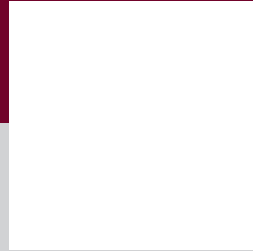


P I N H E I R O N E T O
A D V O G A D O S



DISPUTE RESOLUTION BOARD FOUNDATION - DRBF
9th Annual International Conference - May 16-17, 2009

Operating DBs in Civil Law Countries

Ideas for Optimizing the DB Process in a Civil Law

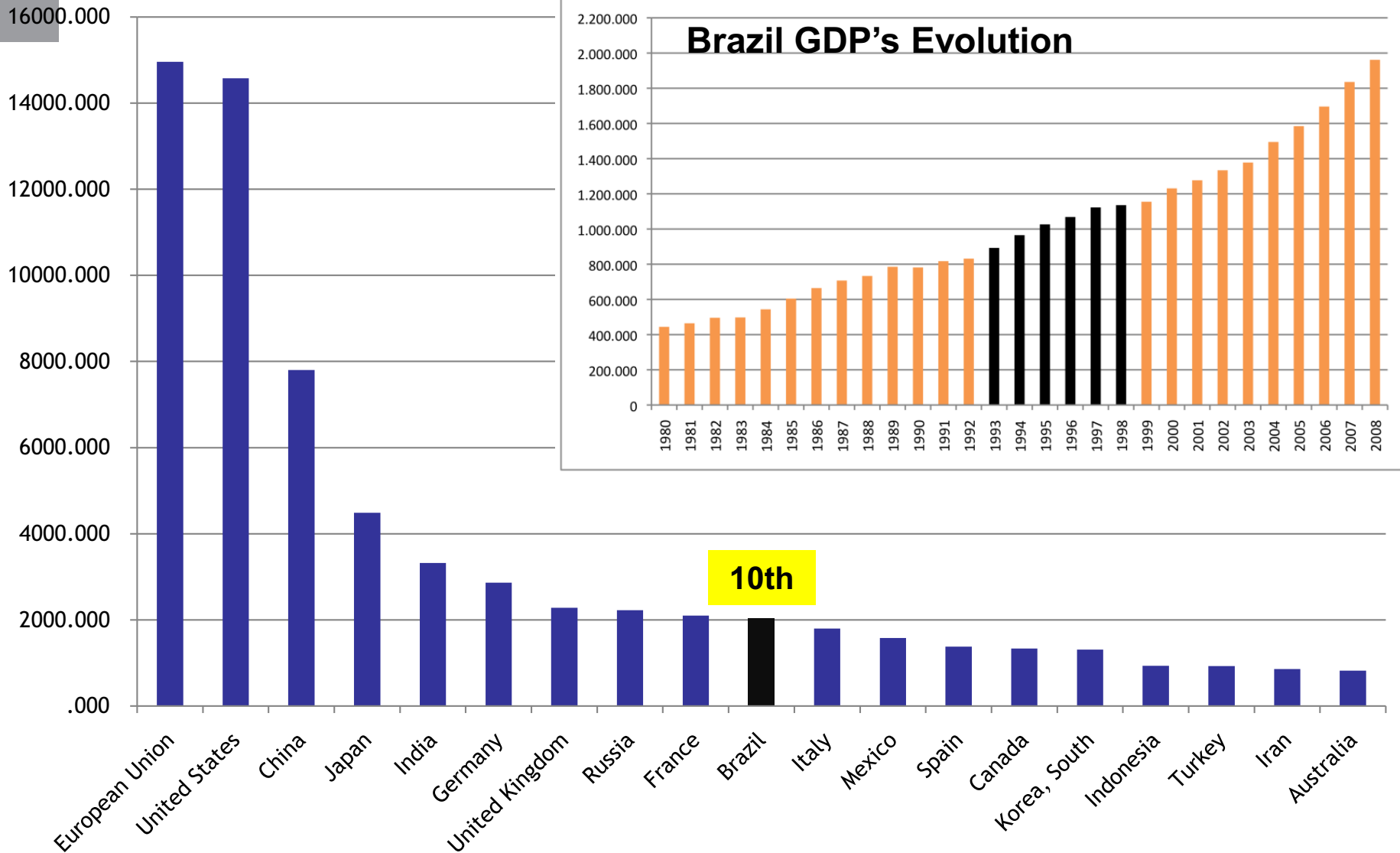
Jurisdiction Like Brazil

Complex Dam Projects, A Case Study

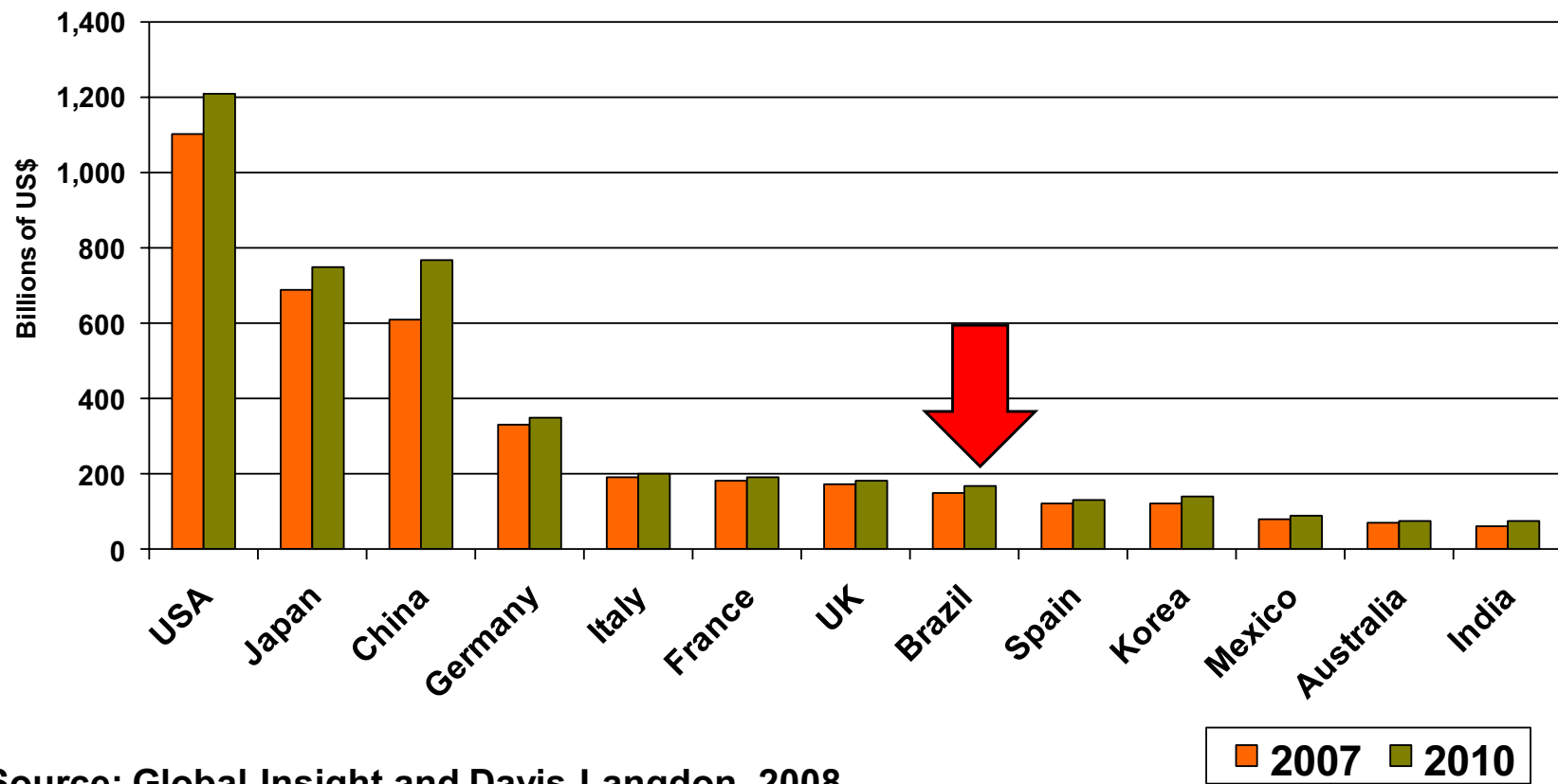
Júlio César Bueno
Pinheiro Neto Advogados
LL.M Cantab, Ph.D USP

