



Investment Dispute Prevention and Management Agencies:

Toward a more informed
policy discussion

IISD REPORT



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Investment Dispute Prevention and Management Agencies: Toward a more informed policy discussion

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Abbreviations and Acronyms

ADR	alternative dispute resolution
APEC	Asia-Pacific Economic Cooperation
BO	Business Ombudsman
CAMEX	Brazilian Chamber for Foreign Trade
CONPES	National Council of Economic and Social Policy
CFIA	Cooperation and Facilitation Investment Agreement
CICS	Inter-Institutional Commission for the settlement of international trade and investment disputes
DICOEX	Office of Administration of International Commercial Agreements and Treaties
DIO	Direct Investments Ombudsman
DPMA	dispute prevention and management agencies
FDI	foreign direct investment
HLGB	high-level government body
GAFI	General Authority for Investment and Free Zones
IAC	Investment Assistance Committee
IFC	International Finance Corporation
IIA	international investment agreements
ISDS	investor–state dispute settlement
JSI	Joint Statement Initiative on Investment Facilitation for Development
MEF	Ministry of Economy and Finance
OECD	Organisation for Economic Co-operation and Development
OFIO	Office of the Foreign Investment Ombudsman
SC	Special Commission
SICRECI	Coordination and Response System for International Investment Disputes
SIFAI	Investment Attraction Facilitation System
SIRM	Systemic Investor Response Mechanism
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
WTO	World Trade Organization



1.0 Introduction

Investment dispute prevention and management agencies (DPMAs) are a hot topic in international investment law. It is difficult to attend a conference on foreign investment without someone suggesting that establishing an investment ombudsperson, or perhaps an agency responsible for coordinating a state’s response to investment disputes, is the solution to the event’s topic. South Korea’s Office of the Foreign Investment Ombudsman (OFIO) and Peru’s Coordination and Response System for International Investment Disputes (SICRECI) are two examples that are frequently cited as models that might be adopted elsewhere. The European Union, for example, recently suggested that a new Multilateral Investment Court might also have an associated “International Ombudsperson” inspired by the South Korean model (UNCITRAL Working Group III, 2020). The World Trade Organization (WTO) Joint Statement Initiative (JSI) on Investment Facilitation for Development process is also contemplating a requirement that signatory states establish a DPMA in any final agreement.

Despite this enthusiasm, relatively little is known about the day-to-day operations and practical effects of DPMAs. Only a relatively small number of states have established such agencies, and, with the notable exception of South Korea, they are almost unheard of in developed countries. This fact, in itself, suggests that there may be other ways to attract investment and manage the risks associated with investment disputes aside from establishing a DPMA. Moreover, major differences in the design and operation of DPMAs between countries invite questions about how such agencies do, and should, relate to other institutions involved in investment governance within domestic systems.¹

In this context, the purpose of this paper is not to argue for or against the establishment of DPMAs but rather to contribute to a more informed policy discussion about them. In particular, we aim to situate policy discussions about DPMAs in the context of wider discussions about investment governance, draw attention to both the risks and benefits associated with DPMAs, and contribute to more technical discussions about the institutional design and operation of such agencies.

This paper is organized as follows. In Section 2, we consider existing policy discussions about DPMAs. While some states, such as Brazil, have established DPMAs as an alternative to providing consent to investor–state dispute settlement (ISDS), we show that international institutions have often promoted DPMAs as the solution to the problem of costly ISDS claims under investment treaties. In framing the problem in this way, international institutions take the existence of investment treaties and the risk of ISDS claims under them as a given. One result of this framing is that other potential solutions to the problem of investment disputes—such as reform or termination of investment treaties or investors’ use of domestic courts—tend to be overlooked.² We also show that international institutions’ efforts to promote DPMAs

¹ For example, in a webinar to discuss the draft of this paper, a participant from Vietnam observed that Vietnam has two separate agencies with different responsibilities in relation to the prevention and management of investment disputes. See: <https://www.iisd.org/events/why-and-how-investment-dispute-prevention-and-management-agencies-sharing-country>

² See also Johnson et al., 2021.



are based on a set of assumptions about the underlying drivers of investment disputes. These assumptions are not necessarily accurate and tend to underestimate the challenges associated with the design of DPMA and the risks associated with their operation.

In Sections 3 and 4, our focus shifts to the review of existing DPMA. Section 3 proposes a new typology that draws attention to significant differences in the design and operational logic of DPMA in different states. Section 4 then examines DPMA that have been established in seven different states. The Appendix contains additional information about other DPMA about which less information is publicly available. Taken together, these sections aim to provide an evidence base for policy discussions about DPMA, as well as a foundation for further research on their operation and effects in practice.

Before proceeding to the analysis, it is important to clarify some parameters. We understand the term “dispute prevention and management agency” as referring to a government agency of the host state that has either the prevention or the management of investment disputes as part of its core mandate.³ As such, our conception of DPMA does not include investment promotion agencies that possess general responsibilities for promoting and admitting new foreign investment unless such agencies have a clear, additional mandate relating to investment disputes. For the same reason, government agencies responsible for negotiating investment treaties also fall outside the scope of our paper. A government legal office that provides advice on the strength of a foreign investor’s legal claims would also fall outside our conception of a DPMA unless that agency possesses additional decision-making powers relating to the coordination and management of the state’s defence of such claims. Even with these parameters in mind, Sections 3 and 4 show that there is considerable diversity in the design and operational logic of DPMA.

³ Johnson et al. (2021) call these institutions “dispute prevention mechanisms.” Echandi (2021) calls these institutions “investor–state conflict management mechanisms.” Nothing turns on these differences in terminology.



2.0 Policy Discussions of DPMAs: Assumptions and blind spots

2.1 The Emergence of DPMAs in Investment Law and Policy

Over the last 15 years at least, international institutions have contributed to popularizing DPMAs, including the United Nations Conference on Trade and Development (UNCTAD) and the World Bank, but also the Organisation for Economic Co-operation and Development (OECD), the United Nations Commission on International Trade Law (UNCITRAL), the Energy Charter Secretariat, the Asia-Pacific Economic Cooperation (APEC), and, more recently, the WTO's JSI on Investment Facilitation for Development. As well as publishing policy briefs on the subject, these institutions have convened conferences and organized international study tours for government officials.⁴

In addition to its long history of promoting the broader use of international investment agreements (IIAs), ISDS, and domestic investment laws (Berge & St John, 2021; Shihata, 1986), the World Bank has been particularly active in providing advice and technical assistance for the establishment of DPMAs in a number of countries. Recently, the World Bank has developed a tool to “identify, track and resolve, in a timely manner, investor–state grievances that put investment projects at risk of withdrawals and cancellations”: the Systemic Investor Response Mechanism (SIRM) (Echandi et al., 2019). Beginning in 2019, this project has rolled out in several countries selected to host pilot projects. As described by its proponents, the SIRM should both collect information on emerging disputes with foreign investors and be involved in political “problem solving” to address investor concerns and suggest solutions to the relevant government entities (Echandi et al., 2019, p. 48).

For their part, UNCTAD, the OECD, and APEC have all written reports or briefs promoting the use of some form of DPMA. In addition, as of 2016, UNCTAD has suggested the establishment of “amicable dispute settlement mechanisms, including mediation, to facilitate investment dispute prevention and resolution” and the designation of a lead agency to “track and take timely action to prevent, manage and resolve disputes” as part of its *Global Action Menu for Investment Facilitation* (UNCTAD, 2016, p. 8).

Since 2019, WTO member states involved in the JSI on Investment Facilitation for Development have contemplated the inclusion of a contact or ombudsperson-type mechanism in an eventual agreement on investment facilitation (WTO, 2019). It was suggested that this mechanism would assist investors in obtaining information from and resolving difficulties with relevant authorities in the host state, in addition to “facilitating the settling of grievances” with

⁴ To pick just two examples, a presentation given by South Korea's Foreign Investment Ombudsman to the APEC Workshop on Dispute Prevention and Preparedness held in Japan in July 2010 also refers to presentations given by the OFIO at similar events convened by UNCTAD and the OECD, as well as a study tour visit for government officials from 11 other countries to South Korea organized by UNCTAD (Choong Yong, 2010). During the development of the new Myanmar Investment Law, it seems that the International Finance Corporation (the private sector lending arm of the World Bank) flew senior officials from the Myanmar Investment Commission to South Korea to study South Korea's OFIO (Bonnitcha, in press).



the goal of “preventing disputes” (WTO, 2021, p. 36). A proposal was also put forward by one member suggesting that signatory states endeavour to establish a Business Obstacle Alert Mechanism to, among other things, serve as a platform for businesses to “report, for resolution by the competent authorities, obstacles faced in relation to investment”; provide a database of “problems as well as preventive measures applied for systemic or recurrent problems”; and monitor the resolution of problems (WTO, 2021, p. 36).⁵

International institutions’ role in the propagation and promotion of DPMA’s gives rise to three specific concerns. First, there is a risk that the international institutions are promoting the adoption of DPMA’s without sufficient understanding and analysis of: the types of problems these mechanisms are designed to address; how they operate on the ground, including how they deal with the complexity of actual investment disputes; and how they interface with other government agencies. Depending on the intended aim of the agency, there will be major differences in the design and operation of DPMA’s between states.

Second, there is a risk that the promotion of such agencies can become caught up in the operational logic of international institutions themselves—specifically, the imperative that international institutions face in demonstrating that their work has led to “deliverables” that can then be reported to the institution’s funders and members.

Third, policy discussions of dispute and management agencies could risk becoming detached from consideration of other domestic institutional frameworks and processes that might also be effective in managing the risk of investment disputes. This is a serious concern, given that DPMA’s are largely being promoted to developing and middle-income countries. In contrast (and with the notable exception of South Korea), it seems that most developed economies rely on laws and institutions with functionally defined mandates (e.g., tax, environment, labour, corporate governance) to manage and address disputes, rather than agencies with an investment-specific mandate.

2.2 The Case for DPMA’s: Questionable assumptions

In advocating for DPMA’s, international institutions make common assumptions about foreign investment and investor–state disputes. These assumptions then justify the need for DPMA’s and shape their design. Through a careful reading of the various reports put out by international institutions on DPMA’s, we have identified a series of assumptions that underpin the rationale for establishing these agencies.

⁵ This text has not been included in the more recent consolidated “Easter text” circulated around April 2021 due to a lack of support from other states. The proposal may, however, be addressed as part of a future work program to be decided at a later stage.



