doi:10.1017/aju.2024.43

SYMPOSIUM ON INSTITUTIONALIZING INVESTMENT DISPUTE PREVENTION

WHAT IS THE PROBLEM WITH INVESTMENT DISPUTES? THE CASE OF THE *DRAFT LEGISLATIVE GUIDE ON INVESTMENT DISPUTE PREVENTION AND MITIGATION*

*Jonathan Bonnitcha**

Embedded in any policy proposal is a set of assumptions about the problem that the policy is intended to solve.[1] As policy processes play out, some of these assumptions are contested by the actors involved, while others remain latent. Policy discussion about institutionalizing investment dispute prevention reflects a set of assumptions concerning the problem of investment disputes. In this contribution, I examine assumptions embedded in the development of, and the response to, the United Nations Commission on International Trade Law (UNCITRAL) Secretariat's 2023 *Draft Legislative Guide on Investment Dispute Prevention and Mitigation*. The *Draft Legislative Guide* represents the high-water mark of efforts to develop a model of investment dispute prevention that could be rolled out at the domestic level. I make three main arguments. First, both the *Draft Legislative Guide* itself and wider policy discussion assume that investment disputes develop independently of the cognitive and institutional environment in which they occur. As a result, policy discussion overlooks the extent to which dispute prevention initiatives can, counter-intuitively, produce investment disputes. Second, policy discussion of investment dispute prevention assumes that investment disputes have their roots in coordination failures across government, rather than democratic processes, distributive conflicts, or tensions between the interests of investors and wider public interests. This premise, and its implications, deserve much closer critical scrutiny. Third, institutionalized models of investment dispute prevention of the sort envisaged by *Draft Legislative Guide* are almost exclusively found in developing states. The dispute prevention agenda needs to grapple openly with the fact that advice is being given to developing states to establish dispute prevention institutions that have no equivalents in the domestic systems of developed states.

Background to the Development of the Draft Legislative Guide

Processes of problem-definition are central to the work of UNCITRAL Working Group III. Working Group III was established in 2017, with "a broad mandate to work on the possible reform of investor-state dispute settlement (ISDS)."[2] Over a relatively short period in 2017–2018, Working Group III recast a broad and unsystematized set of issues relating to investment treaties as a set of more technical *concerns* relating to the design of ISDS

* *Associate Professor of Law, University of New South Wales, Sydney, Australia.* *This research was supported by the Australian Government through the Australian Research Council's Discovery Projects funding scheme (project DP220101632). The views expressed herein are those of the author and are not necessarily those of the Australian Government or Australian Research Council.*

[1] Carol Bacchi, Analysing Policy: What's the Problem Represented to Be? (2009).

[2] UNCITRAL, Report of Working Group III, para. 6, UN Doc. A/CN.9/930/Rev.1 (Dec. 19, 2017).

mechanisms—the consistency and correctness of outcomes, the independence and impartiality of arbitrators, and the costs and duration of ISDS proceedings.[3]

The turn to dispute prevention within UNCITRAL Working Group III occurred in the context of debate over how to address the costs and duration of ISDS proceedings.[4] While there was general support for considering alternatives to ISDS, states' submissions reflected a variety of different assumptions about the underlying problem. Some implied that the ease with which investors could invoke ISDS was the problem;[5] others implied that government officials' failure to attend to investor grievances at an early stage was the problem.[6] From this diverse but partially overlapping set of submissions, the Secretariat distilled broad support among states to pursue solutions to "prevent and reduce the occurrence of investor-state disputes."[7] In October 2020, Working Group III requested that the UNCITRAL Secretariat "compile relevant and readily available information on the best practices for states on dispute prevention and mitigation" at the national level.[8] The Working Group's request identified problems of lack of information and coordination within the state apparatus as a primary source of disputes, orienting the Secretariat's work toward solutions addressing these presumed causes. Insofar as states have established institutions to prevent investment disputes, this is broadly consistent with the problems that those states have sought to address through their systems.[9]

The Draft Legislative Guide and States' Response to it

The result was the *Draft Legislative Guide*, which the UNCITRAL Secretariat circulated to states in January 2023 for consideration. The document contains a detailed set of recommendations for institutionalizing investment dispute prevention at the national level through the creation of a new government agency. The *Guide* was prepared jointly with the World Bank Group,[10] and incorporates features of the World Bank's Systemic Investment Retention Mechanism (SIRM).[11] In this section, I highlight four features of the model proposed by the *Draft Legislative Guide* and show how they reflect underlying assumptions about the problem of investment disputes.

