

# Preventing, mitigating and managing investor-state disputes

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## 1. Background

At its thirty-eighth session, the UNCITRAL Working Group III requested the Secretariat to undertake preparatory work on dispute prevention and mitigation as well as on means of alternative dispute resolution. A number of proposals for reform submitted by governments in preparation for the deliberations on the third phase of the mandate stressed the importance of measures to prevent investor-state disputes from arising and address means to solve disputes through alternative methods. Focusing on investor grievances prior to their escalation into formal disputes is presented as a cost-effective approach to the reform of ISDS. This paper aims to support WGIII and the UNCITRAL Secretariat by analysing the background, typology, potential benefits and drawbacks of dispute prevention and management measures (DPMs) at the national level. The paper also draws on the emerging empirical data and the most recent studies<sup>1</sup> about the design and operation of dispute prevention and management agencies (DPMAs) in various jurisdictions. It will also briefly highlight some lessons that can be drawn from the use of alternative dispute resolution in commercial disputes.<sup>2</sup>

## 2. Origins of DPMAs

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<sup>1</sup> While DPMAs remain underexplored, some recent studies have made significant forays in analysing their origins, aims and impact. See in particular Jonathan Bonnitcha and Zoe Williams, 'Investment Dispute Prevention and Management Agencies: Towards a more informed policy discussion (IISD, 2021), available at <https://www.iisd.org/system/files/2021-10/investment-dispute-prevention-management-agencies-policy-discussion.pdf>; Jonathan Bonnitcha, 'The Impact of Investment Treaties on Domestic Governance in Myanmar' (2022); Lise Johnson, Lisa Sachs, and Ella Merrill, 'Investor-State Dispute Prevention: a Critical Reflection' 75 (2021) *Dispute Resolution Journal* 107; Roberto Echandi, 'Straightening the Purpose of International Investment Law from Litigation to Consolidating Relationships: The Role of Investor-State Conflict Management Mechanisms' 17 (2021) *University of St Thomas Law Journal* 219; Mavluda Sattorova, *The Impact of Investment Treaty Law on Host States: Enabling Good Governance?* (Oxford, Hart Publishing 2018); Josef Ostránský, Facundo Pérez Aznar (2021), 'Investment treaties and national governance in India: Rearrangements, empowerment, and discipline'. *Leiden Journal of International Law*, 34(2), 373-396.

<sup>2</sup> The notion of dispute prevention, when construed broadly, encompasses mediation and third party settlement of disputes. While mediation and settlement raise issues similar to those covered in this paper, their distinctive characteristics warrant a separate discussion. Consequently, this paper only touches upon these forms of ADR in section 5, without delving into detailed analysis. For more recent comprehensive studies of mediation, see fn 53 below. Mediation has also received significant attention at the ICSID: <https://icsid.worldbank.org/services/mediation-conciliation/mediation>.

Over the last fifteen years, dispute prevention and management agencies (DPMAs) have been established in a number of countries across the world. Some of these agencies have been created not so much with the aim to avoid ISDS disputes but rather with a view to improving an investment climate at the national level in general.<sup>3</sup> International organizations, including most notably UNCTAD and the World Bank, but also the OECD, UNCITRAL, the Energy Charter Secretariat and APEC, have played a leading role in pioneering DPMAs and their initial design and set-up. For instance, the World Bank has developed and rolled out its Systemic Investment Response Mechanism (SIRM) the principal function of which is to ‘identify, track and resolve, in a timely manner, investor-state grievances that put investment projects at risk of withdrawals and cancellations.’<sup>4</sup> Likewise, since 2016 UNCTAD’s Investment Facilitation Action Menu proposes 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.’<sup>5</sup>

### **3. Typology of DMPAs and their functions**

The emerging data on DPMAs reveals a number of distinct and at times overlapping functions such agencies are expected to carry out, including the following:

- Raising awareness (e.g. the dissemination of information about investment treaties, the systematic compilation, mapping and evaluation of investment contracts and treaties, as well as the analysis of investment arbitration cases; systematic training of government officials on investment treaties’ implications for their day-to-day jobs)
- Monitoring and communication (e.g. identifying investor-state grievances at risk of withdrawals and cancellations, including through “early alert / early detection” and

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<sup>3</sup> For instance, attracting and retaining FDI appear to be the key drivers behind the creation of the South Korean Ombudsman. See Choong Yong Ahn, ‘New Direction of Korea’s of Foreign Direct Investment Policy in the Multi-track FTA Era: Inducement and Aftercare Services’ (2008) available at <https://core.ac.uk/download/pdf/51177754.pdf>

<sup>4</sup> Echandi et al, (2019). Retention and Expansion of Foreign Direct Investment: Political Risk and Policy Responses. *The World Bank Group*, XII.

