



**Asia-Pacific  
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## **Dispute Prevention Policies and on Investor-State Dispute Settlement Management**

Submitted by: Peru



**Capacity Building Workshop on Investor-State  
Dispute Settlement Prevention and Management  
Washington, D.C., United States  
3-6 October 2017**



# DISPUTE PREVENTION POLICIES AND ISDS MANAGEMENT

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APEC Capacity building workshop on investor-State  
dispute settlement (ISDS) prevention and management

Washington DC – 3-7 October

Anna Joubin-Bret

Avocat à la Cour – Paris (France)

## The context: The specific nature of investor-State dispute settlement

- They involve measures taken by a sovereign State at the central, regional or municipal levels). The State is **ALWAYS** the defendant in these cases;
- Recourse to international arbitration is among the options an investor can choose from – usually no alternatives in the treaty;
- The dispute is subjected to international law;
- The relationship between investors and host States are meant to be long term;
- A final award granting compensation defeats the purpose of investment promotion;
- The amounts to defend the cases and final awards are very high and involve public money.

# Disadvantages of investment arbitration

- Generally costly and takes a long time before the final decision.
- Requires intensive involvement of human resources. High level of sophistication.
- Limited control by the State over the arbitration process and the outcome.
- It will negatively affect the relationship between the investor and the State and have a negative impact on the investment climate and the general perception of the State as an investment destination.
- It generates concerns about the ISDS system and public scrutiny.
- It is based on monetary compensation through public funds.

# Dispute Prevention Policies (DPPs) – Early work by UNCTAD

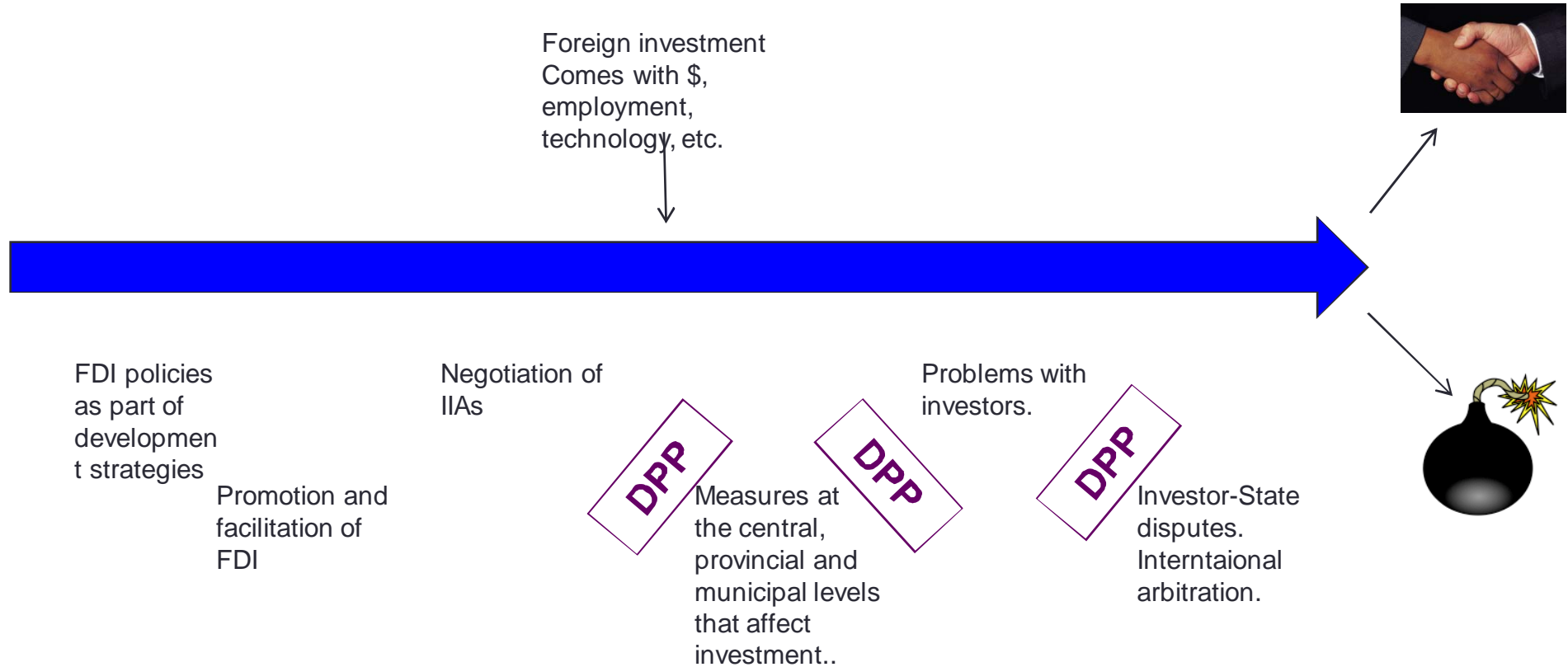
Preventing, avoiding and managing investor-State disputes settlement is an important contribution to improving the investment climate.

