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Resolution Of Disputes Arising From Major Infrastructure Projects In Developing Countries

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Abstract:

Multilateral Development Banks including the World Bank have identified infrastructure development as a crucial component of any poverty alleviation strategy in developing countries. The last two decades have seen tremendous increase in the percentage of resources developing countries have invested in infrastructure development. About £755 million was committed to private-public infrastructure development in the developing world between 1990 and 2001. Unfortunately, as exemplified by the Dam Construction Project in Lesotho, disputes often arise from major infrastructure projects in the developing world that are resolved at great cost by courts and arbitral tribunals constituted from the most expensive legal professionals in the developed world. This research presents a critical review of the literature on the experience of such disputes and the methods used in resolving them. It derives from the preliminary phase of a study aimed at developing the knowledge and understanding necessary for more cost effective resolution of such disputes. The key findings of the review so far are as follows. What literature exists is limited largely to resolution by international commercial arbitration. As to be expected of the size of these projects, governments or state entities are often parties to the underlying contract and, therefore, the disputes from the projects. In the overwhelming majority cases, the parties from developing countries are often the respondents and rarely the claimants. There is a perception that developing countries are always at a considerable disadvantage in the conduct of arbitration proceedings, which is a source of disaffection with the process on the part of these States. However, what is most remarkable about the literature is that, although there is a rapidly growing use of alternative dispute resolution (ADR) methods other than arbitration to resolve similar disputes in the developed world, the literature is silent on the use of such methods on projects in developing countries. The paper also considers the implications of the findings of the review for the design of the study.

Keywords:

case study research, developing countries, disputes resolution, infrastructure, international

1 Introduction

In 2000, when one hundred and forty-seven heads of States met at the United Nations (UN) Millennium Summit, poverty reduction was high on the agenda (Sachs and McArthur, 2005). Among the goals agreed was to halve those surviving on a dollar a day by 2015. Many of the world's poor are in the developing countries¹. The International Bank for Reconstruction and Development (the World Bank) and the other Multilateral Development Banks (MDBs) have identified infrastructure development (road, water treatment, plants, power generation/transmission plants and irrigation projects) as a essential part of any effective strategy for alleviating poverty in the developing world (World Bank, 1994; Briceno-Garmendia *et al.*, 2004). At the heart of

¹ Developing countries as used here refers to all countries classified by the World Bank as developing economies (low income and middle income economies). More information on the World Bank's classification of economies is available at: <http://data.worldbank.org/about/country-classifications>.

infrastructure development in developing countries are the major construction projects, often dominated by foreign contractors with the State as the main client (Chen et. al, 2007). It is usually the case that these projects are funded by MDBs such as the World Bank, and the various regional development banks (African Development Bank (AfDB), Asian Development Bank (AsDB), European Bank for Reconstruction and Development (EBRD) and Inter- American Development Bank (IDB)). The parties involved, the specific economic and political context and the peculiar features of major construction projects make disputes inevitable.

Often, disputes arise from these projects that are resolved by arbitral bodies outside the jurisdictions of these developing countries at great cost and expense to the respective States. It is rather worrying that the citizens of these impoverished states have to bear the brunt of expensive arbitral processes with the concomitant effect of project delivery delays and increased project cost. This research presents a critical review of the literature on the experience of such disputes and the methods used in resolving them. It reports on the early stages of an on-going study aimed at developing the needed knowledge and understanding for efficient and more cost-effective resolution of such disputes. The review is organised into three main sections. The first section briefly examines recent trends in infrastructure development in developing countries and its relationship with the construction industry. This is followed by a critical review of the literature on the resolution of disputes arising from major projects in developing countries. The final section examines the implications of the outcome of the review on the design of the rest of the study.

2 Infrastructure Development and Construction in Developing Countries

2.1 Characteristics of Infrastructure Projects

Infrastructure, in the broader sense of the word, means more than a physical project. It has been defined as comprising the physical facilities, institutions and organizational structures, or the social and economic foundations, for the operation of a society (UNCTAD, 2008). In this research the definition of infrastructure focuses on physical infrastructure. The World Bank (2004) defines infrastructure, in economic terms; as public utilities (power, telecommunications, piped water supply, sanitation and sewerage, solid waste collection and disposal, and piped gas), public works (roads and major dam and canal works for irrigation and drainage) and transport facilities (urban and inter-urban railways, urban transport, ports and waterways, and airports). The World Bank's definition however is steeped in the historical view of infrastructure as "public utilities" and/or "public works". This characteristic of infrastructure is not all-encompassing as there are many infrastructure projects today which do not fit the "public" tag. However, one can agree with the World Bank on the examples of infrastructure projects which were cited in the definition above. Many authors such as Prud'homme (2004) and Kessides (1993) provide similar definitions of infrastructure projects. Facilities such as roads, irrigation projects, dams, power generation plants, transport (airports and seaports) share some common characteristics as infrastructure. The United Nations Conference on Trade and Development (UNCTAD) (2008) list five characteristics of infrastructure. Firstly, they are capital-intensive. Secondly, they often involve physical networks. They also are major determinants of the competitiveness of an economy. Fourthly, in many societies, services associated with infrastructure are thorny social and political issues. Finally, infrastructure projects are relevant to economic development and global integration. Prud'homme (2004) adds that infrastructure projects are capital goods in themselves; they are often "lumpy" and not "incremental"; they are long-lasting and space-specific. He concludes that they often benefit both enterprise and households. To the above, one may add disputes; these projects are often laden with all kinds of disputes which may occur some time between the commencement of the project and its commissioning or even thereafter (Cheung and Yiu, 2007).

