Revista de Arbitragem e Mediação

Coord.: Arnoldo Wald

ano 4 - 14
julho - setembro de 2007
Investment arbitration in Brazil: revisiting Brazil's traditional reluctance towards ICSID, BITs, and investor-state arbitration

JEAN KALICKI
Counsel.

SUZANA MEDEIROS
Foreign attorney.

RESUMO: Embora a arbitragem em matéria de investimento tenha crescido rapidamente na América Latina, como um veículo favorável para resolver as disputas entre os investidores estrangeiros e os Estados receptores, em um fórum neutro e com o mínimo de perturbações diplomáticas, o Brasil permaneceu distante desta realidade. Apesar da importância de investimento estrangeiro direto no Brasil e do crescente número de companhias brasileiras investindo no exterior, o Brasil continuou como o único país da América do Sul que não ratificou a Convenção sobre Resolução de Disputas envolvendo Investimentos entre Estados e Nacionais de Outros Estados (“Convenção ICSID”) nem concordou com um contexto favorável à arbitragem direta em caso de conflitos com investidores. Este artigo explora as raízes da tradicional resistência do Brasil em consentir com

ABSTRACT: As investment arbitration has grown rapidly throughout Latin America as a favored vehicle to resolve disputes between foreign investors and host States, in a neutral forum and with a minimum of diplomatic disruption, Brazil has remained aloof. Despite the importance of foreign direct investment (“FDI”) to Brazil and the increasing number of Brazilian companies investing abroad, Brazil remains the only country in South America not to have ratified the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (“ICSID Convention”), or otherwise agreed to a framework for direct arbitration of investor disputes. This article explores the roots of Brazil’s traditional reluctance to consent to investor-State arbitration in light of global developments in the field and the increasing importance of FDI

ÁREA DO DIREITO: Arbitragem
When the World Bank in 1966 proposed the creation of ICSID, the idea of a regional environment for international disputes in which claims could be resolved by arbitration was new and provocative. In contrast, the process that eventually led to the creation of ICSID is one of the most innovative and successful of its kind in the history of international law.

The ICSID Convention was designed to provide a forum for the peaceful resolution of disputes that arise under international investment agreements. It has been a model for the development of international investment law and has been widely adopted by countries around the world.

The ICSID Convention

1. The ICSID Convention

The ICSID Convention is a multilateral treaty that establishes a dispute resolution mechanism for resolving investment disputes. The Convention entered into force in 1966, and has been ratified by over 180 states.

2. The ICSID Convention and International Investment Law

The ICSID Convention has been a key instrument in the development of international investment law. It has helped to establish a framework for resolving disputes between investors and host countries, and has been instrumental in shaping the law and practice of international investment arbitration.

3. The ICSID Convention and State-Private Disputes

The ICSID Convention has been widely used to resolve disputes between investors and host states. It provides a streamlined process for arbitration that is both efficient and effective.

4. The ICSID Convention and Investor-State Disputes

The ICSID Convention is also used to resolve disputes between investors and states. It provides a forum for investors to seek redress for breaches of their investment agreements.

5. The ICSID Convention and International Investment Disputes

The ICSID Convention is a key instrument in the resolution of international investment disputes. It has been widely adopted by states and has been instrumental in shaping the law and practice of international investment arbitration.
Investment arbitration in Brazil

Investment arbitration in Brazil is a complex area of law that is governed by the United Nations Convention on the Settlement of Investment Disputes (ICSID Convention). The ICSID Convention is an international treaty that provides a framework for the resolution of disputes between states and private investors. It is widely regarded as the premier source of investor-state dispute resolution.

In Brazil, investment arbitration is primarily governed by the Brazilian Investment Code (CIE), which is modeled on the ICSID Convention. The CIE provides for the establishment of investment arbitration tribunals to resolve disputes between investors and states. The tribunals are composed of three arbitrators, appointed by the parties to the dispute, and are drawn from a list of qualified experts.

The Brazilian Investment Code also provides for the recognition and enforcement of arbitral awards in Brazil. The award is final and binding on the parties, and can be enforced in the same manner as a judgment of a Brazilian court. However, the enforcement of foreign arbitral awards is subject to certain conditions, such as the existence of a valid arbitration agreement and the absence of public policy objections.