<sup>5</sup> UNCTAD (2016). Global Action Menu for Investment Facilitation. UNCTAD Investment and Enterprise Division, 8.

“single window”<sup>6</sup> mechanisms; identifying sensitive or strategic sectors and issues of concerns through continuous communication with investors)

- Ensuring treaty compliance (e.g. engaging with officials and departments across the whole of government and/or establishing a system that ensures that new laws and policies are adopted and implemented in line with investment treaty obligations)
- Early resolution of investor-state disputes (identifying and addressing investor-state grievances before they escalate into formal disputes)
- Management of ISDS cases (establishing a lead agency tasked with the coordination and management of a state’s defence in arbitral proceedings, including defense strategy, appointment of arbitrators and external counsel, possible settlement etc)
- Post-dispute measures (coordinating the payment of awards, apportionment of adverse awards of compensation and legal costs between different agencies of government; proposing reforms and other changes to the state’s law and policy framework to address the root causes of disputes and reduce exposure to claims in the future).

The emerging empirical data reveals that the abovementioned functions often overlap and may at times fall within the remit of different domestic agencies. For instance, the functions of monitoring and communication as well as early detection of investor grievances can be carried out by a national investment promotion agency and/or so called after-care agencies and an office of investment ombudsman. Conversely, early detection and early settlement of disputes may fall within the institutional mandate of domestic administrative review tribunals and national ombuds-offices. In a similar vein, a single domestic lead agency may be vested with combined powers to perform all of the functions, from training government officials, to treaty compliance review, early settlement and management of the state’s defence and post-dispute actions. While each DPMA may follow its own unique design, an overview of emerging

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<sup>6</sup> “Single window” presupposes a single agency in charge of leading or coordinating dispute prevention and management process which, by its nature, is likely to warrant the involvement of multiple agencies at various tiers of the government machinery.

models suggests that certain features of the institutional design can entail their unique costs, benefits and drawbacks.

## **4. Benefits, limits and costs of DPMA**

In this section, we draw on existing research to identify a range of potential benefits and potential costs associated with the operation of DPMA. These benefits and costs are described in general terms – the benefits and costs of any particular DPMA will depend on its specific functions and powers (see Section 3, above) as well as its effectiveness in carrying out these functions.<sup>7</sup> In addition to the discussion of benefits and costs, we also identify a range of potential limits to the functioning of DPMA that emerge from existing research.

### **4.1. Potential benefits of DPMA**

#### **4.1.1. Investment retention**

Perhaps the most important potential benefit of DPMA is their potential to support investment retention, by resolving grievances that would otherwise lead foreign investors to divest.<sup>8</sup> This is a more general benefit than the avoidance of claims under investment treaties.

DPMA's effectiveness in retaining investment that would otherwise have exited the host state will depend on a range of factors, including the design and operation of the agency in question. A World Bank review of its SIRM pilot – a mechanism designed to resolve grievances that lead to a risk of divestment – suggested that the mechanism was successful in retaining investment.<sup>9</sup> One challenge in assessing such benefits is that investors have an incentive to overstate the value of investment and the number of jobs at stake in order to secure a more favourable outcome.<sup>10</sup> Focusing *exclusively* on investment retention as a metric of performance also creates an incomplete and potentially inaccurate impression of DPMA effects.<sup>11</sup>

#### **4.1.2. Promotion of policy consistency**

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<sup>7</sup> Johnson et al (2021), 114.

<sup>8</sup> Echandi (2021).

<sup>9</sup> Echandi et al (2019)

<sup>10</sup> Echandi et al (2019) 53 and 56

<sup>11</sup> Johnson et al (2021); see Section 4.3.2 below.

A second potential benefit of DPMA is promotion of policy consistency within the state apparatus.<sup>12</sup> Some disputes in ISDS arise from situations in which different parts of the state apparatus have adopted differing and even, occasionally, contradictory stances to an investment project.<sup>13</sup> Survey data also suggests that this is a concern of investors beyond ISDS.<sup>14</sup> If DPMA assist in identifying and reducing policy inconsistency between different parts of the state apparatus, this would count as a governance benefit associated with the agencies.

