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SYMPOSIUM ON INSTITUTIONALIZING INVESTMENT DISPUTE PREVENTION

INTRODUCTION TO THE SYMPOSIUM

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Investment dispute prevention is hailed as a silver bullet—a neat fix at the national level to reduce the overreach of investor-state dispute settlement (ISDS) and soften its bite. It is difficult to attend a conference on international investment law without someone proposing that greater focus on dispute prevention is the solution—that establishing a national dispute prevention agency would solve whatever problem is under discussion. National dispute prevention agencies are presented as "win-win": a way to reduce the number of costly ISDS cases, while also increasing rates of investment retention and improving the quality of domestic governance. This enthusiasm is shared by a range of international organizations, including the UN Trade and Development (UNCTAD), the World Bank, the Organisation for Economic Co-operation and Development (OECD), the World Trade Organization (WTO), and others. In 2023, United Nations Commission on International Trade Law (UNCITRAL) Working Group III discussed a *Draft Legislative Guide on Investment Dispute Prevention and Mitigation*, which encouraged states to adopt a particular model of dispute prevention agency.[1] Following negative reaction to the prescriptive tone of the document,[2] the UNCITRAL Secretariat has since proposed a more cautious guidance document that recognizes the diversity of domestic practice.[3] Though mostly understudied, there are already dozens of real world examples within national jurisdictions, with widely varied features, functions, and records—the most salient of which are South Korea's Office of the Foreign Investment Ombudsman and Peru's Coordination and Response System for International Investment Disputes (SICRECI).

Transnational enthusiasm for dispute prevention has run well ahead of the academic and policy literature. At least two sets of questions call for more careful attention, toward which this symposium proposes a reorientation. First, because the field is generally approached in the context of ISDS reform, discussion to date has mostly

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[1] UNCITRAL, Possible Reform of ISDS, Draft Legislative Guide on Investment Dispute Prevention and Mitigation, UN Doc. A/CN.9/WG.III/WP.228 (Jan. 19, 2023).

[2] Anthea Roberts & Taylor St John, *UNCITRAL and ISDS Reform: Lifelong Learning*, EJIL:Talk! (Nov. 23, 2023).

[3] UNCITRAL, Possible Reform of ISDS: Draft Guidelines on Prevention and Mitigation of International Investment Disputes, UN Doc. A/CN.9/WG.III/WP.235 (Nov. 20, 2023).

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avoided basic questions about "dispute prevention agencies" as social facts in their own right. What are the similarities and differences between actually existing dispute prevention agencies? To what extent do the distinctions reflect differences in their intended functions or diversity in the domestic legal systems in which they are embedded? Why have dispute prevention agencies proliferated mainly in developing countries? And how do developed countries prevent and mitigate investment disputes without establishing an agency with a cross-cutting mandate? A second set of more obviously normative questions link directly to the framing of policy advice. What assumptions about the causes and consequences of "investment disputes" are embedded in proposals to establish new dispute prevention agencies? Are there trade-offs between policy objectives that should be considered when designing or reforming such an agency? Can a single model agency be appropriate for states with diverse constitutional structures and systems of government?

History and Background to the Field

Any attempt to grapple with investment dispute prevention at the national level must first delimit the field. What is an investment dispute prevention agency? Although the concept is not always defined, it is possible to infer some essential characteristics from existing policy discussions. We understand an investment dispute prevention agency to be:

1. An agency within the executive branch of government;
2. That has responsibility, among other things, for preventing investor-state disputes from arising and/or escalating; and
3. Where that investor-state dispute prevention mandate is cross-cutting, in the sense that it is not limited to a specific sector, a specific geographic area, or to a specific regulatory field (e.g., tax disputes or environmental disputes).

This definition excludes many parts of the state apparatus that play important roles in preventing investor-state disputes from arising and escalating—notably, domestic courts and administrative tribunals within the executive branch. National ombuds-offices are also excluded, unless they are conferred with a mandate that is specific to investors. At the same time, our definition leaves open the question of how and at what stage(s) in a dispute an investment prevention agency might seek to intervene. One important implication of this definition is that it implicitly constitutes a new field of practice, the prevention of *investment* disputes, in circumstances where such disputes might previously have been understood differently—for example, as contractual disputes between state instrumentalities and private actors or as disputes about the application of environmental regulations.

