Settling Direct Disputes with Sovereigns: Striving for Transparency in the Settlement of Public-Private Partnership Disputes

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Much ink has been spilt on discussing whether or not the Investor-State Dispute Settlement ("ISDS") regime, has played a role in encouraging the growth of developing economies by creating a more secure system for Foreign Direct Investment ("FDI"). As of late, the viability of the treaty arbitration system has been called into question. Some developing countries are threatening to retract themselves from dispute settlement mechanisms ("DSMs"), such as the International Centre for Settlement of Investment Disputes ("ICSID") completely, while sovereignty-related alarms can now be heard loudly in the halls of cities such as Washington, London, and Brussels.2 The authors do not wish to reiterate or re-litigate any of the arguments advanced by such States. They do see, however, mutually shared advantages to international trade and investment and in harmonizing legal codes. These advantages include bolstered investor confidence in the certainty of due diligence by recipient States and improved trade and investment flows that can provide the
necessary capital to help economies pursue inclusive and sustainable economic development. We particularly see such advantages in embracing a model of transparency in dispute resolution as put forth in the United Nations Commission on International Trade Law ("UNCITRAL") Rules on Transparency in Treaty-based Investor-State Arbitration (the "Rules on Transparency") and in the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (New York, 2014) (the "Mauritius Convention"), hereinafter the "UNCITRAL Transparency Standards", in situations where disputes are directly related to the interests of citizens and taxpayers, namely on what concern Public-Private Partnership ("PPPs"). This paper examines these issues and presents suggestions as to how to address them.

The Mauritius Convention was adopted by the UN General Assembly in December of 2014. This adoption allowed Parties to investment treaties concluded before April 1, 2014 to express their consent to apply the Rules on Transparency, and is significant in regards to the suggested reforms to the arbitral processes for resolving investor-State disputes to ensure greater transparency and accessibility to the public. We see advantages in heightening transparency in the current investment treaty arbitration system, specifically through the UNCITRAL Transparency Standards. Such transparency in dispute settlement results in strengthening the rule of law while continuing to emphasize the importance of encouraging FDI flows to the growth of developing economies. PPPs in infrastructure have been considered a vector within FDI, but have unique qualities that distinguish them from other forms of foreign investment. PPPs are closely aligned with the public interest as they are often entered into with the purpose of delivery of public services through infrastructure projects. These projects thus often deal with the conveyance of key utilities, such as water, sewage and electricity, as well as the extraction of natural resources, which are frequently tied in to lucrative government concessions. The public authority is thus incentivized to achieve value for money and can retain specific prerogatives in the project's regulation. In order to ensure the confidence of foreign investors in a PPP arrangement while also increasing the amount of FDI inflows, it is necessary to guarantee investors' rights through sound DSMs. For this reason, this paper focuses on disputes in PPPs involving international investors—also called "international PPPs"—and seeks to provide recommendations for improved transparency therein.

DEFINING PPPS

The World Bank describes PPPs as entailing "long-term contract[s] between a private party and a government entity, for providing a public asset or service, in which the private party bears significant risks and management responsibility, and remuneration is

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linked to performance."5 Apart from these features (long-term contract, risk management and responsibility), PPP projects are considered to be complex, in designing and managing/governing contracts,6 and, as noted above, concern the interest of current and future citizens, both as taxpayers and service users. Even, however, where such funds are not primarily rooted in the tax base of the contracting sovereign, such as where development funds are utilized, the need for transparency is of particular importance. Regardless of the extent to which the State becomes involved in a PPP, its involvement imposes marginal social costs in either the form of an explicit cost or an opportunity cost. For instance, a State may choose to allocate a large role for itself in a PPP by directly financing, either through loan or grant, the project in some form, or by waiving certain administrative costs or applicable taxes. Alternatively, the State may play a more intermediary role by hedging risks by underwriting investments or providing investor protection against indemnity. A third alternative can be that the State helps channel products from international financial institutions into PPPs or private finance from commercial banks or other enterprises.7 The very fact that the State chooses to undertake a PPP means that it diverts its attention from another potential project, meaning that such decisions need to retain high levels of transparency to ensure accountability. Additionally, the delivery of public service and the use of public funds also require high levels of transparency to ensure accountability.