To date, there is little evidence of the extent to which DPMA have been successful in promoting policy consistency across the state apparatus. One partial exception is the high level description of grievances resolved by South Korea’s Office of the Foreign Investment Ombudsman, which suggests that this mechanism has had some effect in addressing instances of policy inconsistency.<sup>15</sup>

It is also important to note that some instances of what foreign investors may perceive as policy inconsistency may serve important and legitimate purposes. For example, ‘problems related to renewal/cancellation of land leases, environmental and labor permit delays’ might be perceived by investors as ‘arbitrary’.<sup>16</sup> However, environmental permits may be delayed due to genuine concerns about compliance with an investment’s operating conditions and leases may expire simply because the period for which the lease was negotiated has ended.<sup>17</sup>

#### 4.1.3. Avoiding adverse ISDS awards

A third potential benefit of DPMA is their ability to reduce the likelihood of adverse ISDS awards against the state. For example, a 2010 UNCTAD report highlighted the role of DPMA

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<sup>12</sup> E.g. Echandi (2021) 240.

<sup>13</sup> See, for instance, *Mr Franck Charles Arif v Republic of Moldova*, Award, 8 April 2013, ICSID Case No ARB/11/23 (the case involved a national court overriding the decision of an administrative agency) and *Metalclad Corp v Mexico*, Award, 25 August 2000, ICSID Case No ARB(AF)/97/1, (2001) 40 ILM 36 (the dispute arose from a conflict between decisions taken at the federal and municipal level). For discussion of coordination failures as a cause of investment disputes see Echandi et al (2019) 31; Bonnitcha & Williams (2021) 6-7.

<sup>14</sup> Echandi (2021).

<sup>15</sup> <http://ombudsman.kotra.or.kr/eng/au/act.do>

<sup>16</sup> Echandi (2021) 245.

<sup>17</sup> See Section 4.3.1 below

in ‘anticipating possible sources of investor-State disputes in advance and taking necessary action much earlier.’<sup>18</sup> This benefit is especially relevant for DPMAAs that have early settlement of investor-state disputes and management of ISDS cases among their functions.<sup>19</sup> It is related to DPMAAs’ effectiveness in retaining foreign investment: investors that perceive that their grievances are effectively addressed are both less likely to exit and less likely to launch ISDS proceedings.

There is little direct evidence about DPMAAs effectiveness in reducing the likelihood and financial costs of adverse ISDS awards. This may be due to: (1) sensitivity around publicising the outcome of confidential settlement negotiations brokered by a DPMAA; and (2) sensitivity around the circumstances in which a DPMAA has been involved from a relatively early stage in a regulatory process and helped the state to act in a manner that reduced the risk of subsequent challenge through ISDS.

#### 4.1.4. Avoiding or reducing the arbitration costs associated with ISDS proceedings

A fourth potential benefit is closely related to the third: the reduction of costs specifically associated with ISDS proceedings. This benefit is primarily relevant to DPMAAs that have management of ISDS cases among their functions. ISDS is expensive and time consuming. If a DPMAA assists in achieving settlement of a claim – for example, by managing the state’s involvement in mediation as lead agency with authority to settle – then the avoided costs of ISDS count as a benefit provided that the terms of settlement agreed by the agency are no worse than what would have been achieved through ISDS.

The costs associated with a particular ISDS claim can be estimated with reasonable accuracy given the parameters of a particular dispute, the range of legal and factual issues involved. However, the wider question of benchmarking the outcomes of settlements achieved by DPMAAs against the outcomes that would have been reached through ISDS is exceptionally

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<sup>18</sup> UNCTAD, *Investor-State Disputes: prevention and Alternatives to Arbitration* (2010) 65.

<sup>19</sup> See typology in Section 3 above.

difficult. This is both due to the uncertainty of ISDS outcomes<sup>20</sup>, and due to the difficulty in valuing benefits granted to an investor as part of a settlement. For example, settlement of a dispute with an investor may involve the re-negotiation of contract provisions, the grant of tax incentives, or the grant of alternative land on which an investment can be carried out.<sup>21</sup> Such measures may come at significant costs to the state, but those costs can be non-transparent and difficult to quantify.<sup>22</sup>

#### 4.1.5. Administrative efficiencies

A final benefit associated with DPMAAs could be administrative efficiencies stemming from increased institutional capacity in managing investment disputes. DPMAAs are generally assumed to have a specialised mandate, which might allow for the development of expertise within their remit. So, for example, if a DPMA developed greater institutional capacity in managing the involvement of external legal counsel in ISDS than whatever agency the DPMA is replacing, this would be a benefit. Such benefits should be weighed against the expense of creating and staffing a DPMA.