Investment dispute prevention agencies are a relatively recent phenomenon. The oldest is South Korea's Office of the Foreign Investment Ombudsman, established in 1999. However, somewhat similar functions were almost certainly being performed by investment promotion agencies on an *ad hoc* basis prior to this. A survey of 101 investment promotion agencies carried out by UNCTAD in the year 2000 found that almost 70 percent self-reported providing "after-care services" (i.e., services to manage the state's relationship with foreign investors after the establishment of their investments).[4] In this light, one way of telling the history of investment dispute prevention agencies is as part of an effort to recognize, formalize, and extend the support provided to investors

[4] UNCTAD, The World of Investment Promotion at a Glance, 14, UN Doc. UNCTAD/ITE/IPC/3 (2001). Similarly, a more recent OECD survey disaggregates aftercare activities performed by investment promotion agencies and finds that 81% self-report that they engage in "structured trouble-shooting with individual investors," while 45% report engaging in "mitigation of conflicts." *See* OECD, Mapping of Investment Promotion Agencies in OECD Countries, fig. 2.6 (2018).

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beyond the point in time at which an initial investment is made, with the aim of attracting and retaining more foreign investment. This was certainly the case in South Korea.[5]

While the emergence of investment dispute prevention agencies was not linked historically to concerns about ISDS, the sharp increase in ISDS cases in the 2000s played a key role in their proliferation. Policy documents produced by UNCTAD, the OECD, the World Bank, and the Energy Charter Secretariat all identify the risk of liability under investment treaties as a core rationale for establishing an investment dispute prevention agency. The perspectives of international institutions—particularly those of the World Bank and UNCTAD—have played a significant role in shaping the development of investment prevention as a transnational field of practice through their analytic and advisory work. At the same time, it would be a mistake to see domestic prevention agencies as *necessarily* entailing an ongoing commitment to ISDS. Brazil's Direct Investment Ombudsman, for example, was established as part of a wider strategy to develop domestic *substitutes* for ISDS.[6]

A Typology of Functions Performed by Investment Dispute Prevention Agencies

Another way to approach the field is to map the range of *functions* that are performed by actually existing investment dispute agencies. Careful attention to function helps sift through the confusing use of common terms to refer to entities with vastly different mandates and powers. An example is the use of the term "lead agency" to refer both to agencies of government tasked primarily with coordinating the state's defense in ISDS proceedings and agencies of government with much broad mandates to intervene in and resolve investors' grievances at an early stage.[7] Drawing on the existing literature and our own empirical work, we can identify at least two axes of variation in these functions.

The first axis relates to the conception of "investment dispute" embedded in the operation of the agency. For example, South Korea's Office of the Foreign Investment Ombudsman handles a range of grievances that could not plausibly be articulated as legal claims against the state; the primary function of the agency is to address practical obstacles facing foreign investors that might otherwise lead to a reduction or withdrawal of their investment. In contrast, Peru's Coordination and Response System for International Investment Disputes is more focused on disputes that pose a litigation risk to the state; its primary function is to manage legal risks associated with particular legal instruments—namely investment treaties and investment contracts.[8] The underlying conception of an investment dispute motivating any given agency is not always clear-cut, but these distinctions can explain (or call for) varied design choices and/or operational strategies.

The second axis is the stage(s) in a dispute at which the agency seeks to intervene. An agency might seek to prevent disputes arising in the first place by training government officials or disseminating "good practice" guides. In relation to complaints raised by individual investors, an agency might provide a mechanism to address grievances at an early stage, or it might only become involved after initial attempts to resolve a dispute have failed.[9] Yet, many agencies intervene in multiple ways at different points in the progression of a dispute.

[5] Dongwook Chun, *Synergizing Government Services with an Investment Grievance Mechanism* 17 U. St. Thomas L.J. 297, 301 (2021).

[6] This strategy is also reflected in Brazilian treaty practice. Brazil's Model Bilateral Investment Treaty requires state parties to designate national focal points that facilitate the resolution of investor-state disputes. Brazil has designated the Direct Investment Ombudsman to perform this function under its treaties; these treaties do not provide consent to ISDS. *See* Fed. Rep. of Brazil, *Model Bilateral Investment Treaty* (2015).

[7] Compare, for example, the use of the term "lead state agency" in Jeremy Sharpe, *Institutionalizing Investment Dispute Prevention: The U.S. Experience*, 118 AJIL Unbound 259 (2024) with the use of the term "lead agency" in UNCITRAL, *supra* note 1, at 7–8, 13–14.

