

# International Meeting Infrastructure and PPPs

BUSINESS OPPORTUNITIES IN INFRASTRUCTURE AND PPPs:  
MEETING WITH THE WORLD REFERENCES ON THE THEME

APRIL 27TH - 28TH, 2015 - BRASILIA

Realização



Parceiros



Apoio



# International Meeting Infrastructure and PPPs

Realização



Parceiros



Apoio



- Subregion of the Americas comprising 20 countries, including the Caribbean
- Spanish, British, French, Dutch and Portuguese colonization



# International Meeting Infrastructure and PPPs

Realização



Parceiros



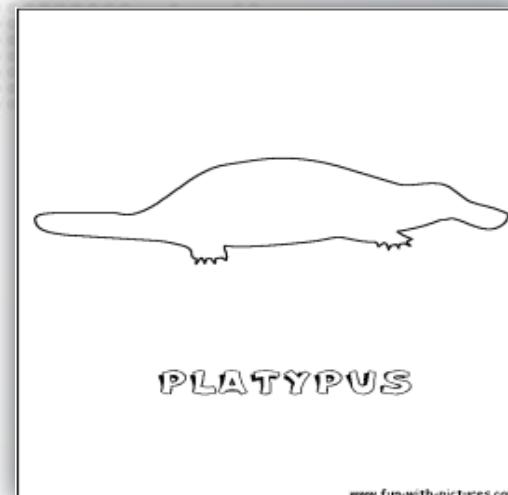
Apoio



- Brazil is the only Portuguese speaking country
- Civil Law prevails
- Traditional “Public International Law” concept
- Day-by-day influence of foreign law in the country due to globalization process



- **Administrative Law:** Spain, Portugal and France
- **Port System and Maritime Law:** UK, US and France
- **Public Law:** US
- **Civil Law:** Italy, France and Germany
- **Civil Procedural Law:** Italy and Germany
- **Environmental Law:** US
- **Concessions Law:** UK and France
- **Arbitration Law:** UK, France and UNCITRAL
- **PPP/PFI Law:** UK and France



- The Calvo Doctrine was formulated by Carlos Calvo, an Argentine diplomat, and published as part of his six-volume treatise, *Le droit international theorique et pratique*, which appeared in five editions between 1868 and 1896.
- The doctrine was created in the wake of the armed interventions in Mexico by France in 1838 and 1861 to effectuate certain claims of French citizens against the Mexican government.
- **At heart, the doctrine is a justification of the right of governments to be free of interference of any sort.**

- The Calvo Doctrine provides that aliens are not entitled to rights and privileges that are not accorded to nationals of a given country, and therefore, aliens doing business in a given country may seek redress for any grievances only before local authorities.
- **The corollary of this concept is that governments can have no greater responsibility toward aliens than they have to their own citizens.**

- The Calvo Doctrine was quickly accepted in Latin America, and was used to restrict foreigners from resorting to diplomatic protection for disputes with the host country.
- Eventually, the Calvo Doctrine was transformed into the *Calvo Clause*, and many Latin American countries attempted to implement the doctrine by negotiating it into treaties.
- **Some countries incorporated the doctrine into their constitutions, while others included it in domestic legislation.**

- International pressure for:
  - Submission to ICSID
  - Submission to NY Convention
  - Adoption of binding models in modern or new arbitration laws
- Due to the political instability of the region in the 50's and 60's, the real discussion about adoption of these options started in the 70's

# International Meeting Infrastructure and PPPs

Realização

Parceiros

Apoio

**CBIC**  
80's



Countries

NY

ICSID

Arb  
Law

NY

ICSID

Arb  
Law

NY

ICSID

Arb  
Law

NY

ICSID

Arb  
Law

NY

ICSID

Arb  
Law

Argentina

1989

Bolivia

1995

Brazil

2002

Chile

1975

Colombia

1979

Costa Rica

1988

Dominican  
Republic

2002

Ecuador

1962

El Salvador

1998

Guatemala

1984

Honduras

2001

Mexico

1971

Nicaragua

2003

Panama

1985

Paraguay

1988

Peru

1988

Uruguay

1983

Venezuela

1995

# International Meeting Infrastructure and PPPs

Countries	60's			70's			80's			90's			00's		
	NY	ICSID	Arb Law	NY	ICSID	Arb Law	NY	ICSID	Arb Law	NY	ICSID	Arb Law	NY	ICSID	Arb Law
Argentina							1989				1994				
Bolivia										1995	1995			2007	
Brazil													2002		
Chile				1975							1991				
Colombia				1979							1997				
Costa Rica							1988				1993				
Dominican Republic													2002		
Ecuador	1962						1986							2010	
El Salvador							1984			1998					
Guatemala							1984							2003	
Honduras							1989						2001		
Mexico				1971											
Nicaragua											1995		2003		
Panama							1985				1996				
Paraguay							1983			1988					
Peru							1988				1993			2000	
Uruguay							1983							2000	
Venezuela										1995				2012	

