WHAT WOULD CHANGE IN BRAZIL'S PRACTICE WITH THE ADOPTION OF AN INVESTOR-STATE DISPUTE SETTLEMENT MECHANISM IN ITS INVESTMENT AGREEMENTS?

Nitish Monebhurrun[*]

Abstract
Brazil has always rejected investor-State arbitration as a means of dispute settlement and its recent Agreements on Cooperation and Facilitation of Investments confirms this choice. Nearly seven decades of investment arbitration practice has not convinced Brazil nor has it inflected its position on the matter. This means that should Brazilian investors face a legal problem in the host States with which Brazil has signed an investment agreement, they will, to some extent, be powerless as far as international juridical recourse is concerned in that the Brazilian investors will not be able to sue these States directly before an international arbitral tribunal. This is a disadvantage if compared to the direct access to international arbitration given by the investment agreements of other States to private investors. This article will examine the question of what would effectively change in the Brazil's practice should the investor-State arbitration be incorporated in the Brazilian investment agreements as a dispute settlement mechanism. This would enable the Brazilian government and negotiators to have a comparative factor and measure the pros and cons of inserting an investor-State arbitration clause in the investment agreements. The article concludes that if the arbitration clause is technically and cautiously drafted, there is no need to fear investor-State arbitration.
Keywords: Investor-State arbitration. Brazil. Investment Agreements.

[*]PhD - International Law (Sorbonne Law School, France); Law Professor (University Centre of Brasília, Brazil); Visiting Professor (University of Sabana, Colombia); Director of the Business, Human Rights and Public Policy Clinic (University Centre of Brasília). Doutor em direito internacional pela Escola de Direito de Sorbonne, Paris (Universidade de Paris 1, Panthéon-Sorbonne) e Professor do Centro Universitário de Brasília. Atuou como Professor assistente em Direito Internacional, introdução às relações internacionais, Direito Internacional Econômico e Metodologia Jurídica na Escola de Direito de Sorbonne, Paris e como consultor do Programa das Nações unidas para o Desenvolvimento para o Conselho Administrativo de Defesa Econômica do Brasil, Brasília. Mestrados realizados em Direito Internacional Econômico e em Direito Internacional respectivamente na Escola de Direito de Sorbonne, Paris e na Universidade Jean-Moulin Lyon III, Lyon, Franca. Graduação em Direito pela Universidade Lumières Lyon II, Lyon, Franca. Bolsista da Academia de Direito Internacional em 2010. É professor visitante no Programa do Mestrado da Universidad de la Sabana (Bogotá). Já foi Professor visitante/convidado na Universidade Aix-Marseille, na universidade Paris V, René Descartes e na Escola de Direito de Sorbonne, Pari, na Universidade Javeriana (Bogotá, Colômbia), na Universidade Salgarcao (Goa, India), na Universidade Najad Abad (Isfahan, Irã). Coordena a Clínica de Empresas, Direitos Humanos e Políticas Públicas do Programa de Mestrado/Doutorado do Centro Universitário de Brasília (UniCEUB).

O QUE MUDARIA NA PRÁTICA DO BRASIL COM A ADOÇÃO DA ARBITRAGEM INVESTOR-ESTADO COMO MECANISMO DE RESOLUÇÃO DE CONFLITOS NOS SEUS ACORDOS DE INVESTIMENTOS?

Resumo

O Brasil sempre rejeitou a arbitragem investidor-estadual como meio de resolução de controvérsias e os seus recentes Acordos de Cooperação e Facilitação de Investimentos confirmam essa escolha. Quase sete décadas de arbitragem de investimentos não convenceram o Brasil, nem influíram a sua posição sobre o assunto. Em consequência, caso os investidores brasileiros enfrentem um problema jurídico nos países com os quais o Brasil assinou um acordo de investimento, eles ficarão impotentes no que diz respeito ao recurso jurídico internacional, pois os investidores brasileiros não serão capazes de processar os seus países anfitriões diretamente perante um tribunal arbitral internacional. Isso é uma desvantagem se comparado com o acesso direto à arbitragem internacional dado pelos acordos de investimento de outros países aos seus investidores privados. Este artigo examinará o que efetivamente mudaria na prática do Brasil, caso a arbitragem entre investidor e Estado fosse incorporada nos acordos de investimento brasileiros como mecanismo de solução de controvérsias. Sendo assim, o artigo oferecerá ao governo brasileiro e os negociadores um fator comparativo para poder mensurar os prós e contras de inserir uma cláusula de arbitragem entre investidor e Estado nos acordos de investimentos. O artigo conclui que, se a cláusula de arbitragem for elaborada técnica e cautelosamente, não há necessidade de temer o instituto de arbitragem entre investidor e Estado.

Palavras-Chave

Arbitragem Estado-investidor. Brasil. Contratos de investimento.

1 INTRODUCTION

Since 2015, Brazil signed ten (10) Agreements on Cooperation and Facilitation of Investments[1]. It thereby unveiled its new investment treaty model. Brazil has indeed always been out of the circuit of international investment law[2] and the specialized community of jurists awaited to see how dexterously the agreement would be framed. More specifically, the focus was set on the dispute settlement mechanism. And, without an iota of surprise, the Brazilian model had ousted the Investor-State arbitration, a dispute settlement mechanism commonly used by other countries[3]. Having international investment law set in its background, this article discusses what would change in Brazil's practice had investor-State arbitration been adopted as a means of dispute resolution method.

