

The formation of the administrative agreement and the State as party to the arbitration convention

- Uruguayan perspective -



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FERRERE



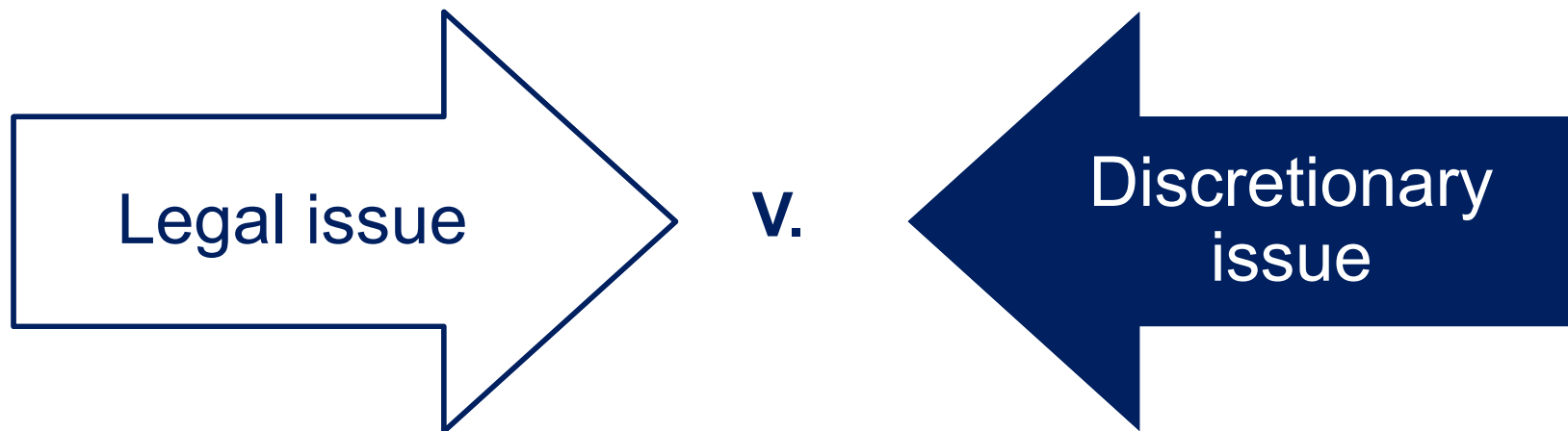
No specific legal reference



No general reference, constitutional or legal, of the State's capacity to arbitrate



Can the State agree to arbitrate?





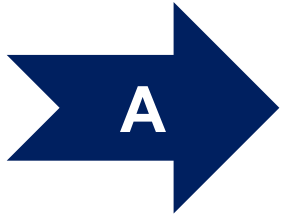
CASE LAW

Decision of the Civil Court of Appeals of 5 Term (July 16, 2013):

“Regarding the arbitration clause (sections 9.2 and 9.2.6) that granted Montes del Plata the capacity to exclude the Uruguayan Court’s jurisdiction on disputes arising from the contract, displacing such jurisdiction in favor of ICSID Tribunals, such clause does not contravene the Constitution, to the extent that there is no express prohibition for the State to be part of an arbitration with private parties”

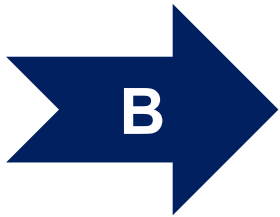


Particular cases



Prohibition to enter into an arbitration agreement based on

- Underlying subject matter
- Type of State's conduct



Arbitration as **mandatory**



I.e.: Uruguayan law on Public-Private Partnerships



*Is a particular formal process
required to form the State's
will?*

*Value of State's legal
opinions*





How has Uruguay agreed to arbitrate?