Realização

Parceiros

Apoio

CBIC

CITIA

FIIC

SENAI  
Iniciativa da CNI - Confederação

# International Meeting Infrastructure and PPPs

**Countries**

**60's**

NY ICSID Arb Law

**70's**

NY ICSID Arb Law

**80's**

NY ICSID Arb Law

**90's**

NY ICSID Arb Law

**00's**

NY ICSID Arb Law

Argentina

1967

1989

1981

1994

Bolivia

1995

1995

1997

2007

Brazil

2002

Chile

1975

1991

Colombia

1979

1989

1997

1998

2012

Costa Rica

1988

1993

1997

2011

Dominican Republic

2002

2008

Ecuador

1962

1986

1997

2010

2006

El Salvador

1984

1998

2002

Guatemala

1984

1995

2003

Honduras

1989

2001

2000

Mexico

1971

1993

2012

Nicaragua

1995

2003

2005

Panama

1985

1996

1999

2006

Paraguay

1983

1988

2008

Peru

1988

1993

2000

Uruguay

1983

1988

2000

Venezuela

1998

1995

2012

2009

# International Meeting Infrastructure and PPPs

Realização

Parceiros

Apoio

Countries
-----------

60's		
NY	ICSID	Arb Law

70's		
NY	ICSID	Arb Law

80's		
NY	ICSID	Arb Law

90's		
NY	ICSID	Arb Law

00's		
NY	ICSID	Arb Law

Argentina

Bolivia

Brazil

Chile

Colombia

Costa Rica

Dominican  
Republic

Ecuador

El Salvador

Guatemala

Honduras

Mexico

Nicaragua

Panama

Paraguay

Peru

Uruguay

Venezuela



1996

2002

- Based on UNCITRAL Model Law and the Spanish Arbitration Law of 1988
- Arbitration clause is binding and arbitration is compulsory
- No distinction between National or Foreign Arbitration
- Distinction between National or Foreign Award
- Foreign awards need recognition by the Brazilian Superior Court of Justice for validity within the country

- Brazil does not officially adhere to the UNCITRAL Model Law, for which reason Brazil is not part of the official list of Model Law countries.
- However, some of the most relevant principles of Brazilian arbitration can be traced back to Model Law provisions, such as:
  - The formal and substantive requirements of arbitration agreements;
  - The principle of kompetenz-kompetenz; and
  - The possibility of obtaining judicial injunctive relief, specially for interim and conservatory measures.

- In 95% of the cases in Brazil the parties spontaneously comply with the arbitral awards
- There has been only 678 appeals or writ of mandamus to Courts of Appelas seeking the nulification of an award
- In 93% of the cases the award was fully preserved
- Nevertheless, important to have a good choice for:
  - Seat of arbitration (*lex arbitri*)
  - Jurisdiction for urgent matter

- Arbitrability of disputes involving the Brazilian Public Administration
- Initially unfavorable doctrine (“disposability of patrimonial rights vs. Principle of non disposability of public interest”)
- Restraints imposed by court (judicial and legislative “TCU”) rulings

- Legislative reforms pro-arbitration: Generic authorization: arbitration stipulated in public contracts
  - Public-Private Partnership Act: Law No. 11.079 (2004) [no Brasil, em português]
  - Modification of the Brazilian Concessions Act: Law No. 8.987/1995 (2005)

- Legislative reforms pro-arbitration: Express and specific authorization: subject arbitrability of state entities
  - Arbitration Act of the State of Minas Gerais: Law No. 19.477/2011
  - PL 7108/2014 (Bill of the Senate)

## What about DB's?

- Recent improvement: of the use of DB's
- Parties are more willing to understand and accept DB's
- The binding version (DAB) has a better acceptance, despite the challenge of enforceability
- Still great concern about the costs
- Recommended for Hydropower Projects, specially Large and Complex Dams Projects

# Integrating the Parties: Results

1

**Informed choice**: full integration of Lenders and Insurance Companies, so they can make the necessary pressure on the Parties for them to reach quick and effective solution