International investment law, in its modern form, finds its first, tender, roots in the post-colonization period, in a conjuncture of political, economic and, to some extent, cultural tension between newly born States and the ex-colonial States[4]. The first

[1] These agreements have been signed with Angola, Malawi, Mozambique, Chile, Colombia, Mexico, Suriname, Ethiopia, Guyana and the United Arab Emirates. Brazil also signed a Free-Trade Agreement with Chile, an Economic and Trade Expansion agreement with Peru. They are available at: https://investmentpolicyhub.unctad.org/IIA/CountryBits/27#iiaInnerMenu

[2] MONEBHURRUN, Nitish. Novelty in International Investment Law: The Brazilian Agreement on Cooperation and Facilitation of Investments as a Different International Investment Agreement Model. **Journal of International Dispute Settlement**. Vol.8. 2017. Pp.80-81.

[3] VIDIGAL, Geraldo; STEVENS, Beatriz. Brazil's New Model of Dispute Settlement for Investment: Return to the Past or Alternative for the Future?. **Journal of World Investment and Trade**. No.19. 2018. pp.475-512.

[4] SORNARAJAH, Muthucumaraswamy. **The International Law on Foreign Investment**. 4th ed. Cambridge: Cambridge University Press. 2017, p.26 *et seq.*

category of States wanted to maintain and consolidate a permanent sovereignty over their natural resources[5], away and far from any colonial yoke so as to avoid a wave of neo-colonization. The second category of States nourished the will and desire to maintain their investors in their ex-colonies. And the freshly independent States championed the application of domestic laws to foreign investments; the once colonial States preferred a minimum standard of investment protection determined by international law[6]. The decolonized States rapidly realized that their level of technological advance and financial capacity were not advanced enough to indulge in an autonomous exploration and exploitation of their resources. A collaboration had to be established with foreign companies — in the name of their economic development[7]. However, for such purposes, these companies had to be guaranteed a sufficient level of legal protection to encourage their international investments. It is within the ambit of this dialectic that the agreements on the protection and promotion of investment were born as a compromise.

The originality of these agreements is the dispute settlement mechanism between foreign investors and their host States: arbitration. Arbitration is, of course, a very ancient means of conflict resolution method[8]. This said, in the sixties, its use in disputes between private investors and States constituted an unprecedent novelty. Indeed, an investor — physical or legal person —, could sue its host State before an international arbitral tribunal on the basis of the violation of an investment agreement. The investor became the claimant and the State, the defendant. This dispute settlement mechanism proved efficient and is provided for by a majority of the more than 3,000 existing bilateral or multilateral investment agreements[9]. In other words, over the decades, arbitration has gained the confidence of most States even if it does not always operate at optimal capacity. Parallelly, arbitral tribunals have gradually built up an international investment case law commonly used in the interpretation of investment agreements[10]. In this context, arbitration as an alternative means of dispute resolution was undoubtedly a success story.

Interestingly, Brazil has persistently shown skepticism and resistance towards the idea of an investor-State arbitration system[11]. Such dispute settlement practice has not yet convinced the Brazilian State and constituted one of the reasons justifying the non-ratification of the bilateral investment treaties it signed in the nineties given that

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[5] MILES, Kate. **The Origins of International Investment Law. Empire, Environment and the Safeguarding of Capital**. Cambridge: Cambridge University Press. 2015. P. 78 *et sea.*: DOLZER, Rudolf; SCHREUER, Christoph. **Principles of International Investment Law**. 2nd ed. Oxford: Oxford University Press. 2012. Pp. 4 *et sea.*: MONEBHURRUN, Nitish. **La fonction du développement dans le droit international des investissements. Paris: L'Harmattan.** 2016. Pp.66-70.

[6] DOLZER, Rudolf; SCHREUER, Christoph. **Principles of International Investment Law**. 2nd ed. Oxford: Oxford University Press. 2012. Pp.3-4.

[7] MONEBHURRUN, Nitish. **La fonction du développement dans le droit international des investissements. Paris: L'Harmattan.** 2016. Pp.66 *et sea.*

[8] PELLET, Alain; DAILLIER, Patrick. 7th ed. **Droit international public**. Paris: LGDJ. 2002. P.45.

[9] These agreements are available at: https://investmentpolicyhub.unctad.org/IIA

[10] DOLZER, Rudolf; SCHREUER, Christoph. **Principles of International Investment Law**. 2nd ed. Oxford: Oxford University Press. 2012. Pp.33-34.

[11] KALICKI, Jean; MEDEIROS, Suzana. Investment Arbitration in Brazil Revisiting Brazil's Traditional Reluctance Towards ICSID, BITs and Investor-State Arbitration. **Arbitration International**. Vol.4. no.3. 2008. p.432 *et sea.*: VIDIGAL, Geraldo; STEVENS, Beatriz. Brazil's New Model of Dispute Settlement for Investment: Return to the Past or Alternative for the Future?. **Journal of World Investment and Trade**. No.19. 2018. P.486.

they contained such an arbitration clause[12]. In the same vein, the recent Brazilian agreements on cooperation and facilitation of investments exclude investor-State arbitration. Nearly seven decades of investment arbitration practice has not convinced Brazil nor has it inflected its position which remains impermeable. This means that should Brazilian investors face a legal problem in the States with which Brazil has signed an investment agreement, they will, to some extent, be powerless as far as international juridical recourse is concerned: the Brazilian investors will not be able to sue these States directly before an international arbitral tribunal. This is a disadvantage if compared to the direct access to international arbitration given by the investment agreements of other States to private investors.