First, reflecting Working Group III's limited mandate, the *Draft Legislative Guide* adopts a particular conception of investment disputes—those disputes that are capable of being articulated as legal claims against the state in ISDS proceedings.[12] This reflects an assumption that the problem that needs solving is the risk ISDS claims pose to the

[3] UNCITRAL, Report of Working Group III, UN Doc. A/CN.9/964 (Nov. 6, 2018).

[4] *Id.*, para. 118.

[5] UNCITRAL, Possible Reform of ISDS: Submission from the Government of Brazil, para. 15, UN Doc. A/CN.9/WG.III/WP.171 (June 11, 2019); UNCITRAL, Possible Reform of ISDS: Submission from the Government of Morocco, para. 14, UN Doc. A/CN.9/WG.III/WP.161 (Mar. 4, 2019).

[6] UNCITRAL, Possible Reform of ISDS: Submission from the Republic of Korea, 5, UN Doc. A/CN.9/WG.III/WP.179 (July 31, 2019); UNCITRAL, Possible Reform of ISDS: Submission from the Government of Thailand, para. 11, UN Doc. A/CN.9/WG.III/WP.162 (Mar. 8, 2019).

[7] UNCITRAL, Possible Reform of ISDS: Dispute Prevention and Mitigation – Means of ADR, para. 5, UN Doc. A/CN.9/WG.III/WP.190 (Jan. 15, 2020).

[8] UNCITRAL, Rep. of Working Group III (ISDS Reform) on the Work of Its Thirty-Ninth Session, para. 26, UN Doc. A/CN.9/1044 (Nov. 10, 2020).

[9] *See, e.g.*, Zhenyu Xiao, *Institutionalizing Investor-State Dispute Prevention in China*, 118 AJIL UNBOUND 253 (2024).

[10] UNCITRAL, Possible Reform of ISDS: Draft Legislative Guide on Investment Dispute Prevention and Mitigation, para. 2, UN Doc. A/CN.9/WG.III/WP.228 (Jan. 19, 2023).

[11] ROBERTO ECHANDI ET AL., RETENTION AND EXPANSION OF FOREIGN DIRECT INVESTMENT: POLITICAL RISK AND POLICY RESPONSES xii (2019).

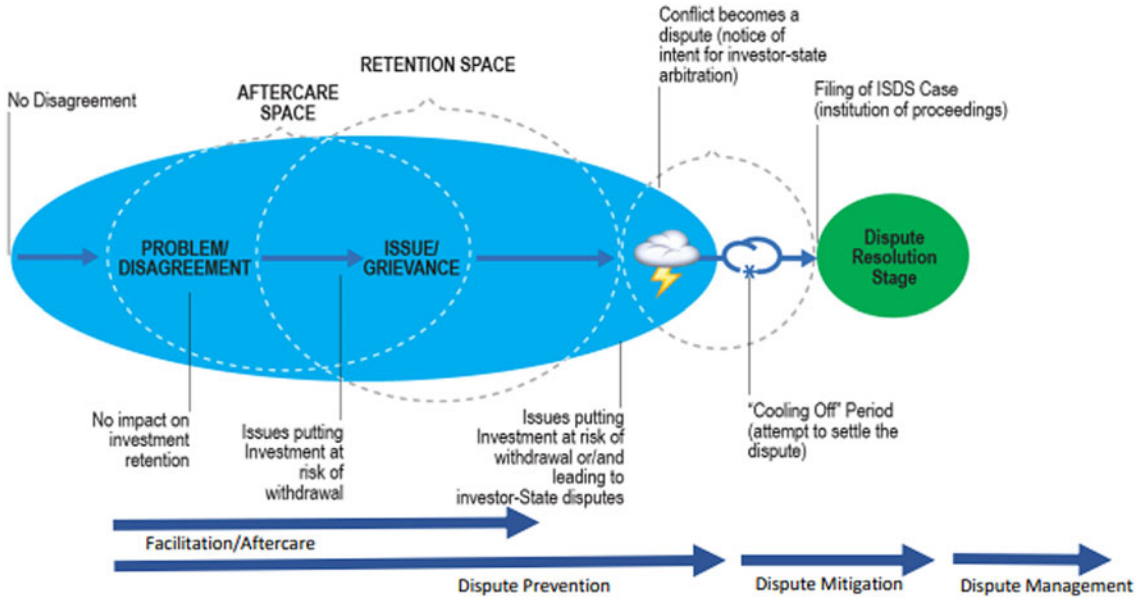
[12] UNCITRAL, *supra* note 10, at 4.