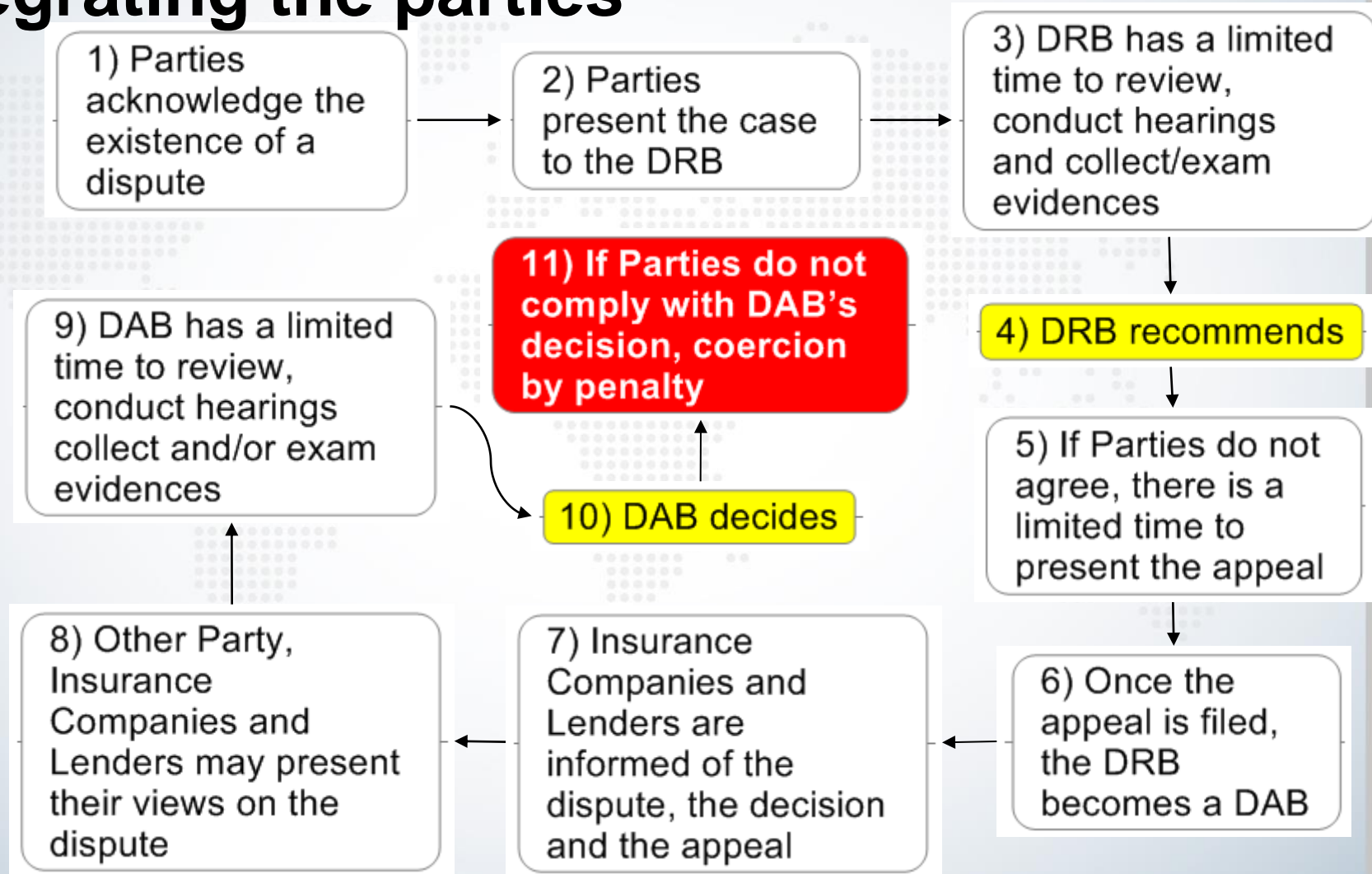
2

**Track record**: All parties are aware of the main problems affecting the project

3

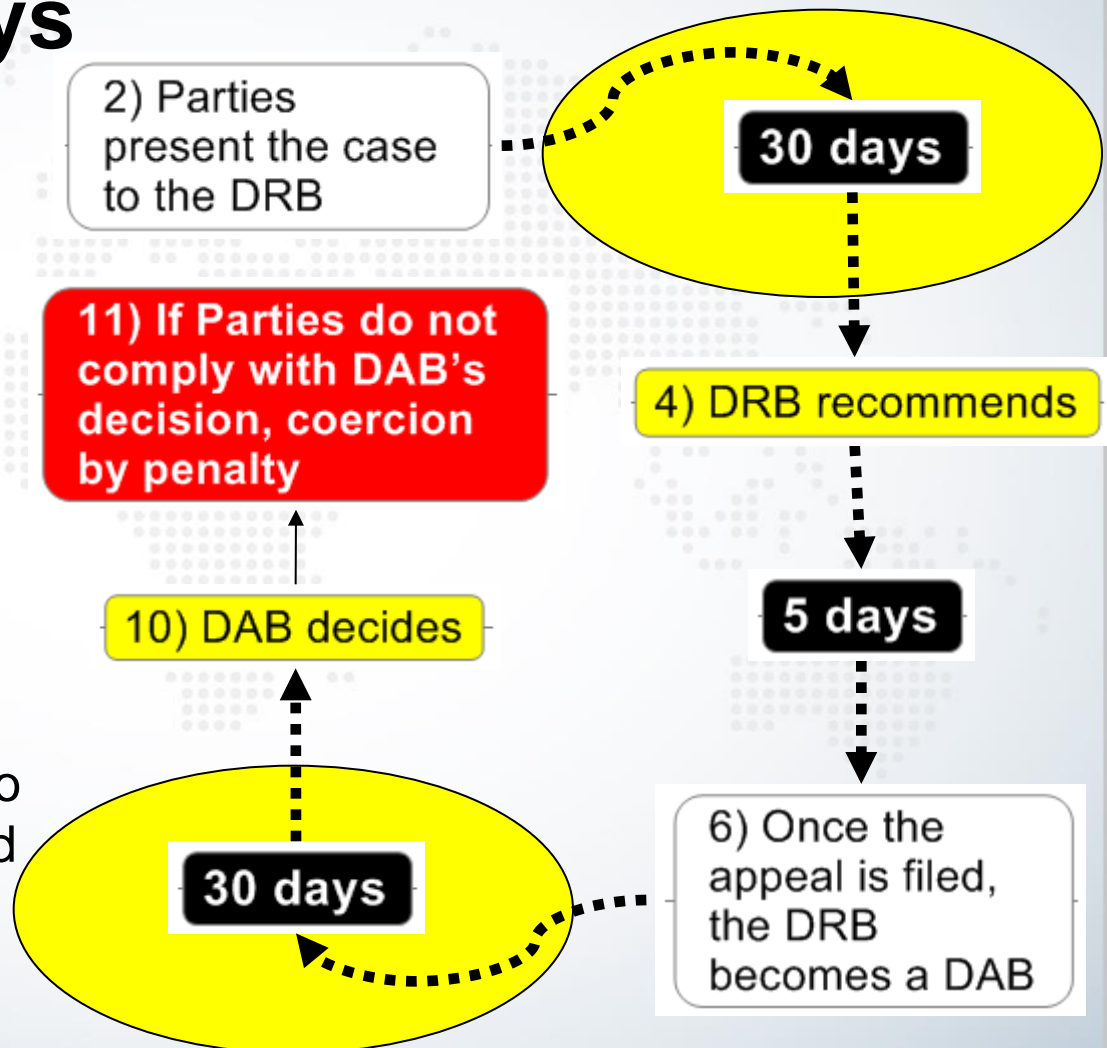
**Fast track**: Parties accepted a fast timeframe for the DB's to examine the dispute and decide

## Integrating the parties



## Fast track: 65 days

- According to the type and complexity of the case, DRB/DAB panel may present a different timeframe
- Some cases may require expert opinions and/ or more detailed evidence
- Parties have to agree to any changes that expand the original timeframe established in the Contract



## Challenges: How to enforce de DAB's decision?

- Brazilian law only recognizes automatic enforceability to Judicial or Arbitral awards

- In order to provide some weight to DAB's decision, Parties have to accept a clear amount of penalties to be imposed in case the decision is not observed

**11) If Parties do not comply with DAB's decision, coercion by penalty**

- Despite the contractual obligation, non compliance with DAB's decision will have to be examined and imposed through Judicial or Arbitral proceeding
- Recommended "statute-of-limitations" rule for any claim, so the parties have to act soon after the DAB's decision is granted

PINHEIRONETO  
ADVOGADOS

Júlio César Bueno

Pinheiro Neto Advogados

*Projects, Construction and Engineering Contracts*

São Paulo, Brazil

Phone: +55-11 3247 8667

Mobile: +55-11 98214-7443

E-mail: [jbueno@pn.com.br](mailto:jbueno@pn.com.br)