Seen from abroad, the Brazilian distrust towards arbitration is seldom understood. And from a local perspective, the technical meanders of investor-State arbitration are sometimes unknown: the lack of Brazilian practice in this area means that the technical studies are scarce, the university lectures and courses are very rare whilst international investment law, as a field of study, is only incipient in Brazil and must, to some extent, be demystified; this is what is proposed hereinafter namely regarding investor-State arbitration. Indeed, this article will peruse the question of what would effectively change in the Brazil's practice should the investor-State arbitration be incorporated in the Brazilian investment agreements as a dispute settlement mechanism. The aim is not to praise and sanctify arbitration as an infallible mechanism but to explain technically and critically what characterizes its practical functioning. This would enable the Brazilian government and negotiators to have a comparative factor and measure the pros and cons of inserting an investor-State arbitration clause in the investment agreements.

Resultantly, it can be stated that enabling an arbitration procedure between foreign investors and host States favorizes a depoliticization of the dispute (**2**) and even if a politicization of the very arbitral tribunals is sometimes criticized, namely when they interfere in the host States police powers (**3**), it still is possible to circumscribe the arbitrators' powers and competences when negotiating the investment agreements in the upstream (**4**).

2 INVESTOR-STATE ARBITRATION AS A MEANS TO DEPOLITICIZE THE DISPUTE

Investor-State arbitration opens the locks for a foreign private investor to have direct access to an arbitral tribunal against its host State. The investor thus has full command to initiate the arbitration procedure. Consent for arbitration is given by the defendant States when signing and ratifying an investment agreement which contains an arbitration clause; the investor reciprocally gives its consent when it submits a case to an arbitral tribunal. There is a temporal offset between the offer of arbitration from the host States and its acceptation by investors[13]. Most importantly, inves-

[12] ICSID. **History of the ICSID Convention. Document concerning the Origin and the Formulation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States.** Washington: ICSID. Vol. II. Part 1. 1968 (reprinted in 2009). P.306.

[13] PAULSSON, IAN. Arbitration Without Privity. **ICSID Review – Foreign Investment Law** Journal. Vol.10. no.2. 1995. Pp.232-257; POTESTÀ, Michelle. The Interpretation of Consent to ICSID Arbitration Contained in Domestic Investment Laws. **Arbitration International**. Vol.27. no.2. 2011. P.152; LIM, Chin Leng; HO, Jean; PAPARINSKIS, Martins. **International Investment Law and Arbitration**. Cambridge: Cambridge University Press, 2018. P. 87 *et seq*.

tors must not rely on their home States[14] — that is, on the good will of their home States —, to initiate the procedure when their protected rights have been allegedly violated. International investment agreements are framed to provide a direct protection to foreign investors and, in principle, no intermediary body is needed to claim such protection[15]. Overall, investor-State arbitration has objectively been a successful and satisfactory dispute settlement mechanism and it has, for this reason, been used over decades in international investment law.

Before the institution of such an arbitration system, disputes between private investors and States were solved through the channel of diplomatic protection. As per the theory of diplomatic protection, a damage caused to a private person can, under certain circumstances, be considered as tantamount to a damaged caused to its home State[16]; the latter accordingly acts on behalf of its national to seek reparation before an international tribunal. In the famous *Mavrommatis* case, the Permanent Court of International Justice (PCIJ) had held as early as 1924:

> "It is an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through the ordinary channels. By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights - its right to ensure, in the person of its subjects, respect for the rules of international law"[17].

Under this logic, the case is internationalized and a State-to-State dispute is born[18]: the investor's home State will consequently sue its host State. To some extent, the private investor dwindles in the case's background and from a directly involved party, it becomes a mere fact to the case. Diplomatic protection rests upon some conditions[19]: the investor must obviously have the nationality of the home State and must have exhausted all local remedies in the host State[20]. This said, access to diplomatic protection depends on the home State's discretion, meaning that it can accept or refuse its national's demand[21]. During the exercise of diplomatic protection, the investor's home State which is not originally involved in the case and which might enjoy friendly relationships with the host State will have to sue the latter. And when the investor's home State sues its host State, the case between both States can take a political turn. A purely contractual relationship between an investor and its host State thus boils down to a potential diplomatic conundrum. Therefore, for political, strategic or economic reasons, a State can sovereignly decline a request for diplomatic pro-

[14] The home State is the State of nationality.
[15] This protection ranges from fair and equitable treatment, full protection and security, national treatment, most-favored nation treatment to protection against expropriation, amongst others. For more details on each specific standard, see: DOLZER, Rudolf; SCHREUER, Christoph. **Principles of International Investment Law**. 2nd ed. Oxford: Oxford University Press. 2012. Pp.98-212.
[16] DUPUY, Pierre-Marie; KERBRAT, Yann. **Droit international public**. 12th Ed. Paris: Dalloz. 2014. p.543; COMBACAU, Jean ; SUR, Serge. **Droit international public**. 11th ed. Paris: LGDJ. 2014. p.533.
[17] *The Mavrommatis Palestine Concessions*. PCIJ, Series A, no.2, Judgement (30/08/1924), p.12.
[18] COMBACAU, Jean ; SUR, Serge. **Droit international public**. 11th ed. Paris: LGDJ. 2014. pp.534-535.
[19] ASCENSIO, Hervé. **Droit international économique**. Paris: PUF. 2018. p. 113-115.
[20] *Case concerning Avena and other Mexican nationals (Mexico v. United States of America)*, I.C.J., Judgement (31/03/2004), para.40.
[21] COMBACAU, Jean ; SUR, Serge. **Droit international public**. 11th ed. Paris: LGDJ. 2014. p.535; DUPUY, Pierre-Marie; KERBRAT, Yann, **Droit international public**. 12th Ed. Paris: Dalloz. 2014. p.543.

tection; it has a discretionary power to do so given that its nationals do not have a right to diplomatic protection[22]. In such a case, the private investor is, in principle, left without any legal remedy at the international level. Said otherwise, when it comes to diplomatic protection, investors are at the mercy of their home States' good will for their cases to be heard and judged by an international tribunal. They can thus be left without any hearing and without any eventual reparation[23]. And this is the situation in which the Brazilian investment agreements put foreign investors in Brazil and Brazilian investors abroad.