2.2 Investments in Infrastructure Projects

As a consequence of their importance and the huge investment required, infrastructure projects have historically been the preserve of States (World Bank, 1994; UNCTAD, 2008; Briceno-Garmendia *et al.*, 2004). As of 1994, developing countries were investing about two hundred billion United States dollars (\$200 billion), amounting to about four per cent (4%) of their national output and a fifth of their total investment in infrastructure development (Kessides, 1993; World Bank, 1994). In spite of efforts by States, much has not changed in terms of the percentage of resources they commit to infrastructure development over the years. UNCTAD maintains that States will need to spend between seven per cent (7%) and nine percent (9%) of their national output on infrastructure if the huge infrastructure gap is to be bridged (UNCTAD, 2008).

In response, many developing countries have opened up the sector, which once was the preserve of the State, to the private sector. Since the 1980s, there has been an increase in private sector participation in infrastructure development across the globe (World Bank, 1994; UNCTAD, 2008). Indeed it is said that with the trend of public-private participation in infrastructure development on the ascendency, about 2500 infrastructure projects in developing countries attracted private sector investment commitment of more than \$755 billion between 1990 and 2001 (Harris, 2003; Kirkpatrick *et al.*, 2006). The increase in private sector involvement in the provision of infrastructure has been attributed to the retrenchment of the State from infrastructure development as a result of inefficiency and inability to expand to meet rapidly growing demands (Harris, 2003). From twenty-one projects involving an amount of about \$11, 787 million between 1984 and 1987, private sector investment in infrastructure projects in East Asia and the Pacific rose to 871 projects with total investment amounting to \$ 135.5 billion between 2000 and 2009 (World Bank, 2010). These projects in addition to investments in existing projects in the region brought the total for the region to \$181 billion constituting 36% of the total investment in infrastructure with private participation for the period 2000-2009 in developing countries (Park, 2010). According to the World Bank, forty-three out of forty-eight Sub-Saharan African Countries implemented 238 infrastructure Projects between 2000 and 2009 with private participation (PPI) and a total investment commitment of \$ 47.6 billion (Izaguirre, 2010). Added to existing investment, the total for this region was \$79 billion, accounting for about 10% of total investment in infrastructure in developing countries for the period (Izaguirre, 2010). Eight developing countries in the South Asian region implemented 361 infrastructure projects with PPI during the last decade. This constituted 15% of the total PPI investment in developing countries with a total investment of \$174.4 billion (Jett, 2010). Compared to the relatively negligible investment in the 1980s, PPI have seen astronomical increase over the past two decades. Figure 1 shows the global distribution of PPI investment commitment to infrastructure in developing countries by region from 1990 to 2008.

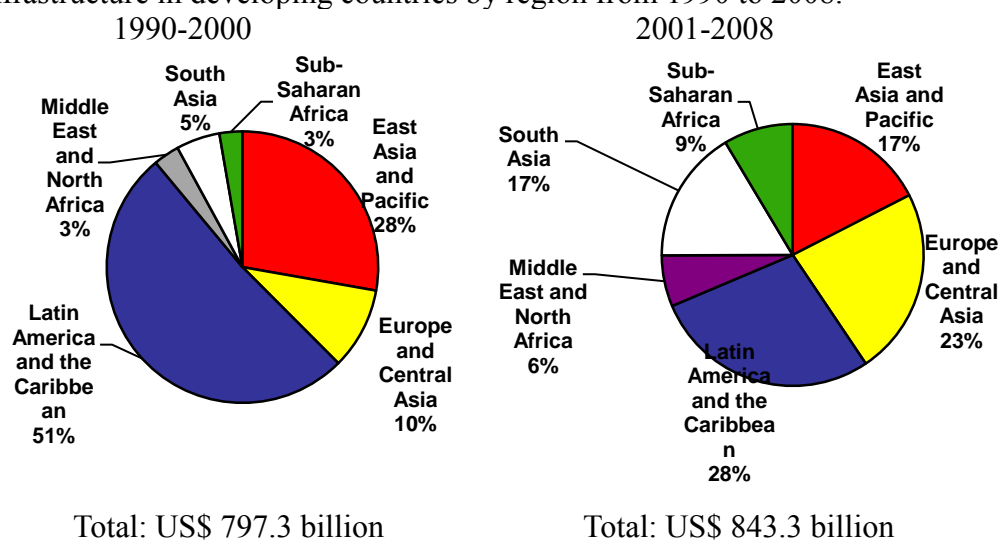


Figure 1: Total investment commitments to infrastructure projects with private participation in developing countries, by region, 1990–2008. (Source: World Bank and PPIAF, PPI Project Database)

From the discussions on infrastructure development so far, some trends can be observed. Firstly, States still remain the primary providers of infrastructure development. Secondly, States since the early 1990s have been more willing to allow private sector participation. This has resulted in billions of dollars of investment commitments in infrastructure development in developing countries. Even with the involvement of the private sector, States still maintain some share or interest in such developments. Where States divest themselves of interest in projects, they still retain regulatory oversight (Kirkpatrick *et al.*, 2004; Kirkpatrick *et al.*, 2006). Finally, the past two decades has seen phenomenal increase in investment in infrastructure by States and the private sector in developing countries.

The reason for the increased investment is, in part, attributable to the perceived impact of infrastructure development on economic development. Many authors have acknowledged the fact that infrastructure development is crucial to economic development (Canning and Pedroni, 1999; Kessides, 1993; Kirkpatrick *et al.*, 2006; Harris, 2003; Briceno-Garmendia *et al.*, 2004; World Bank, 1994; UNCTAD, 2008; Calderón and Servén, 2010). Research examining the relationship between infrastructure development and economic development identifies a correlation between the two (Sanchez Robles, 1998; Canning and Pedroni, 1999; Tan, 2002; Briceno-Garmendia *et al.*, 2004; Giang and Sui Pheng, 2011). Kessides and Prud'homme have argued that much of the literature on the relationship has been focused on infrastructure capital and not services. To them, infrastructure services should be the main measure of impact of infrastructure development. Kessides argues further that whilst most of these studies are fixated on economic growth, not much is explained about the impact on the welfare of people. Prud'homme asserts, in agreement, that impact of infrastructure development affects both enterprises (economic growth) and households (welfare of the people). His explanation of the linkages is illustrated by him as shown in Figure 2. below.