## 4.2. The limits of DPMAAs

Emerging empirical insights<sup>23</sup> into the experience of national DPMAAs in developing countries suggest that the ability of such agencies to effectively prevent investment disputes can be limited due to a number of reasons. Two key factors that significantly bear upon the effectiveness of DPMAAs are (1) the nature and causes of investor-state disputes; and (2) the nature and limits of powers vested in DPMAAs.

### 4.2.1. DPMAAs cannot effectively prevent certain categories of investor-state disputes

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<sup>20</sup> For analysis of uncertainty in ISDS, see Andrew D Mitchell, Elizabeth Sheargold and Tania Voon, 'Investor-State Dispute Settlement: Uncertainty, Inconsistency and Scope for Reform' in Andrew D. Mitchell, Elizabeth Sheargold and Tania Voon (eds) *Regulatory Autonomy in International Economic Law* (Edward Elgar 2017) 163-198; also David Gaukrodger and Kathryn Gordon (2012), 'Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community', OECD Working Papers on International Investment, 2012/03, OECD Publishing.

<sup>21</sup> See UNCTAD (2010) 33 as an example of this tendency.

<sup>22</sup> Bonnitcha & Williams (2021)

<sup>23</sup> These insights are drawn primarily from the empirical studies conducted in developing countries by Bonnitcha (2022); Sattorova (2018), (2022) and Ostránský & Pérez Aznar (2021).



The idea that dispute prevention can reduce state exposure to ISDS is often based on a narrow conception of causes triggering investor-state disputes. Investor-state disputes are seen as primarily resulting from coordination failures, lack of awareness among government officials and lack of competence within the government in general.<sup>24</sup> However, although lack of awareness has been identified as an issue, there is empirical evidence showing that even when aware of investment treaties governments persevere with measures that cause investment disputes.<sup>25</sup>

Furthermore, many investor-state disputes are caused not by incompetence and coordination failures within government but, rather, the fact that the investor's interests clash with local community interests or wider public policy objectives.<sup>26</sup> The growing number of investor claims brought against states with highly developed legal and institutional systems also confirms that investor grievances are not always the result of lack of knowledge and bureaucratic capacity within the government. The World Bank acknowledges this limitation of DPMA in its proposal for dispute prevention through the SIRM. In particular, the World Bank has conceded that its proposed dispute prevention model 'is not intended to address grievances stemming from the conduct of other branches of government, like the legislative or judiciary branch.'<sup>27</sup>

Some studies also reveal that investors may resort to ISDS to extract value from challenging and underperforming investment projects. Likewise, there is data showing that investors at times resort to ISDS only after concluding that their projects in the host state are no longer economically and politically viable.<sup>28</sup> DPMA's focus on early detection, monitoring and communication with investors can be useful in situations where an investor is seeking a genuine resolution of its grievance with a view to continuing a project in the host state. Conversely, early detection and intervention may not help prevent investment disputes that are driven by the investor's desire to recover the losses from the underperforming project.

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<sup>24</sup> UNCTAD (2010) 66; Echandi (2019) 31.

<sup>25</sup> See Sattorova (2018); Lauge N. Skovgaard Poulsen, *Bounded Rationality and Economic Diplomacy: The Politics of Investment Treaties in Developing Countries* (Cambridge University Press 2015).

<sup>26</sup> Bonnitcha & Williams (2021)

<sup>27</sup> Echandi et al (2019) 44, see also Bonnitcha & Williams (2021).

<sup>28</sup> See Sattorova (2018) 67.

#### 4.2.2. DPMAAs may lack sufficient powers to prevent investor grievances from escalating into ISDS claims

Analysis of legal instruments governing the operation of DPMAAs in a number of developing countries as well as interviews with government officials reveal that such agencies frequently do not possess powers vis-à-vis government agencies whose measures have caused investor grievances.<sup>29</sup> Customarily, DPMAAs are vested with powers to request information from domestic ministries and agencies involved in the grievance, and to recommend actions with a view to resolving the investor's complaint. Typically, the host state's central and local government agencies are under an obligation to supply the requested information and otherwise cooperate with the DPMAA, but the latter cannot compel the relevant government bodies to act in a certain way, e.g to withdraw the offending measures, pay compensation or otherwise settle the complaint. As such, the main function of the existing DPMAAs, especially those recently created across a number of developing countries, is to act as a focal point for resolving investor grievances, without matching powers to issue binding resolutions.<sup>30</sup>

#### 4.2.3. DPMAAs may replicate the structure of ISDS in failing to consider wider stakeholders' interests in investment disputes

In international investment law, investment disputes are frequently portrayed as bilateral conflicts between the investor and the state. This framing overlooks the multiplicity of interests and stakeholders involved in the governance of investment projects. If dispute prevention is conceived in such narrow terms, purely as a means of managing investor-state relationships, DPMAAs may not only fail to resolve the underlying investor grievances but also replicate some of the much-criticised aspects of ISDS such as the lack of transparency, accountability and inclusivity. A broader framing for the avoidance or resolution of investment-related disputes would allow countries to consider approaches that allow for broad participation and the consideration of a range of stakeholders' interests and policy considerations on equal footing.<sup>31</sup>

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<sup>29</sup> For example, as an interviewee put it in one case-study, there is a sense that the Ombudsman 'does not have competence to do much, mostly to issue recommendations. It needs prerogatives to impose obligations and other executive powers.' See Sattorova (2018) 78.

