PPP DISPUTE RESOLUTION CENTRE AT UN ECE

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Introduction

- Aim of this presentation:
  - to highlight the need for a special tribunal for the settlement of disputes arising out of or in connection with PPPs
  - To indicate what is needed for such a tribunal
  - To specify what steps must be taken
Issues to be discussed

- Why a special PPP dispute resolution centre is needed
- Practicalities
- Investor State Dispute Settlement
- Prevention of disputes
- Further steps to be taken
- Conclusions
Why a special tribunal for resolution of disputes related to PPPs is needed

- In recent years, a certain tendency towards special arbitration institutes can be seen
- Examples of such specialized arbitration institutes include:
  - International Centre for Energy Arbitration (ICEA), Edinburgh
  - PRIME Finance (Panel of Recognized International Market Experts in Finance), The Hague
  - TAMARA (Transport and Maritime Arbitration Rotterdam-Amsterdam)
- PPPs have their own very special characteristics
- PPPs have three pillars: financial – construction – legal
- Therefore, a specialized dispute settlement centre would fill a gap
What is needed for a PPP Dispute Resolution Centre?

- Some preliminary ideas:
  - Under the aegis of UN ECE
  - Based in Geneva (UN seat) or The Hague (seat of ICJ and PCA; ‘legal capital of the world’)
  - Arbitrating under UNCITRAL Rules (as revised in 2010)
  - Governing bodies: advisory board – management board – secretariat
  - List of experts
  - If based in The Hague, disputes could be administered by PCA
Investor-State Dispute Settlement (ISDS)

Recently, criticism regarding ISDS has been raised.

Main arguments contra ISDS:
- State sovereignty is at stake
- Strong private investors can sue state bodies
- In the case of poor countries, there may be a misbalance
- Private investors may cause states to go bankrupt (Argentina)
- States may be cut off international funding as a result
- As a rule, arbitrators are internationally practicing lawyers and not always perceived by the host State as independent
Investor-State Dispute Settlement (ISDS) (II)

- Arguments pro ISDS
  - It guarantees a fair procedure
  - In many cases, state courts of the country concerned are not well-suited to hear complex disputes involving foreign parties
  - As a rule, International Financial Institutions demand dispute settlement outside the country concerned
  - Also, investors themselves will demand ISDS
Also, in the Transatlantic Trade Investment Partnership Treaty (TTIP) that is currently negotiated between the USA and the European Union, a lot of criticism has been raised regarding the ISDS mechanism in the draft text of the Treaty.

In September 2015, the European Commission published a proposal for setting up a new Investment Court System.

Main features of the proposed Investment Court System:
- Partly modelled after WTO Appellate Body
- Composed of first instance Tribunal and Appeal tribunal
- Publicly appointed judges
- Grounds for suing states would be precisely defined and limited to specific events such as discrimination, expropriation without compensation, denial of justice
ISDS in EU Investment Treaties (II)

- Principles proposed by EC for Investment Court System
  - Transparent proceedings: open hearings, comments on line available, intervention by interested third parties
  - No forum shopping allowed
  - No frivolous claims
  - Distinction between international and domestic law will be preserved
  - Avoidance of multiple and parallel proceedings

- EU/US Investment Court should be a model for a future International Investment Court
The draft text of the EU-Canada Investment Treaty (CETA – Canada-EU Free Trade Agreement) also provides for a special investment court consisting of:
- Permanent tribunal
- Appeal tribunal

Proceedings shall be conducted in an impartial and transparent manner.

However, open proceedings is not what is sought after by international investors.
Prevention of Disputes (I)

- Obviously, before going to court or arbitration, parties are under an obligation to settle their dispute amicably.
- Amicable settlement can be done through:
  - High level negotiations between the parties
  - Mediation
  - Binding advice by an independent expert
- If a dispute cannot be solved amicably, in principle, there is no other option than arbitration, if the agreement so stipulates.
Prevention of Disputes (II)

- ICSID published a document called “Practice Notes for Respondent in ICSID Arbitration” (2015), which contains a chapter on prevention of disputes.
- In this regard, ICSID provides the following recommendations:
  - Ensure that there is no conflict between domestic law and international legal obligations.
  - Ensure that all government officials are aware of the State’s investment obligations.
  - Engage regional and local authorities in the State’s investment obligations, too.
  - Set up formal dispute prevention and management systems.
  - Monitor recent developments in investment arbitration.
Conclusions