alert mechanism (Article 8) and (iv) coordination at all stages of the International Investment Dispute (Chapter II).

Article 6

Centralisation of Information and Transparency

The storage of all data on concluded IIAs and Investment Contracts by the Responsible Body is crucial for both dispute prevention and dispute management. Regarding dispute prevention, these IIAs and Investment Contracts should be duly reviewed for risk assessment (e.g. if there are stabilisation clauses) and could serve as basis/reference for negotiation of future IIAs or contracts. Regarding dispute management, the *travaux préparatoires* of the concluded IIAs may serve as additional source of treaty interpretation.

Often, public access to information is subject to specific national legislation, which can differ in scope, requirements and extension. Therefore, the Model Instrument refers to the relevant domestic law.

Article 7

Consistency

Many States have a Model Bilateral Investment Treaty (Model BIT), which is used as the basis for negotiation of IIAs but also reflects the investment policy of the State. It is important to have consistent dispute settlement provisions in IIAs and investment contracts. Such consistency would facilitate similar administration of the disputes resulting in more predictability.

Furthermore, taking into account the increased transparency and public access to investment arbitration, as well as the number of parallel or related proceedings, it is advisable for States to be consistent in their arguments in cases with similar subject-matters in order to avoid contradictions.

Besides, the Ministry or Commission may adopt a set of provisions which could formalise standard practices for contracting external legal counsels and other experts. Such a document could establish the rules on confidentiality, good faith, ethics and other issues.

Article 8

Early Alert Mechanism

Time is of the essence in the case of International Investment Disputes. The IIAs and Investment Contracts usually do not contain contact details of the responsible official or Public Entity to whom investor should address its concerns. Thus, the investor may lose a lot of time merely by trying to reach out to the relevant entity while the later may not be aware of the existence of potential problems with the foreign investor. This lack of information and communication may result in the escalation of conflicts into full disputes instead of facilitating their potential resolution at the initial stage.

Hence it is essential to have a well-functioning mechanism which enables a swift exchange of information. An online preventive system could be undertaken to ensure better connectivity between different layers of public entities: it could be a digital platform containing all international agreements of the State with investment dispute provisions, as well as some information about the Responsible Body. Public Entities would be obliged to notify the Responsible Body, via this digital platform, of any threat of a dispute with a foreign investor. Another option would be to undertake some regular preventive measures, including the exercise of due diligence of public officials in dealing with foreign investors (to carefully draft contracts with foreign investors, avoid contradicting statements etc.).

An early alert mechanism is a useful tool for both preventing and managing International Investment Disputes. If competently handled in its early stages, the conflict may be resolved before it escalates into a full dispute, or at least it would help to better prepare for the potential future international arbitration.

II. RESPONSIBLE BODY

Article 9

Responsible Body for Resolution of Disputes Arising out of Contractual Obligations

The Public Entity that negotiated or signed on behalf of a State a contract with a foreign investor is the most familiar with the subject matter of a dispute arising out of that contract. In fact, quite often State companies, local governments and State agencies with distinct legal personality (legal entities of public law), if directly sued, are authorised to represent themselves in dispute settlement procedures. Therefore, it is reasonable to designate that Public Entity as responsible body for disputes arising out of the contract.

The succession of responsibility should be ensured from the Public Entity that has ceased to exist to the Public Entity that took over its functions. Since the restructuring of Public Entities is often officially documented, this would eliminate any ambiguity in the identification of the Responsible Body.

Some exceptional cases may appear, such as when there is no clarity on which one is the responsible Public Entity (because of shared competences, or when several Public Entities had been signed the contract, or when competences relative to a dispute at stake shifted to another Public Entity). In such circumstances, the **Ministry / Commission** will need to intervene and appoint the Responsible Body. The Model Instrument could include a deadline for the appointment of the Responsible Body in such cases.

