BEST PRACTICES IN INVESTMENT CONFLICT PREVENTION AND MANAGEMENT

ENERGY CHARTER SECRETARIAT
Brussels
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This paper has been prepared by Iryna de Meyer, Dominik Moskvan and M’ Cristina Baldemor; respectively, Junior Legal Assistant and former Legal Interns at the International Energy Charter, with the support of the General Counsel. The paper has benefited from the discussion held on 20.09.2016 at the Investment Group of the International Energy Charter and from a presentation by Mr. Jeremy K. Sharpe, partner at Shearman & Sterling and former Chief of Investment Arbitration at the U.S. Department of State, on best practices for States in organising their defense to international investment claims.
Introduction

Investment conflict prevention tools are designed to facilitate resolution of investors’ grievances at a very early stage, thereby preventing their escalation into full blown legal disputes. Should the issue invoked by the investor still persist and escalate into a full dispute, conflict management tools allow for an effective and coordinated response from the host state.

Conflict prevention and management mechanisms are fundamental to the maintenance of a long-term relationship between the investor and the host state. The ability of states to respond to investment-related issues strengthens existing investment relationships and contributes to the maintenance of those relationships in the host state’s economy. Moreover, they increase investment confidence of new investors to start their operations in the host economy.

To prevent and manage disputes host states should implement policy measures and instruments to deal with three potential stages:

1. **Before a problem arises**
   a. Preliminary design phase to design investment policies (which include negotiation of international investment agreements and relevant domestic legislation);
   b. Pre-conflict phase, where an investor experiences a difficulty either with unclear cause or the relevant state actor contributing to the problem has not been informed yet;

2. **After the problem arises but before it escalates into a full dispute:** authorities are informed but the grievance can still be addressed at an early stage;

3. **After a formal notice of dispute has been received**
Most of the practices mentioned below are standalone measures, although their immediate goals might overlap, and as a result reinforce each other if adopted in combination. In fact, sometimes both stages of conflict management – conflict prevention and dispute management – are interrelated and may overlap as well (e.g. additional grievances between the investor and the same or other state institutions may spark after a dispute has already started).

Although adopting a policy change in the host state’s system of dispute prevention and conflict management may entail short-term political and economic costs, foreign investment cycles are of a long-term nature. Efforts into dispute prevention and management mechanisms (if efficiently implemented and used) significantly improve the general quality, stability, and predictability of the investment environment.
1. Stocktaking

Stocktaking comprises a range of activities to provide a comprehensive understanding of the national investment environment. Stocktaking also consists of a thorough audit of the regulatory, institutional, and economic environment, and should feature the following fundamental processes:

i. Clear overview of international legal obligations undertaken by the host state (bilateral investment treaties; free trade agreements with investment provisions and double taxation treaties; legal stability contracts; privatisation contracts; concessions; agreements for the exploration and exploitation of natural resources; and all government agreements with foreign entities including an international arbitration or mediation/conciliation clause);

ii. Analysis of potential gaps between specific provisions of domestic law and international treaties binding on the state;

iii. Understanding as to whether the legal investment framework applies equally to domestic and foreign investors;

iv. Mapping the categories of foreign investors currently present in the territory of the host state, and subsequent analysis of the potential risks stemming thereof;

v. Comprehensive study into problems, conflicts, and disputes the host state experienced in the past;

vi. Overview of the host state agencies most frequently involved in the conflicts.

1.1 Peru

As an example, in 2006, Peru established a State Coordination and Response System for International Investment Disputes,\(^1\) coordinated by the Ministry of Economy and Finance. One of the main objectives, in addition to the coordination of the public entities involved in a dispute, is to centralise information on investment agreements, contracts, licenses and treaties signed by the Peruvian State that refer to international dispute settlement mechanisms.

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2. Identification and Monitoring of Sensitive Sectors

While the presence of foreign investments in economic sectors differ from state to state, some sectors may be more susceptible to arbitration than others. This may be due to the dependence of the host state’s economy on one dominant sector (e.g. oil, gas, and mining) or some other combination of factors contributing to a potential prevalence of disputes in certain sectors or areas of the economy. Adopting a targeted proactive mechanism of coordination in economic sectors that are crucial to the host state may prove to be particularly cost-effective.

Identification and monitoring of sensitive sectors is closely linked to stocktaking and may even be incorporated therein. This is due to the fact that proper identification of economic sectors with foreign investment inflows allows for a reverse, alternative methodology of detection of agencies and governance structures that may be exposed to investment claims from the foreign market operators. Moreover, whereas the provisions of treaties and national law may alter minimally, investment flows to a certain sector may change over the course of few months, potentially prompting a timely reaction from the institutional framework.

2.1 Colombia

When designing its conflict prevention and mitigation programme, Colombia first identified the areas that were most likely to generate a conflict. For instance, in Bogota district the government authorities mandated a survey to identify conflict-prone institutions and agencies. The survey focused on four major areas:

i. Contact with foreign enterprises;
ii. Functions undertaken by the agency;
iii. Enforcement and regulatory authority; and
iv. Document management and communication practices.