<sup>30</sup> Ibid, 77-79.

<sup>31</sup> Johnson et al (2021) 125.

### 4.3. Potential costs of DPMAs

4.3.1 DPMAs may lead to overprotection of investors and exacerbate the asymmetry of the global investment protection regime

Recent studies highlight a risk that DPMAs ‘...that prioritise resolution of investor complaints and avoidance of ISDS claims—intensify policymakers’ focus on addressing the concerns of, and measuring benefits to, foreign investors to the exclusion of other stakeholders and considerations.’<sup>32</sup> An overview of ISDS practice reveals a significant number of disputes that arose due to a clash between interests of the investor on one hand and wider public policies (concerned with protection of the environment, public health, human rights) on the other.<sup>33</sup> At times, ISDS cases have arisen due to resistance from local communities owing to concerns over the relevant investment project’s negative social or environmental impact.<sup>34</sup> If DPMAs prioritise the resolution of such disputes to the satisfaction of the investor, the very idea of dispute prevention can become subject to the same criticisms as the ISDS regime. In particular, if safeguarding the interests of investors is seen as the sole and overriding objective of dispute prevention, this could exacerbate the concerns over the asymmetry of the foreign investment laws at both international and national levels. This concern has been acknowledged by UNCTAD in its 2010 report which notes that dispute prevention measures are ‘not suitable for all types of investment disputes’, including those concerning public interest laws of general application, particularly when implemented in line with democratic choices.<sup>35</sup>

4.3.2 DPMAs may create a two-tier legal system privileging foreign investors

Closely related to concerns over asymmetry is a potentially negative role DPMAs could play in limiting the application of domestic laws and instead creating legal enclaves to benefit

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<sup>32</sup> Ibid 123.

<sup>33</sup> See Andreas Kulick, *Global Public Interest in International Investment Law* (Cambridge, Cambridge University Press, 2012).

<sup>34</sup> See, for instance, Mavluda Sattorova, ‘The Foreign Investor as a Good Citizen: Investor Obligations to Do Good’ in Jean Ho and Mavluda Sattorova (eds) *Investors’ International Law* (Hart Publishing 2021) 45-58; Lorenzo Cotula, ‘(Dis)integration in Global Resource Governance: Extractivism, Rights, and Investment Treaties’ (2020) 23 *Journal of International Economic Law* 431.

<sup>35</sup> UNCTAD (2010) 36.

foreign investors. Much depends on a yardstick by which a DPMA is expected to judge the basis and merits of an investor's complaint. Some agencies would be focused less on the economic fallout if the dispute is not resolved to the investor's satisfaction and more on the question of whether the measures under complaint were lawful as a matter of domestic law. However, depending on design, DPMA's might be tasked with preventing ISDS claims as their primary objective and evaluate investor grievances in light of international investment law. For instance, the World Bank's SIRM model envisages an evaluation of whether an investor-state complaint at hand may give rise to an ISDS claim.<sup>36</sup> This is commonly the case in agencies that are formally tasked with managing the legal risks to the state arising from investor-state arbitration.<sup>37</sup> By focusing on preventing investor complaints from reaching the ISDS stage, such an approach may lead to the threat of ISDS being used to 'give heightened legal and political powers and/or duties to certain actors within government' to address investor concerns.<sup>38</sup> This may increase the power of investors due to their ISDS-related leverage. By using investment treaties as a benchmark and focusing on reducing the exposure to ISDS as a primary objective, DPMA's might lead to the creation of a two-tier legal system within a host state – a system where domestic investors would be subject to domestic law and, unlike foreign investors, unable to use the threat of ISDS as a leverage to access additional benefits and concessions. Domestic investors are not the only category that can be potentially disadvantaged by DPMA's focus on foreign investor grievances. Since the functioning of DPMA's is usually subject to a set of somewhat opaque guidelines<sup>39</sup>, there are concerns over the impact of their interventions on other stakeholders, including local communities.<sup>40</sup>

#### 4.3.3 DPMA's may exacerbate governance distortions

Analysis of caseload and institutional mandates of the existing DPMA's reveals that such agencies may reach their dispute prevention targets by, among others, waiving regulatory requirements, the re-negotiation of contract provisions, the extension of the duration of concessions, and the grant of tax incentives.<sup>41</sup> The DPMA's powers to resolve complaints

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<sup>36</sup> Echandi et al (2019) 45.