2.2.1 Questionable Assumption 1: All foreign direct investment automatically has a positive development impact

The first assumption on which the rationale for establishing DPMA is based is that all foreign direct investment (FDI) automatically has a positive development impact. For example, a 2011 UNCTAD report on Peru's Coordination and Response System for International Investment Disputes (Sistema de Coordinación y Respuesta del Estado en Controversias Internacionales de Inversión [SICRECI]) begins by noting the importance of FDI for development, as well as the subsequent efforts states have made to attract investment by signing investment treaties and including access to arbitration in investment contracts (UNCTAD, 2011, p. 1).⁶ Similarly, a 2013 APEC and U.S. Agency for International Development (USAID) report on DPMA begins with a discussion on the importance of FDI for development. In the same vein, a 2019 World Bank report on efforts to establish DPMA in several countries begins by noting that due to its "recognized benefits," countries at all development levels today compete for FDI and require policies in place to both attract and retain it (Echandi et al., 2019).

While it is true that much FDI can have positive development impacts, it is not the case that all foreign investment has an equally positive impact on the host state economy. For example, some projects may produce negative externalities—such as environmental degradation—while not creating significant linkages with the domestic economy to spur further growth or create meaningful amounts of employment. This type of investment may be more likely to be at the centre of investor–state disputes that go to arbitration.⁷ Additionally, in some cases, foreign investment may even be associated with systematic corruption and the transfer of state assets into private hands.⁸ For these reasons, it is inappropriate to design and evaluate DPMA solely on the basis of their success in retaining and expanding FDI, as is the case with the World Bank's SIRM project, which measures success by the amount of investment retained (Echandi, 2021, p. 247).

⁶ Following the adoption of its *Investment Policy Framework for Sustainable Development* in 2012, UNCTAD shifted position and began to emphasize the importance of sustainable development, rather than assuming that all FDI automatically has a positive development impact. However, UNCTAD reports on DPMA prior to 2012 remain online and continue to play an important role in shaping policy debates around DPMA, including through cross-citation in UNCTAD's own *Investment Policy Framework for Sustainable Development* (see, e.g., UNCTAD, 2015, p. 56), which continues to support the adoption of DPMA, albeit in more nuanced terms (see, e.g., UNCTAD, 2015, pp. 89, 112).

⁷ See e.g., <https://investmentpolicy.unctad.org/investment-dispute-settlement> for the high number of ISDS cases related to extractive projects.

⁸ Such conduct has been alleged in relation to the multi-billion-dollar contract-based ISDS case of *PE&ID v. Nigeria*. These allegations of corruption are currently being considered by English courts, with a decision expected in 2022. For discussion, see Bonnitche & Mathews, 2020. See also the discussion of the fraudulent scheme to forge mining licences that formed the basis of the ISDS claims in *Churchill Mining PLC and Planet Mining Pty Ltd v. Republic of Indonesia*, ICSID Case No. ARB/12/14 and ICSID Case No. ARB/12/40, discussed Siqueira de Oliveira, 2017.



2.2.2 Questionable Assumption 2: Investment treaties and ISDS are necessary to attract foreign investment

A second assumption is that investment treaties are a necessary element of states' efforts to attract foreign investment (APEC & USAID, 2013, pp. 3–5). On the basis of this assumption, the ongoing existence of investment treaties is taken as a given. It is then noted that the proliferation of investment treaties has led to a new problem for states: an “upsurge in investors' use of arbitration provisions embedded in [investment treaties]” (APEC & USAID, 2013, p. 6). DPMA's are thus presented as a solution to help states retain investment and avoid the problem of ISDS. As UNCTAD (2010) notes, these dispute prevention efforts “constitute a very new approach in addressing the problem of increasing investment disputes” (p. xxvi). More specifically, DPMA's have been presented as a way of managing the risks of ISDS, on the basis that “states would be better off anticipating possible sources of investor-State disputes in advance and taking necessary action much earlier. In doing so, the difficulties and costs, including political costs, involved by resorting to international arbitration or ADR [alternative dispute resolution] could be avoided entirely” (UNCTAD, 2010, p. 65). This approach continues to be reflected in the World Bank's work on the SIRM, whereas UNCTAD's more recent work recognizes that DPMA's may be used either as an *alternative* or complement to state consent to ISDS through investment treaties.

The assumption that the ongoing existence of investment treaties is a given is troubling. Several studies have examined the relationship between investment treaties and foreign investment. The findings are mixed and raise serious doubts that investment treaties tend to increase inflows of FDI for developing countries (Bonnitcha, 2017). On any reading, the evidence does not suggest that investment treaties have a strong and consistent positive impact on FDI inflows across all countries and sectors. On this basis alone, the assumption that investment treaties are a necessary and inevitable component of states' efforts to attract foreign investment is not justified. One consequence of the framing that takes the ongoing existence of investment treaties as a given is that other potential solutions to the problem of investment disputes—such as the reform or termination of investment treaties or investors' use of domestic courts—are either ignored or dismissed.

2.2.3 Questionable Assumption 3: Investment disputes are the result of coordination failures and incompetence within government, not of tension between competing interests

A third assumption is that investment disputes leave both the investor and the host state worse off, meaning that steps taken to reduce or resolve investment disputes lead to a “win-win” scenario for host states and investors. This assumption reflects a narrow conception of the underlying drivers of investment disputes: the view that investment disputes result from coordination failures and incompetence within the government of the host state. In particular, specialized agencies and subnational levels of government are assumed to lack awareness or understanding of investment treaty obligations and to be insufficiently attentive to the costs of investment disputes in terms of foreign investment foregone.



This assumption is evident in how the reports of international institutions discuss the underlying causes of investment disputes. For example, UNCTAD's 2010 report on DPMAs notes that "most" recent cases arise due to measures taken by sub-state entities and that "often" these entities lack awareness of investment treaty obligations (UNCTAD, 2010, p. 66). Similarly, the 2019 World Bank report on the SIRM notes that investment treaties and arbitration can touch on a wide array of issue areas and different government entities, not all of which may be aware of the state's international obligations, and "that most of the measures generating ISDS disputes have been taken by subnational or autonomous regulatory authorities shows the challenge that many governments face in ensuring this minimum level of policy coherence" (Echandi et al., 2019, p. 31). From the assumption that investment disputes stem from mistakes due to government incompetence, it follows that any "complaints can be addressed and discrepancy of related agencies can be harmonized" (Republic of Korea, 2019, p. 5) through relatively technical processes that do not involve hard questions about the reconciliation of competing interests.

Unsurprisingly, this focus on awareness and capacity issues is also evident in the design of existing DPMAs, some of which are discussed at greater length below, and the World Bank's SIRM pilot projects (Echandi et al., 2019). With regard to the latter, the World Bank report makes it quite clear that the key to preventing investor-state arbitration cases is to tackle the lack of bureaucratic capacity and focus on substate agencies, which are said to be the source of "most" of the grievances that lead to these disputes. On the other hand, the report notes, "the SIRM is not intended to address grievances stemming from the conduct of other branches of government, like the legislative or judiciary branch" (Echandi et al., 2019, p. 44).

International institutions' assumptions about the underlying drivers of investor-state disputes raise the obvious question: is it true that most investment disputes arise from coordination failures and incompetence within government? This is a difficult question to answer. However, one way to gain some insight into the drivers of investment disputes is to consider the background to cases that investors have submitted to ISDS.

This exercise presents a somewhat different picture from that put forward by the international institutions in relation to DPMAs. Some ISDS cases are indeed triggered by a lack of bureaucratic capacity, mismanagement, and coordination failures. These disputes could very well be avoided by the kinds of DPMAs discussed by international institutions and presented in the case studies below. For example, investors have turned to arbitration after bureaucratic delays or failures have impeded the development of an investment project⁹ when sub-state entities have cancelled concession contracts or otherwise made decisions that do not reflect the priorities of the central government.¹⁰ However, a birds-eye view of the universe of ISDS cases suggests that many investor-state disputes engage wider public interest or involve distributive conflict. The underlying drivers of such disputes are not incompetence and

⁹ Gelsenwasser AG v. People's Democratic Republic of Algeria, ICSID Case No. ARB/12/32.

¹⁰ E.g., AbitibiBowater Inc., v. Government of Canada, ICSID Case No. UNCT/10/1. Even in cases such as this, strengthening central oversight and control over sub-state actors like provincial or state governments may have implications for the constitutional arrangements in the state in question, which are largely overlooked in existing policy debates about DPMAs.



coordination failure within government but rather the fact that the investor's interests are in tension with other interests present in the host state.

First, ISDS cases are clustered in several industries or sectors—resource extraction, public utilities including water and waste management and energy generation, and infrastructure—which are heavily regulated and involve many sub-state agencies, but which also have a significant impact on host-state citizens. Indeed, it is often the very impact of the investment on host state populations that triggers an eventual investor–state dispute, and many high-profile cases fit this pattern. For example, several ISDS cases have, at their core, issues related to the quality or accessibility of public utilities. In *Biwater v. Tanzania*, a dispute arose following measures taken by the state in response to the alleged mismanagement of a water concession by the investor and related public protest.¹¹ Similarly, dozens of claims against Argentina in the early- to mid-2000s resulted from measures taken by the state to ensure continued access for its people to water services.¹²

Extractive projects are often met with resistance from local communities due to their negative impact on the environment and other local industries, which in turn can create political pressure on government entities to take measures that are detrimental to specific foreign investors. Such dynamics have led to numerous disputes between states and extractive industry investors.¹³ More broadly, the environmental or health impact of certain industries may also lead to policy shifts that in turn trigger disputes, such as the Canadian province of Alberta's recent move to phase out coal mining¹⁴ or Colombia's efforts to limit mining in sensitive ecological zones.¹⁵ The claims that the Philip Morris tobacco company brought against Australia and Uruguay related to plain-packaging policies also fit this pattern. Regardless of industry, state decisions about appropriate resource distribution, such as the withdrawal of subsidies¹⁶ or changes to taxation rates,¹⁷ have also triggered ISDS claims.

These disputes are all driven by underlying tensions between different interests and the way that these tensions are resolved through governmental decision-making processes; they are not attributable to a lack of bureaucratic capacity or a lack of awareness of the host state's obligations under investment treaties. Resolving such disputes to the satisfaction of the foreign investor does not necessarily result in a “win–win” outcome from the perspective of the host state or wider public interests.

In its 2010 report, UNCTAD acknowledges some of these issues, noting that DPMA's are “not suitable for all types of investment disputes,” including those concerning public interest

¹¹ *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22.

¹² E.g., *Impregilo v. Argentina (I)*, ICSID Case No. ARB/07/17.

¹³ E.g., *Clayton and Bilcon of Delaware Inc. v. Government of Canada* (PCA Case No. 2009-04), *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, *Bear Creek Mining Corporation v. Republic of Peru*, ICSID Case No. ARB/14/21, *Gabriel Resources Ltd. and Gabriel Resources (Jersey) v. Romania*, ICSID Case No. ARB/15/31.

¹⁴ *Westmoreland Coal Company v. Government of Canada*, ICSID Case No. UNCT/20/3.

¹⁵ *Eco Oro Minerals Corp. v. Republic of Colombia*, ICSID Case No. ARB/16/41.