PSC Contract

“Any Dispute between [the State] and Contractor about technical and/or economic matters arising from or related to the enforcement of the Contract that cannot be resolved in friendly terms between the Parties nor with the involvement of Advisors within the term of sixty (60) days after the date on which any of the Parties receives a notice from the other Party on the existence of such Disputes, shall be referred by any of the Parties to an arbitrator, without prejudice to referring the matter to court, when applicable. Legal matters shall not be referred to arbitration, but to Courts and Judges of República Oriental del Uruguay, in accordance with section 29.1”.



Investment contract with pulp mill company (2011)

9.2.1 Disputes arising from the present Agreement, between the parties, will be settled, if possible, through amicably consultations.

9.2.2 If the dispute cannot be settled within a lapse of six months since the amicably consultations began, any party can submit the dispute to:

- a) The tribunals of Montevideo, or
- b) International arbitration, in the conditions described on this Article, paragraph 4

9.2.3 Once the [pulp mill company] has submitted the dispute to one of the proceedings indicated on the paragraphs a and b of the abovementioned numeral 2, the choice shall be definitive, unless both parties agree otherwise.



9.2.4 In case the proceeding chosen is the international arbitration, the dispute could be submitted to one of the following arbitration courts, at the choice of any of the parties:

- a. to the International Center for Settlement of Investment Disputes (ICSID), created by the convention on the Settlement of Investment Disputes between States and Nationals of Other States submitted to its signature on March 18, 1965;
- b. To an ad hoc Arbitral Tribunal established according to the UNCITRAL Rules, adopted by the Resolution 31/98 of the General Assembly of December 15, 1976. The Arbitral Tribunal shall be composed of three arbitrators, one appointed by the ROU, one appointed by the [pulp mill company] and a third arbitrator that shall preside the Tribunal, designated by the other two appointed arbitrators.

9.2.5 The Arbitral Tribunal shall decide based on the dispositions of this Agreement, Uruguayan Law, the terms of the investment agreements entered by the República Oriental del Uruguay with the República de Chile and the Republic of Finland, likewise the International Law principles on the subject.

9.2.6 The arbitral decisions shall be final and binding on the parties and shall be executed according to Uruguayan Law.



Power Purchase Agreement

Determination of price, its adjustments and revisions shall not be subject to arbitration in any case. All other disputes arising from this agreement or related hereto shall be definitively resolved by the parties through arbitration according to the law, under the Arbitration Rules of UNCITRAL. Number of arbitrators shall be three (3), appointed according to the abovementioned Rules. The seat of the arbitration shall be Montevideo, Uruguay and shall be conducted in Spanish.



Investment agreement – Pulp mill company (2017)

11. DISPUTE RESOLUTION AND ARBITRATION

11.1 Settlement of disputes

- (a) Disputes arising between the Parties in accordance with this Agreement or relating to it, its Annexes and their addenda, shall be notified by the Party alleging the existence of the dispute to the other Party and, to the extent possible, will be resolved through amicable consultations.
- (b) If the dispute cannot be resolved through amicable consultations within 3 (three) months from the day following the date of notice thereof pursuant to Clause 11.1(a), either Party may refer the dispute to:
 - i. where expressly provided for in this Agreement or mutually agreed by the Parties, an Expert appointed pursuant to Clause 11.3; or
 - ii. arbitration in accordance with Clause 11.2, provided that, in case of arbitration, UPM may, at its sole discretion and at any time until it has appointed an arbitrator pursuant to Clause 11.2, refer the dispute to the competent courts in Uruguay; where UPM elects to refer a dispute to the competent ROU courts, the specific dispute may not be referred to arbitration and the judicial decision of the domestic courts shall not be susceptible to arbitration, provided that:
 - A) this is without prejudice to UPM's right to submit any claim under the Bilateral Investment Treaty to arbitration as long as UPM fulfils the requirements of the Bilateral Investment Treaty; and
 - B) referring a dispute to the competent ROU courts shall not prejudice the ability of UPM to refer unrelated or future disputes to arbitration at its sole discretion.