As argued elsewhere, the Brazilian investment agreement model adopts an interesting approach regarding dispute settlement because it focuses more on dispute prevention than on a traditional contentious procedure[24]. The Brazilian Agreements on Cooperation and Facilitation of Investments provide for the establishment of a Joint Committee which is supposed to work hand-in-hand with an Ombudsperson with the idea of acting as an articulating intermediary between the foreign investors and the Host States[25]. Henceforth, the aim is to solve any nascent conflict between both parties before it boils down to an irreversible legal dispute. If such an administrative intervention proves unproductive, the next step would then be arbitration, the latter being however demarcated to State-State arbitration. The model is interesting and original. It prioritizes a conciliatory approach which, if successful, would enable to save on the costs which normally characterize international arbitration.

Having said that, this mechanism faces some limits which raises a range of doubts regarding its function and purpose as an efficient dispute settlement system. Firstly, the Brazilian Ombudsperson will have its seat at the Brazilian Chamber of External Trade (CAMEX). Any entity acting as ombudsperson is expected to be independent from the parties involved in a dispute. The CAMEX is however a governmental body under the orders of the Brazilian State, with a duty of coherence with Brazil's line of public policy and external affairs. It is, for this reason, hard to see how the CAMEX will be able to work as an independent ombudsperson and gain the full confidence of foreign investors. This is undoubtedly an important lacuna. Secondly, what the Brazilian investment agreement model actually proposes is a way back to diplomatic protection. This means that foreign investors in Brazil and Brazilian investors abroad will necessarily have to submit their cases to local tribunals and will, accordingly, be obliged to exhaust all local remedies. This investment agreement model is modern and novel in a number of ways; however, in terms of dispute settlement, it was not innovative. On the contrary, it undeniably paves the way towards a potential politicization of the dispute.

[22] DE NANTEUIL, Arnaud. **Droit international de l'investissement**. Paris: Pédone, 2017, p.20; LIM, Chin Leng; HO, Jean; PAPARINSKIS, Martins. **International Investment Law and Arbitration**. Cambridge: Cambridge University Press, 2018, p.5.

[23] DE NANTEUIL, Arnaud. **Droit international de l'investissement**. Paris: Pédone, 2017. p.20 *et seq.*

[24] MONEBHURRUN, Nitish. Novelty in International Investment Law: The Brazilian Agreement on Cooperation and Facilitation of Investments as a Different International Investment Agreement Model. **Journal of International Dispute Settlement**. Vol.8. 2017. P.83 *et seq.*

[25] ACFIs between Brazil and Chile (24/11/2015) art.18; between Brazil and Suriname (02/05/2018) art.18; between Brazil and Ethiopia (11/04/2018) art.17; between Brazil and Colombia (09/10/2015) art.16; between Brazil and Malawi (25/06/2015) art.3; between Brazil and Mexico (26/05/2015) art. 14; between Brazil and Angola (01/04/2015) art.4; between Brazil and Mozambique (03/03/2015) art.4.

Brazil will therefore have to stand up for its private investor against the latter's host State before an arbitral tribunal. This means that in case of disputes of multiple Brazilian investors in a given country (say Angola), Brazil — under the reservation of its discretionary power —, might have to sue the same State several times. Conspicuously, this can be prejudicial to maintaining sound diplomatic relationships with that country. The case of a private Brazilian investor will henceforth expand its dimensions to take a political turn. This politicization could be easily avoided by providing for an investor-State arbitration system in the agreements. It seems that an ideological approach (of resistance) of the Brazilian State to international arbitration has taken the lead on this issue and has substituted more pragmatic considerations which would be more beneficial to its own investors.

True, investor-State arbitration has sometimes been criticized because of the arbitral tribunal's intrusion in the host State's regulatory powers while solving the dispute, meaning that a politicization might, in any case, exist even at this level. This will be discussed in the next section before arguing how the arbitral tribunal's jurisdiction can be circumscribed.

3 A POSSIBLE POLITICIZATION OF THE DISPUTE BY THE ARBITRAL TRIBUNAL'S INTRUSION IN THE HOST STATE'S REGULATORY POWERS

Cases brought by private investors against their host States before international arbitral tribunals sometimes have an indirect political character. This happens when a State adopts a given regulatory measure — aiming, for instance, to protect the environment, the population's health or any other public good —, which is contested by a private investor under the argument that such measure is detrimental to its investment. In this case, the investor will invoke a violation of an applicable investment agreement; in turn, the State will argue that it is exercising its regulatory power to protect the public interest. There is a general legal understanding validating the State's right and capacity to regulate in good faith and in a non-discriminatory manner to uphold its population's interests[26]. The same State must nevertheless guarantee the foreign investor's rights and protection as set in investment agreements[27]. If not, a legal dispute will be resultantly born and will, in most cases, have to be settled by an arbitral tribunal. This means that a panel of three arbitrators will somehow have to intervene in a matter regarding a State's sovereign police powers. It is this particular aspect of international investment arbitration which is sometimes considered as politically tainted[28].

