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The International Comparative Legal Guide to:

Investor-State Arbitration 2019

1st Edition

A practical cross-border insight into investor-state arbitration.

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Brazil

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1 Treaties: Current Status and Future Developments

1.1 What bilateral and multilateral treaties and trade agreements has your country ratified?

Brazil has ratified one Cooperation and Facilitation Investment Agreement (CFIA) entered into with Angola. Brazil is also part of the following trade agreements: MERCOSUR; ALADI; GATS; TRIM; TRIPS; complementation agreements with Argentina, Mexico, Suriname, Uruguay and Venezuela; and an agreement of partial scope of economic complementation with Guyana, San Cristobal and Nevis. As a MERCOSUR member, Brazil has entered into cooperation agreements with the European Union and Canada, complementation agreements with Bolivia, Chile, Colombia, Cuba, Ecuador, Mexico, Peru and Venezuela, framework agreements with the Andean Community and Egypt, India and Israel, and an auto sector agreement with Mexico. Sources: http://www.mdic.gov.br/comercio-exterior/negociacoes-internacionais/796-negociacoes-internacionais-2; and http://investmentpolicyhub.unctad.org/IIA/CountryBits/27#iiaInnerMenu; https://concordia.itamaraty.gov.br/.

1.2 What bilateral and multilateral treaties and trade agreements has your country signed and not yet ratified? Why have they not yet been ratified?

The following CFIAs have been signed but not yet ratified: Chile; Colombia; Ethiopia; Malawi; Mexico; Mozambique; Peru; and Suriname. The Following BITs have been signed and never entered into force: BLEU (Belgium-Luxembourg Economic Union); Chile; Cuba; Denmark; Finland; France; Germany; Italy; Korea; Netherlands; Portugal; Switzerland; United Kingdom; and Venezuela. Pursuant to information available from the Ministry of Foreign Affairs, the CFIAs were created as a response to the negative experience of many countries with BITs, particularly with the inadequacy of the investor-State dispute settlement mechanism. In 2016, Brazil signed an Agreement for Economic and Commercial Growth with Peru, which is under analysis by the Brazilian Congress. MERCOSUR signed a FTA with Palestine in 2011 that is subject to ratification by the MERCOSUR members. Sources: http://www.mdic.gov.br/comercio-exterior/negociacoes-internacionais/796-negociacoes-internacionais-2; and http://investmentpolicyhub.unctad.org/IIA/CountryBits/27#iiaInnerMenu; https://concordia.itamaraty.gov.br/.

1.3 Are your BITs based on a model BIT? What are the key provisions of that model BIT?

The CFIAs are based on a 2015 model that was initially drafted in 2013 by the Brazilian Government. Its purpose is to attract investments preserving the States' regulatory autonomy. The Model CFIA 2015 is based on three pillars: risk mitigation; institutional governance; and thematic agendas for investment cooperation and facilitation. The following provisions are also found in the Model CFIA 2015: national treatment; most-favoured nation treatment; transparency; specific conditions for direct expropriation; and compensation in case of conflicts. Unlike BITs, the CFIAs do not set forth mechanisms to settle investor-State disputes. In case an investor considers that the host State has breached any provision of the CFIA, the model encourages dialogue and bilateral consultation between the States. If the States do not reach an understanding, such model provides for State-State arbitration. In other words, the State of nationality of the investor shall bring the investor's claim against the host State.

1.4 Does your country publish diplomatic notes exchanged with other states concerning its treaties, including new or succeeding states?

Brazil does not publish notes exchanged with other States concerning its treaties. However, memoranda of understanding for cooperation on trade and investments can be found at the following link: https://concordia.itamaraty.gov.br/.

1.5 Are there official commentaries published by the Government concerning the intended meaning of treaty or trade agreement clauses?

The Brazilian Ministry of Foreign Affairs published a note explaining the development and the key clauses of the Model CFIA 2015. However, the note is brief and does not detail the meaning of every clause. Other than that, there are no explanatory notes on trade agreements available for public consultation.

2 Legal Frameworks

2.1 Is your country a party to (1) the New York Convention, (2) the Washington Convention, and/or (3) the Mauritius Convention?

Brazil has been a party to the New York Convention since 2002.

2.2 Does your country also have an investment law? If so, what are its key substantive and dispute resolution provisions?