11.2 Arbitration

- (a) In the event of arbitration, the dispute will be resolved by arbitration at the International Centre for Settlement of Investment Disputes (ICSID) established by the Convention on the Settlement of Investment Disputes between States and Nationals of other States, opened for signature at Washington on 18 March 1965. Any arbitral hearings shall take place in Washington, USA and be conducted by a tribunal consisting of 3 (three) arbitrators. Each Party shall appoint 1 (one) arbitrator, and the third arbitrator, who shall be the president of the tribunal, shall be appointed by agreement of the Parties. The determination of any dispute will be made under the ICSID Arbitration Rules and Regulations in force at the time the request for arbitration is filed.
- (b) On UPM's written request, ROU shall designate government entities which contract with UPM or any of its Affiliates in connection with the Project to ICSID in accordance with Article 25(1) of the ICSID Convention and ROU shall approve and consent in writing to such government entities' agreeing to binding international arbitration.
- (c) If, for any reason, the ICSID Secretary-General refuses to register a request for arbitration in accordance with the ICSID Arbitration Rules or the arbitral tribunal determines that the dispute is not within the jurisdiction of ICSID, the dispute may instead be referred by either Party to be finally resolved by arbitration in accordance with the UNCITRAL Arbitration Rules and to be administered by the ICSID Secretariat. The seat and venue for any arbitration conducted in accordance with the UNCITRAL Arbitration Rules shall be Paris, France.
- (d) The Parties agree that the arbitral tribunal shall have the power to order a consolidation of arbitration proceedings arising out of or in connection with this Agreement and/or the Project.
- (e) The arbitration procedure will be conducted in both English and Spanish.



11.3 Expert Determination

- (a) In the event that a technical or commercial dispute arises between the Parties which the Parties have agreed in this Agreement or may mutually agree in writing to refer to an Expert, either Party may refer the matter for determination in accordance with this Clause, by giving notice to the other Party to the dispute of the request for Expert determination (the “**Request for Expert Determination**”).
- (b) Where a Party submits a Request for Expert Determination, the Parties hereto agree that such determination shall be carried out expeditiously by an Expert. The Expert is not an arbitrator of the dispute and shall not be deemed to be acting in an arbitral capacity.
- (c) The International Centre for ADR of the International Chamber of Commerce (“**ICC**”) shall administer the Expert determination in accordance with the ICC’s Rules for the Administration of Expert Proceedings (“**Rules for Expertise**”) in force at the commencement of the Expert determination and as modified by this Clause 11.3 (Expert Determination), which Rules for Expertise shall be deemed incorporated into this Clause.
- (d) If the Parties to the dispute are unable to agree upon an Expert within 10 (ten) days after receipt of the Request for Expert Determination, then, upon the request of any of the Parties to the dispute, the International Centre for ADR of the ICC shall appoint such Expert.
- (e) Before issuing a final decision, the Expert shall issue a draft report and allow the Parties to the dispute to comment on it. The Expert shall try to resolve the dispute within 30 (thirty) days (but not later than 60 (sixty) days) after his or her appointment, taking into account the circumstances that require an

expeditious resolution of the matter in dispute. The Expert’s decision shall be final and binding on the Parties to the dispute, provided that, if the Expert has not rendered a final and binding decision within sixty (60) days of his or her appointment, either Party may refer the matter to arbitration in accordance with Clause 11.2.

11.4 Remedies

- (a) Without prejudice to Clauses 11.1 and 11.3 (including UPM’s right to refer a matter to the competent ROU courts), the Parties agree that the referral of any dispute or claim arising out of or in connection with this Agreement, its Annexes and their addenda to arbitration shall represent the Parties’ sole means of resolving that dispute or claim.
- (b) ROU acknowledges and agrees that any claim or any action taken by UPM (or any Affiliate) against ROU (or any Government Entity) under this Agreement or any agreement under which UPM (or any Affiliate) has rights (including in respect of any compensation payable thereunder) shall not affect or impair any right, cause of action or remedy available to UPM (or any Affiliate) under the Bilateral Investment Treaty.



Obrigada!