Article 10

Responsible Body for the Resolution of Disputes Arising out of International Investment Agreements

Option 1 (a single unit, department or person)

In many States, an existing Ministry (e.g. Ministry of Justice or Ministry of Finance) is responsible for the resolution of International Investment Disputes arising out of IIAs. However, such Ministry usually has many other additional tasks not related to the dispute settlement. For that reason, it is useful to specify which particular unit/department/person will carry out all the functions and responsibilities of the Responsible Body. An additional internal regulation can identify the relevant department or unit within the Ministry. The responsible Ministry ought also to be the one authorised to represent the government. This would diminish the risk of inconsistencies and unnecessary bureaucratic delays.

Option 2 (an inter-institutional commission)

In contrast to Option 1, this option envisages the creation of a separate, specific body with the sole responsibility of managing International Investment Disputes. In different jurisdictions, the Inter-Institutional Commission has different titles but plays a similar role.

Option 3: other option that reflects the particularities of the State while providing required coordination

Article 11

Functions of the Responsible Body

The functions are inherent to the Responsible Body, regardless of whether the dispute in question is arising out of contractual obligations or IIAs, and whether the Responsible Body is the Commission or a Ministry. However, the Functions may vary depending on the legal system of the State. Nevertheless, the idea is that the Responsible Body should be the central focal point and have enough competences to run the dispute settlement process from the very beginning (amicable settlement) until the very end (enforcement). It should also be given exclusive authority, as the sole legitimate representative in relation to the investor and the tribunal.

Article 12

Elaboration of a Strategy for Resolving International Investment Disputes

A strategy for resolving International Investment Disputes is a cost-benefit analysis of the case and a roadmap for the Responsible Body. The Strategy may contain the following:

- Summary of the dispute and legal instruments invoked;
- Assessment of the dispute which could include an analysis of the strengths and weakness of the State and foreign investor;
- Introduction of the dispute settlement process and explanation of the tasks required of the relevant public entities, organisations and individuals;
- Proposals with respect to hiring of external legal counsel, experts, appointment of mediator or/and arbitrator;
- Plan on handling mediation, negotiation, conciliation;
- Relevant comments, other proposals;
- Estimation of expenses for resolution of international investment dispute;

The size of the dispute would determine the level of detail of the strategy. In any event, it is advisable that the Responsible Body or the external counsel prepare a short memo with a preliminary evaluation of the claim.

The option of drafting and confirming the strategy for resolution of contractual disputes with the [Ministry / Commission](#) may have both advantages and disadvantages. On the one hand, an extra step of confirmation may result in a loss of time and unnecessary bureaucratic delays. On the other, the opinion of the [Ministry / Commission](#) may be useful for the positive outcome of the dispute settlement if the Public Entity in charge of the dispute is not experienced or competent in International Investment Disputes.

As an option, a provision could be envisaged on the regular notification by the Public Entity in charge of disputes arising out of Investment Contracts, to the [Ministry / Commission](#) about the progress of implementation of the strategy. In this case, the [Ministry / Commission](#) will have the function to monitor the implementation of a strategy and coordinate the handling of problems.

The Strategy should be developed under the coordination of the Responsible Body, but in close cooperation with any other Public Entities, the involvement of which would be needed.

Considering all advantages of the amicable resolution of disputes, the Energy Charter Treaty (and most IIAs) encourage it and allow parties to resort to them at any point in time. Therefore, the strategy should duly assess the usefulness of amicable dispute settlement procedures and their benefits for a particular dispute. Some assessment criteria can be found in Article 23 of the Model Instrument.

Article 13

Elaboration and Completion of Documents for Submission to International Arbitration or Competent International Tribunals

The Responsible Body will prepare documents for submission to international arbitration or competent international tribunals in close consultation with other stakeholders (Involved Public Entities) as well as third parties (hired legal counsels, witnesses, experts), if appropriate. Such consultation may be necessary in case of a complex dispute, involving many parties or when a particular knowledge is needed. This allows taking into consideration the interests of all relevant stakeholders, and ensuring that all relevant information is included in the documentation.

When necessary, the Responsible Body may delegate the function of document preparation to the external counsel. Nevertheless, the Responsible Body is still accountable and must check all the documentation before it is submitted to the tribunal.