The HydroPower Energy Sector in Brazil

Brazil - GDP's Evolution



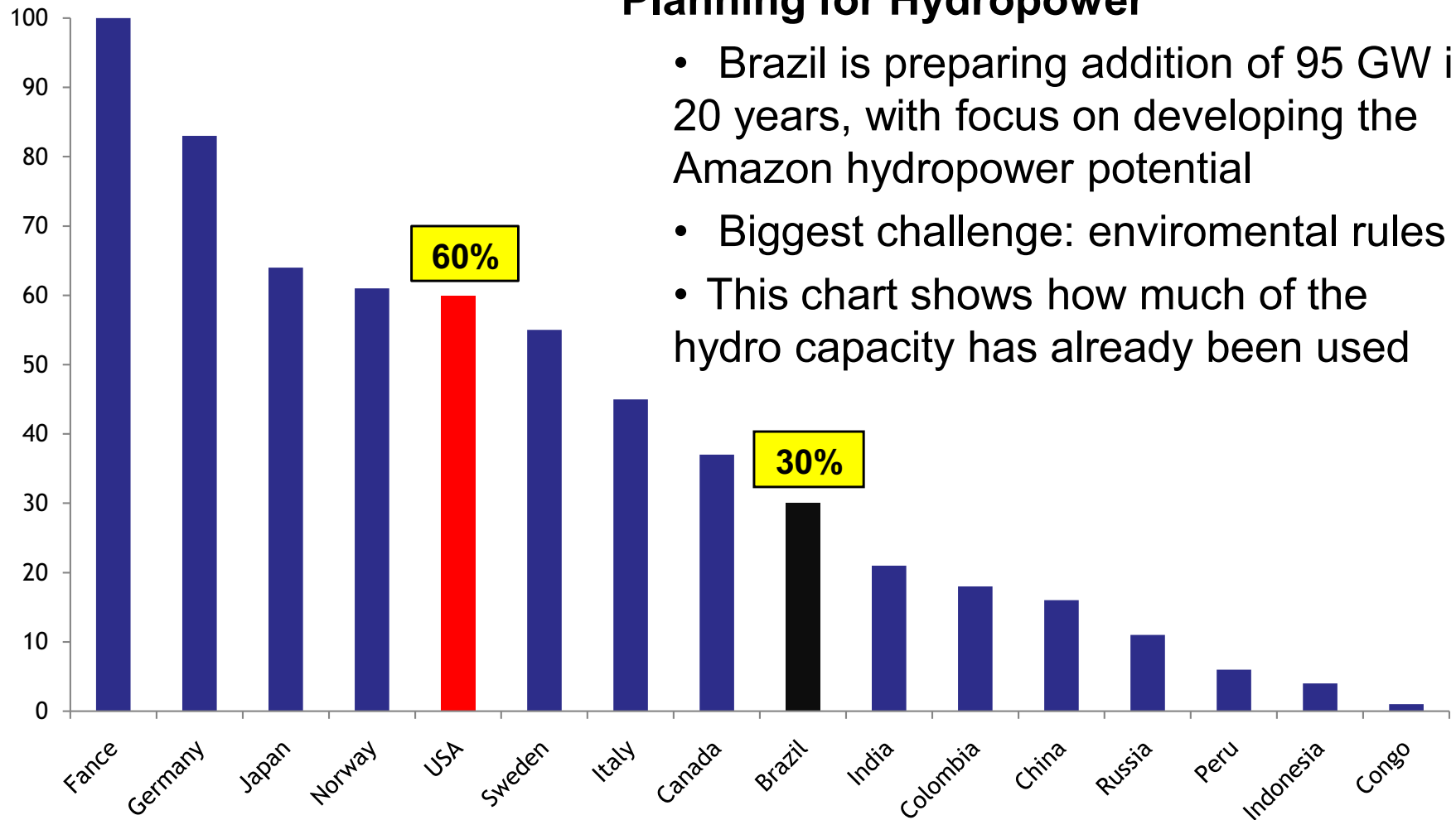
Construction Business in Brazil



Energy trends : Hydro Power

Planning for Hydropower

- Brazil is preparing addition of 95 GW in 20 years, with focus on developing the Amazon hydropower potential
- Biggest challenge: environmental rules
- This chart shows how much of the hydro capacity has already been used