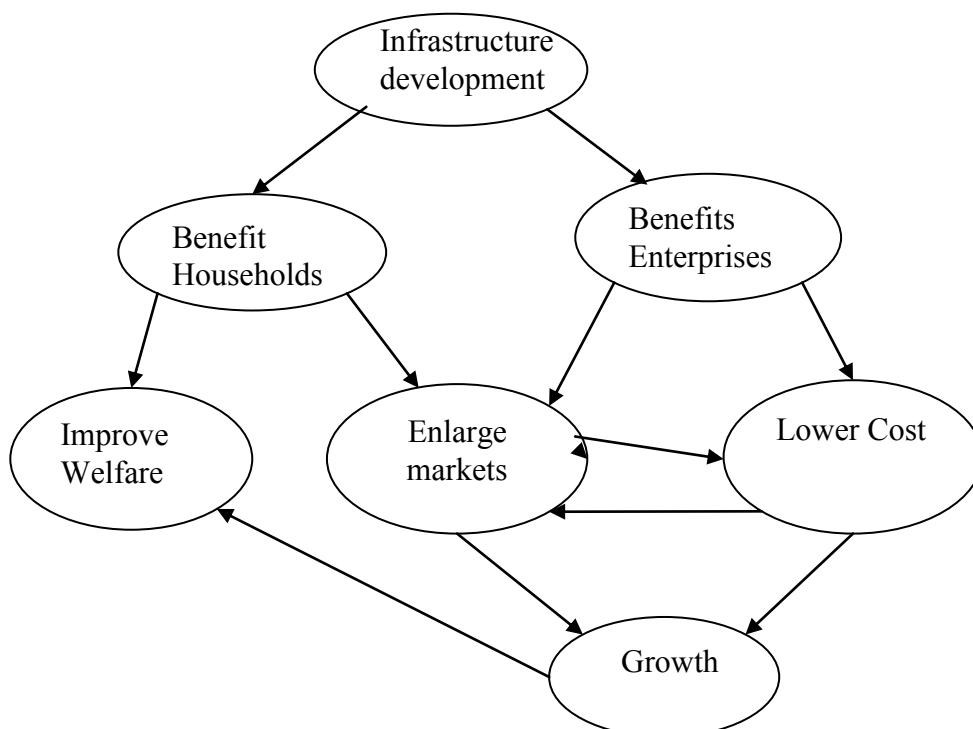


Figure 2: How infrastructure contributes to development. (Source: Prud'homme (2004).)

The provision of infrastructure for potable water, electricity, health and sanitation will directly and dramatically benefit and improve the welfare of households and thereby impact poverty reduction (Briceno-Garmendia *et al.*, 2004). The importance attached to infrastructure makes the process by which they are developed a matter of utmost importance.

2.3 Infrastructure Development and Construction: The Relationship

At the heart of the ever expanding infrastructure in developing countries is the international construction industry. Whether it involves building from the scratch or rehabilitation, infrastructure development involves construction. As a result of the huge capital outlay required many infrastructure projects have been awarded to foreign construction companies and experts who have the capacity to execute these projects (Chan, 2005). In Africa, for instance, many American, European and Asian construction companies have been involved in infrastructure project construction for decades. A table compiled from Engineering News Record by Chen et al (2007) spanning the period 2001-2005 reveals that American contractors had 15.42% market share of construction projects on the African continent in 2005. Whilst British firms had 5.04% of the share of the market, European contracting firms collectively had 49.33% of the construction market share. In recent years many Chinese construction companies have joined the competition for construction projects on the African continent (Chen et al., 2007). A study conducted into the operations of Chinese construction firms in Africa found that there is a huge increase in the number of Chinese construction firms operating in the region. From the building of soccer stadia and dams in Ghana to the construction of roads in Zambia, the influence of the Asian construction companies is being felt. The Chinese construction firms as of 2005 controlled 21.36% percent of the market (Chen et al., 2007).

The involvement of international construction firms in infrastructure development in developing countries is a global phenomenon not limited to Africa. This has resulted in the emergence of a huge international construction industry with implications for *inter alia* law and dispute resolution. Disputes often arise as a result of land acquisition for the projects, re-settlement of communities affected by projects, employment and labour concerns, health and safety issues or indeed shareholding challenges. In this research however, the focus is on construction disputes and their resolution.

3 Resolution of Construction Disputes Relating to Major Projects

3.1 International Construction Disputes

By the very nature of infrastructure projects as outlined earlier, and the peculiarities of the construction industry whether domestic or international, disputes are bound to occur (Hibberd and Newman, 1999; Gaitskell, 2006). Dispute may arise between clients (who are often States) and designers of the project, in respect of unsatisfactory or poor quality designs; between Clients and main contractors for instance in relation to excess works, unforeseen works or subsequent works (Matijevic, 2008). Issues of quantity and quality, extension of time and claim payment are often associated with such projects. From the ICSID Caseload Statistics for 2011(ICSID, 2011) geographic distribution of new ICSID Cases registered in 2010 by State Party involved are as follows: Eastern Europe and Central Asia, 27%; Sub-Saharan Africa, 27%; South America, 31%; South and East Asia and the Pacific, 8%; and Central America and the Caribbean, 7%. The sectors affected by these disputes included power generation, transport and construction. These statistics give an indication that many disputes relating to projects involving developing countries are being submitted to international arbitration.