While there are no strict models as to the form a PPP can take, they typically involve a public authority ordering the project, and a private company created for the purpose of the project: a Special Purpose Vehicle ("SPV"). The SPV is created by project proponents through equity investment.8 The private company may take the form of a project company, or an SPV that works between private entities like construction companies and the sponsors of the project (the equity owners or financiers). The public authority or State-owned enterprises ("SOEs") can own equity of the SPV when deemed necessary. The extent to which the public entity and private entity are involved in the financing and operation of the project is diverse. For instance, ordinarily, the SPV would obtain most of the required funding for the project through a bank loan. Investors can be local, but also international, such as international commercial banks, development finance institutions, bilateral agencies, and multilateral development banks.9 In order to realize the project, the SPV also sub-contracts other stakeholders such as consultants, operators and managers. The SPV repays its liabilities and pays out shares on the income generated during the project’s operation.

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6 Id. at 42, 89.
8 The World Bank Group et al., supra note 5, at 50.
Shareholders (Shareholders' Agreements)

Lenders

Lending Agreement

Shareholding

Concession Agreement

Authority

Project Company

Operation and Maintenance Agreement

Offtake Purchase Agreement

Offtake Purchaser

Operator

Construction Contract

Input Supply Agreement

Construction Contractor

Input Supplier

This structure shows that a PPP project is a "network of interrelated contracts and other legal relationships involving various parties." Disputes in a PPP project can arise regarding any of these contractual relationships. This paper focuses on a particular type of dispute arising in PPP, namely disputes directly involving the contracting authority, which is often a Sovereign or an Agency thereto.

As discussed above, the contractual structure of a PPP is particularly prone to disputes due to the existence of multiple contractual relationships as well as the risks transferred between stakeholders. The UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects distinguishes three types of disputes that can arise between the stakeholders: (1) disputes between the contracting authority and the SPV; (2) disputes between the SPV and sub-contractors; and (3) disputes between the SPV and other parties, such as end users. Moreover, it is necessary to mention that within a PPP, specific disputes can arise at various stages of the project that are related to the awarding of contracts. We are herein focusing primarily on the first type of dispute—those between a Sovereign and a private party.

OVERVIEW OF DISPUTE RESOLUTION IN PPP TRANSACTIONS

When PPPs involve long-term arrangements between two or more parties, the risk of conflicts over issues such as service quality, customer satisfaction, and tariff reviews are
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especially high. The World Bank mentions that “PPP arrangements are long-term and complex, contracts [that] tend to be incomplete,” so subsequently “this creates room for differences in interpretation.” Therefore, DSMs allow for the quick resolution of disputes between public and private parties, while avoiding disruption of public services. In giving its recommendation related to the governance of PPP projects, the Organization for the Economic Co-Operation and Development (“OECD”) provided that “clear, predictable and transparent rules for dispute resolution should be in place to resolve disagreement on the above between the public and private parties.” Practitioners have also argued that “careful attention must be given to managing potential disputes in [PPP] projects.” Finally, the lack of trust in the treatment that will be given to Sovereigns (or, more likely, parties opposed to a Sovereign) under domestic judicial systems is also a factor in favor of alternative dispute resolution systems. In assessing these statements together, one finds that PPP projects interweave procedural with agency conflicts, resulting in legal and policy narratives that my easily find themselves at odd of each other.

The World Bank provides the comprehensive study in relation to infrastructure concession, describing both binding (court litigation and arbitration) and non-binding mechanisms (conciliation, mediation and expert panels), with a focus on international arbitration. After defining the advantages and shortcomings of all these means (time, costs), the study provides a table comparing different mechanisms and their appropriateness for concession (see Table 1). The UN further explains that the dispute resolution mechanism that would be the most appropriate depends on the nature of the dispute, and that usually “mediation and/or arbitration are the most commonly chosen options.” Finally, practitioners would refer to the same mechanisms. It is important to notice that experts do not recommend a particular type of alternative dispute resolution mechanism, since this choice depends on the nature of the dispute, making this issue highly contextual.
The characteristics and goals of dispute settlement in concessions are outlined in Table 1. Access to reliable, neutral, and noncorrupt forums, long-term nature of relationships, public nature of services, large investment in immovable assets, and complexity and sophistication of projects are some of the key characteristics. The goals of dispute settlement include access to reliable, neutral, and noncorrupt forums, sustainability of the parties' relationship, prompt resolution of disputes, open and inclusive processes, and enforceability.