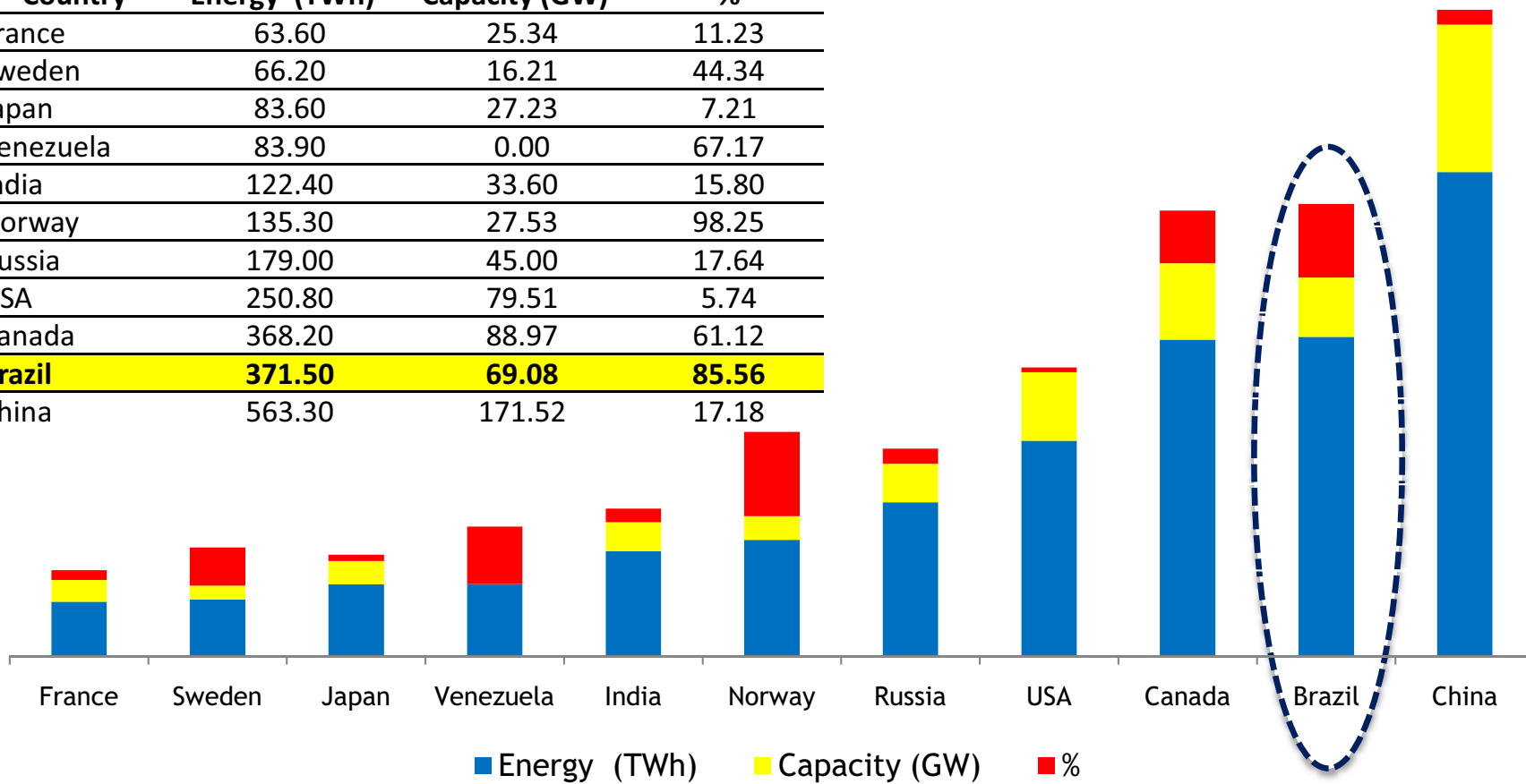


Brazil's Tradition in Large Dams

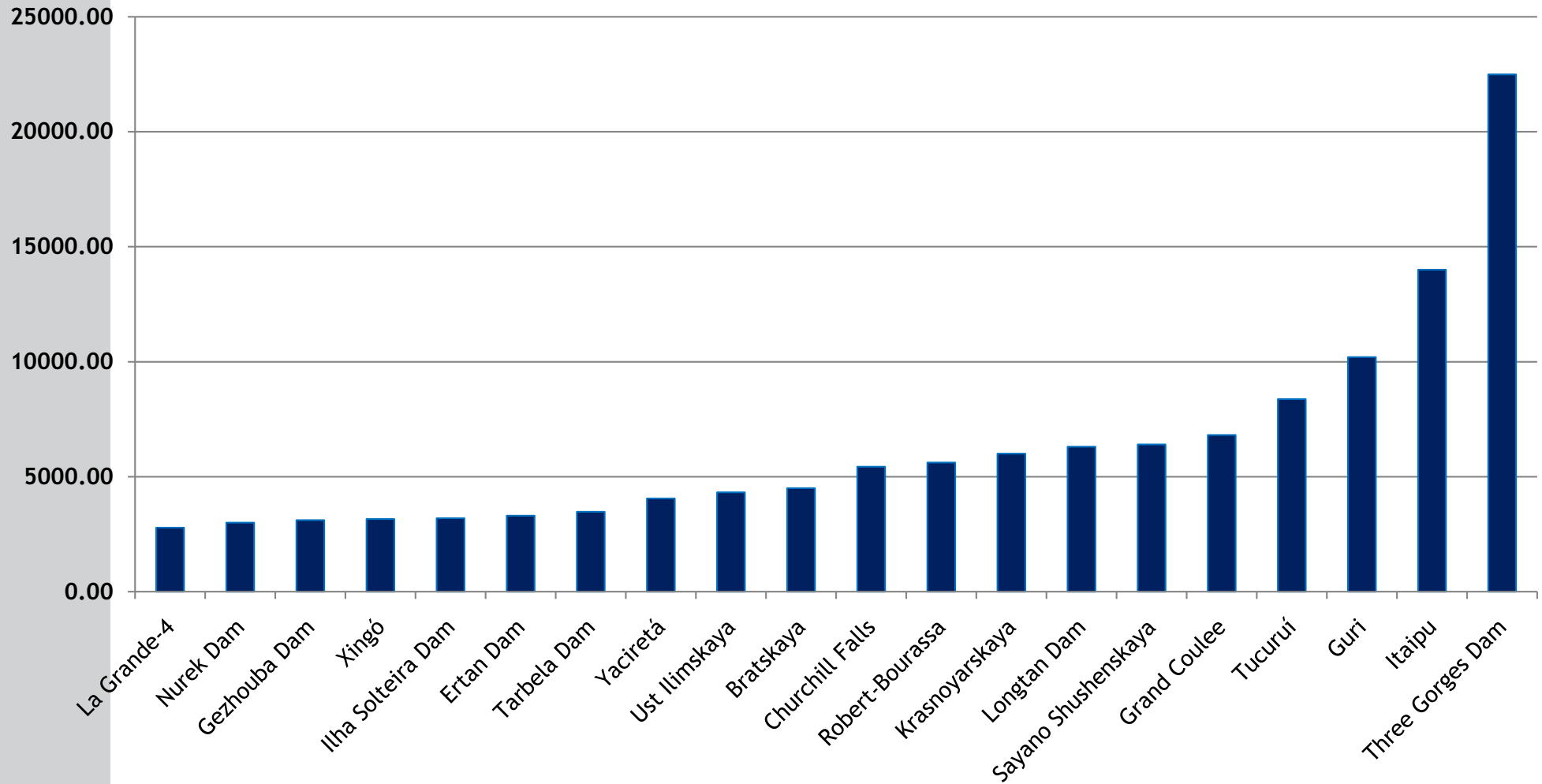
Large Dam Projects

- **Brazil is highly dependent on hydropower electricity, with about 80% coming from large dams**