High-level decision makers or legal officers in twenty different agencies or governmental divisions were targeted. The analysis of the data obtained in the survey showed that agencies operating in sectors of public works, infrastructure, and environment were among the most susceptible to conflict with investors. Agencies with poor regular communication practices and insufficient document preservation methods were strongly linked to the agency’s overall high risk rating.
In 2009, Colombia established the System Enabler to Attract Investment (SIFAI), a public-mechanism that identifies and centralises information concerning investment climate and laws, regulations, or practices that could be improved in order to perfect the national investment strategy. Once such areas for improvement are identified, the interdisciplinary group consisting of the Minister of Commerce, Industry and Tourism; the Senior Advisor of Public and Private Management; the National Planning Director; the President of PROCOLOMBIA; and the President of the Private Competitiveness Council (private sector representative) meet with the objective to propose actions based on the system’s collection of data. The online platform also assesses impacts of sectoral economic reforms on the investment climate. For instance, in 2013 the SIFAI contributed to the changes in foreign trade (reduction of requirements to access the VAT exemption for export of services) as well as the immigration regime for investors (simplification of requirements for obtaining work visas, and investor visas-related real estate acquisition).

2.2 Dominican Republic

To identify economic sectors prone to investment disputes, the investment promotion agency of the Dominican Republic carried out a survey of investors’ complaints during the implementation of the Dominican Republic–Central America Free Trade Agreement (CAFTA-DR).

3. Creation of a Lead State Agency

A Lead State Agency (LSA) is a government agency established by a law or decree with conferred competences to implement conflict management mechanisms. Its main responsibility is to address the investor’s complaint (grievance or request for arbitration, depending on the institutional setting) and coordinate the responsive actions of relevant agencies involved. The host state may confer the following competences on the Lead State Agency:

   i. Serving as a central resource for all other state agencies, including dissemination of information concerning investment claims and developing an institutional memory;

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2 Sistema de Facilitación para la Atracción de Inversión. Accessible at [http://www.procolombia.co/apris](http://www.procolombia.co/apris)


ii. Providing support to, or representing, the state in negotiations of investment treaties as well as in negotiations with other state agencies concerning the obligations stemming from the investment treaties;

iii. Gathering and retaining records and information concerning investor-state proceedings; exercising authority to collect evidence and information from other agencies;

iv. Serving as a primary interlocutor for aggrieved investors and facilitating amicable settlement negotiations with the investor;

v. Coordinating, directing, and developing recommendations for prevention and management of international disputes;

vi. Ensure continuing training of civil servants at all levels of state administration;

vii. Leading the defence of the host state in case the investor dispute escalates into an arbitral claim, building on experience gained from each investment dispute;

Even though agencies that are responsible for negotiations of investment treaties may not necessarily be the same as those that serve as a contact point for investors on a daily basis, it is beneficial that they share their expertise on investment protection. If several government entities are involved in the events raised by the claim, coordination is crucial to achieve an efficient internal understanding of the dispute and objectively coordinate how to deal with the complaint (avoiding conflicting interests among the involved state agencies). It is therefore recommended that the LSA designate an officer to serve as the point of contact. This officer’s responsibility is to act as the single contact point for the investors as well as other agencies, whilst being well informed on the internal procedures to deal with such complaints or requests. The officer’s knowledge of internal procedures is critical to ensure effective streamlining of the complaints. In general, it is essential that the host state implements a set of clear internal rules (e.g. identifying the ministry responsible for the file; the source of funding for defences and settlement agreements; the procedures to engage an outside counsel) that the officer follows upon receiving a request. It would be desirable for this person to receive training in investment matters to be able to effectively streamline the information flow.

It is crucial that the lead agency be provided with sufficient resources and legal authority. Should the LSA lack funds to finance the costs of preventing and managing disputes, the ability of the host state to come up with a compelling robust defence would be affected. While some states have specific budget items to cover this eventuality, it is also important to ensure that any designated fund will receive any award of costs.
In addition, it is vital to have in place standard operating procedures to ensure that the LSA promptly receives, and is required to take action on, any notice of arbitration or request for arbitration. This could be additionally facilitated by posting the information online (easily accessible to potential claimants) even with a non-binding template Notice of Intent to submit a claim to arbitration. As an example of the later, the Free Trade Commission published a template Notice in relation to Claims under the North American Free Trade Agreement (NAFTA).\(^5\)

### 3.1 Costa Rica

In 2009, Costa Rica created the Inter-Institutional Commission (CISC) as the lead agency for the settlement of international trade and investment disputes.\(^6\) The CISC is coordinated by the Ministry of the Office of the President, and the Commission consists of representatives from other ministries (foreign trade, foreign affairs, finance, justice), as well as any agency relevant for the dispute. Members meet at least once a year (if there is no pending ISDS case) or at least once every three months (in case there is an ongoing investment dispute). The Commission monitors and coordinates the handling of disputes, requests for information and adopts decisions in the area of investment dispute settlement.

