

The resolution of litigations in PPPs

Workshop on Risk and Insurance for
Water Infrastructure

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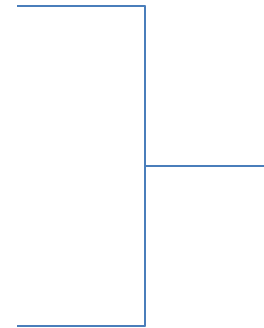
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Dispute resolution mechanisms in PPPs are essential means of enforcing the allocation of risks among the project participants, including Government parties. Key risk mitigation element

It is important that the applicable mechanism be flexible, reliable, final and enforceable

Means of dispute settlement in (international) infrastructure PPP transactions

- Domestic courts
- **Arbitration**
(domestic and international)
- **Mediation** and conciliation
- Others (mini trial..)



Alternative means
of dispute
settlement / Modes
alternatifs de
règlement des
différends

*The term Alternative Dispute Resolution (ADR) is often used to describe a wide variety of dispute resolution mechanisms that are **alternative to full-scale court process**. The term can refer to everything from facilitated settlement negotiations, to arbitration systems, mini trial, mediation, and other processes.*



1/ ARBITRAGE/ARBITRATION

Arbitration is a proceeding in which a dispute is resolved by (an) impartial individual(s) chosen by the parties to the dispute on the basis of his/their expertise («arbitrator(s)»), whose decision (“the award”), the parties have agreed, or legislation or an international treaty has decreed, will be final and binding

International arbitration is arbitration taking place in an international context: parties with different nationalities.....

Arbitration/Arbitrage

Main types of arbitration:

- *Standard commercial arbitration, national and international: Disputes involving standard commercial risks*
- *Investment arbitration: arbitration between investors and States (with a political risk dimension) : special features. Reviewed here since most common in international PPP projects*

Arbitration standard features: Benefits

- **Consensual nature**: Based on **consent** of the parties which must be unequivocal= Generally consent **in written form**
- **Neutrality and international recognition**
International arbitration is autonomous and based on international treaties, to facilitate recourse to arbitration and enforcement of arbitral awards
- **Confidentiality and flexibility** (choice of arbitrators, availability of many rules...)
- **Quick and cheap?**

ARBITRATION STANDARD FEATURES

TYPES OF ARBITRATION

1. **INSTITUTIONAL**
 - institution administers proceedings
 - standard procedural rules and **model clauses**
 - Ex International Chamber of Commerce (ICC) arbitration

2. **AD HOC WITH PREEXISTING RULES**
 - UNCITRAL/CNUDCI Arbitration Rules

3. **CUSTOM-MADE AD HOC**

ARBITRATION STANDARD FEATURES

LEADING ARBITRAL INSTITUTIONS

1. **ICC/CCI** (International Chamber of Commerce Court of Arbitration)
2. **ICSID/CIRDI** (International Centre for the Settlement of Investment Disputes): investment state arbitration, reviewed below
3. **LCIA** (London Court of International Arbitration)
4. **AAA** (American Arbitration Association)
5. **Others** (Permanent Court of Arbitration)

ARBITRATION STANDARD FEATURES

CONSENT ELEMENT: TYPES AND LOCATION OF AGREEMENTS TO ARBITRATE

1. CONTRACTUAL CLAUSE IN A CONTRACT
("clause compromissoire")
2. SPECIAL SUBMISSIONS ("compromis") AT THE TIME A DISPUTE ARISES
3. Clauses in DOMESTIC LAWS AND TREATIES: Investment laws and investment treaties (see below)
4. VALIDITY AND ARBITRABILITY
autonomy and jurisdiction, applicable law
5. Once given, consent cannot unilaterally withdrawn

ARBITRATION STANDARD FEATURES

KEY ELEMENTS OF ARBITRAL CLAUSE

1. APPLICABLE PROCEDURAL RULES AND SCOPE OF DISPUTE
2. CONSTITUTION OF ARBITRAL TRIBUNAL (No. of arbitrators and means of appointment if parties disagree..)
3. PLACE AND LANGUAGE OF ARBITRATION
4. ACCESS TO COURTS
5. LAW GOVERNING SUBSTANCE
6. ARBITRAL AWARDS (Final and binding, recognition and enforcement...)

Model UNCITRAL arbitration clause

Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules.