¹⁶ E.g., the many claims brought against Spain and Italy related to changes to the feed-in tariff framework for the solar energy industry.

¹⁷ *Sergei Paushok, CJSC Golden East Company and CJSCVostokneftegaz Company v. Mongolia*, UNCITRAL



laws of general application, particularly when implemented in line with democratic choices (UNCTAD, 2010, p. 36). Our review of ISDS cases confirms this finding.

2.3 Lack of Attention to Risks Associated with DPMA

The international institutions that promote DPMA also tend to overlook challenges of institutional design and the related risks associated with the establishment and operation of DPMA. At a basic level, DPMA are central agencies of government, which may be conferred with powers to override decisions or actions taken by specialized agencies, such as those dealing with tax, land-use permits, or environmental operating standards. For example, in the context of the JSI negotiations, language has been discussed that would empower the proposed contact/focal point to “recommend to the competent authorities, as appropriate, measures to improve the investment environment” (WTO, 2021, p. 36).¹⁸ A 2010 UNCTAD report explains that a DPMA may have “the right to obtain information from other government agencies and the authority to resolve a dispute through the preferred means of settlement” (UNCTAD, 2010, p. xxvii).

Such powers may well be necessary to resolve coordination failures within governments, but they also create risks that the DPMA body will prioritize its own mandate of resolving investment disputes over public interests, such as ensuring equitable taxation or protecting the environment, that are represented by specialized agencies. This risk is especially acute given that many of the tools of dispute resolution in the hands of a central DPMA—the waiving of regulatory requirements, the renegotiation of contract provisions, the extension of the duration of concessions, the grant of tax incentives, and the grant of alternative land on which an investment can be carried out¹⁹—involve costs to the host state that are significant yet non-transparent and difficult to quantify.

These potential risks have received little attention in the policy literature on DPMA to date. For example, in promoting its SIRM concept, the World Bank acknowledges that there may be a risk that foreign investors will exaggerate the value of an investment and the number of jobs at stake if a dispute is not resolved, to put pressure on the DPMA to resolve the dispute in a way that is favourable to the investor (Echandi et al., 2019, pp. 53, 56). The World Bank argues that the solution is to ensure that investors’ assertions are validated by objective criteria (Echandi et al., 2019, pp. 52, 53, 56) but does not explain how this could be done, given that the investor generally holds the information needed to verify such assertions. Moreover, this document does not discuss the situations in which it would be *inappropriate* to accede to an investor’s request, given countervailing public interests that may be at stake.

To be clear, we are not suggesting that states should not establish DPMA solely because decisions of whether to settle investment disputes normally engage competing interests. Rather, our point is that the existence of competing interests needs to be taken seriously and considered explicitly in the process of institutional design.

¹⁸ Note that this text is not included in the more recent consolidated “Easter text.”

¹⁹ UNCTAD, 2010, shares an example of this tendency (p. 33).



In addition to the general concern that a DPMA may alter how the balance is struck between investors' interests and wider public interests in government decision making, there are more specific concerns relating to the risk of agency "capture" and corruption within the DPMA itself. Notably, the World Bank highlights risks of agency capture as a driver of investment disputes but is curiously inconsistent in ignoring the possibility that a DPMA might also be vulnerable to capture (Echandi et al., 2019, p. 39). A 2011 UNCTAD report discusses the risk that a DPMA might be perceived as corrupt but approaches this as a problem of misperception to be managed through public relations strategies.²⁰ There is no discussion of the possibility that a DPMA might become a target for actual corruption or an acknowledgement that the common characteristics of such agencies—for example, that they may operate outside normal structures of government accountability and possess unusual powers to override decisions made by government agencies—might increase the likelihood of corruption. Allegations in several recent investor–state disputes highlight the risk of foreign investors using settlement agreements to legitimize corrupt transfers from states, particularly in circumstances in which the government officials that are responsible for concluding the settlement agreement are able to operate outside mechanisms for bureaucratic accountability (see, e.g. Charlotin, 2020).²¹ These risks should be acknowledged explicitly and considered in the design of DPMA.

²⁰ UNCTAD, Peru (2011, pp 52–53):

A negotiated settlement may be politically costly for a government, and there will always be critics who will say that the outcome of arbitration would have been more beneficial for the State coffers than the settlement reached with the investor, and subsequent allegations of corruption may arise.

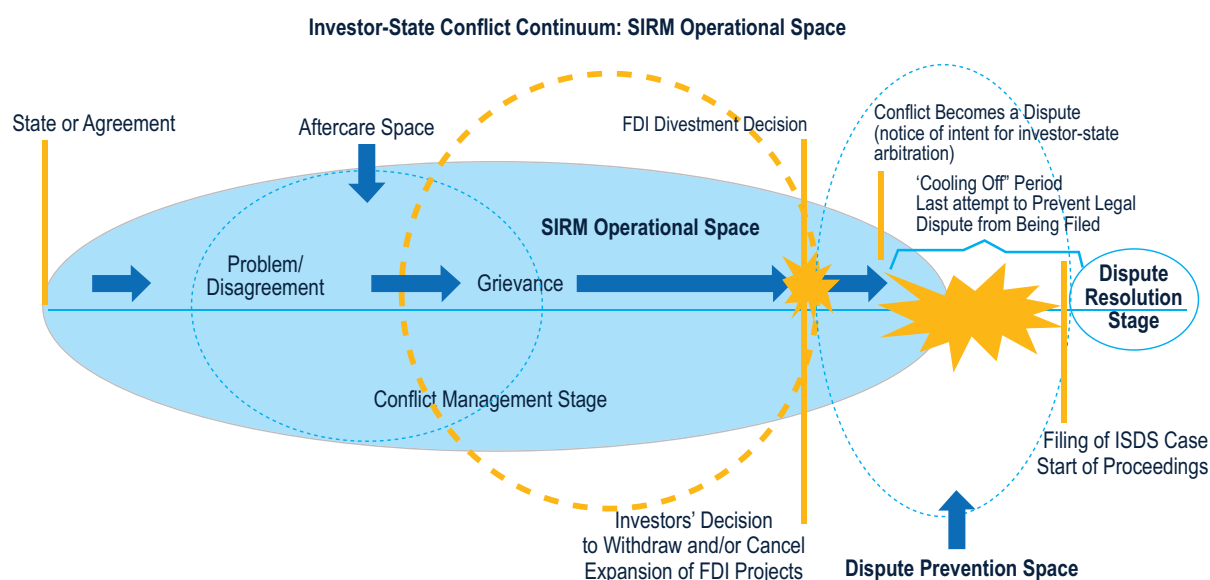
²¹ In *P&ID v. Nigeria*, it is also alleged that the investor, P&ID, corruptly obtained a contract from Nigeria that it never intended to perform with the objective of using the contract as leverage to obtain a pay-out under a settlement agreement. Republic of Nigeria v Process & Industrial Developments Limited, Judgment of the High Court of Justice of England and Wales [2020] EWHC 2379 (Comm), paras 225 and 234.

3.0 A Typology of DPMAs

In this section, we shift our attention from a policy discussion about DPMA to a close analysis of DPMA themselves. While all DPMA seek to mitigate the adverse consequences of investor–state disputes, they do this in very different ways. To make sense of this diversity, we propose a typology that distinguishes between four different types of such agencies. This typology draws attention to the key characteristics of such agencies; it is a tool to assist in making sense of the diversity among the agencies reviewed in Section 4. As such, some of the agencies reviewed in Section 4 fall neatly into one of the four types, while others combine elements of multiple types.

Our typology draws attention to two key characteristics of DPMA. The first is the point(s) in a dispute at which the agency is designed to intervene. At one end of the spectrum, an agency might focus on preventing investor–state disputes from arising in the first place—for example, by training other government agencies how to act in ways that are sensitive to investors’ rights and interests. Alternatively, an agency might focus on dealing with specific complaints or grievances articulated by investors before these grievances become legal claims. At the other end of the spectrum, an agency might focus on managing a state’s defence in claims that have been submitted to investor–state arbitration and are, therefore, fully crystallized legal disputes.

Figure 1. The point in a dispute in which a dispute prevention or management agency is intended to intervene: The example of World Bank’s Systemic Investment Response Mechanism (SIRM) concept



Source: Echandi et al., 2019, p. 42.

Variation along this spectrum is well understood in the work of international institutions operating in this space, although the terminology sometimes differs. For example, although the World Bank uses the terms “aftercare,” “grievance,” and “dispute prevention” slightly differently from the way we do in this paper, their use of these terms draws attention to the



same characteristic: the point(s) in a dispute at which the agency is designed to intervene. The idea of the SIRM, which the World Bank is encouraging developing states to adopt, envisages an agency that intervenes to resolve investor-specific grievances that are serious enough to place the investment at risk but prior to the commencement of formal legal proceedings.

The second key characteristic of DPMA concerns the legal/policy framework that the agency applies to resolve investment disputes. This characteristic has received less attention in policy discussion of DPMA to date and so requires more careful explanation.

Agencies tasked with preventing and resolving investment disputes operate according to different logics. Some agencies are intended to resolve disputes by focusing on the mutual interests of the investor and the state. Such agencies operate according to a logic of negotiation and accommodation, focusing on the (presumed) *interests* of the state and the investor in securing the retention and expansion of existing investments. For such an agency, questions of whether the investor's complaint has any basis in law or whether the investor's complaint creates a risk of state liability under an investment treaty are secondary or even irrelevant. In contrast, other DPMA evaluate prospective disputes primarily in light of the standards of international investment law. This is commonly the case in agencies that are formally tasked with managing the legal risks to the state arising from investor–state arbitration. Finally, a DPMA might seek to prevent and resolve disputes by ensuring that domestic law is faithfully and accurately applied, in which case the agency begins to resemble traditional institutions of administrative control in both common law and civil law countries. Such an agency would be focused less on the amount of investment or the number of jobs supposedly at risk if the dispute is not resolved to the investor's satisfaction and more on whether the state conduct of which the investor complains was lawful as a matter of domestic law.

As with the question of the point at which an agency intervenes in a dispute, a given DPMA can operate according to multiple logics. For example, the SIRM that the World Bank is encouraging developing countries to adopt is intended to operate primarily according to the logic of economic interests, with the focus on the amount of investment in the host state that will be retained and expanded if a dispute is resolved to the investor's satisfaction (Echandi et al., 2019, pp. 51–53). The SIRM is also intended to incorporate some additional evaluation of whether a particular dispute may give rise to a claim under international investment. However, it is not intended to consider whether the conduct that the investor has complained about was consistent with domestic law (Echandi et al., 2019, p. 45).

Nevertheless, it is important to draw attention to this dimension of variation because agencies that operate according to different logics may have different strengths and give rise to different types of concerns. For example, a DPMA that operates according to an interest-based or “economic” logic may prove more pragmatic and adept at resolving some of the bureaucratic barriers to investment. However, because such an agency operates outside normal domestic legal constraints, it may prove more vulnerable to capture by investors, less sensitive to wider public interests, and more vulnerable to corruption.