<table>
<thead>
<tr>
<th>Characteristics of concessions</th>
<th>Goals in dispute settlement</th>
<th>Courts</th>
<th>Independent regulator</th>
<th>Nonbinding ADR</th>
<th>International arbitration</th>
</tr>
</thead>
<tbody>
<tr>
<td>Many occasions for conflicts</td>
<td>Access to reliable, neutral, and noncorrupt forums</td>
<td>=</td>
<td>=</td>
<td>+</td>
<td>+</td>
</tr>
<tr>
<td>Long-term nature of relationship</td>
<td>Sustainability of the parties' relationship</td>
<td>-</td>
<td>+</td>
<td>+</td>
<td>-</td>
</tr>
<tr>
<td>Public nature of services</td>
<td>Prompt resolution, open and inclusive process</td>
<td>-</td>
<td>+</td>
<td>+</td>
<td>-</td>
</tr>
<tr>
<td>Large investment in immovable assets</td>
<td>Enforceability</td>
<td>=</td>
<td>-</td>
<td>-</td>
<td>+</td>
</tr>
<tr>
<td>Complexity and sophistication of projects</td>
<td>Expertise</td>
<td>=</td>
<td>+</td>
<td>+</td>
<td>+</td>
</tr>
</tbody>
</table>

+ Usually appropriate.
- Usually inappropriate or presents difficulties.
= Appropriateness highly dependent on the independence and accountability of the decisionmaking body.

Source: World Bank staff.

Table 1. Dispute Settlement Techniques and Their Appropriateness for Concessions

A few country case studies on alternative dispute resolution in PPPs have been written, but these do not always deal with international PPPs.

As to treaty arbitration, the ICSID has been criticized for disproportionately emphasizing commercial and private interests. New practices of local dispute resolution have also emerged. During the UNCITRAL colloquium on PPPs, for example, participants questioned the suitability of utilizing international arbitration for PPP-related disputes, mainly because of the "multiple investment treaties, multiple international arbitration forums, cases

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23 Greiman, supra note 23.
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and rulings and the poor enforcement of international arbitral awards." 24 Participants further added that the tendency of using local dispute resolution involving governments should be taken into account and that "a more practical approach would be helpful." 25 Furthermore, at its fiftieth annual session held in July 2017, UNCITRAL announced that it would entrust its Working Group III ("WGIII") with a broad mandate to work on reform of ISDS. 26 Specifically, WGIII has been tasked with identifying concerns regarding ISDS while considering possible reforms and developing recommendations for UNCITRAL's consideration. 27

The considerable variation in the type of arrangements made in PPPs, combined with the unique characteristics of PPPs themselves, enable the use of a wide range of dispute resolution mechanisms. Delmon described a comprehensive concession agreement as employing a mixture of dispute resolution mechanisms that best minimizes the "detriment to [the contracting parties'] working relationship." 28 This echoes the recommendations given in the UNCITRAL Legislative Guide on Privately Funded Infrastructure Projects, which calls for the need for the use of dispute settlement mechanisms "that avoid as much as possible the escalation of disagreements between the parties and preserve their business relationship; that prevent the disruption of the construction works or the provision of the services; and that are tailored to the particular characteristics of the disputes that may arise." 29 Given the necessity to maintain the continuity of public services in PPPs projects, intergovernmental bodies like the World Bank, 30 the United Nations Development Programme ("UNDP"), 31 UNCITRAL 32 and the United Nations Economic and Social Commission for Asia and the Pacific ("UNESCAP") have cautioned against the use of litigation as a primary means of resolving PPP-related disputes. 33