Note — Parties should consider adding:

- (a) The appointing authority shall be ... (name of institution or person);
- (b) The number of arbitrators shall be ... (one or three);
- (c) The place of arbitration shall be ... (town and country);
- (d) The language to be used in the arbitral proceedings shall be

ARBITRATION STANDARD FEATURES

RECOGNITION AND ENFORCEMENT OF INTERNATIONAL AWARDS: IMPACT OF INTERNATIONAL TREATIES

1. 1958 CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS (NEW YORK CONVENTION) . Ratified by 149 countries (2013). All MENA countries except Lybia and Yemen

➤ **ENFORCEMENT OF AGREEMENTS TO ARBITRATE**

By obliging national court judges to defer to arbitration

➤ **ENFORCEMENT OF AWARDS**

By obliging national court judges to order enforcement of awards made in foreign countries

Very limited possible grounds of refusal

2. THE ICSID CONVENTION. self contained. 159 states as of April 2014. All MENA except Lybia, Iraq, Djib. Qatar

Exemple of the International Centre for Settlement of Investment Disputes

(ICSID)

Bertrand Marchais

What is ICSID and what does it do?

ICSID is one of the 5 organizations of the World Bank Group, which also includes:

- International Bank for Reconstruction & Development (IBRD)
 - International Development Association (IDA)
 - International Finance Corporation (IFC)
 - Multilateral Investment Guarantee Agency (MIGA)
-
- ICSID provides facilities for conciliation and **arbitration of investment disputes** between a State and a national of another State.
 - Promote international investment for development by providing an independent forum for dispute settlement.

How Do You Handle an ICSID Case?

- Request for Arbitration
- Constitution of the Tribunal
- Procedural framework of the proceeding
- Award
- Role of the Secretary of the Tribunal

Request for Arbitration/demande d'Arbitrage

Requirements set forth in:

- ICSID Convention Article 25:

- ✓ Legal Dispute
- ✓ Investment
- ✓ Contracting State & National of another Contracting State
- ✓ **Consent in Writing**. Once given cannot be unilaterally withdrawn

- ICSID Convention Article 36:

- ✓ The Secretary-General shall register the request unless he finds, that the dispute is **manifestly outside** the jurisdiction of the Centre

Sources of Consent to ICSID Arbitration/Sources de consentement

- Contracts
- Investment Laws
- Bilateral Investment Treaties
- Multilateral Agreements
 - North American Free Trade Agreement (NAFTA)
 - Central American Free Trade Agreement (CAFTA).
 - Energy Charter Treaty (ECT)
 - Association of South East Asian Nations (ASEAN)

Example of of consent to ICSID in a Bilateral Investment Treaty

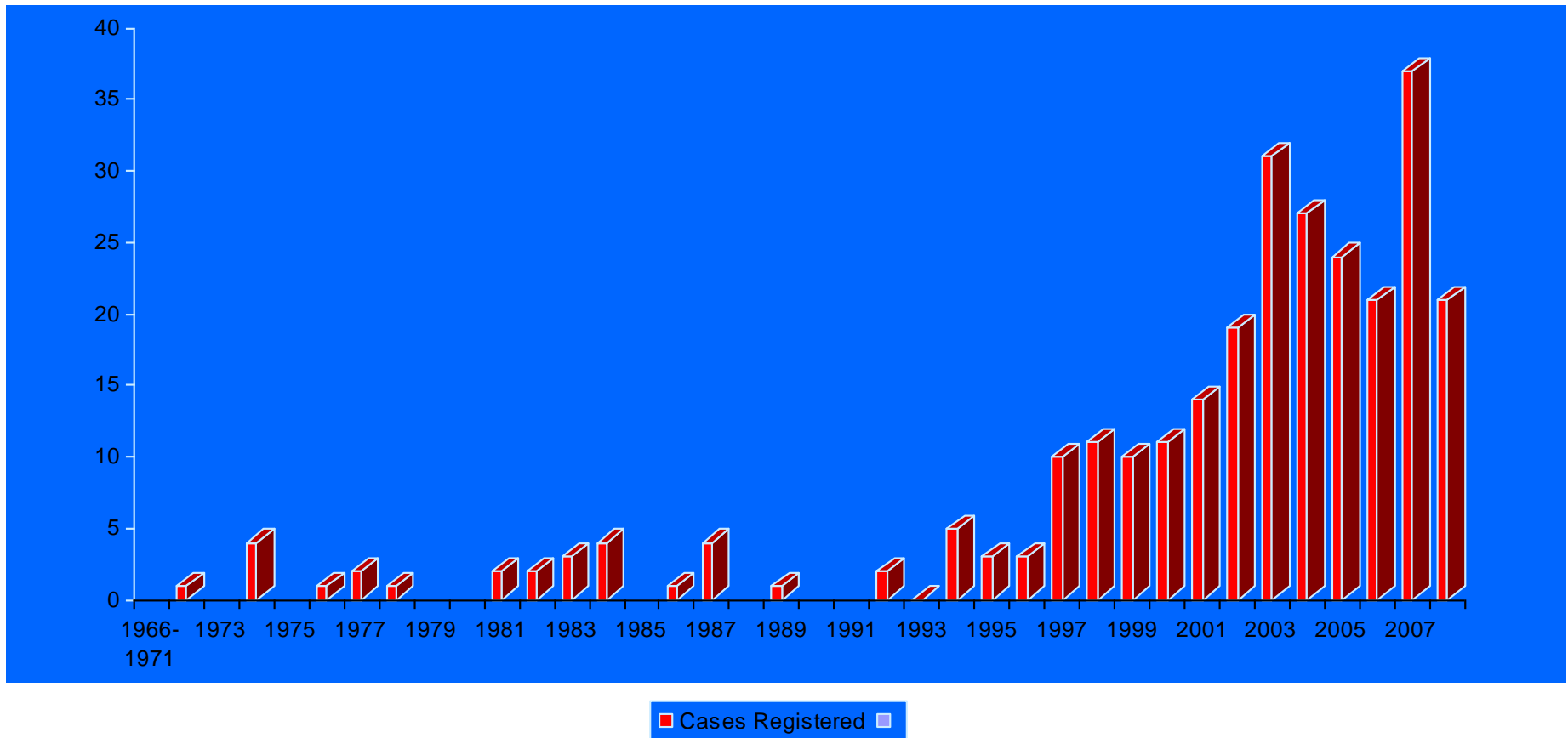
"Each Contracting Party hereby consents to submit any legal dispute arising between that Contracting Party and a national of the other Contracting Party concerning an investment of that national in the territory of the former Contracting Party to ICSID for settlement by conciliation or arbitration under the ICSID Convention"