Within the general cooperation duty, the relevant public entities, individuals, legal counsels and experts shall provide, within the scope of their powers, their comments to the draft documents. Usually, the comment/information provider is responsible for the accuracy and compliance of the information provided. The Model Instrument sets an indicative deadline of seven working days, which can be adapted or substituted by the word ‘promptly’.

Article 14

Representation of the Government in International Arbitration Proceedings or Competent International Tribunals

As the principal coordinator of dispute resolution, the Responsible Body will also take part in hearings where a dispute is being examined, ensuring that the State’s position is delivered. When appropriate, the Responsible Body may delegate (under its supervision) the function of participation and representation of a State to other Public Entities or to an external legal counsel.

Article 15

Recognition and Execution of Settlement Agreements or Awards, Decisions and Orders of International Arbitral Tribunals or Competent International Tribunals

A positive record of strict compliance with award obligations is viewed favourably by tribunals while deciding on provisional measures. Furthermore, it improves the reputation of the host States to attract investors.

The recognition and execution of international arbitral awards and decisions much depends on the national legislation of the host State (usually based on UNCITRAL’s Model Law on International Commercial Arbitration) and the obligations assumed pursuant to the international agreements to which the State is a party (e.g. the successful 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, also known as the ‘New York Convention’). The national legislation and the international treaties may contain cases when recognition or enforcement may be refused. Recognition and enforcement are two different issues which can exist separately. Recognition implies that the issues resolved in the award or

decision cannot be raised in new proceedings, whereas enforcement means applying prescription of the tribunal to force the losing party to abide by it.

Concerning enforcement of settlement agreements, UNCITRAL has finalised the Convention on International Settlement Agreements Resulting from Mediation (Singapore Convention), which is expected to be open for signature in 2019. The Singapore Convention would apply to investment settlement agreements unless a Contracting Party declares (according to its article 8) that it shall not apply the convention to settlement agreements to which it is a party, or to which any governmental agencies or any person acting on behalf of a governmental agency is a party, to the extent specified in the declaration.

Execution in the host State of settlement agreements, awards, decisions and orders of international arbitration tribunals or competent international tribunals implies the payment of financial compensation or performance in kind (for instance, issuance of a licence). These actions should be accomplished by the Public Entity, in whose competence falls the implementation of those issues. Therefore, the Responsible Body has to coordinate the execution of foreign decisions with the competent Public Entities (for example, payment of financial compensation would probably be coordinated with the Ministry of Finance).

Article 16

Enforcement in Foreign Countries of Awards, Judgments, Decisions and Orders of International Arbitral Tribunals or Competent International Tribunals

There are cases where enforcement of awards and decisions takes place in another State. Coordinated action between the Responsible Body and a competent Ministry (often, Ministry of Foreign Affairs) is also required.

Article 17

Hiring of Legal Counsel

In case of complex and high-value disputes, States may consider using an external counsel. It is important to make the selection process clear, predictable, efficient, transparent and simple.

The main features of selection procedure may contain the following:

1. Market research of law firms that have extensive experience with representing States before investment tribunals,
2. Selection of potential candidates for legal counsel and invitation to place a bid,
3. Request to provide a declaration of the non-existence of conflict of interests (in connection with a claimant), and
4. Evaluation of selected law firms, which could take into account:
 - a. The proposed price of the legal representation,
 - b. Number of representations either of States or claimants (including successful representations) of each member of the team proposed by the law firm,
 - c. Representation and success in listed arbitration cases could be cross-checked for accuracy,

- d. State's previous experience with a particular law firm or lawyer should be considered
 - e. Years of experience of team members in arbitration representation,
 - f. Seniority of team members (partner, lead, counsel senior associate, associate, junior associate),
 - g. Structure of the proposed team, i.e. which of the team members will be in charge of
 - i. case strategy
 - ii. communication with the Responsible Body
 - iii. case management
 - iv. pleading
 - v. writing submissions
 - vi. legal research
 - vii. ancillary tasks
 - h. The percentage of time to be devoted by each team member based on the monthly cap.
 - i. Presence of law firm office in the respondent State or if the law firm candidate is teamed-up with a local law firm. This indicator is crucial for logistic and practical reasons. Sometimes, legal representation may be required before national courts or government authorities so that defence in investment arbitration is coherent. Another point is technical issues such as fact-finding or translation of documents.
5. Based on the above, a list of shortlisted law firms could be created,
 6. Shortlisted law firms could be requested to provide a short analysis of the investment dispute based on selected documents which the Responsible Body provides upon declaration of non-disclosure.