<sup>37</sup> Bonnitcha & Williams (2021)

<sup>38</sup> Johnson et al (2021) 114.

<sup>39</sup> For an instance, even a cursory look at the regulatory acts governing DPMA's in Kyrgyzstan and Kazakhstan reveal lack of guidelines which the agencies could use to evaluate investor grievances at hand.

<sup>40</sup> Johnson et al (2021) 123.

<sup>41</sup> The analysis draws on the findings in Bonnitcha & Williams (2021), Sattorova (2018) as well as the findings from the recent project conducted by Sattorova (2022, funded by the University of Liverpool School of

might include conducting negotiations or placing political... or “peer pressure” on other government agencies.<sup>42</sup> That pressure, the World Bank explains, can comprise highlighting to the public the potential loss of jobs, loss of investment, and ISDS liability associated with the challenged measures.<sup>43</sup> Likewise, although DPMAs may not be granted powers to issue legally binding recommendations, they may be able to elevate the disputes to higher political levels which possess such powers.<sup>44</sup> In cases where DPMAs may succeed in using political means to resolve a complaint to the investor’s satisfaction, such outcome might be achieved through overriding and undoing the measures adopted by specialized agencies, such as those dealing with tax, environmental policy, or public health standards. Conferring such powers on DPMAs may indeed be necessary for their ability to prevent disputes stemming from coordination failures within the government. However, enabling DPMAs to use flexible, ad hoc, informal solutions – solutions that ‘may have no basis in law’<sup>45</sup> – gives rise to numerous concerns. Such concerns include but are not limited to (1) lack of transparency and accountability of DPMAs and their internal decision-making processes; (2) the risk of agency capture and corruption; and (3) the risk of undermining democratic processes and thus altering the ways in which governments balance investors’ interests and wider public interests.<sup>46</sup> A number of investor-state disputes have highlighted the risk of foreign investors using settlement agreements to legitimize corrupt transfers from host governments, particularly in circumstances in which the settlement agreement is reached outside the traditional mechanisms for bureaucratic accountability.<sup>47</sup>

#### 4.3.4 DPMAs may divert attention from underlying problems with investment treaties

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Law and Social Justice RDF, on file with authors). These studies collectively analyzed legal documents pertaining to the operation of DPMAs and analogous agencies in 12 countries: Brazil, Colombia, Costa Rica, the Dominican Republic, Georgia, Kazakhstan, Kyrgyzstan, Myanmar, the Republic of Korea, Peru, Uzbekistan, and Ukraine.

<sup>42</sup> Ibid 112.

<sup>43</sup> Ibid 113; see also World Bank Group, *Retention and Expansion of Foreign Direct Investment: Political Risks and Policy Responses* (2019) 45.

<sup>44</sup> Johnson et al (2021) 113; see also Sattorova (2018) 78-9.

<sup>45</sup> Sattorova (2018) 78.

<sup>46</sup> Bonnitcha & Williams (2021)

<sup>47</sup> Ibid, see also Damien Charlotin, ‘Libya Announces Successful set-aside of 450 million Euro Award, as French Court Finds Underlying Settlement Tainted by Corruption’, IA Reporter, 18 November 2020. 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.

Dispute prevention can be understood in different terms. At one end of the spectrum, dispute prevention can be understood as a set of measures aimed at reducing the exposure to ISDS by maintaining investment treaties and investor-state arbitration but ensuring domestic compliance with their prescriptions. At the other end, dispute prevention can be understood as a set of measures primarily designed to limit the state's exposure to ISDS by reducing the general reach of investment treaties (e.g. altering the scope of substantive protections and introducing procedural barriers for access to ISDS).<sup>48</sup> Designing dispute prevention strategies with the purpose of avoiding ISDS claims may provide the opportunity to highlight and address the problems with investment treaties. However, such design may also divert state capacity away from reforms that tackle wider problems with investment treaties and the ISDS mechanism.<sup>49</sup> Agencies tasked with dispute settlement under investment treaties may have an indirect institutional interest in keeping ISDS relevant.<sup>50</sup> This issue may be somewhat alleviated if the ISDS agenda is not concentrated in one state agency but rather is one among other competences of an agency that is tasked with a more integrative approach to governance of foreign investment.