The Award/La Sentence

- Tribunal renders the Award after it has heard the case
- Automatic Recognition and Enforcement of ICSID awards in all member States on the basis of the ICSID Convention
- Post award remedies available:
 - ✓ Rectification, Interpretation, Revision
 - Annulment

Almost All Cases Are Brought To ICSID
Under Treaties, especially bilateral
investment treaties

ICSID total Caseload



ICSID Awards on water/wastewater projects

www.ICSID.org

- Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania (ICSID Case No. ARB/05/22). Water and sewer services concession agreement. 2008 Award
- Salini Costruttori S.p.A. and Italstrade S.p.A. v. Hashemite Kingdom of Jordan (ICSID Case No. ARB/02/13). Dam construction. 2006 Award
- Waste Management, Inc. v. United Mexican States (ICSID Case No. ARB(AF)/98/2). Waste disposal project. 2000 Award
- Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic (ICSID Case No. ARB/97/3). Award annulled and resubmitted
- Metalclad Corporation v. United Mexican States (ICSID Case No. ARB(AF)/97/1). Waste disposal project. Award of 2000
- Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic (ICSID Case No. ARB/07/26) Water service concession. Pending
- Veolia Propreté v. Arab Republic of Egypt (ICSID Case No. ARB/12/15) . Waste management services. Pending

Cases involving MENA countries about 10% of total (400+)

II/ MEDIATION

Mediation is a process in which a neutral third party – the mediator – assists parties in an effort to reach a mutually acceptable solution to a dispute. The mediator uses a variety of skills and techniques to help the parties reach an agreement. The mediator has no power to make a decision, because the parties take the decision themselves.

Benefits of Mediation

- 1. Voluntary process.** Parties in dispute initiate the mediation procedure and participate in reaching a mutually acceptable agreement on a voluntary basis.
- 2. Agreement mutually reached.** Because the agreement is negotiated, it can often be more creative than a judgment imposed by the court, allowing a greater probability of a “win-win” resolution.
- 3. Cheaper than court!** Mediation can drastically reduce the overall costs for those involved. Lengthy and burdensome procedures are more expensive than mediation process. For businesses, mediation can quickly free assets tied up in legal disputes, which can mean the difference between solvency and bankruptcy for small and medium enterprises.
- 4. Faster than litigation.** A litigated case may take years! By reducing the time, mediation allows the resolution of an issue to be much easier.
- 5. Preserves business relationships!** Mediation gives parties a way to resolve their disputes together.

EXAMPLE OF MEDIATION CLAUSE

All claims, disputes, and controversies arising out of or in relation to the performance, interpretation, application, or enforcement of this agreement, including but not limited to breach thereof, shall be referred to mediation before, and as a condition precedent to, the initiation of any adjudicative action or proceeding, including arbitration; (INSERT TIME LIMIT)

The parties understand that mediation is an agreement-reaching process in which the mediator assists parties to reach agreement in a collaborative, consensual and informed manner. It is understood that the mediator has no power to decide disputed issues for the parties.

