Managing International OGEMI-Investment Disputes

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Dispute: Different perception of rights and obligations as between parties which has a significant effect on what they expect – are expected to do with effect on each other

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Context of OGEMI-Investment Disputes

- International/Transnational: crossing national/political/legal boundaries
- Cross-cultural: different perceptions by parties of rights, obligations and functioning of project; – expectations – loyalties (political – ethnic – religious) – communication styles – ideologies (Salacuse)
- Cross-linguistic: different languages
- Inter-temporal: Time flows between deals and disputes
- Different markets and market structures: in particularly change from closed-monopoly structures to open-competition structures
- Dependence-exposure to global economy: markets – finance (interest rates) – currency exchange rates
- Multinational companies and investment: relations with and within governments; with and within other companies;
- Distinguish: short-term transactions (sales) and long-term: investment – joint venture – licensing - management
What causes disputes?

- Economic conditions change: Projects and project regimes that were economically viable are no longer viable (Argentine and Indonesian devaluations)
- Calculations made initially – under uncertainty – prove ex-post to have been wrong: Errors about the future; technology; markets;
- Expectations about cooperation (joint ventures; long-term contracts) fail: parties can not cooperate due to external pressures; cultural differences; different expectations about what joint project is to achieve
- Change of government – new government when in opposition criticised deal and now feels obliged to do something (Belco; Mexico; Blair 1997 with windfall tax
- Political opposition
- Individuals in organisations can not get along: Ego-trips;
- Dishonest behaviour – fraud – corruption –
- Distinguish: disputes within an existing relationship and investment disputes without specific relationship (Nykomb-Latvia-Latvenergo);
- Responsibility, risk and control are separated: State enterprise/state (Methanex in California) cause problem, but are not directly liable: dysfunctional set-up
- Contracts perceived subsequently as unfair and exploitative
- Contracts becomes symbolic issue in domestic politics; foreigners – or association with foreigners – as scapegoat
Conflict Avoidance and ex-ante Management

- Relationship building: Asian approach v Anglo-saxon: detailed, literal contract (Salacuse): Bargaining in the shadow of contract, law and arbitration
- Contractual mechanisms: automatic adjustment; review and revision; renegotiation clauses
- Continuous informal consultation and negotiation: Building a conflict-avoidance mechanism into the contract and the way the communications between the parties are institutionalised and structured
- Readiness to adapt rights and obligations to change of circumstance if the original equilibrium is significantly disturbed, if original expectations do not materialise
- Creating an arrangement that is fair – is seen as fair – and which continues to be so
- Avoid alienation of important powers: within society (Bolivian gas export) – within government/parties – within counter-part – but also avoid too close affiliation/identification with one party/group/person whose political and power fate may be cyclical
- Risk of getting implicated in domestic politics: Bolivian ethnic-political-social tensions
Ex-Post Conflict Management: Negotiation

• Most disputes get settled by negotiations before formal dispute resolution methods are deployed

• 60% of ICC arbitral cases get settled during arbitration – after request for arbitration – setting-up tribunal – exchange of statement of claim/defense – after taking evidence – after oral hearing

• Challenges for negotiated dispute resolution: Blockages – external pressures – “losing face” – playing to an external audience - unrealistic expectations: with negotiators – their chiefs – their audiences and constituencies – past history creates perceptions of hostility which make rational discussion difficult

• Problem if those who caused the dispute are in charge of solving it – desirability of sometimes replacing the key players to liberate from history
Litigation before domestic courts

- Standard solution in domestic commercial relationships
- Also used in transnational transactions if either contracts stipulate a national law as applicable or they are subject to domestic courts jurisdiction by virtue of law governing the relationship
- Domestic jurisdiction sometimes can be negotiated away – either for foreign courts or arbitral tribunals – and sometimes not
- Problem with domestic courts: Lack of special expertise (except highly reputed courts: English High Court – New York federal courts) – but mainly: Lack of real and perceived neutrality: use of anti-arbitral injunctions by domestic courts under control of government: Pakistan – India – Indonesia
International Arbitration

- Has become the preferred way of settling transnational business disputes over the last year
- Has become similar in terms of procedure to court litigation – even often more cumbersome and protracted, but is a privatised system of justice: no standing tribunals (as, e.g. WTO AB; ITLOS; ICJ), but as a rule a procedure agreed upon ex ante and a tribunal appointed by parties (with appointing authority to break deadlocks)
- Avoids the bias of domestic courts – but also provides neutral forum
Main elements of international arbitration