The *Philip Morris v. Uruguay* arbitration is, for instance, a good case in point. In 2003, Uruguay signed and ratified the World Health Organization's Framework Con-

[26] See for instance: *Philip Morris Brands Sarl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Uruguay*, ICSID case no. ARB/10/7, Award (08/07/2016), para. 291 *et seq.*; *Marvin Roy Feldman Karpa v. Mexico*, ICSID ARB (AF)/99/1, Award (16/12/2002), para. 103; *Tecnicas Medioambientales TECMED S.A. v. Mexico*, ICSID case no.ARB (AF)/00/2, Award (29/05/2003), para.119. See also: SORNARAJAH, Muthucumaraswamy. **The International Law on Foreign Investment**. 4th ed. Cambridge: Cambridge University Press. 2017. p.461.

[27] See generally: TITI, Aikaterini. **The Right to Regulate in International Investment Law**. Baden-Baden: Nomos. 2015. Pp.72-73.

[28] DIETZ, Thomas; DOTZAUER, Marius. Political Dimensions of Investment Arbitration: ISDS and the TTIP Negotiations. **Zentra Working Papers in Transnational Studies.** Vol. 48. 2015.pp.1-28.

vention on Tobacco Control[29] and it accordingly adopted a series of internal measures on cigarette packaging policies. These measures provided for the inscription of warnings for the consumer on eighty percent of the cigarette packages and imposed branding limits, meaning that the company could only use the *Marlboro Red* brand, excluding the others[30]. Philip Morris is a private company incorporated in Switzerland. This country signed a bilateral investment agreement with Uruguay on the 7th October 1988. Invoking the said agreement, Philip Morris argued, amongst others, that the measures adopted by Uruguay were arbitrary and hence violated the fair and equitable treatment clause[31] and that they were furthermore tantamount to an expropriation, that is, the measures were so intrusive in the business' activities that they constituted *in fine* an indirect expropriation[32]. This article does not aim at revisiting all the technical legal questions and answers which lurk in this case's background[33]. It is its context which is relevant: a sovereign State adopting legal measures to protect the local population's health; these measures being contested by a private foreign company on the basis of an international investment agreement, which, in the practice of international investment law, is commonplace; and the whole dialectic being ultimately submitted to be cleared by an arbitral tribunal acting as last linchpin. The risk of having a biased arbitration is in this sense questioned[34].

It is at this junction that the case can be politicized (or considered as such), namely because a sovereign decision on matters of public interest — matters which are sometimes part of the State's *domaine reservé* — will be adjudicated by an arbitral tribunal. A private investor can question a State's regulatory policies before such a tribunal with a successful outcome, in which case the State might have to pay heavy reparations. The fact that a private interest can supercede public interest rooted in regulatory powers and that three arbitrators, with an ultimate say, have such an important matter resting in their hands is what potentially turns the case politically tainted. The legitimacy of an arbitral tribunal to deal with such issues has been questioned. The situation has been described as a "threat to states' regulatory interests"[35]. On this question, Professor Sornarajah wrote that "the democratic legitimacy of a tribunal that is called to deal with such issues is suspect"[36], considering that such a tri-

[29] Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Award (06/07/2016), para. 85.
[30] *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award (06/07/2016), paras. 9-11.
[31] *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award (06/07/2016), p.88 *et seq.*
[32] *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award (06/07/2016), p.48 *et seq.*
[33] For more detail, see for example: ZARRA, Giovanni, Right to Regulate, Margin of Appreciation and Proportionality: Current Status in Investment Arbitration in Light of Philip Morris v. Uruguay. **Brazilian Journal of International Law.** Vol.14, no.2, 2017, Pp.94-120.
[34] An interesting study of this question is available in: SCHULTZ, Thomas; DUPONT, Cédric. Investment Arbitration: Promoting the Rule of Law or Over-empowering Investors? A Quantitative Empirical Study. **European Journal of International Law**. Vol.25, no.4, 2015, Pp.1147-1168. See also: VAN HARTEN, Gus. Arbitrator Behaviour in Asymmetrical Adjudication (Part Two): An Examination of Hypotheses of Bias in Investment Treaty Arbitration. **Osgoode Hall Law Journal**. Vol.53, no.2, 2016, Pp.540-586.
[35] TITI, Aikaterini. **The Right to Regulate in International Investment Law**. Baden-Baden: Nomos, 2015, p.68.
[36] SORNARAJAH, Muthucumaraswamy. **The International Law on Foreign Investment**. 4th ed. Cambridge: Cambridge University Press, 2017, p.462.

bunal is in utter disconnection with host State's local reality, needs, necessity and policies[37].

Arbitral tribunals' "super powers" have exponentially been drawn under the spotlight mostly recently. This occurred because States which were traditionally capital exporting ones — mainly European ones — started to appear as defendants in arbitration cases. The now famous *Vattenfall v. Germany* case[38] set the debate's tone. In 2011, after the Fukushima disaster in Japan, Germany decided to gradually end its nuclear energy production by 2022. Vattenfall, a Swedish energy production company which had established its activities in Germany considered that this measure was in violation of the Energy Charter Treaty: the dispute was born. This case rose a general outcry from European States and its respective civil society; they indeed seemed to discover that investors can sue States before arbitral tribunals on the basis of an investment agreement[39]. What actually came as a surprise was to see an important European State being sued before an international arbitral tribunal whilst the history of international investment law had chiefly been marked by the opposite trend: European companies suing other countries, namely developing ones.