With these two dimensions of difference in mind—the point in a dispute at which the agency is intended to intervene and the legal/policy framework that the agency applies to



resolve investment disputes (i.e., the logic according to which the agency operates)—we can distinguish four basic types of DPMA.

3.1 Aftercare Agencies

The first category in our typology is the aftercare agency. Aftercare agencies, as we understand the term, are agencies that are focused on specific problems or grievances raised by investors. They intervene after a specific problem has been identified by an investor but prior to the investor lodging legal claims before a court or tribunal. The basic idea is to catch disputes before they escalate into larger conflagrations that leave both the investor and the host state worse off. Aftercare agencies approach grievances through the logic of interests rather than the legal lens of rights and obligations. They seek to find practical solutions to investors' problems rather than to evaluate the legality of state conduct.

The clearest example of an aftercare agency is South Korea's OFIO. The SIRM being promoted by the World Bank also falls within this category in our typology, even though the SIRM is intended to intervene in a narrower category of disputes (only those in which the investor threatens to withdraw or cancel the investment) and at a slightly later stage than is the case with the South Korean Ombudsman.

3.2 Treaty Compliance Agencies

The second category in our typology is the treaty compliance agency. Treaty compliance agencies, as we understand the term, focus on ensuring compliance with obligations of investment treaties across the host state's apparatus of government. They are intended to increase the consistency of government conduct in the host state with investment treaties, thereby potentially reducing the risk of investor–state disputes. In practical terms, this might involve:

- Collating information on treaties and investor–state contracts entered into by the state.
- Disseminating information about investment treaties across government by training government officials on treaties' implications for their day-to-day jobs or publishing a handbook on the relevance of investment treaties for the day-to-day work of public administration).
- Formalized compliance review processes—for example, a system that reviews new regulations for consistency with treaty obligations prior to adoption.²²

Treaty compliance agencies operate according to the logic of international investment law.

None of the case studies discussed in Section 4 constitutes a “pure” example of a treaty compliance agency. However, several of these agencies combine treaty compliance functions with other roles. Peru's well-known DPMA —SICRECI— is an example.

²² The second and third categories are examples, respectively, of what Calamita and Berman (2022) identify as “informational” and “monitoring” processes for the internalisation of investment treaties in bureaucratic decision-making.



3.3 Litigation Management Agencies

The third category in our typology is the litigation management agency. Litigation management agencies, as we understand the term, are responsible for managing disputes that have crystallized into formal legal claims against the host state. As such, they are distinguished by their responsibility for disputes falling at a relatively late stage along the spectrum discussed above. For the purposes of this paper, we focus particularly on litigation management agencies focused on the defence of the state in investor arbitration—that is to say, those that operate according to the logic of international investment law.

Our conception of litigation management requires something more than an ordinary government legal department that advises on questions of international law but lacks any power of decision. A litigation management agency, as we understand the term, differs from an ordinary government legal department in that it has powers of decision in relation to the coordination and management of the state's defence. These may include powers to settle the dispute, powers to compel other agencies of government to cooperate and provide information relevant to the dispute, and powers to apportion adverse awards of compensation and legal costs between other agencies of government. Peru's well-known SICRECI is an example of a litigation management agency that also has additional functions as a treaty compliance agency.

3.4 Administrative Review Agencies

The fourth category in our typology is the administrative review agency. Administrative review agencies, as we understand the term, focus on specific problems or grievances raised by investors. They differ from aftercare agencies in that administrative review agencies address claims of government conduct that the investor complains was unlawful as a matter of domestic law. In contrast to litigation management agencies, administrative review agencies operate according to the logic of *domestic* law.

In this paper, we focus on administrative review agencies with a mandate that is limited to investment disputes. However, administrative review through internal accountability systems, external tribunals, and ombuds offices are a common feature of modern administration in all developed states. One common characteristic of administrative review agencies beyond the investment context is that they operate according to a logic of *adjudication* rather than interest-based negotiation. In other words, administrative review agencies generally have the power to decide whether the government conduct in question was consistent with domestic law,²³ with such decisions generally subject to further review by domestic courts.

Administrative review agencies reflect a commitment to supporting and strengthening the rule of law in host states. They are also consistent with the principle of exhaustion of local remedies under customary international law, in the sense that states are expected to provide mechanisms to correct government misconduct within their own legal systems and

²³ Domestic law, in turn, will ordinarily articulate further criteria by which the lawfulness of government conduct is determined—for example, whether a specialized agency of government acted within the scope of its legal mandate, whether its action was reasonable, or whether investors directly affected by the action were accorded minimum standards of procedural fairness.



that disputes should only be escalated to the international level after the domestic system has been tested and issues of domestic law clarified. For this reason, we have included the administrative review agency as a type of DPMA distinct from the other three. However, it is important to acknowledge that none of the seven examples reviewed fits neatly within this category. Myanmar's Investment Assistance Committee comes closest—at least, as it operated prior to the 2021 coup—in that this agency evaluates investors' grievances primarily according to domestic law. However, the Investment Assistance Committee lacks the power to authoritatively determine whether the conduct of other government agencies conforms to domestic law.

A different example, though beyond the scope of this paper, is China's system of administrative review for investment disputes. Under many of China's investment treaties concluded in the early 2000s, foreign investors are required to seek to resolve a dispute through China's domestic system of administrative review prior to initiating investor–state arbitration (UNCTAD, 2010, p. 76). For example, the China–Portugal Bilateral Investment Treaty contains the following condition on access to investor–state arbitration:

With respect to investments in the People's Republic of China an investor of Portuguese Republic [sic] may submit a dispute for arbitration under the following conditions only:

- (a) the investor has referred the issue to an administrative review procedure according to Chinese law,
- (b) the dispute still exists three months after he has brought the issue to the review procedure.²⁴

Unlike in the case of Myanmar's Investment Assistance Committee, the process of administrative review referred to in this provision is not operated by a single investment agency but instead involves higher-level administrative agencies reviewing the conduct of lower-level agencies.²⁵

²⁴ Ad Article 9 in the Agreement Between the People's Republic of China and the Portuguese Republic on the Encouragement and Reciprocal Protection of Investments (2005).

²⁵ For more detailed discussion of China's system of administrative review and its relationship to China's investment treaties, see Zhenyu Xiao. (in press). *The evolution of the settlement of investor-state disputes in China* [Doctoral dissertation, University of New South Wales].



4.0 Case Studies

This section reviews DPMAAs that have been established in seven different states. One of the challenges in research on DPMAAs is the limited amount of publicly available information on their operation. The seven case studies examined in this section—Brazil, Colombia, Costa Rica, the Dominican Republic, Myanmar, the Republic of Korea, and Peru—were chosen primarily because some information about their structure and operation was publicly available. The seven examples include countries with different levels of development and illustrate important differences in the design and operation of DPMAAs between states. Additional examples of DPMAAs about which less information is available are collected in the Appendix.

To assist with comparability between cases, our analysis of the seven case studies is organized according to a common structure:

1. **History of the agency:** How did the agency come into existence? What actors were involved in the decision to establish the agency, and what (perceived) policy problems is the agency meant to address?
2. **Formal institutional structure of the agency:** Who are the members of the agency? Where does the agency sit within government?
3. **Functions and powers of the agency:** What are the functions of the agency? What are its powers? Have these functions and powers changed over time? Where does the agency fit within the four-part typology proposed in Section 3?
4. **The agency's operation in practice:** What can be said about the agency's operation in practice? What disputes has the agency avoided or settled; concerning what types of government conduct? For those disputes that have been avoided or settled through the agency's operation, is information known about how the disputes were resolved—for example, through regulatory change, payment of compensation to the investor, or by some other form of administrative accommodation of the investor's claims?

4.1 Brazil

4.1.1 History

Aside from a handful of micro-states, Brazil is unique in that it is not party to any investment treaties that provide advance consent to ISDS (Veira Martins, 2017). Brazil's Direct Investments Ombudsman (DIO) emerged in the context of its Cooperation and Facilitation Investment Agreement (CFIA) program. CFIAAs differ from traditional bilateral investment treaties in their focus on investment facilitation and dispute prevention. Brazil's CFIA program was conceived in 2012, with a model CFIA subsequently adopted in 2013. The idea to include an ombudsman in Brazil's model CFIA was inspired by South Korea's OFIO (Government of Brazil, 2019) and was influenced by papers authored by UNCTAD and the OECD (Anonymous, personal communication, June 25, 2021).



Brazil's first CFIA was signed with Mozambique in 2015, and it has subsequently negotiated CFIAs with 12 other countries. The treaties require the establishment of two institutions: a joint committee of representatives of both state parties to the treaty and an ombudsman in each state party to provide practical assistance to foreign investors of the other state party. Brazil's DIO was established in September 2016 to carry out its obligations under its CFIAs (Improving Business Environment for Prosperity, 2020; Portuguese Republic, 2016; Sanchez Badin & Morosini, 2017). While South Korea's OFIO inspired the idea of the DIO, there are important differences between the functions and formal institutional structures of the two organizations (Sanchez Badin & Morosini, 2017, p. 226).

In 2018 Brazil initiated cooperation with the World Bank on the implementation of the DIO (Anonymous, personal communication, June 25, 2021). In 2019, by Decree No 9.770/2019, Brazil expanded access to the DIO. This change allowed all foreign investors in Brazil to access the DIO, not just those from states that have a CFIA with Brazil, as had been the case when the DIO was first established (Reyes et al., 2019).

4.1.2 Formal Institutional Structure of the DIO

The DIO sits within the Brazilian Chamber for Foreign Trade (CAMEX). CAMEX is a high-level "inter-ministerial body responsible for formulating, adopting and coordinating trade investment policies" (Vieira Martins, 2017). It comprises representatives of seven ministries and sits immediately under the president as part of the Government Council (Benítez, 2018). The executive secretary of CAMEX is designated as the DIO, and the executive secretariat of CAMEX functions as the secretariat for the DIO. The DIO is supported by a network of focal points across other government agencies, including Brazil's states and federal district. The agencies and entities that form this network of focal points designate "staff as focal points in order to work together with the DIO to provide information on investments, answer requests and seek to solve inquiries of investors within their area of competence, among other activities" (DIO, n.d.).