In recent years, Brazil has been a focal point for investment arbitration. The country has experienced a significant increase in foreign direct investment, particularly in sectors such as energy, mining, and telecommunications. This has led to an increase in disputes between investors and the government, many of which have been resolved through investment arbitration.

Despite the benefits of investment arbitration, there are also concerns about its use. Critics argue that investment arbitration can lead to the erosion of regulatory autonomy and result in outcomes that favor foreign investors over local interests. Furthermore, the high costs and complexity of investment arbitration can be a barrier to its use in many cases.

In conclusion, investment arbitration in Brazil is a complex and multifaceted area of law. While it offers a valuable mechanism for resolving disputes between investors and states, it is important to carefully consider the potential costs and consequences of its use.
I. Introduction to the CISD Convention

The problem of the (CISD) Convention is of a different nature. It is a legal instrument intended to streamline the process of international arbitration. The treaty was signed in 1965 and entered into force in 1966.

The purpose of the CISD Convention is to provide a comprehensive, unified framework for the conduct of international arbitration. It aims to promote the peaceful resolution of disputes between states and to ensure the effective and fair resolution of disputes.

The Convention is based on the principles of reciprocity, non-intervention, and the rights of states to determine their own means of dispute resolution. It sets out a uniform procedure for the conduct of international arbitration, including the appointment of arbitrators, the conduct of hearings, and the enforcement of awards.

II. Application of the CISD Convention

The Convention is designed to apply to all disputes between states that are not already subject to the jurisdiction of a different international agreement. It is intended to be used in conjunction with other international agreements on the conduct of international arbitration.

The Convention also provides for the establishment of a list of arbitrators who are qualified to serve as arbitrators in proceedings under the Convention. This list is maintained by the Secretariat of the United Nations.

III. Implementation of the CISD Convention

The Convention is implemented by states that sign and ratify the treaty. Signatory states are required to ensure that the Convention is given effect in their domestic law.

The Convention has been ratified by a number of states, including the United States, Canada, the United Kingdom, and Australia. It is also widely recognized and respected by other states.

The Convention is an important tool for the peaceful resolution of disputes between states. It provides a clear and consistent framework for the conduct of international arbitration, and promotes the rule of law and the principles of justice and fairness.

IV. Conclusion

The CISD Convention is a significant legal instrument for the resolution of international disputes. It provides a comprehensive framework for the conduct of international arbitration, and is widely recognized and respected by states around the world. Its implementation is essential for the peaceful resolution of disputes and the promotion of international cooperation.
Economic application in Brazil

1. Foreign direct investment into Brazil

The Brazilian economy is highly integrated with the global market. The country has attracted significant foreign direct investment (FDI) from various sectors. This investment has contributed to the growth of the Brazilian economy, particularly in sectors like manufacturing, energy, and infrastructure. The government has implemented policies to attract FDI, including tax incentives and streamlined bureaucracy.

2. Consequences for Brazil to weigh in coordinating investment-

Brazil faces several challenges in coordinating investment. These include limited infrastructure, bureaucratic hindrances, and fluctuating currency exchange rates. The government has implemented several programs to address these issues, including the National Development Plan (PDN) and the Private Participation in Infrastructure (PPI) program. These initiatives aim to create a favorable environment for investors.

3. Coordination for Brazil to weigh in coordinating investment-

Brazil's coordination for investment is crucial for its economic growth. Effective coordination requires a robust institutional framework, strong regulatory mechanisms, and transparent policies. The government has taken steps to improve coordination, such as the creation of the National Coordination Council for Investment (CNCI) and the implementation of the National Investment Plan (PNI).

4. Questions to be addressed by Brazil

Brazil needs to address several questions related to investment. These include:

- How can the government improve coordination among different agencies?
- What measures can be taken to reduce bureaucratic challenges for foreign investors?
- How can Brazil ensure a stable and predictable tax environment for investors?

These questions require a comprehensive approach involving policy makers, investors, and stakeholders. Effective coordination can lead to increased investment, which will contribute to the country's economic development.
Foreign Direct Investment in China and the United States

For example, the US-China Investment Agreement, signed in 2005, is a significant milestone for bilateral investment relations. It includes provisions on market access, national treatment, and investment protection. However, recent developments and tensions in the US-China relationship have raised concerns about the effectiveness of this agreement.