Currently, the perception is that developing countries are spending huge sums of money in dispute resolution across the arbitration centres of this world. Disputes can have very devastating consequences for the contractors and more importantly the clients, whether it is a State or both a State and an investor in a joint venture. Delays can occasion huge cost overruns and retard the progress of other economic activities. It has been found through analyses of large engineering projects that in the areas of arms, petrochemical, energy and power projects cost overruns range between 30% to 700% (Miller and Lessard, 2000). Whilst these overruns may be attributed to several factors, inflation, and poorly defined contract terms are also cited as causes of such overruns (Merrow et al., 1988 in Miller and Lessard, 2000). The impact may reach far beyond the parties

involved. Resource constraint has always been an issue with the developing world. For developing countries, an effective system of resolving such disputes is indispensable. What then are the experiences of developing countries regarding how dispute from major infrastructure projects are resolved?

3.2 Developing Countries and Construction Dispute Resolution

Disputes arising from transactions within a State fall within the jurisdiction of the State and are often tried by national courts. However, with the upsurge of cross-border and international commercial activities, national courts in developing countries have lost their appeal as the preferred choice for settling disputes arising from such transactions (Leahy and Pierce, 1985-86). Domestic litigation has been costly and time-consuming (McLaughlin, 1979). Undeveloped laws, political risk, perceived bias against foreign parties, over-crowded national courts, lack of familiarity of foreign parties to local procedure, lack of confidentiality, forum-shopping, conflict of law complications and issues of enforcement of foreign judgments (Leahy and Pierce, 1985-86; Perloff, 1992; McLaughlin, 1979) are but a few of the reasons which have been advanced in support of a system which can render fair, effective, efficient and final decisions in cross-border transactions (Leahy and Pierce, 1985-86).

International Commercial Arbitration has emerged as a preferred mechanism for dispute resolution in international commercial¹ transactions globally (Ehrenhaft, 1977; McLaughlin, 1979; Al-Baharna, 1994; Leahy and Pierce, 1985-86; Perloff, 1992; Blackaby *et al.*, 2009; Fowler *et al.*, 1980; Cotran *et al.*, 1996). The word “commercial” is often defined to include construction transactions. Features of ICA such as jurisdictional neutrality, its consensual nature, flexibility in procedure and process generally, confidentiality (Ehrenhaft, 1977), reduced cost, speed and party autonomy have made it suitable for the emerging global system of commerce which have parties from different countries, cultures and legal systems (McLaughlin, 1979; Perloff, 1992).

The development of ICA in developing countries can be examined from two perspectives; legal developments and institutional developments. In respect of the former, two international instruments have been crucial; the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (the New York Convention) and the United Nations Commission on International Trade Law (UNCITRAL) Model Law on ICA. The main objective of the New York Convention has been to commit States who signed on to it to give effect to agreements to arbitrate and to enforce within their territories foreign arbitral awards which satisfy certain agreed criteria for validity and legitimacy². The possibility of enforcement of a binding arbitral award not just at the seat of the arbitration but also internationally has endeared ICA to the international business community. Currently, 145 countries are parties to this treaty³. Even in Latin America, a region noted for its support of the Calvo doctrine⁴, it is reported that all countries within the region have signed on to the Convention as of 2003 (Bernal, 2009). The UNCITRAL Model Law on International Commercial Arbitration, 1985 (as amended in 2006) on its part, aims at eliminating the inadequacies of national laws and disparities between them. To this end it sets out special procedural regime for international commercial arbitration⁵. Currently, about sixty countries, many of them developing nations, have adopted local arbitration legislations based on the UNCITRAL model.

¹ See the notes accompanying the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration, 1985 (as amended in 2006). It suggests that the word “commercial” be interpreted broadly to include all matters arising from relationships of commercial nature. The list provided as part of the note include construction of works, consulting, engineering, and investment.

² See Article III of the New York Convention, 1958.

³ See the New York Convention, 1958, Status of Parties. Available at:

http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html. Accessed on 18th May, 2011 at 11:30am.

⁴ This doctrine essentially insists on “the non-intervention and absolute equality of foreigners with nationals” in dealings by States with foreign nationals.

⁵ See notes accompanying the UNCITRAL Model Law, 1985 (as amended in 2006).

Beyond these global efforts, there have been regional efforts to develop the law on international arbitration. For example, the Organization for the Harmonization of Business Law in Africa (OHADA), an international organization set up by treaty in 1993, with sixteen mainly West and Central African francophone member States, aims at harmonizing business laws among member States. As part of its activities it has adopted a uniform Arbitration Act, set up a court, and developed its own arbitration procedures.

International arbitral institutions in Europe have served as venues for ICA between many developing countries and foreign entities. The role of national courts in international commercial arbitration has been ancillary. Arbitral institutions such as the International Court of Arbitration of the International Chamber of Commerce, the London Court of International Arbitration, and the International Centre for Settlement of Investment Disputes (ICSID) in particular, have arbitrated hundreds of cases between private entities, States and private entities and between States for several decades. In relatively recent times, other arbitral institutions have been set up in Hong Kong, Singapore, China, Dubai, Cairo and Nigeria to serve Asia and Africa. The African-Asian Legal Consultative Committee (AALCC) has been very instrumental in the effort to ‘regionalise’ arbitration centres (Asouzu, 2001; Asouzu, 2006; Sempasa, 1992). AALCC’s efforts led to the setting up of the regional centres in Cairo and Nigeria in Africa and in Kuala Lumpur and Tehran in Asia. The rationale is to bring ICA closer to countries in Asia and Africa.