### 3.2 Colombia

Colombia established the High Level Government Body (HLGB) to address international disputes.\(^7\) The members of the HLGB are the members of the Board of Advisors of the National Agency of Legal Defence of the State, i.e. the Minister of Justice and Law, the Minister of Finance, the Minister of Foreign Affairs, the Minister of Trade, Industry, and Tourism, and the Legal Secretary of the Presidency of the Republic, as well as two external advisors. The Body coordinates, directs, and develops mechanisms for preventing and managing disputes. It is supported by the Inter-Institutional Support Group and the Ministry of Trade, Industry, and Tourism (MTIT). The Inter-Institutional Support Group comprises officials from the HLGB, the agency involved in the dispute, and any other agency that the HLGB would consider relevant for the dispute. The group is further coordinated by the Director of Foreign Investment and Services of MTIT (which

\(^5\) [http://www.state.gov/documents/organization/38792.pdf](http://www.state.gov/documents/organization/38792.pdf)


becomes the lead agency once the conflict reaches the stage of investor-state arbitration).

Phases: I. Centralization of notifications and coordinating of responses; II. Consultations on between investors and the lead agency – lead agency is the front desk for contacts between investors and the state; III. Arbitral proceedings stage. Source: UNCTAD\(^8\)

### 3.3 Chile

In Chile the lead agency is the Committee on Foreign Investment (CIE Chile).\(^9\)

### 3.4 Mexico

Mexico’s investment promotion agency ProMexico is the entity responsible for investment aftercare.\(^10\) The agency maintains communication with investors, and is commonly the first public entity to be informed about an issue that the investor is

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facing. ProMexico takes on an active role in the communication with investors and often functions as a mediator between investors and other governmental agencies. The promotion agency also alerts other authorities should ProMexico consider the investor’s grievance to be serious enough to lead to an arbitral proceeding.

If the efforts of ProMexico to resolve the grievance fail and the conflict escalates into investment arbitration, the Secretary of Economy’s Legal Advisor for Negotiations General Directorate (who is also responsible for the design and implementation of dispute prevention mechanisms) takes over the file and continues to manage the dispute.\footnote{APEC, Investor-State Dispute Prevention Strategies (2013) 26.}

\subsection*{3.5 Peru}

The Special Commission that represents Peru in international investment arbitration was established in 2006 as part of the dispute prevention and management system \textit{(see point 1.1)}. The Commission includes four permanent representatives (the Ministry of Economy and Finance, Ministry of Foreign Affairs, Ministry of Justice and ProInversion, and Peru’s investment promotion agency) as well as two ad hoc members (the Ministry of Trade and Tourism once there is an investment dispute, and the agency responsible for adopting the measure invoked by the investor). The Special Commission coordinates the state’s actions and conducts negotiations aimed at resolving the dispute.

\subsection*{3.6 Slovakia}

Slovakia conferred the competence to deal with investment promotion on the Slovak Investment and Trade Development Agency (SARIO), whilst the competence to manage disputes originating from a breach of an investment treaty lies within the purview of the Ministry of Finance. The Ministry of Finance is obliged to manage investment arbitration irrespective of the agency or body that allegedly caused the breach of the investor’s right.\footnote{Law No. 575/2001(zákon č. 575/2001 Z. z. o organizácii činnosti vlády a organizácií ústrednej štátnej správy v zneni neskorších predpisov).}

\subsection*{3.7 Czech Republic}

A dual governance structure, similar to Slovakia, was adopted by the Czech Republic’s CzechInvest, the investment promotion agency, and the Ministry of Finance, the lead agency in the phase of an escalated investment dispute. The Czech Ministry of Finance
established a specialised unit dealing with investment arbitration as well pre-arbitration negotiation of agreements for the promotion and protection of investments.\textsuperscript{13}

3.8 Latvia

In November 2015, the Cabinet of Ministers of Latvia adopted the Informative Report on the Representation of the State Interests in International Investment Disputes.\textsuperscript{14} According to the Report, the State Chancellery shall represent national interests in international investment disputes and draft the state’s positions. Furthermore, the State Chancellery shall be in charge of the relevant legal research, communication with investors, legal training for the state administration employees as well as consulting the Cabinet of Ministers on the protection of the foreign investments. The State Chancellery can involve other institutions that have connection to the dispute and ask for consultation from external experts.

3.9 Bulgaria

In Bulgaria, the Litigation Directorate under the Ministry of Finance acts as LSA in arbitration cases against the state.\textsuperscript{15} Among the functions performed by the Litigation Directorate, as defined in Article 36 of the Ministry of Finance Structural Regulations, are:
- represent as counsel, the State, the Minister and the Ministry under legal and arbitration proceedings before the judicial authorities in the country;
- organise, coordinate and manage the protection of the Bulgarian state in international arbitration cases;
- represent as counsel, the Bulgarian state in foreign jurisdictions, including in international arbitration proceedings;
- draw up opinions on legal issues in connection with on-going and future legal and arbitration proceedings;

3.10 Vietnam

Vietnam’s 2014 Regulation on Coordination in Resolution of International Investment Disputes\textsuperscript{16} established a specific managing authority to be assigned to each dispute according to its involvement in the act giving rise to the dispute. E.g. the State bodies that led the negotiations or represented the Government in the signature of contracts or