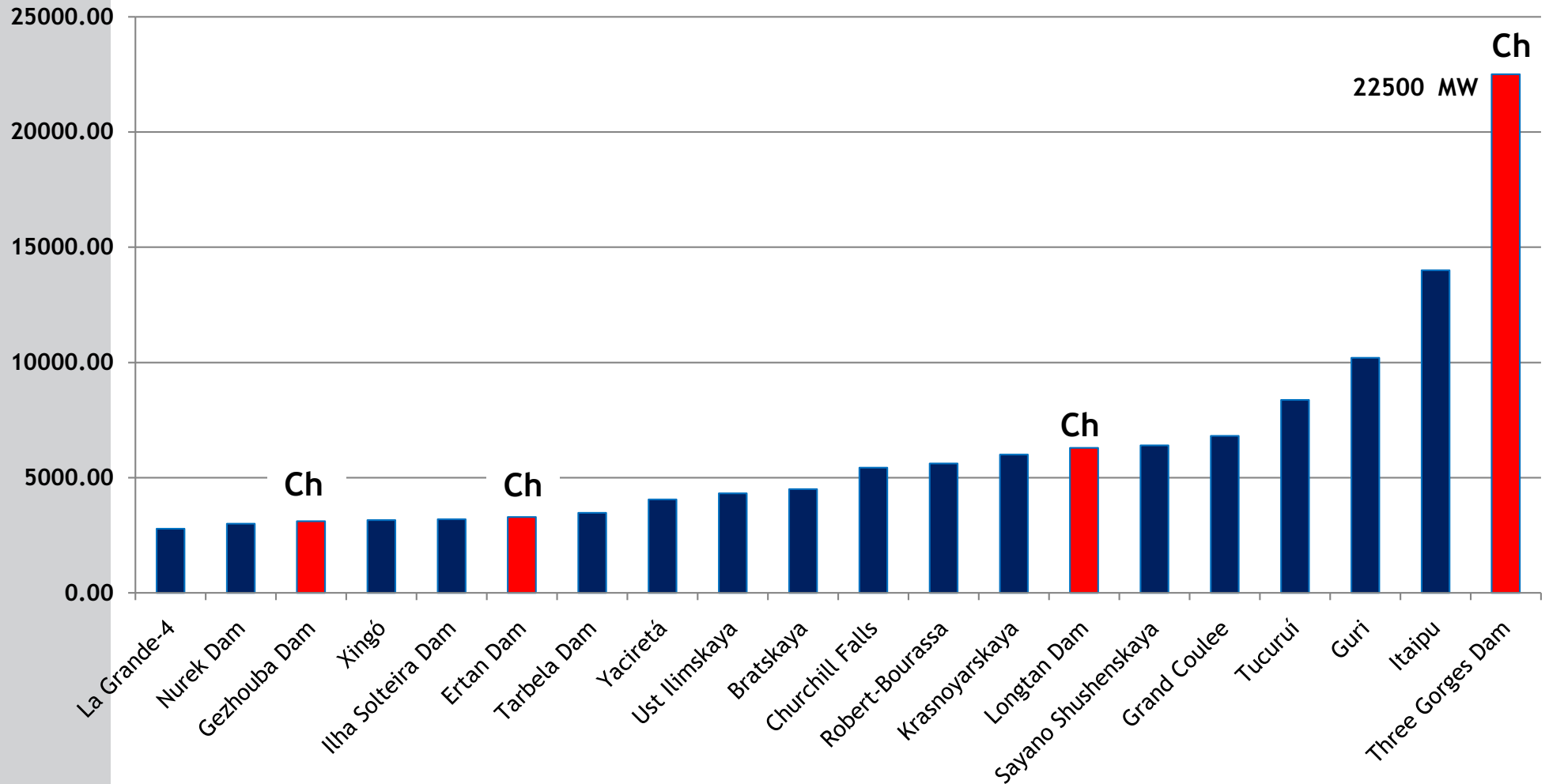
Country	Energy (TWh)	Capacity (GW)	%
France	63.60	25.34	11.23
Sweden	66.20	16.21	44.34
Japan	83.60	27.23	7.21
Venezuela	83.90	0.00	67.17
India	122.40	33.60	15.80
Norway	135.30	27.53	98.25
Russia	179.00	45.00	17.64
USA	250.80	79.51	5.74
Canada	368.20	88.97	61.12
Brazil	371.50	69.08	85.56
China	563.30	171.52	17.18



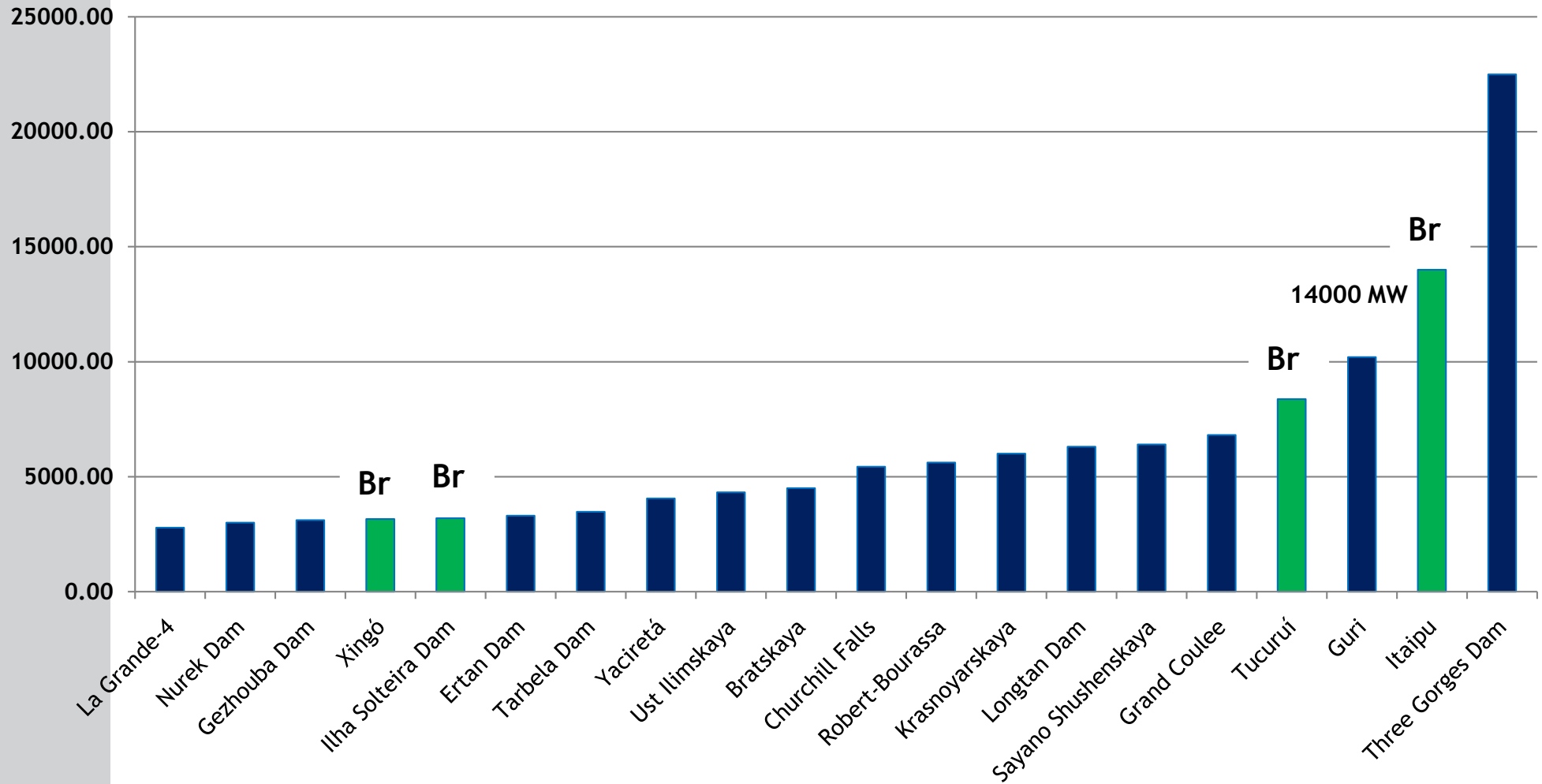
Largest Dam Projects in the World



Largest Dam Projects in the World



Largest Dam Projects in the World



Large Dam Projects in Brazil

- **Large Dam Projects require at least US\$ 5 billion in investments to produce around 3.000 MW**
- **A 3.000 MW dam provides energy for around 10 million residences**
- **Since 1996:**
 - Creation of the Brazilian Electricity Regulatory Agency (Aneel) to regulate and coordinate the expansion of the energy sector, with greater emphasis on hydropower investments
 - Intense search for good locations in Brazil
 - Intense investments in Small Power Plants
 - Great debate and final approval of several Large Dams