From this point on, some States of the European Union, like Germany, which had traditionally included an investor-State arbitration clause in their investment agreements seemingly started to become skeptical vis-à-vis this dispute settlement mechanism[40]. On the spur of the moment, arbitral tribunals became politically tainted and illegitimate because they could be brought to discuss and question the State's regulatory power. The Canada-European Union Comprehensive Economic and Trade Agreement (CETA) has, in this sense, discarded investor-State arbitration by instituting a permanent investment tribunal[41] having jurisdiction over cases involving private investors against their Host State or against the European Union[42]. There is a small trend engulfing developed and developing countries which questions the legitimacy of investor-State arbitration[43].

It is a similar skepticism that has always characterized the Brazilian position[44] and which other States seem to be discovering now. Whether or not we agree with the merits of Brazil's policy choices vis-à-vis investment arbitration, its coherence cannot be denied. The State's understanding of investment arbitration has always been that of a privileged forum granted to foreign investors to the detriment of local

[37] SORNARAIAH, Muthucumaraswamy. **The International Law on Foreign Investment**. 4th ed. Cambridge: Cambridge University Press, 2017, p.462.
[38] *Vattenfall AB and others v. Germany*. Case no. ARB/12/12 (Vattenfall II) (arbitration in progress).
[39] MONEBHURRUN, Nitish. E eles descobriram a arbitragem investidor-Estado. **Revista de Direito Internacional**. Vol.12, no.2, 2015, Pp.12-14.
[40] ASTERITI, Alessandra. Environmental Law in Investment Arbitration: Procedural Means of Incorporation. **Journal of World Investment and Trade.** Vol.16, 2015, pp.249-250; NOLAN, Mikael. Challenges to the Credibility of the Investor-State Arbitration System. **American University Business Law Review.** Vol 5, 2016, Pp. 429-445; KULICK, Andreas. Investment Arbitration, Investment Treaty Arbitration and Democracy. **Cambridge Journal of International and Comparative Law**, Vol. 4, 2015, Pp.441-460; VIDIGAL, Geraldo; STEVENS, Beatriz. Brazil's New Model of Dispute Settlement for Investment: Return to the Past or Alternative for the Future?. **Journal of World Investment and Trade**, No.19, 2018, p.482.
[41] Canada-European Union Comprehensive Economic and Trade Agreement (CETA), art. 8.27.
[42] Canada-European Union Comprehensive Economic and Trade Agreement (CETA), art.8.21.
[43] TRACKMAN E, Leon. Choosing Domestic Courts over Investor-State Arbitration: Australia's Repudiation of the Status Quo. **University of New South Wales Law Journal**. Vol.35, no.3, 2010, pp.979-980.
[44] KALICKI, Jean; MEDEIROS, Suzana. Investment Arbitration in Brazil Revisiting Brazil's Traditional Reluctance Towards ICSID, BITs and Investor-State Arbitration. **Arbitration International**. Vol.4, no.3, 2008, Pp.423-445.

investors. The privilege is consequently exacerbated if the foreign investors have, in addition, the capacity to question local public (interest) policies and regulations. In this regard, one of the neighboring countries' — Argentina — negative experience in matters of investor-State arbitration[45] also acted as a red flag alert. But already in 1964, during the *travaux préparatoires* leading to the adoption of the Washington Convention instituting the International Centre for the Settlement of Investment Disputes (ICSID), Brazil's dissenting statement on the matter was crystal clear. The *Document concerning the Origin and the Formulation of the Convention* reads:

> "Brazilian constitutional law guaranteed the judicial power a monopoly of the administration of justice (see Art. 141, paragraph IL, of the Brazilian Constitution) and therefore it would be inadmissible to create within the territory of the nation a body entrusted with decisions in the field of law. Were such activities to be delegated to an international organization, the violation of this constitutional precept would be even more flagrant. Another aspect of the problem that raised doubts in his mind was that despite the optional character of the draft Convention, foreign investors would be granted a legally privileged position, in violation of the principle of full equality before the law."[46]

This understanding has permeated the Brazilian practice over decades and has not changed even though Brazil has become a capital exporting country. It maintains another vision of investment protection which does not necessarily consider arbitration as its most important feature. Besides, the argument concerning "the monopoly of the administration of justice" of domestic courts put forward by the Brazilian diplomacy in 1964 has recently become topical at the European Union level. Indeed, in the landmark *Achmea* case, the Court of Justice of the European Union (CJEU) decided in a preliminary ruling that arbitration clauses found in bilateral investment treaties signed between member States of the Union are incompatible with European law whose natural judge is the CJEU[47].

Distrust is what currently seems to characterize investor-State arbitration. A mentioned earlier, the new Brazilian investment agreement model has opted for a State-State arbitration mechanism as one of its dispute settlement mechanism. On pragmatic grounds, this was possible because Brazil had a stronger bargaining power than its signatory partners, that is, States like Malawi, Angola, Mozambique, Ethiopia, Suriname, Colombia, Mexico, amongst others. It was thus able to 'impose' its investment agreement model. It remains to be seen if Brazil will still be able to maintain this position during its future negotiations with States having the same or superior bargaining power. The new Brazilian political scene is also likely to influence the nature of future investment agreements. As a matter of fact, the newly elected President and the new Government might be tempted to give a more liberal shade to the invest-

[45] BURKE-WHITE, William. The Argentine Financial Crisis: State Liability under BITs and the Legitimacy of the ICSID System. **Asian Journal of WTO and International Health Law and Policy**. Vol.3. 2008. Pp.199-234.