The following sections explore the implications of the US-China Investment Agreement on foreign direct investment (FDI) in China and the United States, and discuss potential strategies for enhancing bilateral investment cooperation.

3.1. The US-China Investment Agreement

The US-China Investment Agreement (USCIA) was signed in 2005 and entered into force in 2006. It aimed to promote and facilitate bilateral investments and to address key issues such as market access, national treatment, the protection of intellectual property rights, and dispute resolution procedures.

Under the USCIA, China and the United States committed to:

- Open and transparent investment policies and procedures
- Fair and non-discriminatory treatment of foreign investors
- The national treatment principle for foreign investors
- The establishment of special economic zones and free trade zones
- The protection of intellectual property rights
- The establishment of a dispute resolution mechanism

3.2. The Agreement's Impact on FDI

The USCIA has had a significant impact on FDI flows between China and the United States. The agreement has provided a more stable and predictable investment environment, which has helped to attract more foreign investors.

However, challenges remain, including the need for further technical cooperation and the implementation of the agreement's provisions. The ongoing trade tensions between the United States and China have also raised concerns about the future of the agreement.

3.3. The Way Forward

To ensure the continued effectiveness of the USCIA, both countries need to work together to address emerging issues and challenges. This could include:

- Enhancing regulatory cooperation and mutual recognition
- Strengthening dispute resolution mechanisms
- Promoting investment in emerging sectors
- Addressing intellectual property rights issues

By working together, China and the United States can continue to build on the foundational agreements like the USCIA and further strengthen their bilateral investment relationship.

Conclusion

The US-China Investment Agreement represents a key milestone in the development of a more robust bilateral investment framework. With ongoing challenges and changes in the global economic landscape, it is essential for both countries to continue to work together to maintain and enhance the effectiveness of this agreement.

References

- World Trade Organization, "Trade and Investment in Services," 2019

For more information, please refer to the following resources.
investor registration and investor protection measures in other jurisdictions also have practices that are similar to that of the United States. For example, in the European Union, there are regulations that provide for investor protection, such as the Markets in Financial Instruments Directive (MiFID) and the Prospectus Directive. These regulations require issuers to provide information to investors that is transparent and comparable, which helps to ensure that investors have access to the information they need to make informed investment decisions. The regulations also provide for investor protection, such as the right to access compensation in the event of a financial institution's failure.

However, there are also differences in the investor protection frameworks between jurisdictions. For example, in the United States, there is a stronger culture of personal responsibility for investors, which means that investors are generally expected to conduct their own due diligence when making investment decisions. This contrasts with some other jurisdictions, where investors may have a stronger expectation that financial institutions will provide them with full and fair disclosure.

Despite these differences, there are also common principles that are used in investor protection frameworks across jurisdictions. For example, there is a general recognition of the importance of transparency and disclosure, and the use of independent third parties, such as rating agencies, to provide objective information to investors.

Overall, while there are differences in the investor protection frameworks between jurisdictions, there are also common principles that are used to protect investors. These principles include transparency, disclosure, and the use of independent third parties to provide objective information to investors.
and has no history of broad violations of general international law standards regarding treatment of aliens\(^{108}\) are positive factors, but may not be enough in the future to satisfy foreign investors, who are becoming more demanding in their expectations of legal remedies with regard to Latin America, and who also have growing alternatives of investment outside the region, including in China and India. Brazil should also recognize, as a reassuring factor, that there is no necessary correlation between the number of BITs a country enters into, and the number of investment claims a country ultimately may face. There are countries in the region (e.g. Chile) that have ratified many BITs, but still have been subject to relatively few ICSID claims, presumably because of their very stable environment for foreign investment.

Investor-State arbitration as provided in investment treaties and the investment chapters of FTAs certainly offers foreign investors a neutral and highly specialized remedy for investment disputes. But any discussion of "remedy" necessarily poses the question that Brazil inevitably will have to face in the near future: if other States throughout Latin America and more broadly the world have proven willing to take the "medicine" of ICSID and BITs to strengthen the "health" of their broader investment environment, why not Brazil? And for how long can Brazil afford to be an outlier to the global trend, without suffering adverse consequences in its quest for an ever more robust economic and investment profile?

108. Bernardo M. Cremades, supra note 6, 55.