\textsuperscript{13} \url{http://www.mfcr.cz/en/about-ministry/organisation-chart/section-02-legal/dept-65-international-legal-services}

\textsuperscript{14} Informative Report on the Representation of the State Interests in International Investment Disputes, 44.§, 17 November 2015, \url{http://www.likumi.lv/doc.php?id=277962}

\textsuperscript{15} \url{http://www.minfin.bg/en/page/938}

\textsuperscript{16} Decision No. 04/2014/QD-TTg
agreements with foreign investors shall be the Managing Body handling the dispute arising out of these contracts or agreements; the Ministry of Justice shall be the Managing Body in disputes based on investment protection agreements and the Ministry of Finance shall manage the settlement of disputes in respect to the Government’s loans, debts or the Government’s secured loans.

The Ministry of Justice shall also represent the Government in determining strategies to settle international disputes and it shall liaise with relevant parties and lawyers along with the Managing Body. When needed, a joint committee will be established among members of the Managing Body and other relevant parties. The presiding agency and relevant agencies, organizations and individuals shall be responsible before law about consequences arising because they fail to coordinate.

In addition, the Regulation states that “[t]he expenses associated with international investment disputes are funded by central or local budgets but the Prime Minister retains the ability to decide on funding for special cases.”

3.11 U.S.A.

The US Department of State is the lead agency representing the U.S. government in international investment disputes.\footnote{17} It closely coordinates with a few federal agencies during international investment disputes and loosely coordinates with some two dozen other agencies. Notices of Intent to submit a dispute to arbitration should be received by the US State Department’s Office of the Legal Adviser’s Executive Office.

In addition, there is an International Litigation Fund (to cover costs of international investment disputes) and a Judgment Fund (to pay claims against government).

4. Integrated Information Sharing System

Once the lead agency is created, it is essential to establish an effective information sharing system to ensure the LSA is informed of the existence of an investment grievance. Information sharing also enables the lead agency to diffuse relevant information to those agencies that are likely to be involved in an investment conflict.

Detailed substantive information should be shared amongst the highest possible number of governmental departments and agencies. Failing to learn about the conflict in time hampers the institutional process of mediating the conflicting interests of the

\footnote{17} http://www.state.gov/s/l/c3433.htm
investor and the state. As a result, this situation leads to an increase of investor’s frustration, which increases the risk of the investor submitting the dispute to an arbitral tribunal. Learning about the conflict before the notice of intent for arbitration is filed is of crucial importance; especially since investor-state grievance may result from an issue caused by a local body or an agency at a lower stage of state administration. Furthermore, early assessments of the investor’s grievance may also prevent investors from instigating investor-state arbitration based on frivolous claims and dispel concerns that the host state may face later at much larger scale.

Once an investor’s grievance is registered by the competent authority, all host state’s institutions may benefit from sharing a set of fundamental information pertaining to the investor/investment in question. For instance, a list similar to the following may be completed with the first notification of a grievance (consistently updated by the relevant agencies), and shared with other authorities:

i. Investor profile and amount of stock of investment;
ii. Factual background of the grievance;
iii. Government agency involved;
iv. Impact of the grievance on investor’s revenue;
v. Impact assessment on the relevance of the grievance to the sustainability of investor’s operation in the host state;
vi. Impact of the grievance on the investment plan in non-financial terms;
vii. Action taken by the investor;
viii. Existence of a domestic/international court case relating to the grievance; current status of case;
ix. Availability of mechanisms to discuss early resolution of the dispute;
x. If a resolution is found, it should be documented and its term shall be made clear to the parties involved;
xii. Preliminary assessment of potential liability under the claim to the host state if unresolved and pursued by the investor.

4.1 Peru

Peru’s investment dispute prevention system requires that the government agencies at all levels of administration (national, regional, municipal) report any agreement or treaty under the scope of the system. This allows for the Peruvian state to be informed of the existence and the content of investment agreements also including those that could have been signed at a local level, and which might be left unnoticed until the agreement is disputed in a full-blown investment arbitral dispute. The response system requires that any agreement concluded by any agency be reported within 30 days after the
agreement enters into force or is signed. Governmental agencies are also expected to report any controversy linked to the agreements. When reporting an investment alert in the Response System, the system requires the following information to be filled in:

i. Personal information (name; type and number of document; country of nationality; phone; and email) and information of represented person if applicable.
ii. Information on the agreement (type of agreement; type of contract; type of contracting agency; name of contracting agency; name of the agreement).
iii. Description of the problem.

If a state agency learns or is notified of the intention of a foreign investor to commence investment arbitration against the host state, the agency reports this dispute within five days. In order to support dissemination of knowledge about investment disputes officials from targeted governmental agencies are to undergo training provided by the central government.

4.2 Chile

Information sharing is conducted on an ad hoc basis by Committee officials’ presentations at a regional level.