It is a logical component of investment promotion policies but goes further into global governance and development objectives

Dispute Prevention Policies (DPPs) are used by more and more countries as part of the implementation of their international investment and adequately addressing investment disputes.

The bottom line is that investment that comes and stays contributes to economic development. Investment that leaves is a loss for the State.

# DPPs: Coordination and monitoring at different stages



## DPPs – a road-map for a systemic response

- ◆ STEP 1: Upfront best practice
- ◆ Coherence, integration and monitoring in the formulation and implementation of FDI policies. FDI policies *per se* and boarder regulatory framework in which investment operates.
- ◆ Monitoring of sensitive sectors: data compilation and analysis: where is investment going, what do problems occur, where are the bottle necks to investment inflows and operation, where do disputes arise.
- ◆ Negotiation of investment contracts and investment treaties that include ISDS provisions.
- ◆ Best practices: Dominican Republic (Coordination) and Peru (SICRECI).

# DPPs – a road-map to a systemic response

- ◆ STEP 2
- ◆ Institutional coordination
  - ◆ Establishing a system for institutional cooperation and coordination at all levels.
  - ◆ **Negotiation/prevention/defense**
  - ◆ Identifying a lead agency in charge of DPPs. **Best practices examples: Peru, Colombia, Peru, Singapore.**
  - ◆ Establishing a legal (Peru) or regulatory (Colombia) system to deal with investment policies and disputes. Budgetary issues, institutional coordination, supervising authorities.
  - ◆ Tasking the lead agency with prevention policies to prevent, avoid and manage investment disputes.
  - ◆ Role in early stages of a dispute: settlement during the cooling-off period.



# DPPs – a road-map to a systemic response

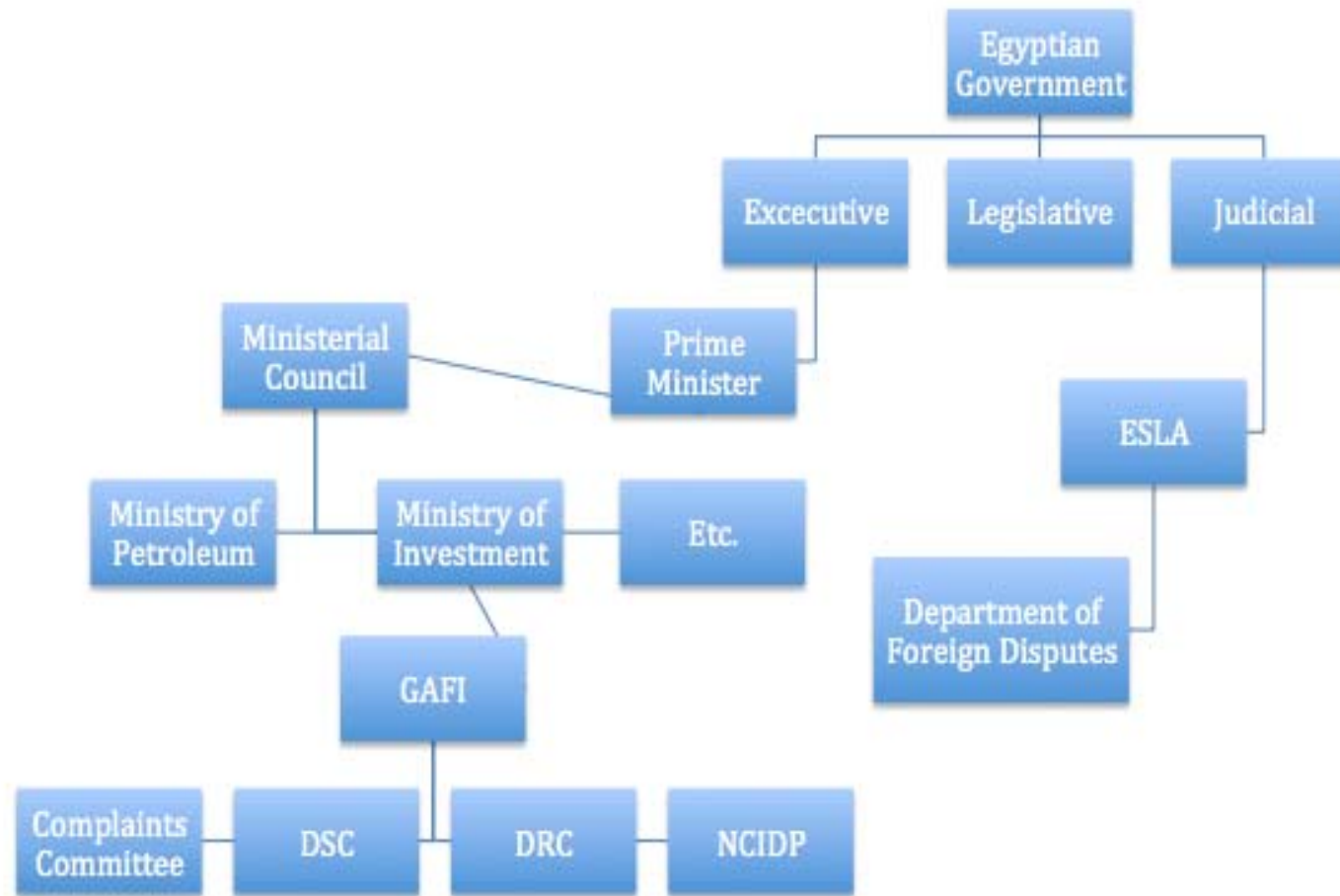
- ◆ STEP 3
- ◆ Paying attention to government officials:
  - ◆ Creating **awareness and knowledge** among government officials about international commitments.
  - ◆ Identifying agencies and levels of government involved with investment policy formulation and implementation. Three levels: executive, legislative and judicial. Central, regional and municipal.
  - ◆ Establishing **two way** communication channels: institutional cooperation. Identifying a central agency to be the interlocutor
  - ◆ Identify and train possible sources of early information and interlocutors for foreign investors. The role of diplomatic services.
  - ◆ Establishing an **early alert system**.