Generally, very little exists by way of literature on ICA in developing countries as compared to the developed world. The little literature relating to developing countries identified so far have revealed that ICA remains the dominant resolution mechanism in all commercial transactions (Cotran *et al.*, 1996; Asouzu, 2001; Blackaby *et al.*, 2009; Tiewul and Tsegah, 1975; Sempasa, 1992). Virtually all standard form contracts governing construction transactions in developing countries, notably those published by the International Federation of Consulting Engineers (FIDIC) contain provisions on ICA (Tackaberry and Marriott, 2003). It is stated that the dominance of the use of ICA has created —*de facto* universality of it as the normal method of dispute settlement and parties sometimes choose it without much thought as to its suitability to the circumstance”. (Tackaberry and Marriott, 2003). For Latin America however, ICA has not been the popular choice. Many Latin American countries until recently have insisted on subjecting international transactions taking place within their jurisdictions to national judiciaries. This practice, deeply ingrained in their constitutional practices, take its roots from the Calvo doctrine (Bernal, 2009). However, the trend is gradually shifting to international commercial arbitration (Bernal, 2009).

What literature exist thus deals generally with ICA without any specific treatment of how it operates in the context of international construction disputes relating to major projects. The focus of the literature has been on the challenges posed by ICA to developing countries (Yelpaala, 2006; Asante, 1993; Asouzu, 2001; Sempasa, 1992). These challenges can be divided into the generic and the peculiar. Key issues under the generic category are cost and delays (Asouzu, 2001). Regarding cost, disputes arising from major infrastructure projects are often resolved at great cost to developing countries whose citizens are made to bear such expenditure eventually. A good example of this is the case relating to the construction of the Katse Dam in Lesotho. The facts of the case are aptly set out in the opinion of the English Supreme Court (then, the House of Lords) in *Lesotho Highlands Development Authority (Respondents) v. Impregilo SpA and Others*.¹ In 1991 (after a sixty year preparatory period), the Lesotho Highlands Development Authority engaged a consortium of seven companies from the United Kingdom, South Africa, Italy, Germany and France to construct the Katse Dam in Lesotho. The contract was made on 15 February 1991 under standard FIDIC Conditions of Contract (4th edition) with terms and additions. The contract was governed by the law of Lesotho. After the conclusion of the project in 1998, the Contractors made a claim for reimbursement of increased costs and for upwards adjustments to prices and rates. The dispute was eventually referred to Arbitration in London under International Chamber of Commerce (ICC) rules as provided for by the contract after the Engineer’s decisions on the claims were rejected. The decision of the arbitrators was also appealed to the Supreme Court.

¹ [2005] UKHL 43

The focus of this reference is not on the substance of the claims. What is worrying however, is the fact that Lesotho, a small landlocked developing country with human development index ranking in 2007/2008 of 138 out of 177¹ had to spend resources on registration fees, administrative expenses, counsel's fees, arbitrator's fees and expenses, witnesses expenses, court, travelling, accommodation and feeding expenses for local representatives and lawyers to pursue the above-described dispute. For a developed economy, the impact of the cost may be negligible. The situation with a developing economy is however different. It may be argued that such cost may be recovered eventually if the State wins the "contest". This however is not always the case as parties often do not recover their entire cost.

UNCTAD, in a related study on the issue of cost in investor-State arbitrations (UNCTAD, 2010) has found that the cost of arbitration generally has increased drastically. Whilst legal fees constitute about 60% of the expenses, the arbitrators' fees, the administration fees of arbitral centres, expenses of witnesses and experts also constitute substantial cost. Referring to previous UNCTAD reports (UNCTAD 2005b, 2006a, 2008a and 2009) the report cited four cases as examples. In *Plama Consortium v. Bulgaria*², the legal cost for the claimant amounted to US\$4.6 million whilst that of the respondent amounted to US\$ 13.2 million. In the second example cited, the claimant legal cost in *Pey Casado v. Chile*³ relating to the jurisdictional and merit phases of the arbitration amounted to US\$ 11million, whilst that of the respondent amounted to US\$ 4.3 million. In *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*⁴ the respondent country had to pay US\$7.6 million in legal cost. Finally, in *Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt*⁵, the respondent was obliged to pay an amount of \$6 million as legal costs, expert and other expenses.

Though relating to investment, these examples are not far-fetched. Many international investment agreements define investment to include, "claims to money and claims under a contract having a financial value" (UNCTAD, 2011). Indeed, international construction transactions and disputes share some common features with Foreign Direct Investment (FDI) and investment disputes. Firstly, the clients involved in international construction transactions in developing countries are often Sovereign States. The decisions which may be challenged by an international construction firm are decisions taken by the State or its agencies. Often, whilst the State will prefer that its courts resolve disputes arising, the Contractor on the other hand will be wary to have a matter involving the State tried before its own courts. The amounts involved in these transactions are huge. FDI's and investment disputes share these attributes. The issue of the rising cost of ICA is a common attribute. The confidentiality of these arbitral processes sometimes make it difficult to obtain figures on cost. However, for both developed and developing countries and indeed even investors (UNCTAD, 2008), cost of arbitration has been an issue.

Regarding delays, ICA was reputed for its swiftness (Ehrenhaft, 1977). However, this feature of ICA has been questioned as cases take more time to resolve (UNCTAD, 2010). Indeed, one author has described ICA as a highly complex commercial litigation (Oh, 1981). Though this description is dated, it remains true. Nearly all the procedural complexities associated with a court proceeding can be found in most arbitral hearings involving huge projects. The consequences of these are delays. The impact of delays on project delivery and increased project cost is hackneyed, and particularly severe on developing countries.