The parties understand that the mediator must remain impartial throughout and after the mediation process It is understood between the parties and the mediator that the mediation will be strictly confidential

MEDIATION OF DISPUTES IN INVESTMENT PROJECTS BY IFIs/MIGA: A KEY RISK MITIGATION FACTOR

- Importance in PPP infrastructure investments
- Unique nature of IFIs . Statutory mandate (MIGA)
- IFIs/MIGA Deterrence effect: Why insurers like working with MIGA
- Settling disputes before formal claims arise
- Example of MIGA mediation. Low level of claims. 6 claims paid out of 100+preclaims

MIGA's Claims History

- ❖ Since inception, MIGA has issued well over a thousand guarantees for close to 700 projects, more than 100 cases treated as possible claims
- ❖ MIGA has successfully facilitated the settlement of disputes in all currency transfer/inconvertibility issues
- ❖ Since its inception MIGA has paid claims in 6 cases:
 - **Indonesia** for expropriation in FY00
 - **Nepal** for war and civil disturbance in FY05
 - **Argentina** for expropriation in FY06
 - **Kenya** for war and civil disturbance in FY09
 - **Madagascar** for war and civil disturbance in FY09
 - **Afghanistan** for war and civil disturbance in FY11
- ❖ All other cases have been resolved (before or after the claim was filed) or the claim was withdrawn

Pre claim settlement: The AMA project in Senegal

- PPP Concession contract for the solid waste management of the City of Dakar. Italian investor (AMA Spa)
- Coverage for 15 years against Expropriation, War and Civil Disturbance and Breach of the concession contract
- In 2005, exceptionnally heavy rainfalls rendered implementation impossible . Govt decided to unilaterally cancel the concession
- With MIGA's mediation support, Govt and investor finally agreed on settlement . Investor was replaced by Veolia
- The project illustrates the deterrence effect (« umbrella » effect) of coverage offered by IFIs
- It also underlines the importance of the contractual framework for long term infrastructure projects in basic public services. In this case, the concession contract followed an outdated obsolete model with limited flexibility to adapt to new circumstance

MEDIATION TOWARDS THE AMICABLE SETTLEMENT OF EXPROPRIATED PROPERTIES OF FOREIGN NATIONALS IN ETHIOPIA



MULTILATERAL INVESTMENT GUARANTEE AGENCY
WORLD BANK GROUP

Addis Ababa, July 2001

III. Investment Treaties

- Essential elements of investment protection
- Bilateral Investment Treaties (BITs)
- Multilateral Treaties with provisions on investments
 - Cotonou and Lomé Conventions
 - European Energy Charter Treaty
 - North American Free trade Agreement: Nafta/Alena
 - Agreements creating ICSID and MIGA....

Bilateral Investment Treaties (BITs)

- Over 2800 known bilateral investment treaties signed by States from all regions of the world
- Close to 600 BITs concluded by Mena countries. About 80 intra-Mena BITs
- The purpose is the protection of investments from one country to the other
- Recognition of subrogation by guarantee institution to covered investor's right (heavy regulation of insurance)
- Source of binding consent to arbitration: Most of these treaties contain ICSID arbitration clause

The Protection of Investments in Treaties generally includes :

- Fair & equitable treatment
- Full protection & security
- No expropriation except in the public interest and against prompt, adequate and effective compensation
- National treatment
- Most-favored-nation treatment
- Recourse to binding arbitration (ICSID)
- Compliance with binding agreements with investors (umbrella clauses)

BIT Scope of cover: Umbrella Clause

- Each Contracting State shall observe any other obligation it has assumed with regard to investments in its territory by investors of the other Contracting State
 - ➔ Important for guarantee systems also covering “breach of contract”
 - ➔ Result of principle of state responsibility

BITs Scope of cover

- **Expropriation (Art. 4 (2))**
 - Investments shall not directly or indirectly be expropriated, nationalized or subjected to any other measure the effects of which would be tantamount to expropriation or nationalisation (hereinafter “expropriation”) except for the public benefit and against compensation
 - Specification of standards for compensation (meet “Hull-criteria”):
 - ➔ Value of the investment immediately before the expropriation has taken place or the threatening expropriation has become publicly known, whichever is earlier
 - ➔ Compensation shall be paid without delay and shall carry interest at the prevailing commercial rate until the time of payment; shall be effectively realizable and freely transferable

Importance of BITs on underwriting political risk insurance

- **Ex. of German Investment Guarantee system:**
 - BITs are essential for German Guarantees as basis for recourse. Existence of a BIT as a condition of cover
 - Assignment of all rights and claims in case of a payment out of a guarantee. Recognition of subrogation rights
 - Through BITs, different country risks become comparable treaty risks (standard premium)
 - Reliance on a model BIT
- **Support of risk coverage.** Ex: MIGA coverage of BIT obligations: Arbitral award default and BIT umbrella clauses. Breach of contract
- **Key elements of recovery by insurers/guarantors.** Ex MIGA bilateral protection agreements
- **Key elements of an attractive FDI environment**