4.3 Mexico

Mexico’s Secretary of Economy’s Legal Advisor for Negotiations General Directorate is the coordinating agency in the established communication network among all other agencies relevant for the dispute. The agency also provides training to central, regional, and municipal governments on the potential collision of their activities and policy decisions with commitments in investment treaties. Apart from training, Mexico has also disseminated a handbook for public servants on investment treaty obligations and their impact on public policy.

4.4 Colombia

To advise the Colombian state agencies on prevention of investment disputes and to ensure integration of public servants in the mechanism, the Directorate of Foreign Investment and Services of the Ministry of Trade, Industry, and Tourism prepared and distributed a handbook explaining investment protection. The handbook provides public servants with guidance as to how they can prevent a grievance or a conflict arising in the first place. Also, the Directorate has been involved in training and communication
with the local and regional governments, chambers of commerce, and associations in the area of investment dispute prevention and management. Furthermore, the Directorate organises training workshops where participants take part in simulations of situations in which a law or a policy could breach investment protection.

5. Grievance Mechanism & Problem-solving Techniques

Investors usually attempt to resolve their disputes informally before bringing them to an arbitral court. Once the local government, other state entities, or investment promotion agency becomes acquainted with the existence of what investors consider to be an issue, the host state may employ several strategies. Common problem-solving techniques employed in order to reach an early resolution of the dispute include:

i. Formal and informal negotiation
ii. Early neutral evaluation
iii. Mediation
iv. Fact-finding
v. Ombudsman’s Office (see next Chapter)

Implementing a grievance mechanism has several advantages for both the host state and the investors. Firstly, the resolution of the investor’s grievance at the stage of a complaint prevents the escalation of the conflict into an arbitral claim, thus ensuring effective allocation of both the investor’s and the host state’s financial resources. Furthermore, resolution of a dispute at the very early stage increases the chances that an investor will continue its investment activities in the host state. Centralised mechanisms and administration of grievances allow also for consolidation of institutional memory of the investment climate, and therefore facilitate identification of potential regulatory improvements. Should the conflict nonetheless escalate into an arbitral proceeding the grievance mechanism provides for an early alert allowing for the host state to better understand and prepare for the dispute.

6. Investment Ombudsman

The Investment Ombudsman is a public office with a significant degree of independence that is charged with investigating and addressing investment complaints. The office of investment ombudsman usually resolves grievances by mediating between the investor and the state agency in question. The Investment Ombudsman may also issue recommendations (binding or non-binding) to state institutions regarding the regulatory framework and the investment climate.
In OECD Member States, similar functions may be carried out by the National Contact Points (NCPs) established pursuant to the OECD Guidelines for Multinational Enterprises since the NCPs are to provide a mediation and conciliation platform for resolving practical issues that may arise with the implementation of the Guidelines.\textsuperscript{18} These Guidelines cover a wide spectrum of standards for responsible business conduct in, \textit{inter alia}, employment, industrial relations, human rights, environment, taxation. The following Members to the Energy Charter Conference have appointed NCPs: Australia, Austria, Belgium, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Latvia, Lithuania, Luxembourg, Netherlands, Norway, Poland, Portugal, Romania, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Turkey, and United Kingdom. In addition, the following Observers to the Energy Charter Conference have appointed NCPs: Canada, Egypt, Korea, Morocco, Tunisia, and the United States of America. To date, approximately 300 specific instances have been treated by country NCPs. Most of them are included in an online database.\textsuperscript{19}

The involvement of the ombudsman may be beneficial for an investor due to the fact that the integrity of the institution is built upon its independence with regard to other state agencies. Moreover, maintaining negotiations concerning grievances, which are self-contained from the agency directly involved in the dispute and which are ‘without prejudice’ basis, prevents the investor from being discouraged to report unfavourable treatment by the state authorities.

6.1 Republic of Korea

The Office of Foreign Investment Ombudsman\textsuperscript{20} was established in the Republic of Korea in 1999 by the Korea Trade Investment Promotion Agency (KOTRA). The Foreign Investment Ombudsman system was created to strengthen the grievance settlement of foreign-invested companies operating in Korea. It is commissioned by the President on a recommendation of the Minister of Trade, Industry & Energy, via the deliberation of the Foreign Investment Committee. However, the ombudsman enjoys an independent status, which allows the office to objectively identify and inspect problems. He/she also heads the grievance settlement body, which supports the duties of the Ombudsman.

\textsuperscript{18} NCPs are agencies established by adhering governments. They are tasked to undertake promotional activities, handling enquiries, and contributing to the resolution of issues that arise from the alleged non-observance of the guidelines by the companies in specific instances. See further http://www.oecd.org/investment/mne/ncps.htm
\textsuperscript{19} http://mneguidelines.oecd.org/database/
\textsuperscript{20} http://ombudsman.kotra.or.kr/eng/index.do
In the past, the office has resolved grievances addressed in the following areas: investment incentives; taxation; investment procedure; visa and immigration; customs and trade; certification and inspection; environment; finance and foreign exchange; and road and transport. Should investors complain about the inadequacy of laws or other administrative procedures, the ombudsman office may directly advocate improvements. A consultation with the ombudsman’s office is free, and the files are kept confidential. The office assigns a ‘home doctor’ to the filing investor and they can check the status of the grievance procedure online.