Main Challenges in Large Dams

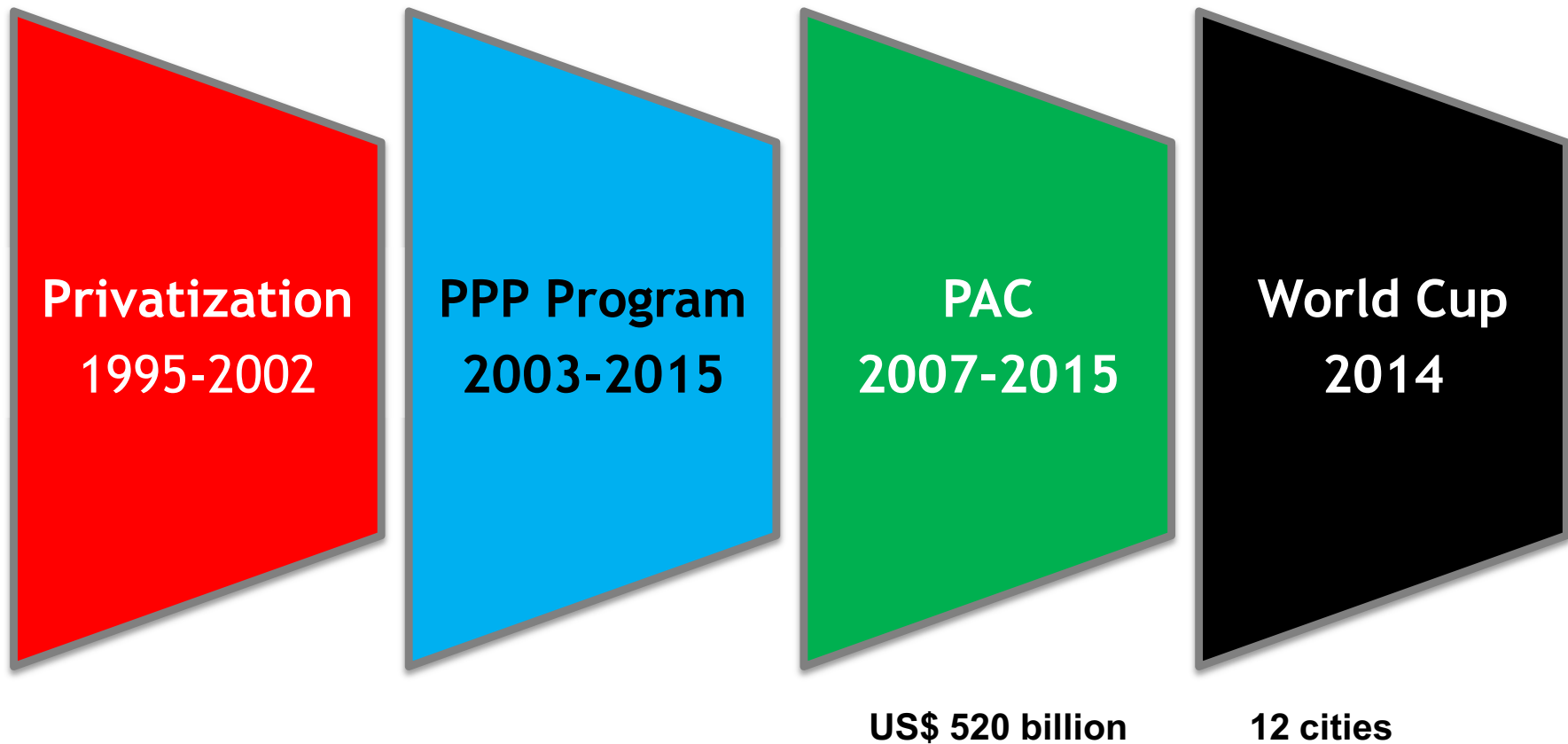
Main Challenges

- **Contractual Administration: adapting to the new way of doing business in the infrastructure sector in Brazil**
- **Dealing with social movements**
- **Time is of the essence: the price of non complying with promises made to energy agency**
- **Preparing and training labor force**
- **Complying with environmental regulations**
- **Integrating all parties involved**


- **HOW TO BEST PREVENT/SOLVE DISPUTES IN THIS SCENARIO?**

Adopting to the new infrastructure delivery methods


- Since 1995, direct impact in infrastructure delivery methods




Adapting to the new infrastructure delivery methods

- **Since 1995, direct impact in infrastructure delivery methods**
 - Public Procurement Perspective for contracting and solving disputes
 - Design, Bid & Bid (DDB) model
- 
- Globalization
 - New and more sophisticated construction delivery methods
 - New and more sophisticated dispute resolution methods

Adapting to the new infrastructure delivery methods

- **Since 1995, direct impact in infrastructure delivery methods**
 - Public Procurement Perspective for contracting and solving disputes
 - Design, Bid & Bid (DDB) model
- 
- International influence and Common Law concepts
 - Best practices on international procurement
 - Adoption of Contract Models (FIDIC): EPC, EPCM, BOT, Alliance, etc.

Adapting to the new infrastructure delivery methods

- **Since 1995, direct impact in infrastructure delivery methods**
 - Public Procurement Perspective for contracting and solving disputes
 - Design, Bid & Bid (DDB) model
- 
- Lack of proper studies on engineering and planning
 - Special attention to Geological / Geotechnical Risks
 - Energy Agency ANEEL proposes heavier rules on engineering planning and design