# DPPs – An institutional response

- The example of Egypt:
  - 81 BITs over the years of active economic diplomacy
  - GAFI
  - Ministry of Investment
- Boom in FDI in the early 2000
- Sharp decline after 2011
- Political decision: the Sharm-el-Sheik speech by Pdt Sissi

# DPPs – Institutional framework

The exemple of Egypt



# DPPs – a road-map to a systemic response

- ◆ STEP 4
- ◆ Special attention to the foreign investors:
  - ◆ Constant dialogue with foreign investors. Investment promotion and after-care. A role for investment promotion agencies.
  - ◆ Monitoring: questionnaires, communication,
  - ◆ Promotion of dispute prevention policies: dialogue during the cooling-off period, alternative approaches to investor-State disputes, institutional coordination identifying a dialogue partner.
  - ◆ Best practices: South Korea: Ombudsman within the investment promotion agency (KOTRA), Ombudsman at the MCI in Saudi Arabia, Ombudsman in Georgia, Ombudsman in Australia

# Dispute prevention policies: the “best practice” case of Peru

- The “Law on State Response” to international investment disputes of 2006.
- The SICRECI
- Two pillars:
  - Harmonization and coordination of investor-State dispute settlement provisions among contracts, stabilization agreements, laws and treaties.
  - Coordination of the State’s defense and management of investment disputes. 4 institutions:
    - Ministry of Economy and Finance (coordinator)
    - Ministry of Justice
    - Ministry of Foreign Affairs
    - The investment promotion agency: ProInversion.

*Reference: UNCTAD Best Practice Case Study*

# Dispute prevention policies: the “best practice” case of Peru

- The Dispute Management Mechanism of SICRECI
- Early alert system: two ways – top down and bottom up alert and information sharing
- The internet platform available for claimants and government agencies.
- Early evaluation of the case:
  - As part of the bidding process ask for strategic evaluation
  - Neutral and technical case assessment
- Involvement of the “dispute party”
- Managing the amicable settlement phase

# Alternative approaches to ISDS

- Prevention
- Mediation: under the IBA Investor-State Mediation rules
- Conciliation: under ICSID rules
- Recourse to 1/3 party neutral
- Role for joint commissions
- State-state dispute settlement
- Special claims tribunals
  
- Appeal mechanism?

# Best practice in dispute prevention and management

- Upstream coordination on treaty and contract provisions
- Lead agency: regulatory framework is needed
- Budgetary autonomy to allow quick reaction
- Pro-active management of the amicable settlement period in the treaty
- Preparation and coordination to conduct amicable settlement
- Mediation awareness and capacity-building
- Coordinated access to documents and document management
- Early assessment of the claim
- Evaluate possibility of counter-claims and contractual claims
- Flexible contracting conditions for outside counsel and role of in-house team to control and limit costs.



## Useful reading

- **UNCTAD –International Investment policy Series**
- **INVESTOR-STATE DISPUTES: PREVENTION AND ALTERNATIVES TO ARBITRATION**
- **Volume I (A. Joubin-Bret and Knoerich)**
- **Volume II ( Susan D. Franck and Anna Joubin-Bret)**
  
- **UNCTAD – Best Practice in Investment Policies**
- **The case of Peru (by Silvia Constain)**



THANK - YOU

[ajb@joubin-bret.com](mailto:ajb@joubin-bret.com)

[www.joubin-bret.com](http://www.joubin-bret.com)