Source: Foreign Investment Ombudsman (KOTRA)²¹

²¹ [http://ombudsman.kotra.or.kr/eng/ogc/useguide.do#none](http://ombudsman.kotra.or.kr/eng/ogc/useguide.do#none)

²² Foreign Investment Ombudsman Brochure, 5 [http://ombudsman.kotra.or.kr/eng/au/poelb.do](http://ombudsman.kotra.or.kr/eng/au/poelb.do)
The Foreign Investment Ombudsman and his grievance resolution body collect and analyse information concerning the problems foreign firms experience, request the cooperation and recommend the implementation thereof to relevant administrative agencies, propose new policies to improve the foreign investment promotion system, and carry out necessary tasks to assist foreign companies in solving their grievances.

There is therefore an attempt to resolve the investor's grievance through in-house methods or through cooperation with other related government bodies and agencies. Since the aim is to achieve a prompt and effective solution upon the receipt of the grievance, the relevant administrative or foreign investment agency should notify the grievance settlement organ on its opinion on the matter within seven days after the date on which the request was made. If a settlement of the issue proves to be impossible, the Office directly advises Korea's main investment policy-making bodies on the systemic changes that should be adopted.

6.2 Kazakhstan

Should a grievance arise any investor in Kazakhstan may appeal to the Investment Ombudsman Office. The function of the Investment Ombudsman is assigned to the Minister for Investment and Development, who reports on its activities and recommendations at the meetings of the Council on Improving the Investment Climate. The Investment Ombudsman is vested with the power to:

i. Address investment-related complaints from foreign investors and gives non-binding recommendations for their solution, including interacting with government bodies;
ii. Assistance to the investors in solving issues arising out of extrajudicial and pre-judicial procedures; and
iii. Develop and suggest recommendations to the Government for improving the investment regulatory framework.

In 2015, the office dealt with 62 grievances, mostly in the areas of taxation, customs regulation, trade mark registration, infrastructure, migration, labour, construction, licensing, and land relations. 20 decisions were taken in favour of the investors. 8 issues of systemic character were developed into the ombudsman’s recommendations for adjustments in the Kazakh investment protection framework. The Ombudsman’s office has also created an interactive platform for investors where investors may actively propose improvements of the investment environment.²⁵

6.3 The Philippines

The Philippines introduced the investment ombudsman²⁶ to promote good governance and transparency, and to attract more investors to the country.²⁷ The Office of the Ombudsman, constituted by the Investment Ombudsman and the Assistant Investment Ombudsman, resolves investment-related grievances and provides assistance to investors. It aims at expediting resolution of investors’ issues and investors may turn to the ombudsman in cases of administrative delays as well as in cases of issuance of licenses, permits, and certificates.

The Investment Ombudsman acts as the approving authority in all action documents of investment-related complaints undergoing field investigation, while the Assistant Investment Ombudsman (in the case of central office) or the concerned field investigation director (in the case of area offices) shall be the reviewing/recommending authority. The main functions of the Investment Ombudsman Team are:

   i. Grievance-handling or public assistance; and

ii. Fact-finding.

Investors may file their grievances with Investment Ombudsman Action Officers through text, phone call, email, letter; and a personal visit. The Action Officers may resolve such grievances through one of the following modes: (1) by telephone call; (2) by calling parties to a conference; (3) by personal visit if the grievance requires immediate action; (4) through other courses of action deemed necessary, appropriate and proper to expeditiously resolve the grievance. The fact-finding investigation of Investment Ombudsman cases is completed within 30 working days from receipt of the case assignment.

6.4 United States of America

The ombudsman’s office\(^\text{28}\) within SelectUSA agency provides a single point of contact for investors facing difficulties with federal bureaucratic and regulatory matters in the United States of America. SelectUSA is intended to promote the United States as the best market for investment and to address federal-level business climate concerns that may impede foreign investment flows. The ombudsman’s office was established by the Department of Commerce in 2007 and it cooperates with another federal body (FIIWG), which responds to specific federal regulatory issues that impact investors’ decisions. The ombudsman’s office acts as a consultative or advisory body and does not have a dispute-settlement mandate.

6.5 Georgia

The Tax Ombudsman institute was created in Georgia in 2011. However, as from 2015, a new law on Georgia Business Ombudsman came into effect, on the basis of which the institute continued operating under a new name.\(^\text{29}\)

According to Article 6 of the Law, the responsibilities of the Business Ombudsman include: to supervise the protection of rights and legitimate interests of an investor in Georgia, to reveal the facts of violation of those rights and legitimate interests by an administrative body and to facilitate restoration of violated rights in accordance with the rules stipulated by the law. The Business Ombudsman shall provide the protection of the rights and legitimate interests of investors through the following:

a) Respond to individual and joint applications;

\(^{28}\) [http://selectusa.commerce.gov/ombudsman-services.html](http://selectusa.commerce.gov/ombudsman-services.html)

b) Reveal errors in the Georgian legislation and practice;
c) Conduct informational-consultative activities.