PPP DISPUTE FILINGS AND CURRENT STATUTORY FRAMEWORK

While it is difficult to estimate the exact number of disputes arising out of PPPs that have gone through ADR, a survey conducted by the law firm Diaz Reuz showed that 44% of 143 large, multinational companies involved in PPPs favored international arbitration over litigation, especially in countries where confidence in national court systems remained low. 34

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25 Id.
27 Id.
28 JEFFREY DELMON, PRIVATE SECTOR INVESTMENT IN INFRASTRUCTURE: PROJECT FINANCE, PPP PROJECTS AND RISK 406 (Alphen Aan Den Rijn et al. eds., 2nd ed. 2009).
29 UNCITRAL, supra note 11, at 174.
31 UNCITRAL, supra note 11.
32 UNCITRAL, supra note 11, at 183.
33 UNESCAP, A GUIDEBOOK ON PUBLIC-PRIVATE PARTNERSHIP IN INFRASTRUCTURE 74 (2011).
34 Resolving Disputes, supra note 16.
States are also embracing ADR to settle PPP disputes. The following is a list of legislative trends of some countries:

- **PHILIPPINES**: The Philippines mandated by law that all PPP contracts contain alternative dispute resolution clauses (Executive Order no. 78, 2012). This additionally mandated the creation of a PPP Centre that oversees relevant dispute resolution.\(^{35}\)
- **AUSTRALIA**: ADR, particularly expert adjudication, was identified as a preferred means of dispute resolution in Australia due to the technical complexity of projects in PPPs.\(^{36}\)
- **BRAZIL**: In order to attract more PPPs, Brazil enacted the “Public-Private Partnership law” in 2004 that allowed for arbitration in disputes arising from PPPs.\(^{37}\) Brazil’s Labour Commission has also recently approved a bill that permits arbitration in public-private partnership contract disputes. The measures in the proposed legislation are designed to speed up the dispute resolution process and to make it easier for foreign firms to enter PPPs.\(^{38}\)
- **GREECE**: Greece mandated in 2005 (Law 3389/2005) that any disputes arising from PPPs “shall be settled by arbitration” with a creation of a PPP Secretariat to evaluate projects.\(^{39}\)
- **EGYPT**: To attract more cross-border PPPs, Egypt amended the rules on arbitration to create the Cairo International Arbitration Centre for disputes arising from PPPs based on UNCITRAL rules.\(^{40}\)

### DISPUTE SETTLEMENT THROUGH THE SOVEREIGN: COURTS AND REGULATORY AGENCIES

The efficacy of national judicial processes or related national bodies to resolve grievances through litigation is largely dependent on whether these domestic processes can render an adequate and unbiased ruling. As the European Investment Bank (“EIB”) expressed through its European PPP Expertise Centre (“EPC”), the use of national regulatory bodies or national court systems involves the judicial or regulatory discretion, which may present risks for private investor in the partnership.\(^{41}\) Given the considerable public interest involved in a PPP project, objective decisions are more likely to be found through a third-party arbitration process.

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\(^{36}\) Michael Earwaker, Resolving PPP Disputes through Arbitration, LEXOLOGY, (September 22, 2009), http://www.lexology.com/library/detail.aspx?g=4b1f3a1e-64b7-48b0-9bfb-02a6326e49f0.


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process. Since PPP projects are complex in that they can involve a variety of parties from different backgrounds—whether cultural or technical—it can be difficult to identify a national court system that can satisfy these different needs or that would be acceptable by all contracting parties.  

INTERNATIONAL COMMERCIAL ARBITRATION

Due to its flexibility, neutrality, and accessibility, commercial arbitration is commonly used to settle PPP-related disputes. Despite, however, considerable developments that have made commercial arbitration procedures more transparent and predictable, barring the occasional need to file awards with courts that require transparency where one seeks to enforce an award, commercial arbitration tends not to be the most transparent vehicles of dispute settlement. Many practitioners have continued to raise “confidentiality” as a key reason why they recommend commercial arbitration to their clients. In fact, in the 2015 Queen Mary University of London/White & Case survey: Improvements and Innovations in International Arbitration, 33% of respondents said that confidentiality was of primary importance in their decision to use arbitration as a dispute settlement mechanism. As commercial arbitration tends not to include sovereign parties, there is far less of a need for the same level of transparency which is being demanded in the UNCITRAL Transparency Standards. Along the same lines, while commercial arbitration has shown to be an appropriate means for settling PPP-related disputes, Delmon points out that should a contract include a government or government entity, “the private contracting party must take into consideration the risk that the government entity may have immunity and the difficulty of executing arbitral decisions against government assets.”