[8] Ricardo Ampuero Llerena, *Investor-State Dispute Prevention Institutions in Latin America – The Case of Peru*, 118 AJIL Unbound 248 (2024).

[9] This axis of variation is highlighted in the analytical work of the World Bank. *See* Roberto Echandi et al., *Retention and Expansion of Foreign Direct Investment: Political Risk and Policy Responses*, World Bank Group, at 42 (2019).

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With this in mind, surveys of dispute prevention agencies reveal a number of distinct and at times overlapping functions such agencies carry out, including the following:

- Raising awareness of the state's legal obligations across the state apparatus (e.g. the dissemination of information about investment treaties; the systematic compilation and evaluation of investment contracts and treaties, as well as the analysis of investment arbitration cases; and the systematic training of government officials on investment treaties' implications for their day-to-day jobs);
- Ensuring treaty compliance (e.g., establishing a system for review of new laws and policies to ensure they are adopted and implemented in line with investment treaty obligations);
- Monitoring of, and communication with, investors to identify grievances at an early stage (e.g., identifying investor-state grievances leading to a risk of withdrawals and cancellations, including through "early detection" mechanisms; identifying sensitive or strategic sectors and issues of concerns through continuous communication with investors); and
- Early resolution of investor-state disputes (i.e., identifying and addressing investor-state grievances before they escalate into formal disputes).

In addition, several dispute prevention agencies perform functions that extend beyond prevention *stricto sensu* to the management of investment disputes. These include:

- Management of ISDS cases (e.g., designation as the lead agency tasked with the coordination and management of a state's defense in arbitral proceedings, including defense strategy, appointment of arbitrators and external counsel, making decisions concerning a possible settlement, etc.);
- Carrying out post-dispute measures (e.g., coordinating the payment of awards, apportionment of adverse awards of compensation and legal costs between different agencies of government; and proposing reforms to the state's law and policy framework to address the root causes of disputes and reduce exposure to claims in the future).

This final function illustrates that dispute prevention and management can be closely related. Combining such competences can facilitate cross-cutting projects, such as conducting "root cause analysis" of existing disputes in order to propose reforms that prevent future disputes.

Arguments for and Against Domestic Investment Dispute Prevention Agencies

Much of the existing literature on dispute prevention agencies is oriented toward providing policy advice to states. As a starting point, we provide an initial overview of key arguments that have been made in favor of and against the establishment of such agencies. These arguments are sketched in general terms. The diversity of existing dispute prevention agencies means that the pattern of costs and benefits associated with any particular agency will also depend on its design, functions, and context—all of which the contributions to this symposium explore in more detail.

The policy literature tends to highlight two core arguments in favor of establishing dispute prevention agencies. The first relates to the benefit of addressing investors' grievances at an early stage, before they escalate. Early diagnosis and resolution can benefit both the investor and the state, by improving rates of investment attraction and retention. This argument depends on a range of further assumptions about the source of investor grievances, including the assumption that many practical problems faced by investors result from coordination failures and bureaucratic inertia across government of the sort that can plausibly be addressed by an agency with a cross-cutting dispute prevention mandate. The second argument relates more specifically to the risk of legal liability to the state. Early resolution of disputes can benefit the state, it is said, by reducing the number of grievances

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that turn into full-blown legal disputes. Insofar as the state chooses not to resolve a dispute in a way that satisfies the investor, early identification of the dispute can still help the state in organizing and preparing its legal defense.

Many criticisms of investment dispute prevention agencies have their root in two observations. First, the category of "investment dispute" is potentially very broad, encompassing a huge range of interactions between economic actors and the entire state apparatus.[10] Second, dispute prevention agencies are rarely found in developed countries, which are generally more successful in attracting foreign investment and in avoiding liability through ISDS. From these observations two high-level criticisms follow. The first critique relates to the *effectiveness* of dispute prevention agencies: the diverse range of issues that are capable of being recharacterized as "investment disputes" raises questions about whether an agency with a cross-cutting mandate will have sufficient expertise to intervene in all of them. What new forms of expertise is a dispute prevention agency expected to bring to the prevention of disputes that concern, say, environmental regulation that go beyond the expertise already available to the responsible environment agency? The second critique relates to the risk of governance *distortions*: to the extent that an investment dispute prevention agency is effective, this relies (at least in part) on increasing the sensitivity across government to investors' concerns. There is a risk, then, that dispute prevention agencies institutionalize a privileged role for investors' interests in decision-making processes that involve consideration and balancing of other interests. These criticisms raise further questions that are not easily answered without empirical study of how the agencies actually operate on the ground.