Article 18

Hiring of Technical Experts and Invitation of Witnesses

Very complex disputes may require additional knowledge and skills in different sectors, which the Responsible Body may not possess. Furthermore, a State might need to support its position by inviting a fact witness. In such cases, the Responsible Body may engage external technical experts for the preparation of expert opinions and reports, or fact witnesses for providing a testimony. The hiring procedure should be coordinated with the relevant agencies, individuals, and legal counsel (if any).

Unlike in some national jurisdictions, only in exceptional circumstances, international arbitral tribunals have hired an external expert to help it resolve disputes between the experts hired by each party to the dispute.

Tasks of the technical expert may include:

- Identification of the matters in dispute
- Initial opinion
- Assistance in preparation of pleadings
- Preparation of expert reports
- Meeting with other experts

- Giving evidence to the tribunal
- Assisting cross-examination of opposing expert
- others.

The main features of technical expert selection procedure may contain the following:

1. Market research of experts that have extensive experience in the sector,
2. Selection of potential candidates,
3. Request to provide a declaration of the non-existence of conflict of interests,
4. Evaluation of selected experts, which could take into account:
 - Proposed price and time for providing the services,
 - Years of experience in the relevant field,
 - Expert's availability because sometimes issuance of a technical opinion will require fact-finding missions,
5. Shortlisting and selection.

III. FINANCIAL ISSUES

Article 19

Allocating Expenses for the Resolution of International Investment Disputes

The financing of expenses for the resolution of international investment disputes is essential and should be clear from the outset. Expenses include (i) the cost of the dispute (including costs of arbitration or trial proceedings; legal costs; hiring of technical experts; travels etc.), and (ii) compensation awarded (if any).

The Model Instrument envisages the possibility for the Responsible Body to request the competent Ministry (often a Ministry of Finance) a budget increase for the resolution of international investment disputes, if needed.

The Model Instrument contains a potential liability clause for the Public Entity whose action or inaction led to a dispute. It envisages that in case the Public Entity's behaviour is found in breach of a contract or IIA, the costs relating to the prevention and defence proceedings will be compensated from the financial resources dedicated for this Public Entity.

IV. CONFIDENTIALITY AND DISSEMINATION OF INFORMATION

Article 20

Confidentiality

Despite the general trend towards transparency in International Investment Disputes, preservation of confidentiality regarding certain issues is crucial. This relates in particular to the strategy of defence (objections regarding jurisdiction and merits, work with witnesses and experts, communication with the Public Entities). Full transparency in dispute management could undermine the defence of the State in related or similar cases. Confidentiality is a part of lawyer-client relationship and is also part of many Civil Service Acts. Nevertheless, the

defence concerns a wide range of entities, including former State employees, experts, witnesses and other cooperating persons which might not be bound by applicable legislation on confidentiality. Therefore, all persons engaged in defending the State in International Investment Arbitration should be bound by strict confidentiality, the breach of which should be enforceable via liability for damage caused by breach of this duty.

Article 21

Information to third parties

This article represents, to a certain extent, a deviation from the general confidentiality duty. Many States provide that people's ability to receive any information is a fundamental constitutional right. The content of information to be provided/published may, however, differ. In investor-State dispute settlement, it is the standard practice of some States to publish arbitration awards on their respective State websites. There are indeed some exceptions to the State's obligation to provide public access to information, as reflected in national legislation.