4.1.3 Functions and Powers of the DIO

The DIO has three closely related functions: "to support and guide investors, recommending solutions to their grievances (Policy Advocacy); [and] to propose to public agencies possible improvements in the legislation or in their administrative procedures" (DIO, n.d.). The first function relates to the DIO's role as a "single window" that can provide information to foreign investors about investment in Brazil. Foreign investors can make both general "requests" or specific "inquiries" about problems affecting their investment. In each case, the DIO receives the request or inquiry, forwards a request for detailed information to relevant agencies through its network of focal points, and then consolidates the information received from agencies into an answer that is delivered to the investor (DIO, 2020). The DIO's mandate to consider inquiries and grievances (explained in the following paragraph) is limited to issues arising from the relationship between the investor and the state. Disputes between private parties, as well as disputes between investors and the state that have already become the subject of court proceedings, are outside its mandate (Government of Brazil, 2002, art. 2). Grievances that



civil society organizations and other stakeholders may have about foreign investors’ activities are also outside its mandate (Droubi, 2020).

The DIO’s second function concerns the resolution of foreign investors’ grievances. This function is closely related to the “inquiry” mechanism for providing information to foreign investors relating to specific problems they have encountered operating in Brazil. If a foreign investor’s inquiry cannot be resolved through the normal inquiry mechanism, the DIO may establish a grievance settlement body to consider the issue. The grievance settlement body thereby established is specific to the grievance in question; it comprises a representative of the DIO along with representatives of agencies relevant to the grievance in question (Government of Brazil, 2002, art. 2). Following the discussions of the grievance settlement body, the DIO prepares a report containing recommendations to resolve the investor’s problem (Government of Brazil, 2002, art. 18(5)). The DIO cannot compel other agencies to adopt these recommendations, but these agencies are required to respond promptly to requests for information from the DIO and give due consideration to recommendations of the report (Government of Brazil, 2002, art. 20). If the agency in question does not adopt the recommendations, the issue can be escalated to the Board of Ministers of CAMEX for final deliberation (DIO, 2020). The steps in this process are represented graphically below.

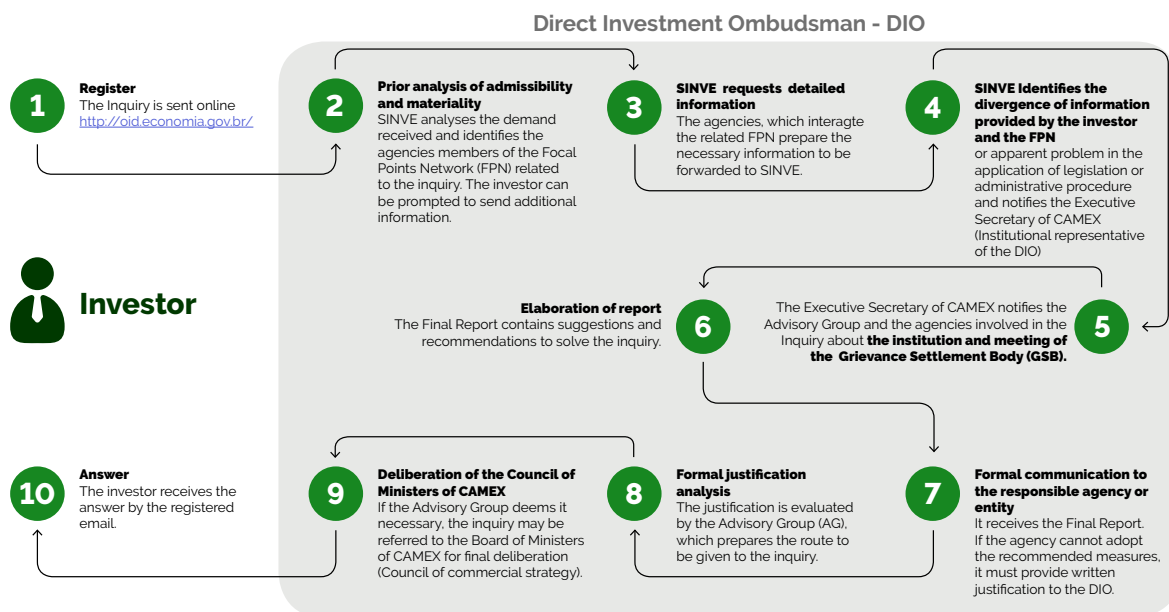
Figure 2. Brazilian Direct Investment Ombudsman

Direct Investment Ombudsman (DIO)

How it works

Inquiries with the institution of the Grievance Settlement Body

It can be created by the OID coordinator if there are discrepancies in information or if apparent problems in relation to legislation and / or administrative procedures are identified.



Note: In this diagram, SINVE refers to the Undersecretariat for Foreign Investments within CAMEX.

Source: Direct Investments Ombudsman, n.d.



The DIO's third function is to assist in improving the investment climate in Brazil through proposals for regulatory reform. In light of its experience working directly with foreign investors, the DIO can make proposals to the National Investment Committee for “measures to improve legislation or administrative procedures” (DIO, 2020).

In terms of the typology developed in Section 3, the DIO is primarily focused on investor aftercare. As is the case with South Korea's OFIO, which inspired its design, the DIO's functions are focused on removing practical barriers facing foreign investors in Brazil rather than evaluating claims in terms of rights and obligations. The DIO has no role in managing Brazil's risk of exposure to ISDS, as Brazil is not party to any treaties that give advance consent to ISDS.

4.1.4 The DIO in Practice

As the DIO has only existed for a few years, there is little publicly available information about its operations in practice. A recent World Bank publication claims that between April 2019 and March 2020, the DIO received six requests for information and eight grievances. Of these 14 cases, 13 were reportedly resolved, leading to the retention of USD 591 million in FDI (Improving Business Environment for Prosperity, 2020). There is no explanation of how this figure was calculated—for example, whether the figure was derived from information provided by investors themselves or through independent evaluation of the cases in question—and we were not able to find any information from government sources to substantiate this claim.

4.2 Colombia

4.2.1 History

While Colombia did not face any publicly known investment dispute until 2016, it began preparing for the eventuality of an arbitral claim several years earlier (UNCTAD, 2010, p. 78). It began in 2008 with a series of seminars organized with the support of the Inter-American Development Bank (IADB), held to raise awareness of IIAs and ISDS among government officials (Robertwray PLLC, 2014) and surveys of relevant government officials. The purpose of the latter was to identify “conflict-prone” government entities (de Meyer et al., 2016, p. 4). The survey found that entities related to public works, infrastructure, and environment, and those with poor communication and document preservation methods, were the most likely to be embroiled in a conflict with foreign investors (de Meyer et al., 2016, p. 4). Seminars and training continued throughout the decade. The government additionally released two handbooks on IIA obligations and how to avoid disputes, published with the support of the IADB and European Union, respectively (APEC & USAID, 2013 p. 17).

A 2010 report published by the National Council of Economic and Social Policy (Consejo Nacional de Política Económica y Social, CONPES) laid out a detailed strategy for the prevention and management of disputes with foreign investors (Republica de Colombia, 2010). The report states that at the time of writing, Colombia was unprepared to either prevent or manage an investment dispute due to the lack of a lead agency to administer the process (CONPES, 2020, p. 13), a lack of clarity regarding how to allocate financial resources



to a defence of the state (p. 18), and a lack of administrative procedures to, for example, collect evidence to aid in defence of the state. Finally, the report notes that relevant officials' lack of awareness of treaty obligations could lead to involuntary treaty violations (p. 20). The report recommends the designation of a lead agency, the allocation of budgetary resources for dealing with investment disputes, and the establishment of administrative procedures to prevent the emergence of disputes.

In 2013, the Government of Colombia issued Decree 1939, which implemented the recommendations outlined in the CONPES report, creating a high-level government body (HLGB) to advise and make recommendations to prevent and manage disputes (APEC & USAID, 2013, p. 15). In addition, in 2009, the government established the Investment Attraction Facilitation System (Sistema de Facilitación para la Atracción de Inversión, SIFAI), which aims to identify and centralize information on how to improve Colombia's investment climate (Procolombia, n.d.).

4.2.2 Formal Institutional Structure

The HLGB is at the centre of Colombia's efforts to prevent and manage disputes. It comprises the Board of Advisors of the National Agency of Legal Defence of the State, who are the ministers of Justice Law, Finance, Foreign Affairs, Trade, and Tourism; the Legal Secretary of the Office of the President; and two external advisors (APEC & USAID, 2013). It is supported by the Inter-Institutional Support Group, which comprises officials from the HLGB and those from the agency or agencies involved in specific disputes, and the Ministry of Trade (De Meyer et al., 2016, p. 7).

4.2.3 Functions and Powers of the HLGB

As laid out in Decree 1939, the role of the HLGB is to

- Coordinate, direct, and formulate recommendations for preventing and managing disputes and defending national interests.
- Recommend alternative dispute settlement mechanisms.
- Recommend measures to prevent or resolve international disputes.
- Recommend measures to ensure the timely and continuous defence of the state in investment disputes.
- Advise on the hiring of external counsel.
- Recommend the prioritization of specific entities and sectors for dispute prevention measures (República de Colombia, 2013).

The HLGB is empowered to define the rules and criteria for conciliation or direct negotiations with aggrieved investors and recommend agreements to the Conciliation Committee.²⁶ Article 8 of Decree 1939 specifies that “extra-judicial negotiations” with investors will be facilitated by the Ministry of Trade, the National Agency of Legal Defence

²⁶ The specific powers of the Conciliation Committee itself are not described in Decreto-1859.



of the State, and the agency involved in the dispute. The Ministry of Trade, however, becomes the lead agency if the dispute reaches the state of international arbitration, and the Inter-Institutional Support Group lends support during this process. The agency involved in the dispute with the investor itself is ultimately responsible for any monetary settlement paid to the investor (APEC & USAID, 2013).

In terms of the typology developed above, the HLGB and the broader work of the government to raise officials' awareness of Colombia's IIA obligations straddle several of the categories we have identified. For example, in the realm of treaty compliance, the government seems to have gone to some lengths to sensitize officials to treaty obligations and methods to avoid or prevent disputes through training and handbooks. The HLGB itself fits clearly into the category of a litigation management body while also apparently having the power to enter into direct negotiations with investors to prevent disputes from moving to arbitration. In addition, the SIFAI can, in theory, act as an early alert system if it determines that a government measure has the potential to trigger disputes, though it is unclear how this is used in practice.

4.2.4 The HLGB in Practice

It is difficult to ascertain how the HLGB and related entities function in practice and how successful they have been at avoiding disputes, as the HLGB has no Internet presence. In an interview published online, the Director of the Ministry of Trade (at the time of the interview, acting as the Director of Foreign Investment and Services) suggests that the government's efforts have been successful insofar as "we now have more public officials reaching out to the Office of Foreign Investment and Services at [the Ministry of Commerce Industry and Tourism] before they issue a measure that could have an impact on Colombia's international investment obligations" (Robertwray PLLC, 2014).

4.3 Costa Rica

4.3.1 History

While Costa Rica was hit by its first investment claim in 1996, it does not appear to have developed a set of formal policies for addressing these disputes until 2009, with Decree N° 35452-MP-COMEX Regulation for the Prevention and Management of International Trade and Investment Disputes. The preamble to the decree highlights the need to ensure inter-agency coordination in the face of these disputes. To do so, the decree created the Inter-Institutional Commission for the settlement of international trade and investment disputes (Comisión Interinstitucional para la Solución de Controversias Internacionales en materia de Comercio e Inversión, CISC) (Republica de Costa Rica, 2009).