[46] ICSID. **History of the ICSID Convention. Document concerning the Origin and the Formulation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States.** Washington: ICSID. Vol. II. Part 1. 1968 (reprinted in 2009). P.306.

[47] Slowakische Republik v. Achmea BV. CJEU. Case C-284/16 (06/03/2018). Para. 60. For a case commentary, see: ROBERT-CUENDET, Sabrina. L'arrêt de la Grande Chambre de la CIUE du 6 mars 2018 dans l'affaire Achmea: la fin des TBI européens? **European Papers**. Vol.3. no.2. 2018. Pp.993-1004.

ment agreements, and this could eventually include investor-State arbitration. Additionally, the new President and his team[48] have, from their first steps, clearly shown an alignment with the (actual) American government, namely with its international policy. New trade and investment perspectives and opportunities might thus be redefined. If this takes the legal shape of a free trade agreement between the two States, investor-State arbitration, as a usual American practice, might be gently proposed to and accepted by Brazil. These political factors might pave the way to revisit the Brazilian posture regarding international investment arbitration.

Still, independently of how the wind blows to shape Brazil's future decisions on investment arbitration, the negotiators, who are not always international investment law specialists, must know that the negotiating States can frame and contain arbitral tribunal's jurisdiction. Henceforth, if there lurks a doubt about how political will be the arbitrators' approach, there are legal techniques which enable to overcome this problem.

4 LIMITING THE POLITICIZATION OF DISPUTES BY CIRCUMSCRIBING THE ARBITRAL TRIBUNALS' JURISDICTION IN INVESTMENT AGREEMENTS

There exists an eternal debate regarding in whose favor — investor or State — do arbitral tribunals decide the most and interesting works have been produced on this subject[49]. Many studies however mainly undertake a quantitative and statistical survey of arbitral awards to conclude on the existence of a bias, be it in favor of the investor or of the State. Quantitative and empirical studies are undoubtedly of paramount importance but must go hand-in-hand with a qualitative analysis to guarantee even more objective results. Indeed, it can be claimed that if the States parties or investors to a dispute are more prone to be winners or losers[50], it might not necessarily be in reason of the tribunal's bias but only because they have stronger or weaker claims[51] — such conclusions would require a deep analysis of the merits of each award. Still, States might consider such statistics or decide only on the basis of a hearsay to discard investor-State arbitration. It is here claimed that States should rather spend more time and energy to frame the arbitration clauses in their investment agreements in a way to decide beforehand what is the extent of the tribunal's jurisdiction.

An arbitration clause must not necessarily be an opened door invitation to litigate. It must be recalled that arbitral tribunals have the jurisdictional limits which they are granted by States in investment agreements. If Brazil fears that arbitral tri-

[48] The freshly nominated Minister of Foreign Affairs, for instance.

[49] See for instance: VAN HARTEN, Gus. Arbitrator Behaviour in Asymmetrical Adjudication (Part Two): An Examination of Hypotheses of Bias in Investment Treaty Arbitration. **Osgoode Hall Law Journal**. Vol.53, no.2, 2016, Pp.540-586; DONOBAUER, Julian; NEUMAYE, Eric; NUNNENKAMP, Peter. Winning or Losing in Investor-to-State Dispute Resolution: The role of Arbitrator Bias and Experience. **KIEL Working Paper**. No. 2074. March 2017. Pp.1-30; FRANCK D., Susan. Empirically Evaluating Claims about Investment Treaty Arbitration. **North Carolina Law Review**. Vol.86. no.1. 2007. Pp.2-88.

[50] The general idea is well developed in: VAN HARTEN, Gus. Arbitrator Behaviour in Asymmetrical Adjudication (Part Two): An Examination of Hypotheses of Bias in Investment Treaty Arbitration. **Osgoode Hall Law Journal**. Vol.53. no.2. 2016. Pp.540-586.

[51] MONEBHURRUN, Nitish. The Political Use of the Economic Development Criterion in Defining Investments in International Investment Arbitration. **Journal of International Arbitration**. Vol.29. no.5. 2012. Pp.578-580.

bunals will have super powers or that they will interfere in matters of public interest, it has the sovereign capacity to circumscribe their competence.

This can be done following two main techniques. The first one, which many States, including Brazil, have adopted is to provide for a specific article on the right of regulation in the investment agreements[52]. Indeed, many of the recent investment agreement include such a provision protecting the States' regulatory space. In its Agreements on Cooperation and Facilitation of Investments, Brazil (and the other signatory States), agreed that foreign investment activities must be in line with domestic regulation and policies on the issues of the environment, of health, of labor and of national security[53]. Similarly, article 23 of the Morocco-Nigeria bilateral investment agreement is entitled 'Right of State to Regulate' and provides that:

> "In accordance with customary international law and other general principles of international law, the Host State has the right to take regulatory or other measures to ensure that development in its territory is consistent with the goals and principles of sustainable development, and with other legitimate social and economic policy objectives."[54]

Such agreements are not isolated[55] and enable to draw a line of articulation between investment protection and the national public interest which States also have the duty to protect. This means that arbitral tribunals will have no choice but to take the host State's right to regulate into account while construing the investor's due level of protection. They will have to make sure that protecting foreign investment is not done at the cost of what has been defined by the host State as national public interest and/or priority. Also, the foreign investors will be aware of such provisions on the right to regulate and will be expected to fine-tune their expected level of protection accordingly. As such, by including these provisions in their investment agreements, States provide a set of guidelines to arbitral tribunals, thereby (pre)defining and eventually reducing their margin of appreciation.