INTERNATIONAL INVESTMENT ARBITRATION

Whether disputes arising from PPPs are addressed by international commercial arbitration or investment dispute settlement depends on whether the cause of a dispute involves issues beyond investments and the rights of an investor, as among other things, protecting investments in regards to expropriation, fair and equitable treatment, discrimination and contractual terms that fall under umbrella clauses. Especially when dealing with Sovereigns or government entities, the private party in a PPP may find that arbitral awards rendered by commercial arbitration are not enforceable. This can happen for a number of reasons under provisions that deal with public interest, public policy, or social justice, as can also be seen in Article V (2) of the New York Convention. In such instances, international investment arbitration, through institutions like ICSID, provides dispute settlement services that would be stricter with its adherence to procedure and enforcement.

While investment arbitration in its traditional form may be limited in its capacity to handle PPPs, a recent development that warrants comment is the Investment Court System (“ICS”), which was approved by the European Commission (the “EC”) in September 2015. Emphasis on transparency and the inclusion of an Appeals Tribunal are notable characteristics

42 DELMON, supra note 28, at 406.
44 DELMON, supra note 28, at 408.
of the proposed system. It is yet to be known whether the new system can break the extant ISDS mold and remain relevant in the face of fluctuating investment patterns. Increasing criticism of ISDS for its lack of transparency and the release of the UNCITRAL Transparency Standards have increased the global calls for change in the system. Related talks on the establishment of a multilateral investment court began under UNCITRAL auspices in late 2017.45 On September 13, 2017, the EC, partly as a means of addressing the above stated ISDS related criticisms, published a Recommendation for a Council Decision authorizing the opening of negotiations for a Convention establishing a multilateral court for the settlement of investment disputes.46 The EC adopted and published the negotiating directives on March 20, 2018, authorizing the EC to negotiate a convention establishing such a multilateral court on behalf of the European Union.47

As is noted above, one criticism of the existing ICSID framework lies in a perceived bias in favor of investors from developed countries.48 The ICSID framework is also criticized for its lack of transparency.49 Finally, the lack of appellate mechanisms raised criticism from several UNASUR members who supported the creation of an alternative forum for ISDS.50

These criticisms against the existing ISDS framework partly led to the creation of an arbitration center under the Union of South American Nations ("UNASUR"). Though Latin American countries were involved in 39% of all investment arbitration cases before ICSID, Argentina, Mexico, Venezuela, Ecuador, and Bolivia particularly stand out in relation to their involvement in Investment Treaty Disputes.51 Ecuador first proposed the new system in 2010 and the UNASUR responded and began work on the creation of a new dispute settlement system.52 As of August 2016, a consensus was reached over almost 80% of the proposed rules of the UNASUR Arbitration Center,53 and a code of conduct for arbitrators was adopted.54

The proposed rules of UNASUR Arbitration Centre are relevant to specific concerns regarding PPP disputes, such as enhanced transparency and the availability of an appeals mechanism. The proposed rules provide that arbitral award and conciliation agreement must be made available to the public unless domestic legislation forbids the release of such information or if the information is confidential.55 Proposed Article 5 favors consultations and
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negotiations, and stresses that conciliation and arbitration are the last resort to any dispute. The proposed Article 31 provides an appeals mechanism that can be utilized where there is error in the application of law in the arbitral award. Argentine, Paraguay, and Venezuela proposed an additional reason for appealing on the basis of a manifest error in the application of facts. This new framework provides great insight for PPP related disputes, since it favors negotiations and consultation, as well as conciliation. Increased transparency in dispute resolution also meets the specific requirements of PPPs, where users and taxpayers are relevant stakeholders in these projects. More generally, this framework shows that some countries believe that adjustments in investment arbitration procedures should reflect public interest related issues. This is particularly true when it comes to PPPs.