The second category of concerns with ICA relate to those peculiar to developing countries. Asouzu (2001) draws attention to some factors in the current international regime for dispute resolution which are causing serious disaffections in the developing world. He mentions that there is a perceived bias against African States and by extension, other countries in the developing world in the international dispute resolution process, enforced by the relationship between the World Bank, a major lending institution for most of them, and the International Centre for the Settlement of

¹ See data on Lesotho at <http://www.unohrrls.org/en/orphan/98/>. Accessed on 15th May, 2011

² ICSID Case Number. ARB/03/24.

³ ICSID Case Number. ARB/98/2

⁴ ICSID Case Number ARB/03/16

⁵ ICSID Case No. ARB/05/15

Investment Disputes (ICSID). This perception, he asserts, is further fuelled by the following factors: absence of African arbitrators on arbitration panels in the West; the fact that in nearly all cases involving African States or companies, they often are the respondents and hardly the appellants; the choice of American and European venues or arbitration centres over equally well established ones in Africa, for example those in Cairo and Lagos; and the long-standing arguments of lack of judicial infrastructure, qualified personnel and fair hearing which are still maintained without any basis. He concludes on the note that while staying the current course, African arbitration centres and governments need to publicize the current wave of change in the industry in Africa (English, 2002). Asouzu's recommendations focused on regionalizing arbitral centres and awareness creation, but were relatively passive and bland in relation to the development of alternatives such as mediation, dispute boards and establishment of dispute early resolution systems, which may be crucial to the international construction industry especially at the initial stages of a conflict. On the absence of African arbitrators on arbitration panels, articles 12 to 16 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention), 1966, for example, provide that member States are allowed to designate four qualified persons to be part of its panel of arbitrators and panel of conciliators respectively. Beyond the ICSID situation, most Arbitration Rules permit parties to nominate an arbitrator, whether the requirement is for one or three arbitrators. Again it may be argued that often, developing countries end up selecting arbitrators from the developed world, and thus can not probably turn around and raise concerns about their own choices (Asouzu, 2006). The reality on the ground however, as conveyed by the ICSID case load statistics (ICSID, 2011), is that Africa and many developing countries still have a lean presence on the ICSID arbitration and conciliation panels.

Characteristically, the existing literature focus generally on ICA with no specific attention paid to the construction industry per se. This is so whether at the national (Cotran et al., 1996) or regional level (Asouzu, 2001), with the exception of a few from the Asian region where some efforts are being made to examine international construction disputes distinctively (Cheung and Suen, 2002; Chau, 2007; Chan and Chan, 2002; Chan, 2005a; Chan and Suen, 2005; Chan, 2006; Chan, 2005b). Two conclusions have emerged from the literature so far. First, the literature existing on resolution of infrastructure disputes in the developing world are generic in nature and deal with international commercial arbitration generally. There is dearth of literature dealing specifically with construction disputes arising from major infrastructure projects and the processes involved in their resolution. Secondly, there is a huge knowledge gap in relation to what transpires immediately a dispute arises and when formal ICA process commences. Whilst one may look up to the dispute clauses in the various standard form Construction contracts for an answer, those answers are merely theoretical as what pertains in practice may differ drastically. No empirical evidence has been found on the issue. As the story of Adjudication in England has shown, good early dispute mechanism(s) of interim or permanent nature, prior to arbitration may be useful for the construction industry in developing countries. Incipient disputes may be nipped in the bud should there be a clearly existing system which parties can resort to prior to International arbitration. Further, the materials so far reviewed do not consider in detail the viability and the role that alternative dispute resolution mechanisms can play in resolving such disputes. These emerging conclusions have implications for the design of the research as next discussed.

4 Research Design

What type of research approach will be suitable for the kind of enquiry envisaged? It is submitted that a qualitative / an interpretivist approach is best suited for this kind of research for several reasons. Firstly, the subject-matter of the research- dispute resolution- is a social phenomenon which occurs in a real world setting. Secondly, the views of participants in major infrastructure projects are crucial to our understanding of the complexities associated with the extant dispute resolution mechanisms. Thirdly, apart from being heavily context-based, the phenomenon under study has not been explored. Further, the appropriate instruments required in studying complex

human interactions such as efforts parties make or steps they take pending ICA proceedings must be those which offer some flexibility in terms of administration on the field. This accords with the social constructivists or the interpretivist view of research (Berger and Luckmann, 1967; Lincoln and Guba, 2000). Most of the major treatises on research design, such as the *Handbook of Qualitative Research* (Denzin and Lincoln, 2005), point towards a qualitative research approach being most appropriate for research with the types of features outlined above.

Qualitative research offers various approaches for data collection and analysis. Ethnography, Phenomenology, Grounded theory (Corbin et al., 2008), the biographical method, Narrative Research (Creswell, 2009) and Case Study (Yin, 2009; Stake in Denzin&Lincoln,1998; Flick,2006) are all qualitative strategies of enquiry. It has been stated that where there is a need for an in-depth investigation into a contemporary phenomenon in its natural context, Case study may be the appropriate strategy of enquiry (Yin, 2009). Yin adds further that case study research is useful where the aim of the research, among other things, is to explain, explore, or describe an intervention in its natural setting. He argues that in making a choice between case study and other social science strategies, consideration should be given to the research questions to be investigated and the type of study envisaged. If the enquiry is about “how” and “why” some social phenomenon works, and extensive and in-depth study envisaged, then case study will be a good choice of strategy.

An in-depth study of the extant dispute resolution system for disputes arising from major projects, the gaps in the system and possible remedial strategies for all developing countries is not feasible in this research. However, an in-depth study of the situation in a typical developing country sharing common attributes with the rest will make vital contribution to knowledge, which *mutatis mutandi* will be informative and useful to the others (Flyvbjerg, 2006; Yin, 2009). This type of study raises a number of challenges; sample or case(s) selection, the theoretical implications of a context-based study, issues of verification and generalizability. The subject of the choice of a case(s) and the complexities that go with such a venture have been discussed by authors (Eckstein, 1975; Achen & Snidal, 1989; Flyvbjerg, 2006; Gerring, 2007; Collier and Mahoney, 1996; Stake, 1995; Seawright and Gerring, 2008; Yin, 2009). It is expected that this research will examine these challenges and their impact on the plausibility of the research design envisaged.