https://doi.org/10.1017/aju.2024.43 Published online by Cambridge University Press

state, as opposed to, say, investment retention or maximizing domestic welfare associated with foreign investment.[13]

Second, foundational to the *Draft Legislative Guide* is the establishment or designation of a lead agency within each state empowered to prevent and mitigate disputes by hearing and responding to investors' grievances.[14] This model reflects a cluster of assumptions about the nature and causes of investment disputes. Most obviously, the functions of the lead agency—focused on improving coordination within government, and improving communication with, and consultation of, investors—reflect assumptions that a lack of policy coordination and insufficient awareness of investors' interests within government are core drivers of investment disputes.[15] A related assumption concerns the nature of the expertise required to prevent investment disputes. While the facts of an investor's complaint may concern tax policy, or environmental regulation, or land tenure, the *Draft Legislative Guide* assumes that handling these prospective disputes requires the input of a lead agency with specialised experience in *investment* grievances.

Third, a core role of the *Draft Legislative Guide*'s proposed lead agency is to intervene in the phase after an investor has raised a specific grievance that could be rearticulated as a legal claim in ISDS proceedings, but before the investor has initiated legal action. This reflects two related assumptions. First, taken on its own terms, the *Draft Legislative Guide* seeks to resolve problems that arise from a gap between "investor aftercare" initiatives[16]—that is, mechanisms focused on addressing practical problems encountered by investors that are not necessarily capable of being rearticulated as legal claims—and government legal offices that are responsible for defending claims against the state once they arise.[17] The "gap" framing reflects a second, deeper, assumption about how investment disputes develop. The *Draft Legislative Guide* is based on a linear and unproblematic view of



[13] *See* UNCITRAL, Working Group III: Compilation of Best Practices on Investment Dispute Prevention and Mitigation, para. 10 (Mar. 2023) (released alongside the Draft Legislative Guide).

[14] UNCITRAL, *supra* note 10, at 7–8, 13–14.

[15] UNCITRAL, *supra* note 13, paras. 5–6.

[16] *Id.*, para. 10.

[17] UNCITRAL, *supra* note 10, para. 3.

https://doi.org/10.1017/aju.2024.43 Published online by Cambridge University Press

investment disputes where, if left unresolved, "disagreements" in the relationship between the investor and the state develop into "grievances" that then become legal "disputes." This linear view is captured visually (above).[18]

Fourth—and most obviously—the *Draft Legislative Guide* assumes that all states face problems with investment disputes that have enough in common to a warrant a common solution. Embedded in this general assumption are more specific assumptions about the common causes of investment disputes across different states, as well as assumptions about the absence of relevant differences in constitutional or bureaucratic structure between states that might call for jurisdictionally specific solutions.

The *Draft Legislative Guide* was discussed in the March 2023 session of Working Group III. It was not received well. Anthea Roberts and Taylor St John capture something of the mood in the room: "[T]here was unanimity—in a rare occurrence, every state and observer objected to the tone and substance" of the *Draft Legislative Guide*.[19] States took issue with the prescriptive tone of the document. Many pointed out that it did not account for diversity in constitutional systems or administrative processes between states. Other states raised concerns about the exclusive focus on the role of the state, suggesting that investors' role in causing and preventing disputes should also be examined.[20]

These reactions constitute a clear rejection of some of the assumptions about the problem of investment disputes underpinning the *Draft Legislative Guide*, while others remained largely unchallenged. In November 2023, the Secretariat published a revised *Draft Guidelines on Prevention and Mitigation of International Investment Disputes*. This document is drafted in less prescriptive terms than the *Draft Legislative Guide*, recognizing that greater diversity in domestic institutionalization of dispute prevention might be appropriate. However, the measures states are encouraged to consider—and the assumptions underpinning them—remain surprisingly unchanged.[21] The following sections interrogate three of these assumptions in turn.