- Procedural Rules: UNCITRAL, ICC, LCIA, Stockholm, ICSID
- Appointment of two wing-persons and one chair – deadlock by appointing authority
- Main principles: procedural fairness – independence/impartiality – giving full opportunity to both sides
- Award: needs to be enforced (NY Convention) – can be set aside – for narrow reasons – some problems: Chromalloy – ICSID award: no setting-aside, enforcement obligation, annulment committee
- Intl arbitration community: 250+ specialists; cross-referral; close community
- Few leading law firms: White and Case; Freshfields; Shearman Sterling; Herbert Smith plus others in Paris, NY, Washington, London
- Specialised arbitration: commodities (london) ; WIPO; shipping et.al
Costs, Risks and economic implications

- Investment arbitrations: 2-15 M US$ per case
- Rates: See WIPO guidelines: 300-600 E per hour
- ICC: diminishing percentage on increasing values
- More expensive than courts
- Time: investment arbitrations: 2.5-5+ years
- Enforcement: additional years
- Issue of arbitrability and public-policy law – competition law: ECJ: review by enforcement court – submission to ECJ: another 5 years
- Economic incentives: Arbitrators want more work – domestic judges less work; Counsel: want to maximise feeing while retaining reputation to gain new business; no incentives for early settlement
- Litigation (court & arbitration) as business/managerial failure
- Setting-aside concerns and legal principles of due process and dependence of arbitrators on business: encourage less application of discipline as a domestic judge can afford – encourage extensive acceptance of applications by parties for more time
Mediation

- Difference from negotiations: An independent third-party manages or facilitates (conciliation – mediation difference?) the communications and negotiations
- Difference from arbitration: The third party does not make binding decision
- Information collection ("learning"): much less biased – stylised – ritualised than arbitration – also covers more: “internal matters – politics – cultural – communications break down: rather than only litigation-relevant selection of facts
- But: combinations: legally binding expert determination (valuation; in-lieu of arbitration decision); med-arb (same person? First mediates, if no result, he/she determines, or becomes sole arbitrator or a normal arbitration process is triggered
- Zero-sum versus non-zero sum approaches by creative solutions
- Effective mediators does not sit and listen, but go to parties, develop deep intelligence, helps to structure negotiating teams/negotiations, comes up with creative solutions; shuttles with proposals between parties; provides reality-check
- Where does mediation work: interest in relationship or velvet divorce; where not: litigation spirit – search for precedents – more difficult if there is no pre-existing relationship (tort-like investment arbitration) – politicians – and executives – need the third-party decision of tribunal as “act of God” for which they have no responsibility
“social” dispute management

- **Context**: Human Rights obligations on MNCs; disputes with indigenous/local people; disputes on environmental obligations
- **Legal standards**: ATCA – Human Rights Law – MNC Guidelines by OECD – Environmental Conventions and Guidelines – Corporate Responsibility Guidelines (UN Compact; Sullivan principles etc)
- **So far, no formal dispute settlement (apart from perhaps dysfunctional ATCA litigation in US):** Mainly “naming and shaming” – toothless investigations in OECD – local agreements
- **Why not**: more formal agreements with mediation and arbitration with NGOs – Local Communities
- **Problem**: Who is legitimate/effective representative?
### Two Dispute Case Studies: 2003 Cross-Border Electricity Investment

**Case 1: (ECT-based) Arbitration – Case 2: Mediation**

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<thead>
<tr>
<th>Case 1 (Arbitration)</th>
<th>Case 2 (Mediation)</th>
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<tbody>
<tr>
<td>Complexity: very low</td>
<td>very high: Reg’s/TPs</td>
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<tr>
<td>Direct Costs: 1.5 M Euro</td>
<td>400 K E</td>
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<td>Time: 22 months to award</td>
<td>3 months to MoU</td>
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<td>24-36 months (?): setting-aside/enforcement</td>
<td>5 months to end</td>
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<td>Dispute Value: 10 M</td>
<td>Max: 750 M E</td>
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<td>Dispute: non-payment of tariff</td>
<td>PPA not complied</td>
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<td>New Benefit: Zero (sum-game)</td>
<td>New profit-making venture/rules</td>
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TW Method of Mediating Case 2

- Selection Tender: does it make sense? What is key criterion? (commitment of sole mediator)
- Mediation agreement: between parties – with mediating contractor – role of success fee
- Mediation team
- Joint statement on dispute: useless
- Extensive File study – request for supplementary information – ideas for solution (indications from negotiating file)
- Questionnaire/Queries to each party separately
- Information visit to both parties: intensive separate/private interviews/dinners/lunches within parties and with third parties and three regulatory agencies (country A – country B – EU Com (DG TREN, DG Comp)
- Acquiring trust – reputation – political leverage through CEOs
- Brain-storming within team; continuous consultation; role of party’s counsel
- Case Assessment for each party; Joint History
- Shuttling with outline proposals
- 4 months detailing negotiations – “St Andrews spirit” - ratification