#### 4.3.5. DPMAs and capacity building

There is an increased interest in the WGIII to foreground issues of capacity building, including through proposals to establish an Advisory Centre on international investment law. The question of legal capacity is directly relevant for the establishment of DPMAs, in particular in the area of investment dispute management. Where the remit of a DPMA is conceived narrowly with focus on the prevention and management of ISDS cases, such narrow focus may have considerable implications for wider capacity-building efforts across the government.

Concentrating efforts on building domestic capacity in management of investor-state disputes may channel resources away from institutions, projects, and policies that deal with broader issues of foreign investment governance that go beyond investment treaty disputes (e.g. aligning foreign investment inflows with national industrial and economic policies; integrating

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<sup>48</sup> Johnson et al (2021)

<sup>49</sup> Ibid

<sup>50</sup> Ibid; see also Josef Ostránský, Facundo Pérez Aznar (2021). ISDS allows the showcasing of even minor procedural decisions, e.g. a decision on bifurcation, as 'victories for the state', thus boosting the image of the relevant agencies, see e.g. <https://www.mfcr.cz/cs/zahranicni-sektor/ochrana-financnich-zajmu/arbitraze/aktualni-informace/2017/procesni-uspechy-mf-v-probihajicich-arbi-27157>.

investment projects into national environmental and social frameworks and policies). Building and, importantly, retaining domestic legal capacity to manage investment disputes can also be both costly and fraught with risks of the bureaucrats experienced in ISDS migrating into the private sector to capitalise on their acquired skills and knowledge.<sup>51</sup>

## **5. Lessons from dispute prevention mechanisms in commercial disputes**

Although the suitability of the norms and principles governing commercial dispute settlement to ISDS cases may be contested<sup>52</sup>, the experience of DPM models used in a commercial context might still be useful. In particular, such DPMs may help inspire solutions to some of the issues at the centre of the dispute prevention agenda in the context of ISDS, including the length of proceedings and costs. For example, traditional facilitative or non-adversarial mechanisms frequently utilised in contractual disputes comprise negotiation, mediation, conciliation, expert determination, and the so-called dispute boards. The modus operandi of these consensual dispute prevention and mitigation mechanisms varies according to (1) the level of control of the parties over decision-making, (2) involvement and the role of neutrals or other third-party facilitators, and (3) the binding nature and enforceability of the decision taken. Parties may choose to combine various elements of DPMs or combine DPMs with adjudicative dispute resolution mechanisms (e.g. arbitration) via so-called multi-tiered or escalation clauses.

Of these DPM mechanisms, dispute boards (also known as dispute adjudicators boards, dispute review boards, or combined dispute boards) are worthy of mention. Dispute boards are customarily tasked with preventing and mitigating disputes through the involvement of permanent panels which accompany the performance of long-term contractual relationships in construction and other fields. Through a combination of informal and formal approaches, dispute boards assist in identifying disagreement, and encourage the parties to resolve the disputes or determine a dispute through a recommendation or a decision (e.g. the ICC Dispute

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<sup>51</sup> Examples from interviews conducted by Ostránský and Perez-Aznar in the Czech Republic, Mexico, Argentina (on file with the authors)

<sup>52</sup> See Gus Van Harten & Martin Loughlin, 'Investment Treaty Arbitration as a Species of Global Administrative Law' (2006) 17 *European Journal of International Law* 121, 131–33. For an overview of peculiarities of commercial arbitration in application to investment disputes, see Joel Dahlquist, *The Use of Commercial Arbitration Rules in Investment Treaty Disputes Domestic Courts, Commercial Arbitration Institutions and Tribunal Jurisdiction* (Brill 2021) 282-311.

Board Rules). Unlike mediation and conciliation<sup>53</sup>, this form of dispute prevention and mitigation is less explored in the context of ISDS.<sup>54</sup> Its potential lies in the capacity to proactively predict, overcome and assist in solving *ongoing* disagreements between the parties in the course of contract performance. As standing bodies of one or three experienced members constituted *at the beginning of* contract implementation, dispute boards assist in preventing the escalation of conflict to a dispute. The commonly identified advantages of dispute boards for commercial disputes are (1) the deterrent effect of their mere existence, (2) the preservation of ongoing business relationships, and (3) their ability to facilitate a quick and binding resolution of a grievance.<sup>55</sup> Effectively used in long-term contractual relationships to secure ongoing uninterrupted commercial cooperation between the parties<sup>56</sup>, dispute boards may be of particular value for *contract-related* investment disputes (such as factually arising out of concession agreements, privatization agreements, agreements relating to infrastructure projects etc).<sup>57</sup> Ultimately, however, the suitability, legitimacy and effectiveness of dispute boards for preventing and mitigating ISDS claims hinges on some of the same factors identified in this paper, including concerns relating to transparency, stakeholder participation, and safeguarding of the public interests. Just as in the context of ISDS, commercial DPMs also raise concerns about independence, impartiality and accountability of neutrals and facilitators.