4.3.2 Formal Institutional Structure

The CISC is coordinated by the Office of the President, and members include the ministries of Foreign Affairs, Trade, Finance, and Justice (APEC & USAID, 2013). The Office of Application of International Trade Agreements within the Ministry of Trade functions as Technical Secretariat of the Commission in an advisory role.



4.3.3 Function and Powers

The CISC “coordinates and monitors” investment disputes, makes decisions about ISDS proceedings such as hiring outside counsel, and provides the Technical Secretariat with instructions on the management or prevention of specific disputes (APEC & USAID, 2013). Members of the CISC meet once a year if there is no ongoing proceeding against Costa Rica; otherwise, they meet more frequently. The Minister of Trade has the power to convene the CISC and bring officials from the government bodies relevant to the specific dispute to the table (APEC & USAID, 2013, p. 22).

For its part, the Technical Secretariat oversees day-to-day dispute management, executing decisions taken by the CISC with regard to specific disputes and preparing and providing documents.

With regard to the typology developed in Section 3, the CISC falls into the category of Litigation Management.

4.3.4 The CISC in Practice

It is difficult to determine how frequently the CISC works to actively prevent disputes—the body has no web presence, and Costa Rica does not appear to publicize any information about its functions. In an interview in 2014, a government advisor was quoted as saying, “In some cases the Commission has effectively fielded investor questions that could have developed into actual claims” (Robertwray PLLC , 2014).

4.4 Dominican Republic

4.4.1 History

The Dominican Republic has been the recipient of World Bank assistance to establish a mechanism for the prevention and management of investment disputes, following the issuance of 2015 Presidential Decree No. 303-15 outlining a plan to standardize the state’s response to international investment disputes, to be centred in the Ministry of Commerce and Industry’s Office of Administration of International Commercial Agreements and Treaties (Dirección de Administración de Acuerdos y Tratados Comerciales Internacionales, DICOEX). The World Bank’s assistance to the Dominican Republic is part of a broader project spearheaded by the organization to design and establish investment promotion and retention mechanisms in several countries (Echandi et al., 2019). In a 2010 report, UNCTAD also mentions that it provided the country with assistance in formulating a law on dispute management (UNCTAD, 2010, p. 86).

In 2016, the World Bank released a report on the Dominican Republic’s efforts. It suggests that a dispute prevention and management mechanism is necessary, given that the country has both signed a significant number of IIAs and been hit with several claims in recent years. It is preferable, the report further notes, to address disputes with investors before they reach the arbitration stage (World Bank, 2016).



The World Bank-aided effort to establish this mechanism began with a series of meetings with government officials and private sector actors, as well as workshops to inform officials on best practices in dispute management. Subsequently, officials developed a procedure for the dispute prevention and management mechanism, including e-registration and the management of investor complaints. According to the report, these Internet-based tools will allow the DICOEX to monitor investor complaints and analyze disputes to, for instance, understand which government entities are most frequently implicated.

Finally, once the mechanism is established, there will be an information campaign directed at both investors and government officials to diffuse information about treaty obligations, the responsibility of public entities to collaborate with the DICOEX for the prevention and management of disputes, and the responsibility of public entities who have taken a measure that has triggered a dispute (World Bank, 2016, p. 5).

4.4.2 Formal Structure

DICOEX, within the Ministry of Commerce and Industry, is the lead agency.

4.4.3 Function and Powers

The mechanism proposed in the World Bank report has several parts. The first is an early alert mechanism in which both investors and relevant public entities will have access to an online form to register cases of potential disputes. Any entity that is notified or has knowledge of a dispute has the duty to inform the DICOEX within three days (World Bank, 2016, p. 6). The dispute will then be added to a database maintained by the DICOEX.

Following the registration of a dispute, DICOEX officials will conduct a legal evaluation of the case, including an interview with the investor and the relevant government entities, to determine if potential treaty breaches exist and assess the costs related to the dispute and possible compensation to be paid to the investor. During this stage, the DICOEX is empowered to retain independent legal advice as well.

If the DICOEX determines that it will take measures to avoid arbitration, it will consult with the relevant agencies to determine possible ways to address the conflict, including direct negotiation with the investor (World Bank, 2016). If the DICOEX determines that the state is not responsible, it will communicate this to the investor and suggest other means of resolving the dispute. Following an agreement between DICOEX and the relevant government entities, DICOEX will seek approval of the proposed solution from the Consultoría Jurídica and, if necessary, the Office of the President.

Following a determination of the appropriate response, the relevant government entity is to carry out the proposed means of avoiding arbitration and cover all relevant costs. The steps to take to resolve the dispute are also catalogued in the database. The DICOEX will monitor follow-up, and the “closing” of the dispute will be registered.

According to the World Bank (2016) report, this mechanism will be applied initially only to the tourism, mining, energy, environment, and public works sectors.



4.4.4 The Mechanism in Practice

While the webpage of DICOEX makes reference to the implementation of a national “system for the prevention and management of investment disputes,” it is unclear at the time of writing if the e-registration of disputes is currently possible, or whether the mechanism is, in its entirety, up and running (Government of the Dominican Republic, 2021). No follow-up reports appear to have been published by the World Bank.

4.5 Myanmar²⁷

4.5.1 History

In 2013, Myanmar began a process of revising its investment laws. This process was supported by the International Finance Corporation (IFC), which prepared early drafts of the new law and remained involved throughout the process of consultation on, and revision of, these drafts. Throughout this process, the IFC strongly supported the creation of a new mechanism for the resolution of investor–state grievances. This position is reflected in Section 82 of the new Myanmar Investment Law, as enacted in 2016, which requires the Myanmar Investment Commission to “establish and manage a grievance mechanism to resolve, prevent the occurrence of disputes, and carry out relevant the inquiries for the investment issues before reaching the stage of legal disputes” (Myanmar Investment Law, section 82).

The 2017 Investment Rules promulgated under the 2016 Myanmar Investment Law carried out this mandate through the establishment of the Investment Assistance Committee (IAC). Originally, the IAC was seen as a temporary institution that would exist only until a new Investor Grievance Mechanism with greater powers and a more formalized legal structure could be established. However, the IAC remains in existence, and moves to replace it appear to have stalled.

4.5.2 Formal Structure

While the IAC is housed within the Directorate of Investment and Company Administration—the agency that has responsibility for administering the Myanmar Investment Law and that also functions as the secretariat to the Myanmar Investment Commission—the IAC is a cross-ministerial institution. Its chairman is the Permanent-Secretary—the most senior public servant—of the Ministry of Commerce. Its nine ordinary members comprise three senior officials from different divisions within the Directorate of Investment and Company Administration, as well as one senior official each from the Attorney General’s Office, the Internal Revenue Department, the Land Record Department, the Environment and Conservation Department, and the Trade Department and the Customs Department.

²⁷ This section draws on material from Bonnitca (2022 in press).



4.5.3 Function and Powers

The basic function of the IAC is to ensure that investors are treated in accordance with Myanmar law. Rule 170 of the Myanmar Investment Rules (2017) enumerates types of grievances and disputes that investors may submit to the IAC:

An Investor may submit notice of their grievance or dispute to the Investor Assistance Committee who believes in good faith that:

- (a) a decision of governmental department or governmental organisation in respect of their Investment was incorrectly made;
- (b) that an application for a permit, licence, registration or approval was incorrectly refused by governmental department or governmental organisation; or
- (c) that any right, protection or Approval benefiting them under the Law has been frustrated.

Each of these three grounds is, essentially, a complaint that the investor has not been treated in accordance with Myanmar law. Investors facing more mundane problems or practical challenges with their investments can bring their queries to the Departmental Cooperation Team, also known as the One Stop Service. The Department Cooperation Team works closely with the IAC and provides support to it (Directorate of Investment and Companies Administration, n.d.).

Once an investor has submitted its complaint to the IAC, the committee determines whether the complaint is justified. In its evaluation of the investor's complaint, the IAC seeks to involve relevant line ministries and agencies of government. This practice reflects the IAC's limited powers. The IAC's ultimate decision on the complaint takes the form of a recommendation to the Myanmar Investment Commission. The IAC's recommendation does not have any legal force of its own. And, in acting on the IAC's recommendation, the Myanmar Investment Commission does not have the power to award compensation to an investor or compel the ministry/agency that was the subject of the complaint to act in a particular way. Instead, the IAC relies on its ability to persuade the ministry/agency to act in a particular way. In this way, the IAC formalizes the Myanmar Investment Commission's wider practice of seeking to resolve disputes with investors through negotiations.

In terms of the typology developed in Section 3, the IAC combines the characteristics of an aftercare institution and an administrative review institution. Unlike other aftercare institutions, notably South Korea's OFIO, the IAC assesses investors' grievances through the lens of the lawfulness of the state conduct that is the subject of the complaint. However, unlike *adjudicatory* institutions of domestic administrative control, the IAC does not have the power to conclusively determine the lawfulness of the state conduct subject to challenge or to compel or discipline the ministry/agency in question. In interviews, government officials tended to characterize the IAC as a particular type of aftercare institution, which has the primary purpose of enabling and retaining foreign investment.



4.5.4 The IAC in Practice

There is little publicly available information about the IAC's operation in practice. In 2018, one of the authors of this paper undertook research on Myanmar's domestic system of investment governance; although somewhat out of date, this is the best information we have on the IAC's functioning.

As of July 2018, investors had submitted five disputes to the IAC. Three of these disputes involved foreign investors, and two involved Myanmar investors. Two had been resolved as of July 2018, while three were ongoing. Four of the five disputes related to land rights authorization. The fifth dispute is related to a line ministry's refusal to issue a permit required for an investment to go ahead (Bonnitcha, in press). In that case, the dispute was resolved, with the ministry agreeing to issue the permit. This outcome followed both the involvement of the IAC and direct communication between officials from the investor's home state and the relevant Myanmar minister. As such, all five disputes involved obstacles to establishing new investments in Myanmar rather than the operation of established investments.

4.6 The Republic of Korea

South Korea's Office of the Foreign Investment Ombudsman (OFIO) is probably the best-known investment dispute prevention agency worldwide. The OFIO was established in 1999 in the immediate aftermath of the 1997 Asian financial crisis, a period of rapid investment liberalization in South Korea (Thomsen & Bang, 2013). The establishment of the OFIO was only one of several reforms in this period that were designed to increase South Korea's attractiveness to foreign investors, including the enactment of the Foreign Investment Promotion Act in 1998.