Do Disputes Develop Independently of the Institutional Environment?

The *Draft Legislative Guide* rests on a linear conception of the development of investment disputes. This conception of the emergence and development of investment disputes was not directly challenged by states in Working Group III; it continues to underpin policy discussion of investment dispute prevention today.[22] It is a conception of disputes that is at odds with decades of law and society research on the social processes by which individuals come to perceive their experiences as grievances, and how those grievances then become legal disputes.[23] These processes are not linear, and have both cognitive and institutional dimensions.

The transformation of an experience into a grievance has a cognitive dimension: an investor must perceive their experience as the result of the state's failure to meet some expected standard. The transformation of an experience into an *investment* grievance requires further interpretive steps: the investor must perceive their identity *as an investor* as relevant. These acts of interpretation are socially embedded. A policy focus on *investment* dispute prevention makes investors' identities as investors, along with the norms of international investment law that pertain to

[18] UNCITRAL, *supra* note 13, at 7. This image is used, with permission, from Priyanka Kher, Eloise Obadia & Dongwook Chun, Managing Investor Issues Through Retention Mechanisms 8 (2022).

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

[20] UNCITRAL, Report of Working Group III (ISDS Reform) on the Work of Its Forty-Fifth Session, paras. 48–51, UN Doc. A/CN.9/1131 (Apr. 14, 2023).

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

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

[23] Wiliam L.F. Felstiner et al., *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming*, 15 Law & Soc'y Rev 631 (1980).

https://doi.org/10.1017/aju.2024.43 Published online by Cambridge University Press

those identities, more salient. Over time, this can encourage both foreign investors and government officials to interpret experiences differently, making it more likely that they will interpret an interaction as an *investment* grievance than, say, a disagreement relating to environmental regulation, tax policy, or land tenure governed by norms specific to those fields. These cognitive effects are difficult to observe but can have profound consequences over time. They can, for instance, result in the recharacterization of diverse disagreements that would otherwise be governed by different sets of norms as *investment* grievances governed by norms of international investment law.[24]

The way that institutions shape the emergence and transformation of disputes is easier to observe directly. Consider, for example, Julia Calvert's excellent study of the politics of investment treaties in Latin America. In it, she draws attention to the inability of Peru's dispute prevention agency, SICRECI, to reduce the number of claims against Peru.[25] One partial explanation for this trend is that investors bring claims "to increase their bargaining power in the hopes of generous contract terms or policy concessions."[26] Because investors act strategically, creating institutions that have special processes and powers to respond to investment disputes can encourage investors to recast their experiences as prospective investment claims. This risk is something that seems to be understood within SICRECI itself,[27] but has been almost entirely overlooked in wider discussion of dispute prevention.

What Are the Underlying Drivers of Investment Disputes?

The *Draft Legislative Guide* rests on an assumption that lack of coordination across government—and insufficient consultation with investors—are core drivers of investment disputes. This assumption remained largely unchallenged in subsequent discussion of the model. Yet, ISDS claims arise from an extraordinarily diverse array of factual scenarios: claims arise from the conduct of all three branches of government, in relation to different economic sectors, and motivated by diverse policy objectives.[28] While some ISDS claims do seem to originate from failures of coordination and consultation, others clearly do not. For example, over fifty claims have been lodged against Spain relating to legislative changes reducing tariffs in the Spanish solar industry. The investors in question retain control of their investments, which continue to operate profitability. These disputes have their origin in simple distributive dynamics—following the 2008 financial crisis, both the International Monetary Fund and the European Commission recommended that Spain unwind the overly generous tariffs paid to generators[29]—not failures of coordination across government.

Many other investment disputes involve more complex tensions between the interests of investors and wider public interests. For example, the well-known case *Eco Oro v. Colombia* raised questions of environmental protection, community opposition to investment projects, and the relationship between Colombian constitutional law, investment treaties, and domestic mining regulation.[30] Greater awareness of the diverse and complex drivers of

[24] *Similarly* Jonathan Bonnitcha & Zoe Phillips Williams, *The Impact of Investment Treaties on Domestic Governance in Developing Counties*, 2 L. & Pol'y 140, 160 (2024).