There is no investment law in Brazil. There is sparse legislation that fosters foreign investment on different industry sectors, for instance, telecommunications (Federal Law No. 9,472/97), oil (Federal Law No. 9,478/97), mining (Federal Decree-Law No. 227/67) and public-private partnerships (Federal Law No. 11,079/04). More recently, the Brazilian Senate approved the Federal Law No. 13,448 that aims to regulate the extension and rebidding processes in partnership agreements related to railway, highway and airports entered into by the Federal Union. Among the most important changes introduced, it is worth highlighting that any dispute arising out of agreements regulated by Federal Law No. 13,448 related to freely disposable rights shall be settled through arbitration or other alternative dispute resolution mechanisms. The arbitration seat shall be Brazil and the arbitration shall be conducted in Portuguese. The Federal Decree No. 8,465/2015 also provides for arbitration to settle disputes in the port sector.

2.3 Does your country require formal admission of a foreign investment? If so, what are the relevant requirements and where are they contained?

Foreign capital is not subject to prior approval by the government. As a matter of fact, Federal Law No. 4,131/62 regulates the investment of foreign capital in Brazil and Article 2 provides that foreign capital invested in Brazil shall receive the same legal treatment granted to national capital. In this regard, there is no limitation as to the amount that may be invested in Brazil. Nonetheless, it should be noted that there are some exceptions. There can be no foreign investment when it comes to activities involving nuclear energy; certain areas of healthcare services; mail and telegraph services; and certain activities related to aerospace. There are also some limitations causing foreign investments to be subject to an authorisation process in case of acquisition/rental of rural property, financial institutions, air transportation companies, media, and the mining sector. In any case, foreign capital is subject to registration, through the Brazilian Central Bank's (BCB) e-registration tool. The BCB also has important rules on the admission and registration of foreign capital that can be found in its Circular No. 3,689/13 and Resolution No. 3,844/10.

3 Recent Significant Changes and Discussions

3.1 What have been the key cases in recent years relating to treaty interpretation within your jurisdiction?

Since the BITs signed by Brazil never entered into force and only one CFIA was ratified in 2017, there is no case on treaty interpretation about this subject in Brazil.

3.2 Has your country indicated its policy with regard to investor-state arbitration?

Please see the answers to questions 1.2 and 1.3 above.

3.3 How are issues such as corruption, transparency, MFN, indirect investment, climate change, etc. addressed, or intended to be addressed in your country's treaties?

Corruption is expressly addressed in some of the CFIAs signed by Brazil. Each State can take the measures and make the necessary efforts to eliminate corruption. States agreed that they would be under no obligation to protect investments obtained by means of corruption. It is worth mentioning that measures adopted by a State to fight corruption cannot be arbitrated under the CFIAs. As to MFN, it is a key provision in most of the Brazilian CFIAs. The MFN treatment: (i) is subject to the laws and regulations in force when the investment is made; and (ii) relates to the expansion, administration, conduction, operation, selling or other disposal of the investment in the territory. The CFIAs provide for different exceptions to the application of the MFN treatment. Rules about indirect investments are not found in all CFIAs. In the treaty involving Angola, for instance, Article 16.3.ii.b states that it is possible for a State to deny the benefits of the agreement to a legal person (investor) not effectively controlled by national or permanent residents of one of the States, directly or indirectly. There are no provisions on climate change. All the CFIAs have rules to promote transparency of laws, regulations and proceedings related to the agreements.

3.4 Has your country given notice to terminate any BITs or similar agreements? Which? Why?

No, Brazil has not given notice to terminate any BITs or similar agreements.

4 Case Trends

4.1 What investor-state cases, if any, has your country been involved in?

Brazil has never been involved in an investor-State case.

4.2 What attitude has your country taken towards enforcement of awards made against it?

There is no public information available about the enforcement of arbitral awards against the Brazilian State.

4.3 In relation to ICSID cases, has your country sought annulment proceedings? If so, on what grounds?

Brazil has never been involved in an ICSID case.

4.4 Has there been any satellite litigation arising whether in relation to the substantive claims or upon enforcement?

No, there has never been satellite litigation arising in relation to substantive claims.

4.5 Are there any common trends or themes identifiable from the cases that have been brought, whether in terms of underlying claims, enforcement or annulment?

No, this is not currently applicable in Brazil.