4.6.1 History

The OFIO was established in 1999 under the Foreign Investment Promotion Act. As far as we are aware, international organizations did not have any involvement in the design or the establishment of the OFIO (vander Graf, 2018, p. 1). Rather, the OFIO evolved from previous institutions that had supported foreign investors operating in Korea (Thomsen & Bang, 2013).

The primary purpose of the OFIO was to assist in the attraction and retention of FDI through aftercare for foreign investors (UNCTAD, 2010, p. 89). This purpose is reflected in the design and operation of the OFIO. The objective of avoiding ISDS claims against South Korea does not seem to have played any role in the decision to establish the OFIO.²⁸ This is consistent with the fact that only a handful of ISDS claims had been brought anywhere in the world at the time that the OFIO was established. Although international organizations have occasionally suggested that the OFIO assists in reducing the risk of ISDS claims against Korea (Thomsen & Bang, 2013, p. 25), management of legal risks is not its focus. The avoidance of ISDS claims is, at most, a collateral benefit of the OFIO's primary functions.

²⁸ For example, a 19-page presentation made by the Ombudsman to the OECD in 2008 emphasizes the role of the OFIO in attracting and retaining FDI (Choong Yong, 2008).



4.6.2 Formal Structure

The OFIO is housed within Korea's trade and investment promotion agency, KOTRA. However, the OFIO is "independent from it, accountable solely and directly to the Prime Minister" (UNCTAD, 2010, p. 88). The Foreign Investment Ombudsman, the head of the OFIO, is appointed directly by the President of South Korea on the recommendation of the relevant minister (Choong Yong, 2010). This gives the OFIO a great deal of institutional authority in dealing with other parts of government.

4.6.3 Functions and Powers

The OFIO has three closely related functions. The first is providing support and advice to foreign investors through the OFIO's "home doctors." The OFIO's team of home doctors has specialist knowledge about investment in South Korea in different economic sectors. Each foreign investor is assigned to a home doctor, who then acts as a point of contact for the investor. The term "home doctor" reflects that these specialists are available to assist foreign investors through site visits to the investors' facilities.

OFIO's second function is addressing grievances or problems raised by foreign investors in relation to their investments in South Korea. The scope of the OFIO's mandate is extremely broad and includes problems relating to labour, information technology, customs, environmental regulation, and construction.²⁹ There is no requirement that the investor's grievance must be grounded in a legal entitlement to be considered. On the contrary, several of the grievances that OFIO has resolved on behalf of foreign investors involve requests to waive or vary the way in which the law applies the investor in question.³⁰ Because the OFIO's home doctors are responsible for managing investors' grievances, the first and second function blur into one another. Other government agencies are required to cooperate with OFIO's investigation into the grievance. The OFIO can then "recommend the heads of relevant agencies and public agencies to take corrective measures" (Republic of Korea, 2017, art. 15-2(4)). Although the OFIO does not have formal powers to compel another agency to comply with its recommendations, that agency must, at a minimum, provide a written response to the recommendation (Republic of Korea, 2017, art. 15-2(5)). Where the agency in question does not adopt the recommendation, the OFIO may request that the issue be submitted to the Foreign Investment Committee (Republic of Korea, 2017, art. 15-2(6)). The Foreign Investment Committee is a high-level policy coordination body within the Ministry of Trade, Industry and Energy (Invest Korea, 2020). As we understand it, the Foreign Investment Committee does not have formal powers to compel another agency to comply with the OFIO's recommendation. Rather, the Committee provides a way for unresolved concerns to be escalated to the political level.

²⁹ The OFIO's website notes the following exceptions as examples of grievances that *cannot* be handled by the Ombudsman: "private disputes between companies, sales of individual companies, requests that contradict global standards and matters that unfairly influence other companies or industries." See: <https://ombudsman.kotra.or.kr/ob-en/bbs/i-2638/list.do>

³⁰ E.g., a foreign investor's request to delay payment of a tax owing to the Ministry of Finance and Economy on account of financial difficulties being experienced by the investor.



The third function of the OFIO is to recommend changes to laws and regulations arising from its work with foreign investors on the ground (Van der Graaf, 2018, p. 5). In doing so, the OFIO ensures that foreign investors' opinions are heard at the highest levels of policy-making (Thomsen & Bang, 2013, p. 25). This connection was institutionalized in 2010 with the appointment of the Foreign Investment Ombudsman as the Chairman of the Presidential Regulatory Reform Committee (ChoongYong, 2010).

In terms of the typology developed in Section 3, OFIO is primarily focused on investor aftercare. Its first and second functions are focused on removing practical barriers facing foreign investors in South Korea rather than evaluating claims in terms of rights and obligations or managing the risk of exposure to ISDS. The OFIO's third function is broader in that it relates to regulatory reform. Nevertheless, this function is consistent with this conception of the OFIO as an agency focused primarily on the attraction and retention of FDI, in that it seeks to improve South Korea's attractiveness as a destination for foreign investment.

4.6.4 The OFIO in Practice

Data provided by the OFIO website provide an overview of the broad range of grievances being resolved, as well as dozens of anonymized examples of the way that the OFIO has resolved disputes. Current data on the proportion of grievances resolved successfully does not appear to be available on the website, but from 2007 to 2011 it seems that over 90% of grievances were resolved to the satisfaction of the investor in question (Thomsen & Bang, 2013, p. 25).

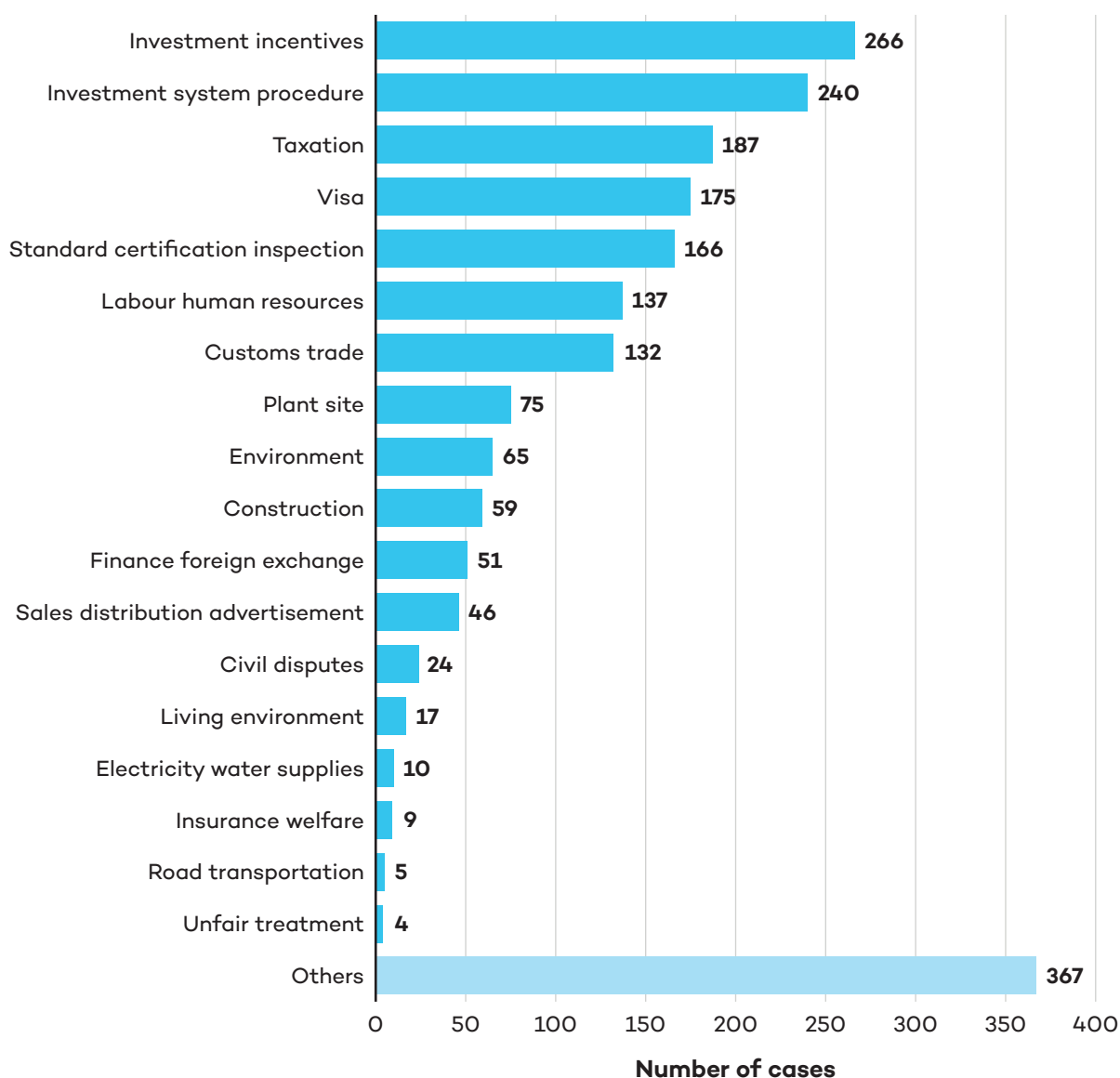
Bearing in mind the rationale for the OFIO is to attract and retain FDI in South Korea, the examples publicized on the OFIO's website have presumably been chosen to illustrate the OFIO's success in resolving a very broad range of grievances, rather than to highlight controversial issues or problems that proved impossible to resolve. Nevertheless, from the information that is provided, it seems that few of the grievances handled by the OFIO could plausibly have been framed as ISDS claims under an investment treaty. On the contrary, the impression one gets from reviewing the OFIO's website is that these are examples of the day-to-day inconveniences and challenges that any investor might face operating in any country.

As to how the OFIO resolves grievances, a review of these cases shows that many of the resolutions reached by the OFIO involve the government agency in question showing a degree of flexibility to the investor, either by reinterpreting legal instruments or waiving the application of laws and policies that would otherwise apply. For example, one grievance concerned a bidding rule relating to the tender for the operation of a water treatment facility. The rules apparently only recognized the experience of a bidder from after the time when the bidder had been licensed to operate in Korea, thereby overlooking the experience of a foreign bidder's parent company in operating abroad. These rules were reinterpreted to allow the foreign investor's parent company's experience to be recognized (Foreign Investment Ombudsman, n.d.-a). Another concerned the Ministry of Food and Drug Safety's ban on the import of sourdough by a baking company, on account of it containing propionic acid. The investor was able to show that the acid found in sourdough was naturally occurring, and,



on this basis, the ban was lifted (Foreign Investment Ombudsman, n.d.-b). The resolution of grievances by the OFIO does not normally involve the payment of compensation.

Figure 3. 2013–2017 Grievance resolution by field



Source: Foreign Investment Ombudsman, n.d.-c

4.7 Peru

4.7.1 History

Peru's well-known dispute prevention and management system, the SICRECI was established in reaction to early experiences with ISDS (Ampuera Llerena, 2013). Specifically, after shortcomings were identified in the way the state had dealt with its first arbitral claim that reached the award stage, Peru adopted Law 28933 and several regulatory decrees, which created SICRECI in 2006 (UNCTAD, 2011, p. 21).