Dealing with Social Movements

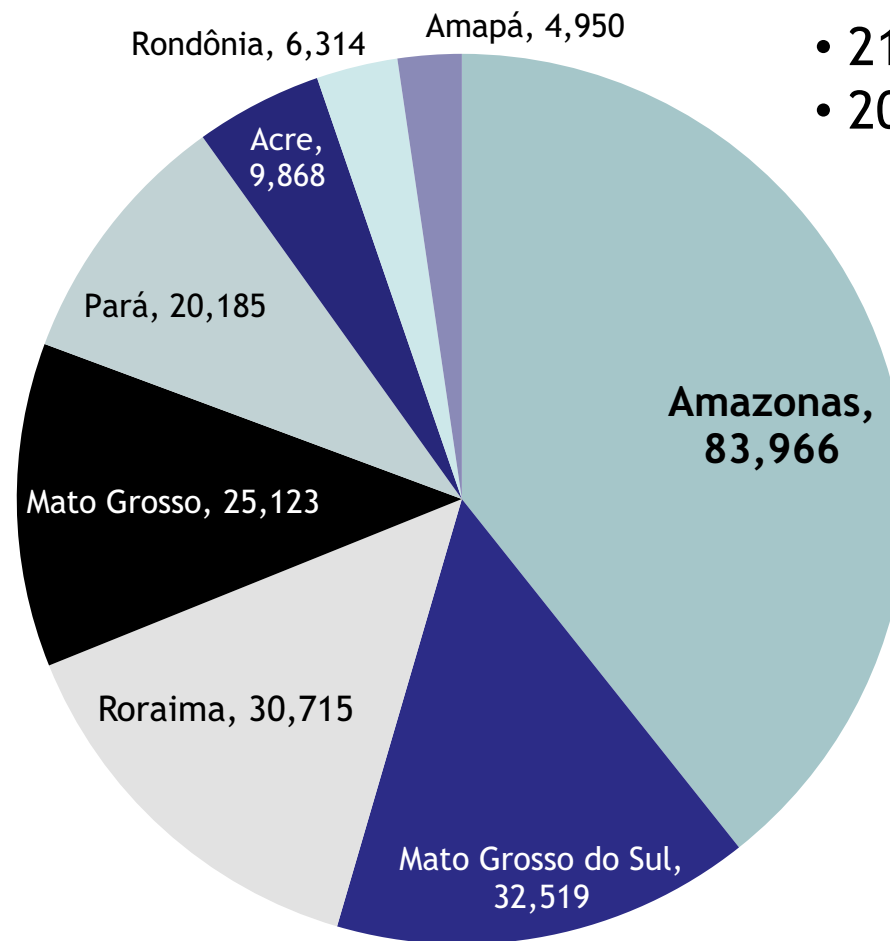


Source: www.mst.org.br



Source: www.mabnacional.org.br

Dealing with Social Movements



- 213,640 people
- 207 indian nations

Source: www.funai.gov.br

Dealing with Social Movements



***PCH Telegráfica (in Mato Grosso)
Attack by tribe Enawnê-Nawê***

Source: www.funai.gov.br

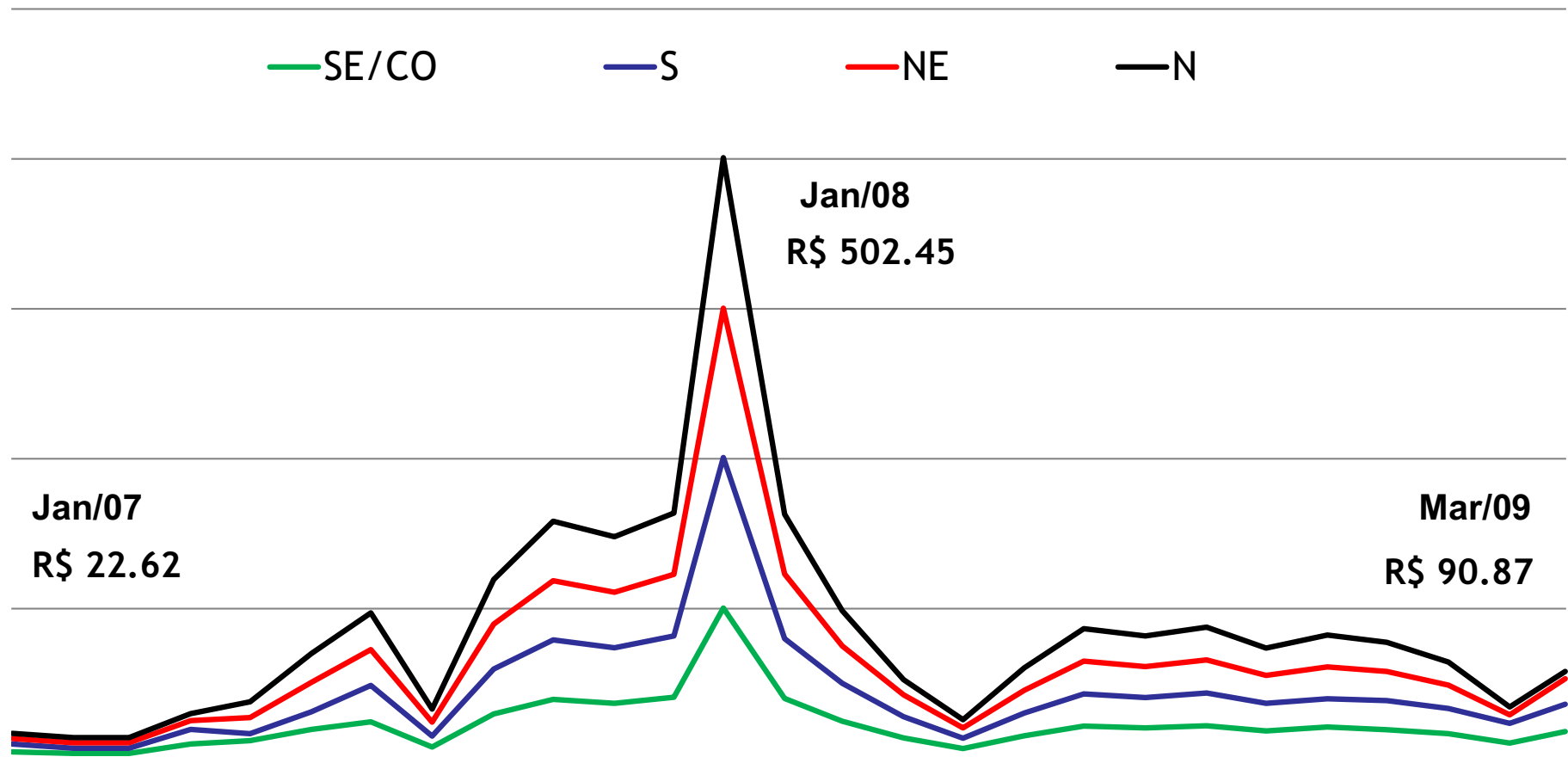
Time is of the essence!

- **Bidding process for a 30 years concession**
- **70% of the energy in the regulated market and 30% can be freely sold**
- **Time is of the essence:**
 - PPA's (Power Purchase Agreements) have already been signed
 - If Completion Date is not achieved, investors have to buy energy in the free market, according to the availability of water (*Energy Price Risk Factor*)

Source: www.bndes.gov.br

Time is of the essence!

- Energy Price Risk Factor: 2007-2009



Source: www.ccee.gov.br

Training and strict control of labor force

- **Big Dam Projects belong to PAC (*Program for the Acceleration of the Economy*), which imposes certain criteria for training of labor force and the acquisition of goods of local vendors/contractors**
- **Labor force may go up to 20,000 workers simultaneously (normally around 13,000 workers)**
- **Short period of time for the:**
 - Intensive training and transfer of technology; and
 - Creation of complex local structure and logistics

Source: www.aneel.gov.br

Environmental regulations

- **Law 6938/81 defines a “National Environmental Policy” and setting up the “National System for the Environment” comprising federal, state and local agencies.**
- **Brazil has a central agency responsible for the monitoring, preservation, enforcement and control of the sustainable use of natural resources (the Brazilian Environmental and Renewable Natural Resources Institute - IBAMA).**
- **For construction projects, specially the large dams, several licenses are necessary and they may take quite some time to be granted, with direct impact in the schedule of any project.**

Source: www.ibama.gov.br

Environmental regulations

- **Arthur D. Little consulting group has recently rated countries into four separate groups according to level of development and enforcement of environmental laws:**
 - **Highly developed:** the United States, Germany, Japan and the Netherlands;
 - **Developed:** Australia, **Brazil**, France and Singapore;
 - **Developing:** Argentina, Bolivia, Chile, Colombia, Ecuador, Mexico, Peru, Venezuela, Spain, Russia, Italy, Ireland, South Korea, Hungary and Hong Kong;
 - **Underdeveloped:** Angola, China, Egypt, Guatemala, Indonesia, Malaysia, Thailand and Vietnam.