The Model Instrument suggests that it is the Ministry's / Commission's responsibility to provide information to third parties. This is determined by the fact that the Ministry / Commission are both: i) central government bodies, thus having certain authority to disclose information on behalf of the State; and ii) may adequately evaluate the consequences of providing some particular information and, as a result, make a selection of what to disclose.

Article 22

Alternative Dispute Resolution Methods

This article emphasises the importance of the amicable dispute settlement mechanisms. Even though all IIAs and majority of commercial contracts include provisions on amicable settlement of disputes, many States lack the national legal framework for its Public Entities to start or to engage with foreign investor into negotiations, conciliation or mediation. Therefore, the Article intends to provide this legal basis. Considering the advantages of the ADR methods for the preservation of good relations with the investor and reputation of the State for investment inflows, the relevant provisions allowing for such settlement should be included into the new IIAs and contracts entered into by the State or public entities.

The Responsible Body will take the lead in amicable procedures of dispute settlement but can also hire legal counsel or adviser, who may have more experience, creative solutions and can be relatively objective over the dispute. In case of engagement of a legal representative, he/she could also be authorised to negotiate and to conclude a draft settlement.

One of the problems faced during the use of amicable dispute settlement procedures is the lack of authority to conclude a settlement. To provide some clarity on this question, the Model Instrument suggests that the Responsible Body will have the authority to negotiate and enter into or recommend a settlement. This provision has equal importance for investors, who may identify by themselves whether their counterpart in the mediation/conciliation proceedings can settle a dispute.

Article 23

Assessing the Use of Amicable Dispute Settlement Mechanisms

The Model Instrument includes an open set of criteria that the Responsible Body could assess in choosing whether or not to engage into alternative dispute resolution mechanisms.

Article 24

Dispute Resolution Clauses Included in International Investment Agreements and Contracts

The Model Instrument underlines the need to provide in IIAs and contracts the possibility for an investor to request amicable dispute settlement before the dispute is submitted to arbitration or before another tribunal. The purpose is to discuss in good faith the dispute and to exchange views over its causes and the interests involved, identifying possible solutions based on mutual advantages. A party can request an amicable settlement without identification of any particular claim. If the negotiations, mediation or conciliation fail before the end of the cooling-off period, there is no prejudice to either party, and there is no reason for the tribunal to deny jurisdiction.

VI. FINAL AND TRANSITIONAL PROVISIONS

Article 25

Implementation provisions

Regular reporting represents an evaluation of the Instrument's efficiency. States may wish to indicate their periods for reporting. Enacting States may prefer to implement this provision in a different related, ancillary document.

Article 26

Liability for Breach of the Instrument

Enforcement is vital for effective compliance. While most domestic legislations contain provisions on confidentiality, liability for damages and diligent performance of public duties, the interests at stake are very relevant in case of International Investment Disputes. Therefore, the State may want to remind in the Instrument the need for a proper and diligent application of the enacted legislation.

Article 27

Entry into force

The entry into force of the proposed Model Instrument will depend on the legislative form chosen by the State. Various legal rules require different procedures for entry into force (e.g. intragovernmental commentary procedure, adoption by the parliament and publishing in the Official Gazette).

The Model Instrument is a non-binding framework that could be voluntarily used as a reference or guide also by those States who already have a similar instrument in place but

want to update it. In this case, States will adopt parts of this Model Instrument by introducing amendments to their existing instruments.

Pending International Investment Disputes initiated before the entry into force of the Model Instrument, should also be dealt with consistently. Therefore, the Model Instrument suggests that the Ministry / Commission takes care of these pending cases. Appropriate handover rules might need to be adopted for the smooth transfer of all files and information.

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As mentioned in the Model Instrument, in case a State opts for the commission, additional provisions could be included in the adopted instrument or in an additional implementation document.