Along these same lines, the European Union and Canada have agreed to include a new approach on investment protection and investment dispute settlement in the EU-Canada Comprehensive Economic and Trade Agreement ("CETA"). Though only approved by the European Parliament in February of 2017, the negotiations on a free trade deal between the European Union and Canada were concluded in 2014 with a reformed investment dispute settlement system which includes full transparency of proceedings, clear and unambiguous investment protection standards and an appeals system. This represents a radical reform of the existing ISDS approach and it demonstrates both a growing challenge to the current ISDS system as well as a move towards establishing a permanent multilateral investment court. Furthermore, the European commitment to the ICS can also be seen in the agreed draft of the EU-Vietnam Free Trade Agreement of January 2016 (EUVFTA), which also calls for a multilateral investment court.

THE UNCITRAL TRANSPARENCY STANDARDS

The Mauritius Convention, which entered into force on October 18, 2017, is an instrument by which Parties to investment treaties concluded before April 1, 2014, express their consent to apply the Rules on Transparency—a set of procedural rules for making publicly available information on investor-State arbitrations arising under investment treaties. The Mauritius Convention applies to disputes initiated based on international investment agreements

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56 Gomez & Titi, supra note 53.
57 Sarmiento, supra note 55.
58 Sarmiento, supra note 55, at Article 31.
60 Id.
61 Id.
"IIA"s) unless a party declares single or multiple reservations under Article 3.\textsuperscript{65} In addition, though a signatory has the flexibility to formulate reservations, whether the arbitration is initiated under the UNCITRAL Arbitration Rules or not does not have any impact on the application of the Mauritius Convention.\textsuperscript{66}

Regardless of the arbitration rules applied to the dispute, the Mauritius Convention applies to existing IIAs concluded before April 1, 2014 without formulated reservations, denunciation, and/or rejection of amendments. The Stockholm Chamber of Commerce ("SCC")\textsuperscript{67} noted that the Mauritius Convention is inapplicable in the following situations, which provides further clarity on its applicability:

1. Either of the disputing parties has made reservations under the Mauritius Convention.
2. The home State of the respondent and host State are not parties to the Mauritius Convention.

Though Article 2(1) specifically mentions the UNCITRAL Arbitration Rules, the Mauritius Convention is applicable to around 3000 IIAs in force as of April 2014, regardless of the arbitration rules selected. States that are parties to the Mauritius Convention may formulate reservations in negative-list approach, for instance, identifying specific IIA(s) to which the Mauritius Convention is/are not applicable. Even if the home State of the respondent and host State are not parties to the Mauritius Convention, they may opt to apply bilaterally and/or unilaterally, the transparency rules and amicus curiae features, thus expanding the scope of applicable disputes to \textit{ad hoc} bodies. Once the home State of the respondent and host State are parties to the Mauritius Convention, the conditions therein apply prospectively to investor-State disputes save for reservations as per Article 5, rejection of specific revision of the Mauritius Convention as per Article 10, or denunciation as per Article 11.\textsuperscript{68} Both signatory States and regional economic integration organizations must observe Article 18 of the Vienna Convention on the Law of Treaties, or the obligation not to defeat the object and purpose of the treaty prior to its entry into force.

According to UNCITRAL, "[t]ogether with the Rules on Transparency, the Convention takes into the account both the public interest in such arbitration and the interest of the parties to resolve disputes in a fair and efficient manner."\textsuperscript{69} The Convention foresees UNCITRAL performing the repository function, through the Transparency Registry,\textsuperscript{70} a publicly available database on information and documents in treaty-based investor-State arbitration.\textsuperscript{71} While at the time of writing there are 23 signatory and 3 ratifying States\textsuperscript{72} and

\textsuperscript{65} Article 3(1)(b) reads, "Article 2(1) and (2) shall not apply to investor-State arbitration conducted using a specific set of arbitration rules or procedures other than the UNCITRAL Arbitration Rules, and in which it is a respondent"; id.
\textsuperscript{66} United Nations Convention, supra note 54.
\textsuperscript{69} United Nations Convention, supra note 54.
\textsuperscript{71} United Nations Convention, supra note 54, at Article 8.
the items in the Registry remain sparse, the Mauritius Convention, as commented by Schill, is a step towards a system of international investment law that is “fundamentally different from the current one, which is still principally based on confidentiality.” Furthermore, the “normative pull” of the UNCITRAL Transparency Standards and its opt-in nature are significant in the endeavour to address questions of public interest and possible appellate body functions.