Source: www.adl.com/reports

Resolving Disputes in Large Dams

Judicial approach?

- **It is a challenge / Not recommended**
 - For decades, no construction dispute out of judicial courts
 - No specialized courts and no fast track proceedings
 - No discovery in the US model
 - Lack of expertise and the normal difficulties to deal with the government
 - Federal Civil Procedure and Federal Civil Code... But local approach is mandatory
 - Time is not of the essence... Be patient!
 - Judicial disputes in some states are to be carefully considered...

Arbitration?

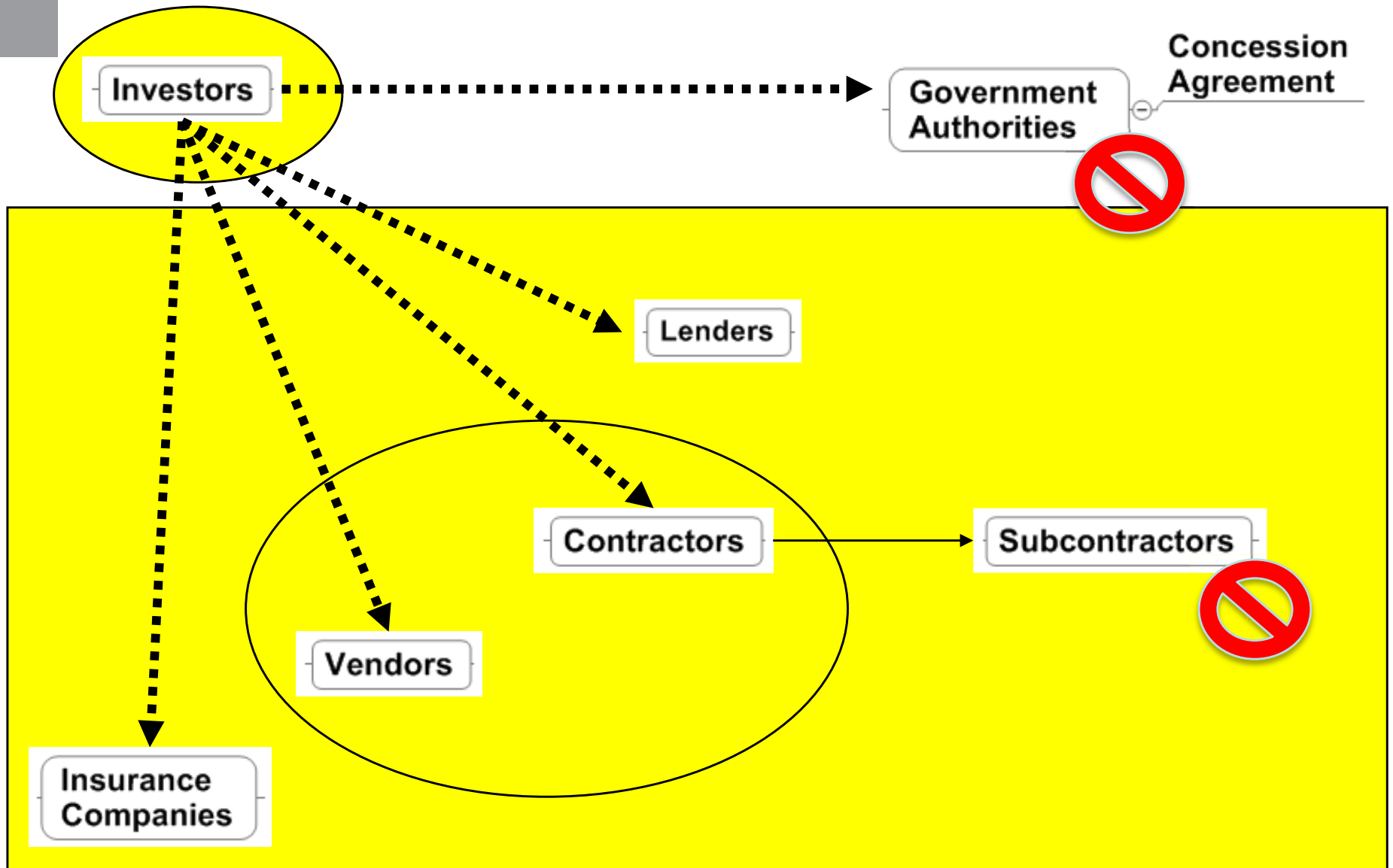
- **Recent history of Arbitration**
 - Until 1996: No binding arbitration
 - 1996: Arbitration Law but challenge before the Federal Supreme Court
 - 2001: Confirmation of the constitutionality
 - 2003: Ratification of the New York Convention
- **May be good, but it's costly!**
 - Fast improve of arbitration in Brazil
 - Some good local arbitration chambers
 - Few judicial challenges of the arbitration decisions
 - Does not avoid and/or prevent the suspension of works
 - Too costly and challenge to deal with “club perspective”

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**

Resolving Disputes in Large Dams

Integrating the parties



Integrating the Parties: Principles

1

Clear and approved timeframe: Easy to follow proceedings, with objective timeframe

2

“Two Steps Combined DRB/DAB” (CDB):
Insurance Companies and Lenders may follow the proceedings and contribute to the DAB’s decision (if they wish to do so!)

3

Enforcement of DAB’s decision: Creativity to implement the DAB’s position among the Parties