5 Funding

5.1 Does your country allow for the funding of investor-state claims?

Brazil does not have any specific provision regarding the funding of investor-State claims. However, the third-party funding (TPF) market has been in constant growth in the country. Therefore, arbitral institutions, such as the Centre for Arbitration and Mediation of the Chamber of Commerce Brazil-Canada (CAM-CCBC), have issued guidelines pertaining to this issue.

5.2 What recent case law, if any, has there been on this issue in your jurisdiction?

There is no case law on this subject.

5.3 Is there much litigation/arbitration funding within your jurisdiction?

Although it is a relatively recent practice in Brazil, TPF has experienced relevant growth in the past three years due to the undeniable interest of national and foreign funding companies. The amount invested by such companies in Brazil is not publicly available.

6 The Relationship Between International Tribunals and Domestic Courts

6.1 Can tribunals review criminal investigations and judgments of the domestic courts?

The Brazilian Federal Constitution provides in its Article 5, paragraph 4, item V that Brazil submits itself to the jurisdiction of the International Penal Tribunal to which creation it has adhered to. In 2002, by means of Decree No. 4,388, Brazil adhered to the Rome Statute for the International Penal Tribunal that acts as supplemental jurisdiction competent for serious crimes, such as genocide, crimes against mankind, war crimes and violent crimes.

Likewise, the Inter-American Court for Human Rights (ICHR) has jurisdiction over any violation to the provisions of the American Convention on Human Rights (Pact of San Jose of Costa Rica), that was ratified by Brazil on 25 September 1992 through Decree No. 678/92. The competence granted to ICHR was ratified by Brazil through the Legislative Decree No. 89/98. Although the matter for judgment by the ICHR does not involve criminal justice, its decisions on violations of human rights can result in granting damages against the defaulting State.

6.2 Do the national courts have the jurisdiction to deal with procedural issues arising out of an arbitration?

Since Brazil ratified the New York Convention, the national courts have shown a more favourable position towards the autonomy of the arbitral jurisdiction. Nonetheless, the national courts have the jurisdiction to deal with certain procedural issues arising out of arbitration, which are expressly defined in the Brazilian Arbitration Act (Federal Law No. 9,307/96). In this regard, the national judge shall appoint the arbitrators if the parties have failed to make an agreement as to the procedure of appointment of arbitrators (Article 7, §4); the court may intervene when one of the parties refuses to allow the commencement of arbitration, even though there is an arbitration clause that provides for it (Article 7); the courts can be asked to enforce certain decisions from the arbitral tribunal as (Article 22-C) or award (Chapter VI). State courts also have jurisdiction to declare arbitral awards null and void (Article 32).

6.3 What legislation governs the enforcement of arbitration proceedings?

Both the Brazilian Arbitration Act (Articles 3, 4, 5 and 7) and the Brazilian Civil Procedural Code (Articles 69, 237 and 260) govern the enforcement of arbitration proceedings.

6.4 To what extent are there laws providing for arbitrator immunity?

Arbitrators in Brazil do not enjoy full immunity. In fact, Article 17 of the Brazilian Arbitration Act provides that the arbitrators are an equivalent to public servants for the purposes of criminal law; as well as Articles 14 and 18 that establishes that the arbitrators enjoy the same duties and responsibilities as a judge.

6.5 Are there any limits to the parties' autonomy to select arbitrators?

The right to appoint the arbitrator provided in the New York Convention is widely respected in Brazil. Nevertheless, the Brazilian Arbitration Act provides that the arbitral tribunal should always be composed of an odd number of arbitrators and that the arbitrators should enjoy full civil capacity (Article 13). Additionally, individuals linked to the parties or to the submitted dispute, by any of the relationships resulting in the impediment or suspicion of State Court members, are prevented from acting as arbitrators (Article 14).

6.6 If the parties' chosen method for selecting arbitrators fails, is there a default procedure?

Whenever the arbitration agreement provides for a sole arbitrator, the rules of most of the Brazilian arbitration institutions establish that, in case of disagreement of the parties, the arbitrator will be appointed by the institution itself. Should the arbitration agreement provide for a three-arbitrator panel, each party may nominate one co-arbitrator, who will jointly nominate the presiding arbitrator. If the co-arbitrators fail to appoint the chairman, he or she will be appointed by the institution. If the arbitration agreement is silent as to the arbitration institution, the interested party may resort to State courts and request the appointment of the arbitrators (Article 7, §4 of the Brazilian Arbitration Act). The Brazilian Arbitration Act expressly provides that the parties may, by common agreement, set aside institutional rules that limit the choice of arbitrators to those that are part of the respective institution's list (Article 13, §4). In case of multiple-party arbitration, the lack of agreement on the appointment of one co-arbitrator will cause the arbitration institution to appoint all members of the Arbitral Tribunal (*Dutco*).