According to a presentation prepared by Peru's Ministry of Economy and Finance (MEF) on the state's experience with investment, arbitration, and dispute prevention, in order to prevent an investment claim, it is necessary to:

- Understand and comply with obligations related to foreign investment.
- Be diligent and careful in the design of investment treaties and contracts.
- Be prudent in communications with and commitments made to investors (MEF, n.d., author's translation).

According to the MEF, the SICRECI provides the Peruvian state with the tools to prevent and manage disputes in a centralized manner.

4.7.2 Formal Structure

SICRECI comprises the MEF as Coordinator, Special Commission (SC)—which includes the Ministry of Foreign Affairs, ProInversión, and the Ministry of Justice, with the MEF acting as Chair—and any other agency relevant to the specific dispute. In the case of a dispute under a free trade agreement, the Ministry of Foreign Trade and Tourism is also involved.

4.7.3 Function and Powers

The SICRECI has several functions. First, it compiles a database of all agreements that provide for ISDS, allowing government agencies to access all the state's commitments in a single place. Government agencies that conclude an agreement containing recourse to international arbitration are required to report it within 30 days (UNCTAD, 2011, p. 29). Relatedly, the SICRECI appears to have developed a capacity-building program for public officials on topics related to investment disputes and has published a dispute prevention manual (MEF, 2019).³¹

Peru's efforts to prevent disputes also include an early alert mechanism. Any government agency that is made aware of a possible dispute with an investor must report to the SICRECI within 5 days. In addition, the SICRECI provides an online platform that allows investors to register complaints with the MEF.³²

If a dispute reaches the point at which an investor chooses to turn to ADR, mediation, or arbitration, the SC is charged with coordinating the state's defence, including determining the possibility of a settlement. The SC is empowered by the relevant legislation to enter into direct negotiations with the investor outside the channels of a formal arbitration (UNCTAD, 2011, p. 38). In the event of arbitration, the SICRECI has the power to allocate costs to the agencies relevant to the dispute.

³¹ See also Cordero Hajar, M. F. (2016, November). *Peruvian State's strategy for addressing investor state disputes* (South Centre Investment Policy Brief). https://www.southcentre.int/wp-content/uploads/2016/11/IPB6_Peruvian-State%E2%80%99s-Strategy-for-Addressing-Investor-State-Disputes_EN.pdf, p. 2.

³² See the SICRECI online platform here: <https://apps4.mineco.gob.pe/sicreciweb/atencionInversionista.jsp?tipoMenu=3>



With regard to the typology set out above, the SICRECI acts in both treaty compliance and litigation management capacities.

4.7.4 The SICRECI in Practice

The SICRECI is widely cited as an example of “best practice” of investment dispute prevention and management.³³ While the MEF does not publicize any information about disputes prevented, according to UNCTAD, the SICRECI has prevented investors from turning to arbitration. For example, the report notes that it resolved a dispute in the energy sector in which

the outcome did not include any compensation or payment, but a review of the regulations and interpretations. The MEF highlighted the positive outcome, which not only avoided international arbitration, but also allowed the relationship between the State and the investor to continue. (UNCTAD, 2011, p. 38)

The UNCTAD report also refers to a second dispute with a Spanish investor in which the SICRECI avoided arbitration and allowed the re-establishment of the relationship between the municipality and investor (UNCTAD, 2011, p. 39).

³³ E.g., UNCTAD, 2011.



5.0 Conclusion

DPMAs have received a great deal of attention in policy discussions on foreign investment governance over the past decade. This enthusiasm is partly due to the work of international institutions in promoting DPMAs as a solution to the problem of costly ISDS claims under investment treaties. More recently, the JSI on Investment Facilitation structured discussions have contemplated the inclusion of a requirement that member states establish DPMA-type entities. Nevertheless, surprisingly little is known about the day-to-day operation and the practical effects of DPMAs. Detailed research on when and how DPMAs resolve investment disputes—for example, by waiving regulatory requirements, re-negotiating contract provisions, extending the duration of concessions, granting tax incentives, providing alternative land on which an investment can go ahead, or paying compensation—is a particularly urgent priority, as is a careful evaluation of outcomes that takes into account investment/jobs retained, revenue foregone, and wider public interests.

Policy discussions also tend to overlook significant differences in the design and operational logic of the DPMAs in different states. In this context, this paper has aimed to provide an evidence base for policy discussions about DPMAs. To do so, we first highlighted some of the underlying assumptions frequently held by the institutions that promote DPMAs, including: that FDI always has a positive impact on the host state; that IIAs attract FDI and are thus a necessary part of the investment regime; and, most importantly, that disputes are the result of coordination failures within government and incompetence rather than tension between competing political and material interests expressed through policy decisions. We raised questions about whether these assumptions are necessarily accurate. Following this discussion, we developed a typology of DPMAs based on different possible structures and competencies. Finally, we analyzed existing DPMAs that represent some of the variation laid out in the typology. One important cross-cutting theme that emerges from our analysis is the importance of considering how DPMAs operate in relation to other systems of investment governance—for example, how they relate to the domestic law of the host state, and to the role of other specialized regulatory agencies in particular—rather than focusing exclusively on the relationship between DPMAs and ISDS.

For states considering establishing a DPMA, several questions emerge from our analysis. These questions are relevant to the decisions of whether to establish and how to design such an agency:

- **Overarching objective:** What policy problem is the DPMA intended to solve? Is the objective to attract and retain foreign investment, to manage legal risks to the state, or something else?
- **Risks associated with ISDS:** Insofar as the DPMA is intended to reduce the risks associated with ISDS claims under investment treaties, what other steps might be taken to achieve this same objective? Is amendment and/or termination of investment treaties likely to be more effective in addressing the risks associated with ISDS claims than establishing a DPMA? If so, should the amendment/termination of investment treaties be pursued instead of, or in conjunction with, the establishment of a DPMA?



- **Interaction and accountability:** How will the DPMAs interact with other agencies of government? What powers will the DPMA have, and what mechanisms of accountability and oversight will be put in place to prevent capture and corruption within the DPMA?
- **Types of disputes:** What types of investment disputes are appropriate for a DPMA to attempt to resolve? Are there any types of disputes that the DPMA should not attempt to resolve?
- **Framework for evaluating options to resolve disputes:** Insofar as it is appropriate for a DPMA to attempt to resolve a dispute, what legal or policy framework should the agency apply in assessing the dispute and evaluating options for resolving the dispute?
- **Monitoring and evaluation:** What mechanisms of monitoring and evaluation should be put in place to assess the effectiveness of the DPMA and ensure learning over time? What evaluation criteria should be adopted to ensure that the DPMA does not become overly focused on retaining and promoting investment at the expense of other interests or policy priorities?



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Appendix

This Appendix includes brief references to other examples of dispute prevention programs that were identified in a review of the secondary literature but about which we could not find sufficient information to merit inclusion in the case studies section above.

ALGERIA

The European Union and Organisation for Economic Co-operation and Development (OECD) have a joint Programme on Promoting Investment in the Mediterranean. In 2018, a meeting took place on investment dispute management and prevention under the auspices of this program (OECD & European Union, 2018). In the meeting report, Algeria is mentioned as a state with “extensive institutionalization” of dispute prevention. Algeria has several government entities related to the promotion of investment, including the Direction de la Promotion et du Soutien aux Échanges Économique, Ministère des Affaires Étrangères³⁴ and the Agence Nationale de Développement de l’Investissement.³⁵ The latter is said to be responsible for intervening with the central and local administrations or agencies of origin to raise any difficulties encountered by investors. However, we were unable to find more information on any specific dispute prevention activities undertaken by any Algerian government entities.

EGYPT

According to website of Egypt’s investment agency—the General Authority for Investment and Free Zones (GAFI)—Egypt established a series of related committees to address investors’ grievances. The relevant page on GAFI’s website contains the following information:

This new investment law no. 72 of 2017 provides for several mechanisms to settle investment disputes between resorting to courts, arbitration and settlement committees that shall be established by a decision of the competent minister and the prime minister. These mechanisms include domestic litigation, amicable settlement and ADR, and administrative review by three specialized committees:

1. The Grievances Committee inside GAFI examines complaints filed against the resolutions issued in accordance with the provisions of the new law by GAFI or the authorities concerned with the issuance of the approvals, permits, and licences.
2. The Ministerial Committee for Settlement of Investment Disputes looks into applications, complaints, or disputes between investors or in which one of the state’s bodies, authorities, or companies is involved.
3. The Ministerial Committee for Settlement of Investment Contracts’ Disputes settles disputes arising from investment contracts to which the state or one of its bodies, authorities or companies is a party. (Arab Republic of Egypt, n.d.)

³⁴ See: <https://www.industrie.gov.dz/?-Direction-Generale-de-la-Promotion->

³⁵ See: <https://andi.dz/>



In researching this paper, we were unable to find any additional information on the operation of these three committees in practice. Several industry publications do, however, refer to the existence of the new mechanisms (Al Tamimi & Co, 2018).

GEORGIA

Georgia established a Business Ombudsman (BO) in 2015 (Business Ombudsman of Georgia, 2016). According to a World Bank memo, some of the BO's activities are related to the SIRM project (World Bank, 2019). However, the BO does not mention investment treaties or arbitration, and very little information is available about the functioning of the BO in practice. Indeed, World Bank reports on the project suggest that raising awareness about and engaging businesses with the BO has been difficult in that context, pointing to broader difficulties establishing these types of mechanisms.

MEXICO

Mexico has significant experience with investor–state disputes and has partnered with the Organization of American States (OAS) to raise awareness of its treaty obligations throughout the government (Asia-Pacific Economic Cooperation and U.S. Agency for International Development, 2013). The General Directorate for Negotiations designs and implements policy to prevent disputes. Additionally, Mexico's investment promotion agency, ProMexico “tries to resolve conflicts with foreign investors before they become full blown disputes” (p. 29). In addition, the minutes of a trade policy review meeting in 2013 refer to a “Promoción de la inversión y prevención de controversias internacionales” (World Trade Organization, 2013), but we were unable to find more information about this program.

KAZAKHSTAN

An Investment Ombudsman was established in Kazakhstan by law in 2014, using the South Korean Ombudsman as a model (Embassy of the Republic of Kazakhstan, 2017). The Ombudsman assists investors when interacting with other government bodies and develops recommendations for the government for improving the investment climate (Republic of Kazakhstan, 2003).

ENERGY CHARTER SECRETARIAT

The Energy Charter Secretariat has proposed a model Investment Dispute Prevention and Management Protocol. The International Institute for Sustainable Development has previously commented on the draft proposal (Bernasconi-Osterwalder, 2018).

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