

# MODEL INVESTMENT DISPUTE PREVENTION AND MANAGEMENT PROTOCOL

## 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, 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 Protocol.

## 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 Protocol shall guide [x] in seeking to prevent, manage and resolve International Investment Disputes against [x].
  2. The terms of this Protocol shall guide any Public Entity as defined in Article 3.
  3. This Protocol addresses tasks, powers, decision-making, information-sharing, financial considerations, coordination among state agencies, relevant organizations and individuals, and representation of the State in the resolution of International Investment Disputes, with the following purposes:
    - a) Optimizing the cooperation and coordination within Public Entities in relation to International Investment Disputes, ensuring their timely, effective and appropriate
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handling;

- b) Establishing an early warning mechanism and associated procedure to enable early resolution, where appropriate, of any emerging International Investment Dispute;
- c) Defining the procedure for coordination between Public Entities involved in resolution of an International Investment Dispute;
- d) Defining the procedure for the hiring of external legal counsel and experts;
- e) 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;
- f) Centralizing 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;
- g) Addressing questions of confidentiality and dissemination of information, in relation to the existence, resolution, and outcome of an International Investment Dispute; and
- h) Defining the procedures for the preliminary assessment and conduct of negotiations, mediations and conciliations, as well as their interaction with investment arbitration proceedings;
- i) Conducting dispute resolution mechanisms and concluding a settlement agreement if possible.

### **Article 3** *Definitions*

1. International Investment Disputes according to this Protocol are those disputes derived from:
  - a) [‘Investment Contracts’, entered into between Public Entities and foreign investors, that contain 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. Public Entity includes but is not limited to:

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- 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.]

3. 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.

4. 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.

5. Responsible Body is<sup>1</sup>

- 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;
- 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.

#### **Article 4**

##### *General Principles of Coordination*

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<sup>1</sup> 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.

1. **Efficiency.** The Responsible Body and other Involved Public Entities shall coordinate their efforts in prevention and management of International Investment Disputes proactively, adequately, timely, efficiently as prescribed in this Protocol to protect the rights and interests of [x].
4. **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.
5. **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 shall be deemed liable under act ...].
6. **Cooperation.** All Public Entities are subject to 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) Centralization 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 Protocol.

#### **Article 6** *Centralization 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.<sup>2</sup>

#### **Article 7**

##### *Consistency of Dispute Settlement Provisions*

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].

#### **Article 8**

##### *Early Alert Mechanism*

Any public entity that is notified or otherwise becomes aware of the existence or threat of an International Investment Dispute involving [x] shall notify the Responsible Body in writing no later than [five] working days from the date it became aware of its existence. 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. 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.

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

**Option 1 for International Investment Agreements:** A particular Ministry

**Article 10**

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

1. The Ministry of [...] shall be responsible for the resolution 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 Protocol.
3. The Ministry of [...] shall act as legal representative of [x] for the purposes of this Protocol.

**Option 2 for International Investment Agreements:** An Inter-Institutional Commission to be created.

**Article 10.1**

*Creation of the Inter-Institutional Commission for Settlement of International Investment Disputes*

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.

**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. Involved Public Entities that are not permanent members of the Commission may request participation of their representatives, who shall –with the consent of the Chair of the Committee– 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.
- (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 Protocol.

### **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 daily 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 sessions 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 session 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 session 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 session of the Commission. The minutes will contain important details of the work and activities of the Commission. The minutes of the session 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 sessions, and, in exceptional cases, it may take its decisions by correspondence.
2. The decisions of the Commission shall be by unanimous agreement. In the absence of unanimous agreement, the decision shall be made by absolute majority. In the event of a draw, the Chair of the Commission shall have the decisive vote.

#### **Article 11**

##### *Functions of the Responsible Body*

The Responsible Body shall have the following functions:

- (a) To coordinate the prevention and 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.
- (c) Elaboration of Strategy on Resolution of International Investment Disputes, as stipulated in Article 12 of this Protocol.

- (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) 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.
- (g) 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.
- (h) To appoint arbitrators, mediators or conciliators as may be the case in accordance with the dispute settlement mechanism in place.
- (i) 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].
- (j) 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.
- (k) 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.
- (l) To coordinate and conduct settlement negotiations, as well as to draft, negotiate and conclude settlement agreements.
- (m) 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 arbitration or a similar notice from foreign investor, the Responsible Body shall coordinate with Public Entities, organizations, relevant agencies and legal experts (if any) to elaborate 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. [In case of International Investment Disputes arising out of Investment Contracts, the Public Entity in charge 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**.]
3. 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.
4. [In case of amendments to the strategy, the Public Entity in charge, shall submit any such amendments to the **Ministry / Commission** for approval. The **Ministry / Commission** shall approve or disapprove the amendments to the strategy within [five] working days after its reception.]
5. 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.

### **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. 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.
3. 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 [x] legislation and the relevant international treaties to which [x] is a contracting party.
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 State Budget Law 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 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 decentralization.
4. The Responsible Body shall use the regular funding allocated for the resolution of 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 State Budget Law 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 Protocol 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 Responsible Body, via [...], shall be responsible for processing and communicating information to third parties, whether physical or legal, which are not parties to preventive or defence proceedings involving the State. [...] 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 conflicts. [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 Protocol.
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 whether:

- (a) the monetary costs of pursuing litigation or arbitration are too high in comparison with what a party can expect to recover by a decision in its favour;
- (b) a fast resolution is of the utmost importance;
- (c) maintaining a relationship is more important than the formal outcome, as well as the likelihood of continuing such relationship in case of settlement;
- (d) a foreign investor does not require interim relief;
- (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;
- (j) the investment has an important impact on the economy or security of [x];
- (k) other issues.

#### **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 of no less than [180] days 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 Protocol and timely report to the [Ministry](#) / [Commission](#) about any relevant issues during the implementation of this Protocol.

2. The **Ministry / Commission** may propose any additional legal framework necessary for implementing this Protocol.

**[Article 26**

*Liability for Breach of the Protocol*

In the event of any omission or breach of the provisions contained in this Protocol by any public entity, its representatives and public employees responsible for the breach or omission shall be held liable and shall be required to compensate the State for the damage suffered due to such breach or omission in accordance with the law on ...]

**Article 27**

*Entry into force*

1. This Protocol 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 Protocol. 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**.