Article 10.2
Composition of the Commission

The Inter-Institutional Commission may have different composition depending on the State administrative structure. The Model Instrument suggests an indicative list which includes officials from:

- The Ministry of Justice, as the main body that regulates State legal policy and conducts the State’s legal defence;
- The Ministry of Foreign Affairs, which is responsible for international representation of the State (international communication, the involvement of diplomatic channels etc.);
- The Ministry of Finance, as the main body responsible for the allocation of financial resources for the dispute settlement and execution of decisions and awards;
- The Ministry of Economy, which in many States carries out the tasks in the fields of tax, budgeting and conducts negotiations of IIAs.
- The Office of the Investment Ombudsman or similar: The ombudsman is a public official with a mandate to process impartially the complaints received from private individuals or companies regarding decisions, actions or omissions of public administration. Its role may vary from the settlement of specific issues at an early stage to formulating general proposals (regulatory or statutory) addressed to the public administration. In particular, the policy objective of an investment ombudsman aims both at protecting the interests of the investment and at improving the investment climate. For that reason, it is suggested to include the Investment Ombudsman (in case it exists in the particular State) as a member of the Commission.

Despite the long list of suggested representatives, it is advisable to take a limited number of permanent members (perhaps, 3-4) to enable the Commission to make fast decisions. Moreover, the Commission should not include the highest authorities (otherwise, there is a risk of their unavailability).

The Model Instrument envisages that the members of the Commission will execute their functions within their responsibilities at their respective ministries and, as a result, will not be additionally remunerated for being part of the Commission.

In addition to the permanent members, the Commission includes Involved Public Entities. As a consequence of the general cooperation duty prescribed in Article 4(6) of this Model Instrument, the Commission may invite other Public Entities to collaborate on a specific case. This might be the case when the invited Public Entity is at the origin of the dispute or possesses relevant information for its settlement (i.e., where the dispute involves reforms in the renewable energy sector, Ministry of Energy may be involved). Involved Public Entities can share with the Commission their knowledge of the facts, explain their relationship with the investor and inform about other aspects of the sector. In some States, the participation of the Involved Public Entities is mandatory.

The Model Instrument gives a possibility to other Public Entities to express their interest to be included in the Commission. At the same time, the mere request from a Public Entity is not enough to join. The Chair of the Commission will have to assess the usefulness/added value of a new member and give his approval.

The Commission may invite some other entities/institutions and persons for participation in its meetings when, for instance, some clarification on a particular issue is needed. In contrast to 10.2(3), the invitee takes part in a specific meeting but does not become a member of the Commission.

Article 10.3

Chair of the Commission

For the smooth organisation and running of the Commission's meetings, they should be led by the Chair (who can be a representative of any ministry or institution involved in the Commission). The Chair should assume functions of general coordinator and a minimum set of tasks which would ensure that the process of dispute prevention and management is not delayed or disrupted as a result of administrative issues. The Chair could be the primary contact point for the external counsel, if engaged, to facilitate the adoption of swift decisions.

Article 10.4

Secretariat of the Commission

The Secretariat of the Commission is expected to manage the international dispute resolution process. Nevertheless, the Commission may appoint advisers from other public entities and agencies, as well as external advisers to cooperate with the Secretariat for managing the specific case.

Option 1: The role of the Secretariat can be exercised by a designated department/unit of the Ministry forming part of the Commission. This option would save costs and is the approach followed in the Model Instrument.

Option 2: A stand-alone Secretariat could be created. Although this would imply additional costs for the government, coordination would be better ensured. Furthermore, such an option would be more appropriate in case a State faces many disputes.

As for the Secretariat's functions:

Option 1: The Secretariat may provide purely technical support to the Commission (such as preparing meeting facilities, printing documents, sending documentation etc.).

Option 2: Alternatively, it may have broader functions and even assume some tasks inherent to the legal department (approach followed in the Model Instrument). Such functions may include monitoring proceedings; informing the Commission regarding the status of current disputes, possible future disputes; managing with the Commission the process of contracting external legal counsel etc. A balance should be kept between functions of the Secretariat and the Commission, having in mind that the latter is the Responsible Body. Misbalance and unclear division of functions may lead to a situation where the Commission is responsible for the Secretariat's mistakes.