A final criticism concerns the way that a focus on investment dispute prevention relates to wider debates on investment governance. Most policy discussion of dispute prevention agencies takes the existence of investment treaties and the ISDS mechanism as given, and focuses on how states can reduce the legal and financial risks associated with them. This framing is troubling for those who see the continued existence of investment treaties and ISDS in their current form as part of the problem. On this view, the creation of dispute prevention mechanisms might entrench and extend the domain of international investment law, even if the mechanisms are successful on their terms.

Overview of the Symposium

This symposium brings together six contributions that speak to the range of national institutional arrangements oriented toward investment dispute prevention, and lay the groundwork for more informed critical reflection on such institutions. The first two contributions are more conceptual and cross-cutting. In *What Is the Problem with Investment Disputes?*, Jonathan Bonnitcha turns a critical eye toward assumptions about the "problem" that dispute prevention agencies are meant to address.[11] Taking the UNCITRAL *Draft Legislative Guide* as a case study, he illustrates how dispute prevention initiatives can, counterintuitively, produce investment disputes and more broadly entrench key problems and inequities of the disputes-oriented investment treaty regime. In *Dispute Prevention Mechanisms as Legal Enclaves*, Mavluda Sattorova suggests that prevention agencies tend to domesticate and broaden investor privileges.[12] In her view, whether or not such agencies are successful at *avoiding* investment disputes, the practice of dispute prevention serves to further replicate and amplify the investor-centrism of the investment treaty regime by extending its asymmetric paradigm back to the pre-disputes stage.

[10] Most existing dispute prevention agencies exclude disputes arising from the conduct of the legislative and judicial branches of government from the scope of their mandates. Even still, the range of potential interactions between economic actors and the entire executive branch of government remains very broad.

[11] Jonathan Bonnitcha, *What Is the Problem with Investment Disputes?*, 118 AJIL UNBOUND 230 (2024).

[12] Mavluda Sattorova, *Dispute Prevention Mechanisms as Legal Enclaves*, 118 AJIL UNBOUND 236 (2024).

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In *Investment Retention Mechanisms*, Priyanka Kher brings to the fore the crucial role played by international organizations in promoting the dispute prevention agenda.[13] Her contribution zooms in on the World Bank's rationale behind developing model prevention agencies, whereby one of the overarching policy aims is "investment retention" and preserving investor-state relationships, as opposed to mere dispute "prevention."

The remaining three essays drill into particular national dispute prevention agencies, highlighting the underappreciated range and variation in their functions, benefits, and pathologies. In *Investor-State Dispute Prevention in Latin America*, Ricardo Ampuero Llerena examines Peru's SICRECI, which combines the functions of coordinating defense of the state in ISDS claims with dispute prevention through learning and capacity building.[14] He also considers its limitations and the need to consider prevention of contract-based investment claims. In *Institutionalizing Investor-State Dispute Prevention in China*, Zhenyu Xiao analyzes China's efforts to institutionalize and centralize hierarchical dispute prevention mechanisms while retaining their informality and flexibility.[15] In her view, beyond improving the investment climate for investors, a key function of centralized institutionalization is to address a domestic policy concern of strengthening central control over subnational governments—to which end they have not yet been particularly successful. In *Institutionalizing Investment Dispute Prevention: The U.S. Experience*, Jeremy Sharpe demonstrates how, beyond its role in defending the state in ISDS claims, the Office of International Claims and Investment Disputes (within the U.S. State Department's Office of the Legal Advisor) performs dispute prevention functions.[16] He views its experience as a success, in part due to its internal institutional features, but also in part due to the United States' broader policy of aligning its investment treaty network with internal U.S. law (and vice versa).

[13] Priyanka Kher, *Investment Retention Mechanisms: Rationale and Implementation Experience*, 118 AJIL Unbound 242 (2024).

[14] *Ampuero Llerena*, *supra* note 8.

[15] Zhenyu Xiao, *Institutionalizing Investor-State Dispute Prevention in China*, 118 AJIL Unbound 253 (2024).

[16] Sharpe, *supra* note 7.

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