STREAMLINING THE PROCESS: EXPERT ADJUDICATION/DETERMINATION AND CONCILIATION

Third-party specialists, such as engineers, can render a technical assessment that may serve as the basis for conciliation between the contracting parties. Since such third-party technical specialists are often employed for inspection of projects, they may be ideal candidates for providing expert determination or adjudication. While conciliation is not binding and decisions rendered through expert determination can be overturned by binding arbitration awards, these channels of dispute resolution can serve as basis for further negotiation or can “impose a decision on the parties” that can result in the settlement of the dispute. For instance, the model contract for Design Build and Operate Projects of the Federation International des Ingenieurs Conseils (“FIDIC”), also known as the Gold Book, has adopted such an approach. The FIDIC standard contracts have a strong influence in the construction business and are widely used in civil law jurisdictions and by Multilateral Development Banks. Sub-clause 20.5 of the Gold Book emphasizes the necessity to avoid dispute and provides to a standing Dispute Adjudication Board (“DAB”) the role to help parties to reach agreement through non-binding decisions (or binding, according to what the parties decided) for disputes occurring during the design and construction stage. Similarly, Harisankar and Sreeparvathy advocate expert adjudication (expert determination) as a preferred method of dispute settlement in infrastructure procurement projects, such as PPP. When writing on dispute resolution for PPP projects in India, Harisankar and Sreeparvathy stressed that “[a]djudication by statutory expert bodies [...] seems to be a viable model for dispute resolution in PPP. There are many advantages like diverse expertise, efficiency in time, less interference by the judiciary, etc., which can be effectively used for structuring a dispute resolution mechanism.” A prominent example is the DAB services offered by the International Chamber of Commerce, which seeks resolution to disagreements before they become costly and hostile, as well as helping to avoid construction-stop situations and their

74 Id.
75 DELMON, supra note 28, at 407–408.
The ICC features both rules as well as a model contract for the use of DABs, including designation of Board Members. The use of DABs before resorting to international arbitration has been a common feature in construction projects, especially in developing or emerging economies. The use of DABs can act as time and cost saving alternatives to litigation or arbitration, or as an interim measure leading up to international arbitration. In Peru, for example, the use of DABs is obligatory before proceeding into other forms of dispute resolution in circumstances involving public works, such as a PPP. The designation of “neutrals” at the contract-writing phase makes real-time dispute resolution a possibility through the assignment of a “standing neutral” third-party who can help guide negotiations. In the United States, where the use of DABs facilitated by the American Bar Association is comparatively more common, it has been shown that 208 out of 225 disputes were resolved through DABs with only one proceeding to litigation.

UNITRAL has also renewed its interest in DABs and their role in PPP dispute resolution. Specifically, at the UNCITRAL Third International Colloquium on PPPs held in Vienna in October 2017, it was recommended that the UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects and accompanying Legislative Recommendations (2000) and the UNCITRAL Model Legislative Provisions on Privately Financed Infrastructure Projects (2003) should continue to be updated and consolidated, partly as a mean of further emphasizing the use of DABs in PPP disputes.

OPTIONS FOR IMPROVING THE CURRENT SYSTEM(S) IN PLACE

It must be recognized that different jurisdictions have their own statutory frameworks in place for resolving disputes of a PPP nature. For example, in India, the Punjab Infrastructure Law establishes the Punjab Infrastructure Regulatory Authority, which sets rates for concessionaires and adjudicates disputes between concessionaires. Further complicating matters, different Indian states have different laws governing dispute resolution related to infrastructure projects. Partly as a result of the commercial versus investment dichotomy set-out above, any attempt at unifying all these variant systems seems gargantuan in scope. As a consequence, unification may not be the best approach.

