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Managing Investor-State Arbitrations

Submitted by: Salans LLP



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Managing Investor-State Arbitrations

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Salans LLP

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Introduction : 3 Key Decisions in 5 Months

During the first five months of the arbitration, the government:

- Names the second arbitrator and participates in the choice of the third
- Chooses the law firm that will represent it
- Decides its procedural strategy



Introduction : 8 Ways to Get Organized

1. Lead agency/office
2. Budget for arbitration expenses
3. Procurement procedures
4. Settlement authority
5. Payment of arbitral awards or settlements
6. Allocate expenses of arbitration proceedings
7. Inter-agency consultation procedures
8. Training

3



Designate Lead Agency/Office

- Responsibility = Effectiveness
- Need for speed
- Litigation requires coherent positions: consensus approach not practical

4



Arbitration Budget Authority

Lead agency requires budget to:

- Pay expenses and fees incurred by the arbitral tribunal, as well as to pay attorney and expert fees
- Pay travel costs and expenses in connection with the arbitration
- Ideally, permanent fund dedicated to international litigation, with funding sufficient to cover expenses of first six to twelve months of investment arbitration (for an example, see US law concerning participation in international arbitrations, 22 U.S.C. § 2710).

5



Procurement Procedures

General considerations:

- When it comes to lawyers and experts, the cheapest solution will only rarely be the best
- Need for relatively rapid action
- Occasional need for secrecy

6



Procurement Procedures

Possible approaches:

- US approach: exempt lead agency from public procurement rules for engagement of litigation counsel, experts and other consultants (see 22 U.S.C. § 2710(c))
- Other approaches: streamlined procurement rules that allow weight to be given to experience and qualifications as well as cost

7



Settlement Authority

Grant the lead agency the authority to settle investment disputes

8



The Payment of Awards

Put in place a budget mechanism permitting the timely payment of arbitral awards or settlements (for an example, see the US Judgments Fund statute, 28 U.S.C. § 2414)

9



Decide *Who Pays the Award*

Establish well in advance how the amount of an adverse award and the expenses incurred in arbitration will be allocated within the government (establish which ministry's budget will be affected)

10



Internal Consultation Procedures

- Establish informal inter-agency consultation procedures for the discussion of positions to be adopted during arbitrations arising out of investment obligations
- Consider allowing other agencies the opportunity to review drafts of briefs and to provide comments
- Mechanism for swiftly resolving inter-agency disputes
 - US approach: Lead agency staff has authority to decide the final position, unless another agency “elevates” the issue to higher levels of government

11



Network of Contact Points

- Designate contact points in relevant ministries for investment disputes
- Responsibilities: transmit requests for information from lead agency and interface with lead agency on investment issues originating from contact point's ministry
- Contact point should receive training in investment law sufficient to enable him or her to identify potential problems

12



Training

- Goal: prevent investment disputes by train officials most likely to be involved in one
- Identify ministries and staff dealing with sectors or topics in which there is substantial foreign investment interest
- Officials and the staff members of these departments should receive basic training regarding investment obligations and procedures

13

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For further information, contact: [Barton Legum](mailto:blegum@salans.com)
Salans / 5 boulevard Maiesherbes / 75008 Paris / France
Tel: +33 1 42 68 48 70 blegum@salans.com

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www.salans.com

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