In exercising its competences, the Business Ombudsman is entitled to request and receive information from administrative bodies; create working groups (which may include representatives of administrative body and private sector); and address the specialist, scientific and/or educational institution for explanation/conclusion needed for the work purposes. The Business Ombudsman publishes annual reports on the past activities. The problems revealed by the Office of Business Ombudsman by the nature of origin can be divided in two parts (a) problems arisen because of the flaws of the legislation and (b) problems arisen during enforcement of the law, e.g. administration problems. The reaction of the Business Ombudsman’s Office differs according to the type of problem:

- If the problem is created during enforcement of the law (wrongful administration), the Ombudsman’s office will conduct an exhaustive study of all the circumstances, and based on this, will issue the recommendation to the respective administrative body. It will also monitor the performance of the recommendation until the end of the administrative proceedings.
- If the problem arises because of the flaw of the legislation, an opinion will be prepared and discussed in a working format with the respective government agency and interested business entities. After the working process, the finalised opinion is to be presented to relevant Ministry.30

6.6 Greece

Invest in Greece Ombudsman was established by the Greek Law 4146 of April 2013 on the ‘Creation of a Development Friendly Environment for Strategic and Private Investments’. The ombudsman’s office has a dual role:

i. The Ombudsman operates as a statutory mediator on behalf of the investor for the resolution of specific disputes or other difficulties arising at stages of the licensing procedure, and also for the overcoming of extraordinary delays in the implementation of investment projects.
ii. The Ombudsman actively contributes to the improvement of the institutional investment framework in Greece. Through the submission of semi-annual reports to the Minister for Development, Competitiveness, Infrastructure, Transportations & Networks, the Ombudsman identifies and highlights key

issues arising at stages of investment projects that call for improvement/resolution and submits documented proposals for such improvements. The role of the Ombudsman is carried out by ‘Enterprise Greece’ under the supervision of the Ministry for Development and Competitiveness.³¹

Investors in projects exceeding the value of two million Euro may bring a complaint to the Investor Ombudsman on specific bureaucratic obstacles, delays, disputes or other difficulties arising from licenses granted by the State or by State actors. The Investor Ombudsman receives and examines the complaint, collects supportive documents needed to examine each case, identifies the competent public authorities and the stage of each case, requests and receives comprehensive information on each specific project/case and estimates the factors causing delays, and cooperates with the competent authorities to accelerate the resolution of specific cases and monitors the resolution process.

The Investor Ombudsman recommends to the competent sectors measures of implementation for the acceleration of the process and composes a six month report to the Minister of Development, Competitiveness, Infrastructure, Transports and Networks, in which the Investor Ombudsman highlights the main issues that investors encounter in Greece and suggests of improvement of the institutional framework. The Investor Ombudsman cannot receive requests concerning cases pending before domestic courts or already judged by a court.

6.7 Japan

The Office of ‘Invest Japan’ and the Subcommittee on Improvement of Business Environment were established to improve access of foreign investors to the Japanese market and to promptly solve issues regarding the business environment.

The initial Office of Trade and Investment Ombudsman (OTO), originally introduced in 1982 and modified in 2001,³² has been transformed into the Cabinet Office for Regulatory Reform. The office continues to accept requests for regulatory reforms.³³ In addition, the one-stop office of ‘Invest Japan’³⁴ was created with offices in the Cabinet, several ministries and their regional bureaus, local governments, and the Japan External Trade Organization (JETRO). The Office of Invest Japan provides the following services:

³¹ http://www.investingreece.gov.gr/default.asp?pid=100&la=1
See also http://www.investingreece.gov.gr/default.asp?pid=127&nwslID=27&sec=12&la=1
³² http://www.japan.kantei.go.jp/policy/index/market/konkyo_e.html
³⁴ http://www.invest-japan.go.jp/contact/en_index.html
i. Request of information on investment.
ii. Complaints about processing of the advanced notification system and on investment.

Several Japanese Economic Partnership Agreements provide for a Sub-Committee on Improvement of Business Environment (composed of governmental authorities and representatives of the private sector) with the function of addressing, and seeking ways to promptly resolve issues related to the business environment on its own initiative or based on the findings reported by the Liaison Office.

6.8 Moldova

Moldova declared its intention to create the Business Ombudsman Institute, in November 2014. The Business Ombudsman Institute is meant to address concerns and complaints by businesses concerning instances of ill-treatment or unfair competition. The Memorandum of Understanding (MOU) on the Investment Climate and Governance Initiative for Moldova is a result of the initiative of the Government and the European Bank for Reconstruction and Development (EBRD). It provides for a framework for cooperation between the Government of Moldova and the EBRD to strengthen the development of the private sector, improve the investment climate and promote good governance.