5 Conclusion

The importance of infrastructure development to poverty reduction and economic growth in developing countries cannot be over-emphasised. Substantial resources are currently being invested in projects in developing countries by both States and the private sector. Crucial to the provision of infrastructure is the international construction industry. With its peculiar features of multiple parties, varied works, quality and quantity of work and issues relating to payment among others, disputes are bound to occur. The literature related to developing countries point to international commercial arbitration generally as the main dispute resolution mechanism. Gaps have been identified in respect of; (1) the absence of specific study relating to resolution of construction disputes arising from major projects; and (2) the absence of empirical evidence on what transpires between the time disputes arise and when the processes of international commercial arbitration commence. The phenomenon to be studied is context-based and to fully appreciate it, the views of participants are required. Due to lack of previous exploration of the field, an in-depth study will be more useful. This makes qualitative study the preferred approach and case study, the preferred strategy of enquiry. However, other research approaches are likely to be considered for their suitability as new evidence emerges. It is expected that the outcome of the study will be useful not only to the case studied but also other developing countries.

6 References

Al-Baharna, H.M. (1994) International Commercial Arbitration in a Changing World. *Arab LQ*, 9, p.144.

- Asante, S.K.B. (1993) The perspectives of African countries on international commercial arbitration. *Leiden Journal of International Law*, **6**(02), pp.331-356.
- Asouzu, A.A. (2001) *International commercial arbitration and African states: practice, participation, and institutional development*. Cambridge Univ Pr.
- Asouzu, A.A. (2006) Some Fundamental Concerns and Issues about International Arbitration in Africa. *African Development Bank Law Development Review*, **Vol. 1**, p.p.81.
- Berger, P.L. and Luckmann, T. (1967) *The social construction of reality*. Doubleday New York.
- Bernal, D.S. (2009) International Arbitration in Latin America. *National Law Center for Inter-American Free Trade*, May, **15**.
- Blackaby, N., Partasides, C., Redfern, A. and Hunter, M. (2009) *Redfern and Hunter on international arbitration*. Oxford Univ Pr.
- Briceno-Garmendia, C., Estache, A. and Shafik, N. (2004) Infrastructure Services in Developing Countries: Access, Quality, Costs and Policy Reform. *World Bank*.
- Calderón, C. and Servén, L. (2010) *Infrastructure in Latin America*. World Bank.
- Canning, D. and Pedroni, P. (1999) Infrastructure and long run economic growth. *Consulting Assistance on Economic Reform II Discussion Paper*, **57**.
- Chan, E.H.C., K. L. and Hills, M. J. (2005a) Construction Industry Adjudication: A Comparative Study of International Practice. *Journal of International Arbitration*, **Volume 23**, (Issue 5), pp.363-374.
- Chan, E.H.W. and Chan, A.P.C. (2002) Conflict Management Pertaining To Design Information, in International Construction Projects. *Journal of Architectural Management*, **U.K. Vol.16**, , pp.32-57.
- Chan, E.H.W. and Suen, H. (2005) Dispute Resolution Management for International Construction Projects in China *Journal of Management Decision*, **Vol.43**(2), pp.589-602.
- Chan, E.H.W., Suen H., & Chan, K. L (2006) A MAUT-based Dispute Resolution Selection Model Prototype for International Construction Projects, . *J. Constr. Engrg. and Mgmt.* , **Vol. 132**, (No. 5), pp. pp.444-451.
- Chan, E.H.W.a., Suen, H. (2005) Legal Issues of Dispute Management in International Construction Projects Contracting. *21 Const. L.J.*, **No. 4**, pp.291-305.
- Chan, E.H.W.S., H. (2005b) Disputes and dispute resolution systems in Sino-Foreign Joint Venture (SFJV) Construction Projects in China. *ASCE Journal of Professional Issues in Engineering Education and Practice*, , **Vol.131**(2), pp.141-148. .
- Chau, K. (2007) Insight into resolving construction disputes by mediation/adjudication in Hong Kong. *Journal of Professional Issues in Engineering Education and Practice*, **133**, p.143.
- Chen, C., Chiu, P., Orr, R. and Goldstein, A. (2007) *An empirical analysis of Chinese construction firms' entry into Africa*. Sydney, Australia.
- Cheung, S.O. and Suen, H.C.H. (2002) A multi-attribute utility model for dispute resolution strategy selection. *Construction Management and Economics*, **20**(7), pp.557-568.
- Cheung, S.O. and Yiu, K.T.W. (2007) A study of construction mediator tactics--Part I: Taxonomies of dispute sources, mediator tactics and mediation outcomes. *Building and environment*, **42**(2), pp.752-761.
- Collier, D. and Mahoney, J. (1996) Research Note: Insights and pitfalls: Selection bias in qualitative research. *World Politics*, **49**(1), pp.56-91.
- Corbin, J.M., Strauss, A.L. and Strauss, A.L.B.o.q.r. (2008) *Basics of qualitative research : techniques and procedures for developing grounded theory*. 3rd ed. ed. Thousand Oaks, Calif.: Sage Publications, Inc., pp.xv, 379 p.
- Cotran, E., Amisshah, A. and Conference, P.A.C.o.t.L.C.o.I.A. (1996) *Arbitration in Africa*. Kluwer Law International.
- Creswell, J.W. (2009) *Research design : qualitative, quantitative, and mixed methods approaches*. 3rd ed. ed. Los Angeles ; London: SAGE, pp.xxix, 260 p.