Additionally, when contemplating how to best create a viable system which both Sovereign and private-parties will be encouraged to utilize, we must keep in mind all the discussions about the future of the current investment treaty framework. We need to take into account the concerns of the investors, engineers, and construction firms, while also considering the Sovereigns that may from time to time view the system as being stacked

83 Harisankar & Sreeparvathy, supra note 78, at 27.
against them\textsuperscript{84}. This rings particularly true in regard to PPPs, as PPPs are so often a tool for building valuable infrastructures that can improve the livelihood of people.

As is also set out above, we should strive to improve the current system(s) by encouraging transparency and consistency. To that end we proposed the following:

(1) The creation of a “repository”-like organization, or the assignment of such a role to an existing organization, whose sole directive will be to act as a collector of PPPs arbitration filings, and to make information related to said filings available to the public. In this way, it will be relatively easy to find out how many PPP-related disputes have been filed in a particular year, and, if the parties were to agree to transparency in relation to their awards, they could turn to previous awards as a means of seeking out the wisdom of previous tribunals. Though such previous awards will not technically act as precedents, they may act as creating an increased sense of certainty and conformity amongst possible parties to a PPP agreement.\textsuperscript{85} The Transparency Registry, currently run by UNCITRAL, would seem to be a reasonable repository which could be utilized instantly.

(2) As opposed to setting up an additional treaty-basis of empowerment, the use of standard PPP ADR clauses should be encouraged. Efforts to enact a model clause through a recognized legislative international body, such as UNCITRAL, could lend the necessary legitimacy for its widespread adoption. Such clauses will require direct disputes involving a Sovereign to utilize the repository described in (1) above, while also requiring that transparency, as envisioned by the UNCITRAL Transparency Standards, to be utilized.

(3) Consider the creation of regional arbitration organizations, such as what is being attempted in Latin America in relation to Investment State Arbitration, or as is envisioned in the CETA, which calls for the creation of some form of a permanent adjudicating body.

(4) Consider the creation of an Appellate Body that can quickly hear appeals made from ADR (or even possibly court litigation) related to PPPs. Again, this can be contracted for and the enforcement mechanism can be the New York Convention, if applicable.\textsuperscript{86}

(5) Consideration should be given to streamlining the system of dispute resolution by requiring attempts at mediation and reconciliation of disagreements through \textit{inter alia} an expert adjudication board. Though ad hoc arbitration with a sole arbitrator may also help streamline the process, as discussed above, disputes over PPPs are often highly technical, and, empowering technical experts with the ability to adjudicate may allow for the creation of a more so efficient adjudication process. Standing

\textsuperscript{84} See generally Lee, \textit{supra} note 2.


(permanent) DABs are also more available, which helps to discuss and find beneficial solution on technical, commercial or legal matter.\(^7\)

Note that despite (2) above, the authors are not taking the position that a treaty-based system would be inappropriate as a means of addressing transparency issues as they relate to PPP. Quite the contrary, the authors believe that there is definite merit in establishing a treaty framework that would apply even retroactively to existing PPP contracts—unless both Sovereign and private party agree otherwise. In this way parties can choose to apply transparency without amending agreements or re-commencing negotiations. Further research is, however, required, before we can make a firm proposal. Issues such as how a treaty framework might deal with different levels of State involvement in PPP, as well with similar vehicles, such as private finance initiative (“PFI”) will need to be explored. The authors are hopeful that this paper can act as a catalyst for further research on this topic.

The authors again stress that it is not their desire to re-litigate the state of investment treaty arbitration and its future. The authors are simply turning to the lessons that the system has to offer for guidance when addressing the issues of settlement of international PPP-related disputes. The authors are seeking to continue the momentum towards a system that will encourage investment in infrastructure projects, while also encouraging transparency. As has been made clear above, the authors believe that the public nature of PPP projects makes transparency imperative, regardless of the selected vehicle of dispute resolution. A system in which both Sovereigns and investors can take solace and comfort is a system that will likely pass the test of time.

\(^7\) Hoek, *supra* note 76, at 4.