6.9 Mongolia

Foreign Investment Ombudsman Council’s main goal is to support foreign companies who have investments in Mongolia, protect their rights, conduct different services, attract new investments, promote country branding, address and resolve the difficulties experienced by foreign companies, and to create an overall more favourable investment environment, while harmonising the country’s bureaucratic/administrative system so that it is in conformity with the global standards. The Council was established by the Mongolian National Chamber of Commerce and Industry, a non-governmental institution, in 2007. Should investors experience any problems, they may report their grievances directly to the Council. The main functions of the Council include:

i. Tackling bureaucratic red tape and cumbersome administrative procedures;
ii. Improving the overall foreign investment environment;
iii. Conducting foreign investor surveys aimed at enhancing Mongolia’s standing as a friendly and comfortable location for doing business;
iv. Issuing Investment Guide;
v. Providing visa assistance service;
vi. Providing information on business and investment;

vii. Arranging individual meetings; and

viii. Arranging logistics in Mongolia.

6.10 Russian Federation

The Russian President announced his decision to appoint the Ombudsman for Entrepreneur’s Rights at the St. Petersburg International Economic Forum in June 2012.\(^{35}\) This position was designed as an additional measure of protection and advocacy for entrepreneurs. The relevant law was signed on May 7, 2013 (Federal Law).\(^{36}\) According to the Federal Law, at the end of the calendar year the Ombudsman reports on the results of his activities to the President. The Ombudsman has the right to establish public contact points on the territory of the Russian Federation, providing consultations for entrepreneurs on issues related to the competence of the Ombudsman. The main tasks of the Ombudsman include:

i. Protection of the rights and legitimate interests of Russian and foreign business entities on the territory of Russia and Russian entrepreneurs abroad; and

ii. Monitoring compliance with the rights and legitimate interests of business entities by the federal executive bodies/ and local authorities.

The Ombudsman’s remit includes advocating for foreign and domestic business rights in court and requesting suspension of official actions if investors feel their rights were violated.

6.11 Ukraine

The establishment of the Business Ombudsman Council (BOC) is intended as a major reform initiative to fight corruption, hold governmental agencies accountable for their actions, and enhance the transparency, effectiveness and attractiveness of Ukraine’s investment environment. The Business Ombudsman Council was created by Resolution No. 691.\(^{37}\) Algirdas Šemeta, former European Commissioner and Minister of Finance of Lithuania has been the Business Ombudsman in Ukraine since December 2014. The BOC


is funded through the Multi-donor Account for Ukraine set up at the European Bank for Reconstruction and Development (EBRD) in 2014. The donors of the Multi-donor Account for Ukraine include Denmark, Finland, France, Germany, Japan, the Netherlands, Poland, Sweden, Switzerland, the United Kingdom and the United States.\textsuperscript{38}

An investor can contact the Business Ombudsman in case of a problem with a state and municipal authorities, state-owned/controlled company that they have been unable to resolve. The Business Ombudsman prepares recommendations for government agencies and uses his authority to ensure such agencies properly implement recommendations in a timely manner. He can also pass the case to the Anticorruption bureau and draw attention of the President or Prime Minister to the issue.

Complaints should be filed via the website. The Ombudsman may start an investigation on his own initiative if he learns of cases of alleged business malpractice from the media or any other sources. In the past, the Business Ombudsman Council dealt with complaints coming predominantly from manufacturers, wholesalers, distributors, agribusiness, and the mining industry. Investors have experienced most urgent problems primarily in interactions with fiscal agencies, and municipalities over land allocation and ownership. Investigations were undertaken in 58\% of received complaints and resolved cases had the direct financial effect of 215 million UAH.\textsuperscript{39} The average time for the preliminary review of the complaint amounted to seven working days.\textsuperscript{40}

**Concluding Remarks**

Whereas the existence of investment treaties and the increased invocation of investment guarantees exert further pressure on administrative structures of the host states, effective dispute management and conflict prevention techniques may not only bring many disputes to an end before they reach the phase of adjudication, but in the long run they contribute to the improvement of the domestic investment environment.

A grievance-solving mechanism, which is typically part of the conflict management structure, also serves as an early alert, providing the lead agency, or the agency dealing with the complaint, a chance to detect an individual risk, as well as systemic risk to the legal, administrative, and financial systems of the host state.

\textsuperscript{38} Web-site of the BOC, https://boi.org.ua/en/about
\textsuperscript{40} Id, at 7.
The overview of best practices observed among various host states shows that optimisation of investment dispute management and prevention policies starts first with the explicit acknowledgment that a problem may arise, and follows with the host state’s readiness to solve the issue at the earliest stage. Coordination and internal information sharing is key. The measures and systems may legitimately differ as long as the functional equivalence of the measures can be attained – to prevent emergence of a conflict and effectively manage it should it still arise.

Whereas it should be clear where investors can turn to in case of problems or of a dispute, investors should not be expected to be familiar with the internal governance procedures. In an ideal situation, investors would be able to turn to a single agency for help (‘one-stop-shop agency’). Nevertheless, as long as the internal coordination of the host state’s administration functions properly, i.e. the system lowers the risk of conflict and provides for a management practice if it yet arises, the host state is at liberty to determine its own internal policy. When balancing their conflict prevention and dispute management policies, host states may utilise the synergic effect of other investment-related structures that follow the same goal, including the OECD National Contact Points or the enquiry points already established pursuant to Article 20 (3) ECT.