- Denzin, N.K. and Lincoln, Y.S. (2005) *The Sage handbook of qualitative research*. Sage Publications, Inc.
- Ehrenhaft, P.D. (1977) Effective International Commercial Arbitration. *Law & Pol'y Int'l Bus.*, **9**, p.1191.
- English, C. (2002) Review: International Commercial Arbitration and African States: Practice, Participation and Institutional Development by Amazu A. Asouzu. *Canadian Journal of African Studies / Revue Canadienne des Études Africaines*, **36**(3), pp.573-575.
- Flyvbjerg, B. (2006) Five misunderstandings about case-study research. *Qualitative inquiry*, **12**(2), p.219.
- Fowler, T.L., Killian Jr, C.D., Northup Jr, I.N. and Range, J.J. (1980) Survey of Arbitral Forums: Their Significance and Procedure, A. *NCJ Int'l L. & Com. Reg.*, **5**, p.219.
- Gaitskell, R. (2006) *Engineer's dispute resolution handbook*. Thomas Telford.
- Gerring, J. (2007) *Case study research: principles and practices*. Cambridge Univ Pr.
- Giang, D.T.H. and Sui Pheng, L. (2011) Role of construction in economic development: Review of key concepts in the past 40 years. *Habitat International*, **35**(1), pp.118-125.
- Harris, C. (2003) *Private participation in infrastructure in developing countries: trends, impacts, and policy lessons*. World Bank Publications.
- Hibberd, P.R. and Newman, P. (1999) *ADR and adjudication in construction disputes*. London: Blackwell Science Ltd.
- ICSID (2011) *The ICSID Caseload – Statistics*.
- Izaguirre, A.K. (2010) *Private Participation in Infrastructure in Sub-Saharan Africa in the Last Decade*. The World Bank PPIAF, p. 1.
- Jett, A.N. (2010) *Private Participation in Infrastructure in Latin America and the Caribbean in the Last Decade*. The World Bank PPIAF
- Kessides, C. (1993) *The contributions of infrastructure to economic development: A review of experience and policy implications*. World Bank Publications.
- Kirkpatrick, C., Parker, D.S. and Zhang, Y.-F. (2004) *Foreign direct investment in infrastructure in developing countries : does regulation make a difference?* Manchester: Centre on Regulation and Competition, p.25 leaves.
- Kirkpatrick, C., Parker, D.S. and Zhang, Y.-F. (2006) Foreign direct investment in infrastructure in developing countries : does regulation make a difference? *Transnational Corporation*, **15**(1), pp.143-171.
- Leahy, E.R. and Pierce, K.J. (1985-86) Sanctions to Control Party Misbehavior in International Arbitration. *Va. J. Int'l L.*, **26**, pp.291, 293.
- Lincoln, Y.S. and Guba, E.G. (2000) Paradigmatic controversies, contradictions, and emerging confluences. *Handbook of qualitative research*, **2**, pp.163-188.
- McLaughlin, J.T. (1979) Arbitration and Developing Countries. *Int'l Law*, **13**, p.211.
- Miller, R. and Lessard, D.R. (2000) *The strategic management of large engineering projects: Shaping institutions, risks, and governance*. The MIT Press.
- Oh, B.S. (1981) Some Problems in International Commercial Arbitration with Developing Countries. *Seoul Law Journal* pp.144- 173.
- Park, J. (2010) *Private Participation in Infrastructure in East Asia and Pacific in the Last Decade*. The World Bank PPIAF.
- Perloff, S. (1992) Ties that Bind: The Limits of Autonomy and Uniformity in International Commercial Arbitration. *U. Pa. J. Int'l Bus. L.*, **13**, p.323.
- Sachs, J. and McArthur, J. (2005) The Millennium Project: a plan for meeting the millennium development goals. *Lancet*, **365**(9456), pp.347-353.
- Sanchez Robles, B. (1998) Infrastructure investment and growth: some empirical evidence. *Contemporary Economic Policy*, **16**(1), pp.98-108.
- Seawright, J. and Gerring, J. (2008) Case selection techniques in case study research. *Political Research Quarterly*, **61**(2), p.294.

- Sempasa, S.L. (1992) Obstacles to international commercial arbitration in African countries. *International & Comparative Law Quarterly*, **41**(02), pp.387-413.
- Stake, R.E. (1995) *The art of case study research*. Sage Publications, Inc.
- Tackaberry, J. and Marriott, A.L. (2003) *Bernstein's Handbook of Arbitration and Dispute Resolution Practice*. Fourth ed. London: Sweet & Maxwell.
- Tan, W. (2002) Construction and economic development in selected LDCs: past, present and future. *Construction Management and Economics*, **20**(7), pp.593-599.
- Tiewul, S.A. and Tsegah, F.A. (1975) Arbitration and the Settlement of Commercial Disputes: A Selective Survey of African Practice. *International & Comparative Law Quarterly*, **24**(03), pp.393-418.
- UNCTAD (2008) *World Investment Report, 2008* New York, Geneva: United Nations.
- UNCTAD (2010) *Investor–State Disputes: Prevention and Alternatives to Arbitration*.
- UNCTAD (2011) *Scope and Definition of Investment*
- World Bank (2010) *Private Participation in Infrastructure Database: Regional Snapshots*. World Bank/ PPIAF.
- World Bank, T. (1994) *Infrastructure for development*. Oxford: Oxford University Press, pp.x, 254p.
- Yelpaala, K. (2006) In Search of a Model Investment Law for Africa. *African Development Bank Law for Development Review*, **Vol. 1**, p.2.
- Yin, R.K. (2009) *Case study research: Design and methods*. Sage Publications, Inc.