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<sup>53</sup> An increased attention to mediation for ISDS in academic discussion and literature has not (yet) translated into its active use in practice. Noah Rubins, Thomas-Nektarios Papanastasiou, N. Stephan Kinsella explain reluctant use of mediation by lack of information, non-binding nature, existing overoptimism and governmental constraints - see Noah Rubins, Thomas-Nektarios Papanastasiou, N. Stephan Kinsella, *International Investment, Political Risk, and Dispute Resolution: A Practitioner's Guide* (Oxford University Press, 2nd edn, 2020) 470-474. For other works on mediation in ISDS see Susan D Franck and Anna Joubin-Bret, 'Investor-State Mediation: A Simulation' (2014) 29 (1) ICSID Review - Foreign Investment Law Journal, 90-111; Silvia Constain, 'Mediation in Investor-State Dispute Settlement: Government Policy and the Changing Landscape' (2014) 29 (1) ICSID Review - Foreign Investment Law Journal, 24-40; Wolf von Kumberg, Jeremy Lack, and Michael Leathes, 'Enabling Early Settlement in Investor-State Arbitration: The Time to Introduce Mediation Has Come' (2014) 29 (1) ICSID Review - Foreign Investment Law Journal, 133-141; Catharine Titi and Katia Fach Gomez (eds), *Mediation in International Commercial and Investment Disputes* (Oxford University Press 2019).

<sup>54</sup> While the potential of disputes boards for investment disputes was highlighted as early as in 2010 by the UNCTAD, not much has been done to advance and further investigate their possible application in investment treaty arbitration.

<sup>55</sup> Andrea Carlevaris, 'Chapter 7: The 2015 ICC Dispute Boards Rules', in Filip JM De Ly and Paul-A Gélinas (eds), *Dispute Prevention and Settlement through Expert Determination and Dispute Boards, Dossiers of the ICC Institute of World Business Law, Volume 15* (Kluwer Law International, International Chamber of Commerce (ICC) 2017) 70.

<sup>56</sup> According to Pierre Genton 'the overall rate of success in resolving disagreements by dispute boards is generally estimated at over 95%'. See Pierre Genton, 'Chapter 8: Dispute Boards in Practice as Prevention of Dispute and Complement to Arbitration', in Filip JM De Ly and Paul-A Gélinas (eds), *Dispute Prevention and Settlement through Expert Determination and Dispute Boards, Dossiers of the ICC Institute of World Business Law, Volume 15* (Kluwer Law International; International Chamber of Commerce (ICC) 2017) 81.

<sup>57</sup> The practical risks in the use of dispute boards are helpfully summarised in Pierre Genton (2017) 83-4.



## **6. Conclusion**

Drawing on recent empirical and legal studies, this paper has sought to elucidate the origins, typology, as well as the potential costs, benefits and limits of dispute prevention and mitigation agencies and measures. While the past decade witnessed a proliferation of national dispute prevention and mitigation agencies, there is still a dearth of studies to evaluate their day-to-day operation and practical effects. Further detailed and empirically grounded research is warranted into how DPMAAs resolve investor-state grievances. As this paper has highlighted, the effectiveness of DPMAAs and measures they utilise will hinge on their design as well as the nature of disputes they are tasked with preventing and managing. This, in turn, requires detailed mapping of investment disputes with a view to identifying various categories and their unique and shared characteristics, with each calling for relevant distinctive dispute prevention strategies. Similarly, as DPMAAs continue to proliferate, the types of dispute prevention measures which are used also need to be mapped in order to determine which measures work well for particular types of investment disputes. Finally, since DPMAAs are being increasingly seen as an important part of the ISDS reform agenda, it is vital to ensure that their design and functioning does not fall foul of the same issues that beset the contemporary ISDS regime and underpin the ongoing ISDS reform agenda. In particular, in formulating and implementing rules and operational guidelines governing DPMAAs particular attention ought to be given not only to financial costs and benefits but also their impact on (1) local communities and other stakeholders; (2) the state's ability to pursue public policy objectives; and (3) wider investment governance both nationally and internationally.