Article 10.5

Meetings of the Commission

Even if there are no pending disputes against the State, meetings can be useful occasions to discuss potential disputes and lessons learnt from the concluded cases, as well as to exchange views concerning developments in international dispute settlement. In case there are pending disputes against the State, the interval for Commission's meetings will be shorter, and may depend on the number of pending disputes and the stage of proceedings of these disputes.

If there is a threat or notification of a new International Investment Dispute and the meeting of the Commission is not yet planned, the Chair will organise an extraordinary meeting. For these purposes, the Secretariat shall notify the Chair of the Commission when specific disputes arise or may be imminent. There can be other circumstances when the organisation of an extraordinary meeting may be necessary (for instance, an emergency arbitration or the need to challenge/re-appoint an arbitrator).

Depending on the number of Commission's members, the quorum for taking decisions may vary. The quorum ensures inclusiveness and coordinated action of different members of the Commission, as well as the fullest exchange of information in the management of the dispute.

As a general coordinator of the Commission, the Chair will moderate the meetings and will be authorised to invite external experts when necessary. Some additional rules could be set to describe the process of invitation to the meetings. Meetings of the Commission should be documented in minutes, which may be used for drafting decisions of the Commission or for information purposes of Commission's members who were not able to participate.

The Commission may invite the investor whose request is being handled. Sometimes, the investor may request such an involvement himself. However, in case an investor will be invited to the meeting of the Commission, it should be considered in advance whether or not the meeting will be recorded since publication of the minutes may later jeopardise positions of the parties in formal proceedings as well as affect decision-making inside the government.

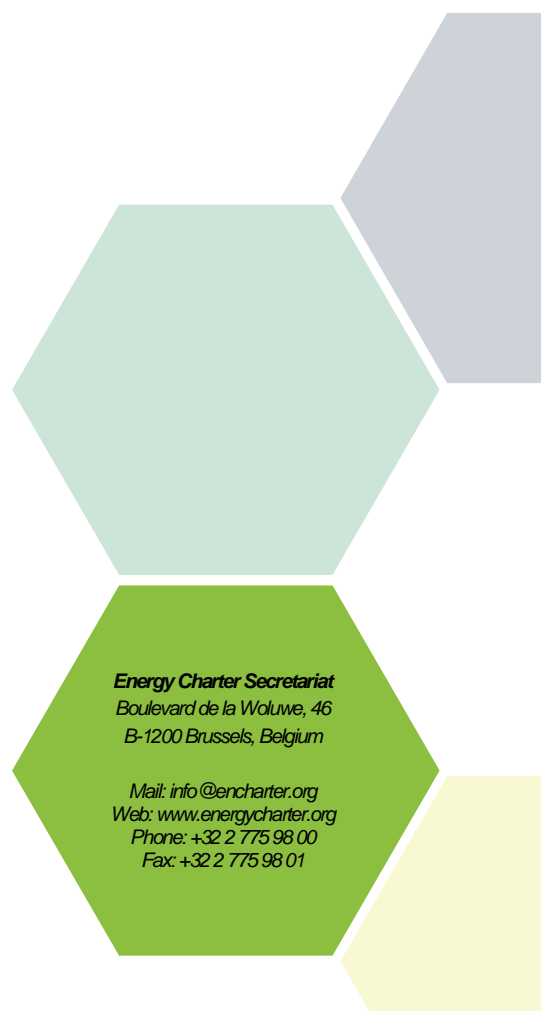
Article 10.6

Decisions of the Commission

As a result of discussions at the meetings, the Commission will have to take relevant decisions (hiring of external counsel, action plan, inviting external parties, etc.). To avoid unnecessary delays, it is advisable that the decisions are taken during the meetings.

However, some exceptional circumstances may appear when the decision cannot be taken at the meeting (i.e., in case some information still has to be confirmed). Then, the Commission should have the possibility to take its decisions by correspondence. Therefore, the internal rules of the Commission could describe the process of taking decisions by correspondence.

In any case, the Commission shall make every effort to reach an agreement by consensus.



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