6.7 Can a domestic court intervene in the selection of arbitrators?

Yes, pursuant to Article 7 of the Brazilian Arbitration Act. Please see our answer to questions 6.2 and 6.6.

7 Recognition and Enforcement

7.1 What are the legal requirements of an award for enforcement purposes?

Domestic awards (rendered by an arbitral tribunal seated in Brazil) are automatically enforceable in Brazil. For that purpose, an arbitral award should contain: (i) a report, including the parties' relevant data and a summary of the dispute; (ii) the grounds for the decision; (iii) the actual decision; and (iv) the date and place of the making of the award. Additionally, unless one of the arbitrators is unable or refuses to sign the award, all of the arbitrators should sign it (Article 26 of the Brazilian Arbitration Act).

As to the foreign arbitral awards, pursuant to the Brazilian Federal Constitution, as amended in 2004, foreign awards are only enforceable after undergoing a recognition procedure before the Superior Court of Justice. Such procedure does not entail re-examining the decision on the merits and the requirements for enforcement are provided in Articles 15 and 17 of Decree-Law No. 4.657/42 and Articles 216-A and following of the Internal Rules of the Superior Court of Justice. According to such provisions, the foreign arbitral award will be enforceable in Brazil if it was issued by the competent authority, it is final (*res judicata*) and it does not violate the sovereignty, the dignity of the human being or the public order. It should also comply with the terms of the New York Convention, meaning that the enforcement may be refused if any of the hypothesis set forth in Article V is verified. However, the Superior Court of Justice's decisions make reference almost only ever to the Brazilian law requirements, which mirror most of the provisions of the New York Convention.

7.2 On what bases may a party resist recognition and enforcement of an award?

A party may resist recognition and enforcement as long as one shows that the award lacks any of the requirements set forth in the previous question. Moreover, the opposing party may raise formal objections such as the notarisation of the translation of the arbitral award by the Brazilian consular authority or the lack of service of process in the original proceedings. Furthermore, Article 39 of the Brazilian Arbitration Law states that the recognition and enforcement of a foreign arbitral award shall be denied if: (i) in accordance with Brazilian law, the subject matter of the dispute is not capable of settlement by arbitration; and (ii) the decision is offensive to national public policy.

7.3 What position have your domestic courts adopted in respect of sovereign immunity and recovery against state assets?

The Brazilian Supreme Court (STF) used to consider that foreign States were completely immune from jurisdiction. However, its position has changed. STF analyse whether the act of the State was public or private. STF admitted in a leading case that sovereign immunity can be mitigated when the foreign State intervenes in matters not related to public acts in the context of private relations (STF, AI-AgR No. 139,671, Rep. *Celso de Mello*, judged on 06.20.1995). The Superior Court of Justice is of the same understanding, as evinced in the following case: STJ, Ag. No. 757/DF, Rep.: *Sálvio de Figueiredo Teixeira*, 08.21.1990. In summary, there is State immunity in case of acts *ius imperii*. As to the recovery against State assets, the Superior Court of Justice rendered a decision in a case where it received a rogatory letter from a court in Spain to seize assets of a Brazilian company that was succeeded by the Brazilian Federal Union. The Superior Court of Justice found that the assets of the Brazilian company were part of the national treasury and that the Federal Union had not waived its immunity from enforcement. Therefore, enforcement was denied (ST, Rog. Letter No. 3,324,Rep.: Humberto Martins, judged on 5.12.2011). In the same sense, STF decided in the context of labour litigation that the States' immunity from execution is broad, except (i) when the State has waived its immunity, or (ii) if there are State assets in Brazil that are not related to diplomatic missions or representations (STF, AgR-RE No. 222,368-4/PE, Rep.: Celso de Mello, judged on 04.30.2002).

7.4 What case law has considered the corporate veil issue in relation to sovereign assets?

There is no case law on this matter.

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