Integrating the Parties: Results

4

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

5

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

6

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

Integrating the Parties: Conditions

7

Permanent DRB/DAB: Members are fully aware of the development of the

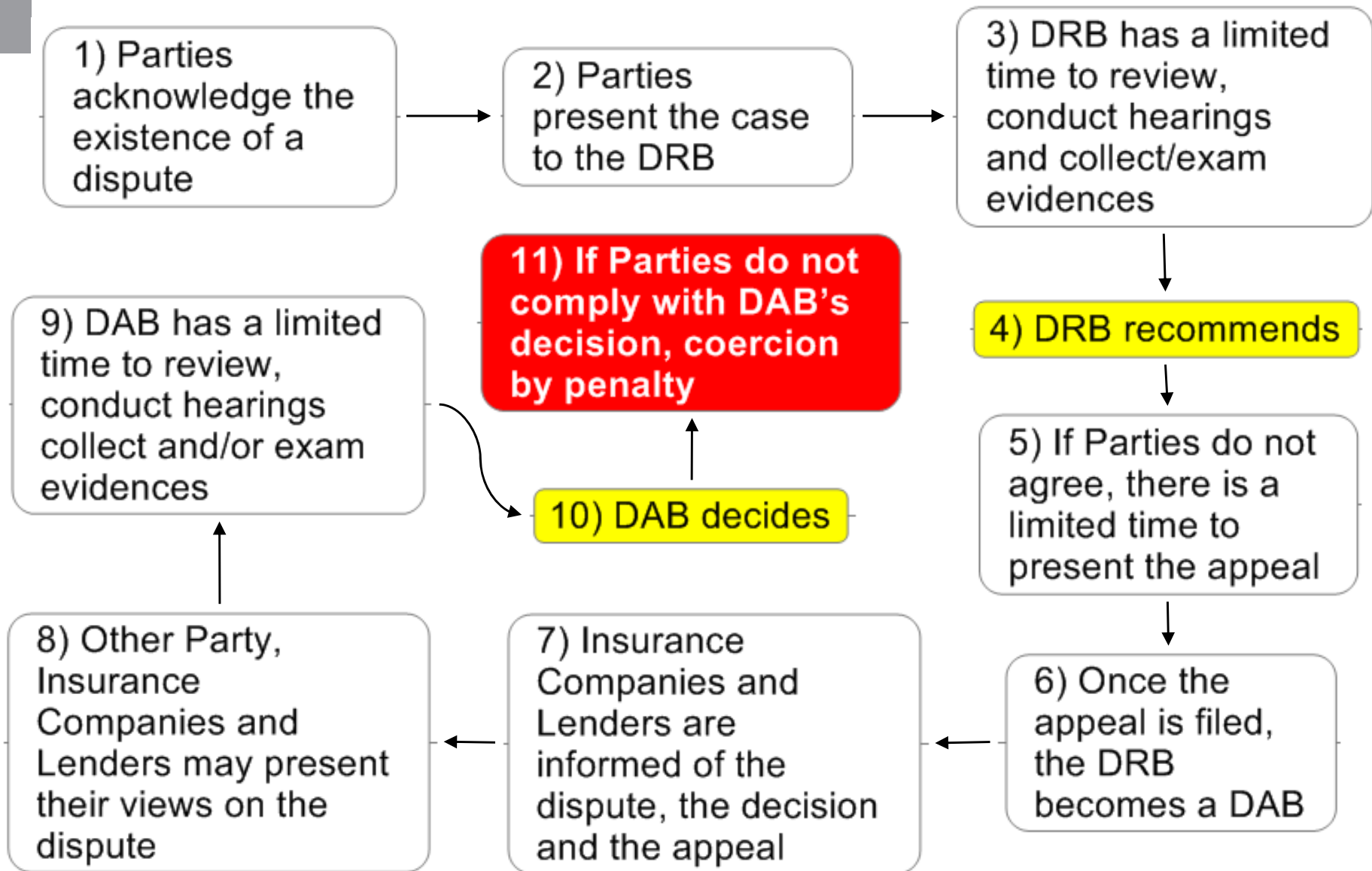
8

Data base: complete integration of “valid documents”, so that the parties can only use the documents that are in the data base

9

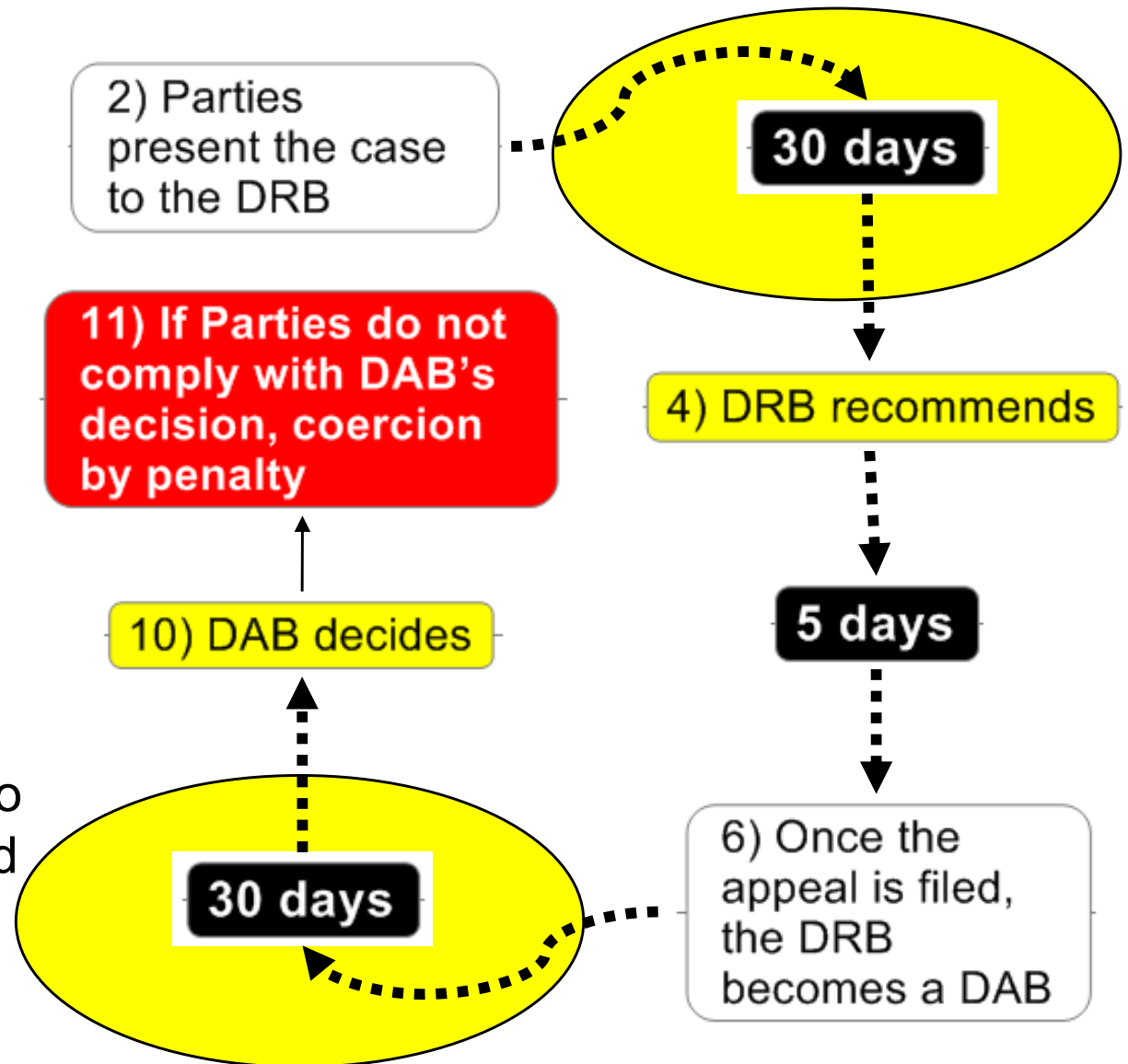
Fast track: Parties accepted a fast timeframe for the DB’s to examine the dispute and decide

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

Conclusion and Questions

- **Take advantage of the recent improvement and interest in the use of DB's**
- **Large dams represent excellent opportunities for the implementation of DB's**
- **The binding version (DAB) appears as something more useful to Brazilian Parties, specially to Contractors**
- **Still great concern about the costs**
- **Need of special training to educate Parties in Brazil**
 - Special opportunities for DRBF to work in the Central and South America Regions
 - **Suggestion: DRBF Annual Meeting in Brazil in 2011!**

Contact

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