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Dispute Resolution Mechanisms

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Because PPP arrangements are long-term and complex, contracts tend to be incomplete, as described in Adjustment Mechanisms. Where this creates room for differences in interpretation, disputes can arise. Defining a dispute resolution process helps ensure disputes are resolved quickly and efficiently, without interruption of service. Dispute resolution mechanisms can be built into the PPP contract. Some governments define dispute resolution mechanisms in international instruments (e.g. bilateral investment treaties or multilateral agreements), or in local PPP legislation, that may apply to all PPP contracts.

As described by **Kerf et al** (Kerf et al. 1998, Section 3.10) dispute resolution mechanisms for PPP can include the following:

- **Mediation and conciliation**—a neutral third party is appointed to resolve a dispute by helping the parties settle their disagreements. It may be used in the hope of not having to enter formal arbitration. A mediator typically acts as a facilitator, assisting the parties in identifying the best possible negotiated solution or settlement—the solution itself will be developed by the disputing parties themselves. A conciliator has a still neutral but more active role, also actively proposing solutions and settlement terms.
- **Recourse to a sector regulator**—for PPPs in sectors under the remit of an independent regulatory body, the regulator can be assigned responsibility for resolving certain disputes. This is a relatively simple and hence low-cost option, but can be risky for the private party, particularly in case of concerns over regulator independence or capacity.
- **Judicial system**—generally, contractual disputes are subject to jurisdiction of the courts, and the same is typically true of PPP contracts. However, parties to PPPs often consider the court system as inappropriate for solving disputes, since it may be slow, or lack technical expertise—particularly in developing countries. Dispute resolution mechanisms for PPPs often try to avoid resorting to the court system as far as possible.
- **Panel of experts as arbitrators**—the PPP contract or law could designate a panel of independent experts, to act as arbitrators in case of dispute. Decisions could be defined as non-binding (in which case a further escalation mechanism is required), or binding.
- **International arbitration**—the last resort for many PPPs is international arbitration, which can be under a permanent arbitration institution such as the International Centre for Settlement of Investment Disputes (see International Centre for Settlement of Investment Disputes) or involve ad hoc arrangements such as an international expert panel.

More than one of these approaches may be used, to allow for escalation of disputes should simpler methods fail. For example:

- **Chile concessions.** The dispute resolution mechanism for PPP contracts in Chile was established in the Concessions Law, and centers on the role of an independent panel of experts, as set out in **Jadresic's review of Chile's experience with expert panels** (Jadresic 2007, 25–26). A conciliation panel of experts is established for each contract, comprising three experts—one chosen by the government, one by the private party, and a third by mutual agreement. The conciliation panel may be called on to propose conciliatory terms to resolve disputes for agreement by the parties. If agreement cannot be reached, the private party can either request the conciliation panel become an arbitration panel (and reach a binding decision), or refer to the court system.

- **Bucharest Water Service Concession.** The dispute resolution mechanism is defined in the PPP contract. It involves an economic regulator, a technical regulator housed in the municipal government, with recourse to an international panel of experts in case of appeal.
- In **Mexico, the Federal Law on Acquisitions, Leases and Services** (MX 2014) sets out the procedures for conflict resolution during the implementation of the PPP contract. The Secretaría de la Función Pública is the organization in charge of handling these processes. The law states that interested party must request for dispute resolution support from the Secretary. The Secretary facilitates a dispute resolution meeting. Any agreements reached through this procedure will be binding, and the parties involved must produce a report showing the progress made in implementing the agreement reached.
- In **Uruguay**, **the Law on PPP Contracts** (UY 2011) prescribes that the parties must agree on an ad hoc arbitration panel to solve any disputes.

The standardized contracts listed in *Examples of Standardized PPP Contracts and Contract Clauses* provide further examples of dispute resolution clauses and options.

International Centre for Settlement of Investment Disputes (ICSID)

ICSID, part of the World Bank Group, is an autonomous international institution established in 1966 under the *Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (known as the ICSID or the Washington Convention) with over 153 member States. ICSID provides facilities and services for the settlement international investment disputes. In addition, it offers fact-finding proceedings to examine and report on facts before a dispute arises.

The ICSID Convention sought to remove major impediments to the free international flows of private investment posed by non-commercial risks and the absence of specialized international methods for investment dispute settlement. ICSID was created by the Convention as an impartial international forum providing facilities for resolving legal disputes between private investors and host states through conciliation or arbitration procedures. Recourse to the ICSID facilities is always subject to the parties' consent. Its main advantage, in comparison to other arbitration mechanisms, is that the ICSID Convention provides for a specialized and completely delocalized arbitration mechanism and the enforceability of awards.

The **ICSID website** (ICSID) provides more information and examples of international dispute settlements—including cases concerning roads, railways, ports, airports, energy, waste, water, wastewater, and other sectors. Many awards are available on the website, in either English, French, and/or Spanish (ICSID-Cases). The website also provides a set of model clauses regarding conciliation and arbitration—in English, French, and Spanish. ICSID also maintains a Panel of Arbitrators and a Panel of Conciliators (mediators) (ICSID-Panels).

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- **Dealing with Unsolicited Proposals**
- **Key References - PPP Cycle**

Additional Resources

- When progress can't wait mediate
- Dispute Resolution Checklist

Find in pdf at PPP Reference Guide - PPP Cycle or visit the PPP Online Reference Guide section to find out more.

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