[25] According to UNCTAD data, twenty-one new ISDS cases have been lodged against Peru since 2018. UN Trade & Development, Investment Dispute Settlement Navigator (last accessed June 25, 2024).

[26] Julia Calvert, The Politics of Investment Treaties in Latin America 194 (2022).

[27] Ricardo Ampuero Llerena, *Investor-State Dispute Prevention Institutions in Latin America – The Case of Peru*, 118 AJIL Unbound 248 (2024); similarly Carlos José Valderrma, *Investor-State Dispute Prevention: The Perspective of Peru*, *in* Public Actors in International Investment Law 130 (Catharine Titi ed., 2021).

[28] Zoe Phillips Williams, The Political Economy of Investment Arbitration Ch. 2 (2022).

[29] Tobias Buck, *Spanish Energy Reforms Slash Subsidies to Suppliers*, Fin. Times (July 13, 2013).

[30] *See* Anna Sands, *Regulatory Chill and Domestic Law: Mining in the Santurbán Páramo*, 22 World Trade Rev. 55 (2023).

https://doi.org/10.1017/aju.2024.43 Published online by Cambridge University Press

investment disputes raises questions about the extent to which models that rely on a lead agency performing coordinating functions are likely to be effective in preventing investment disputes, as well as deeper questions about the extent to which prevention of disputes should be a policy goal at all.

The Implications of Diversity Among States and in State Practice

Many states have processes in place to manage their compliance with, and liability risk under, investment treaties. However, the practice of empowering a lead agency to respond to investors' grievances at an early stage is specific to developing countries.[31] In the discussion of the *Draft Legislative Guide*, many states noted that the proposed model does not reflect the practice of Organisation for Economic Cooperation and Development states.[32]

Rather than establishing new institutions to deal with *investor* grievances, developed countries tend to rely on general, established practices to prevent disputes—for example, consultation with stakeholders (not just investors) in policy development, and transparent notice-and-comment procedures for proposed laws and regulations.[33] These general governance practices are supplemented by a government legal office that informs other parts of government about the implications of investment treaty obligations, provides legal advice across government, and manages the state's defense of ISDS claims. While these legal offices often act as lead agencies in coordinating the state's response to ISDS claims, they do not perform the range of dispute prevention functions envisaged by the *Draft Legislative Guide*. The U.S. State Department's Office of International Claims and Investment Disputes[34] does not act as a grievance mechanism allowing an investor to bring a complaint to Washington, D.C., for instance, about new Californian State Mining and Geology Board regulations concerning remediation requirements for open pit mining.[35] A whole-of-government investment grievance mechanism of the sort envisaged by the *Draft Legislative Guide* would be politically unthinkable in the United States and almost certainly unconstitutional given the constraints of federalism.

Conclusion

Proposals to institutionalize investment dispute prevention rest on a set of tendentious assumptions about the problem of investment disputes. While UNCITRAL Working Group III has moved on from the *Draft Legislative Guide*, assumptions embedded in that document continue to shape wider policy discussion. I have highlighted three particularly troubling assumptions, which I have argued are overly narrow at best, and wholly inaccurate at worst. Any future attempt to develop new "solutions" to the problem of investment disputes should be grounded in a more careful and explicit reckoning with the nature of the problem.

[31] South Korea is a partial exception. *See* Jonathan Bonnitcha & Zoe Philips Williams, Investment Dispute Prevention and Management Agencies: Toward a More Informed Policy Discussion (2022).

[32] Roberts & St John, *supra* note 19.

[33] *See, e.g.*, Sylvie Tabet, General Counsel, Canadian Trade Law Bureau, "Remarks," UNCITRAL Secretariat and World Bank, Forum on Dispute Prevention in Investor-State Dispute Resolution, Vienna International Centre (July 7, 2023).

[34] *See* Jeremy Sharpe, *Institutionalizing Investment Dispute Prevention: The U.S. Experience*, 118 AJIL Unbound 259 (2024).

[35] Readers may recognize these facts as the basis for the claim in Glamis Gold v. United States, Award, NAFTA Chapter 11 (UNCITRAL June 8, 2009).

https://doi.org/10.1017/aju.2024.43 Published online by Cambridge University Press