In the same vein, States secondly have the possibility of drafting arbitration clauses by delineating arbitrable matters, that is, subjects which fall within the ambit of an arbitral tribunal's jurisdiction and those which are resultantly excluded. This can be done on a sectorwise basis or by subject matter: hence, given sectors (petrol, gas, banking, infrastructure for instance) and given matters (national treatment, most-favored nation, environmental regulation, health, security, for instance) would be considered as non-arbitrable matters. If it is, of course, not an easy procedure to include or exclude sectors and matters from the competence of arbitral tribunals, such a negotiation policy is perfectly feasible.

It firstly depends upon the bargaining power which Brazil has vis-à-vis its commercial partners. Secondly, as per the circumstances, Brazil has to consider

[52] TITI, Aikaterini. **The Right to Regulate in International Investment Law**. Baden-Baden: Hart Publishing, 2014. p. 123 *et sea*.

[53] ACFIs between Brazil and Chile (24/11/2015) art.17; between Brazil and Suriname (02/05/2018) art.17; between Brazil and Ethiopia (11/04/2018) art.16; between Brazil and Colombia (09/10/2015) art.15; between Brazil and Mexico (26/05/2015) art. 13(2)(e); between Brazil and Angola (01/04/2015) Annex II (iv); between Brazil and Mozambique (03/03/2015) Annex II (v).

[54] Bilateral Investment Agreement between Morocco and Nigeria (03/12/2016), art. 3(2).

[55] See: CETA (30/10/2016), art. 8.9; *Comprehensive and Enhanced Partnership Agreement* between the European Union and Armenia (24/11/2017), art. 273

whether it is in a capital-exporting or in a capital-importing position. The bargaining power acts as a pendulum which would enable the Brazilian State to oscillate from a more conservative to a more liberal stance and vice-versa in framing the dispute settlement clause of its investment agreements.

When negotiating with a State to which Brazil exports more private capital than it imports therefrom — say Mozambique, Angola, Malawi or Ethiopia —, it would be recommendable to include an investor-State arbitration clause in the investment agreements. In the event of a dispute, private Brazilian investors will thus have the possibility of suing their host State directly with no need to depend on their home State's diplomatic protection; and, as Brazil would mostly be in a capital-exporting country position, it minimizes the probability of being sued by investors of the other signatory States. To avoid treaty and forum shopping — that is, investors opening a shell company in one country with which Brazil has signed an investment agreement only to benefit from the latter when investing in Brazil —, a denial of benefits clause could be preventively inserted in the agreements. By the mechanism of a denial of benefits clause a State "reserve[s] the right to deny the benefits of [a] treaty to a company incorporated in a state but with no economic connection to that state"[56], that is, when the investor does not operate a substantial investment activity therein[57]. This is common practice in international investment law[58]. A denial of benefits clause helps construe — and circumscribe — an arbitration clause. Similarly, an opened arbitration clause must be read together with the most-favored nation clause. The latter extends the protection and advantages of an investment agreement to other investors whose home States are not originally parties to the agreement[59]. In this case, as often done by Brazil itself[60], the most-favored nation clause can simply specify that it does not extend to dispute settlement resolution. As a capital-exporting country, this would be Brazil's position on investor-State arbitration.

As a capital-importing country, the investor-State arbitration clause can still be maintained. However, it would in this case have to be strategically drafted in a more restrictive fashion so as to exclude sectors or matters which Brazil considers as non-arbitrable. Brazil is arguably in a position to do so when negotiating with developed and highly industrialized States. This practice is, for example, adopted by China[61]. A

[56] DOLZER, Rudolf; SCHREUER, Christoph. **Principles of International Investment Law**. 2nd ed. Oxford: Oxford University Press. 2012. P.55.

[57] GASTRELL, Lindsay; LE CANNU Jean-Paul. Procedural Requirements of 'Denial-of-Benefits' Clauses in Investment Treaties: A Review of Arbitral Decisions. **ICSID Review**. Vol.30. no.1. 2015. Pp.78-97.

[58] For instance: The United States Investment Treaty model (2012), art. 17; Canada's Investment Agreement model (2014), art. 19; ASEAN Comprehensive Investment Agreement (26/02/2009), art. 19; European Union-Japan Economic Partnership Agreement (17/07/2018), art.8.19; Comprehensive and Progressive Agreement for Trans-Pacific Partnership (08/03/2018), art.9.15.

[59] DOLZER, Rudolf; SCHREUER, Christoph. **Principles of International Investment Law**. 2nd ed. Oxford: Oxford University Press. 2012. Pp.206 *et seq.*; SORNARAJAH, Muthucumaraswamy. **The International Law on Foreign Investment**. 4th ed. Cambridge: Cambridge University Press. 2017. p.318, p.378; SCHILL W., Stephan. Mulitilateralizing Investment Treaties through Most-Favored-Nation Clauses. **Berklev Journal of International Law**. Vol.27. no.2.. 2009. Pp.496-569.

[60] See, for example, Brazil's Agreement on Cooperation and Facilitation of Investments with Chile (24/11/2015), art. 6(3)(a)(i) or with Colombia (09/10/2015), art. 5(3)(a)(i).

[61] For the legal literature on Chinese investment agreements, see: BATH, Vivian. The South and Alternative Models of Trade and Investment Regulation: Chinese Investment and Approaches to International Investment Agreements. *In*. MOROSINI, Fabio; RATTON SANCHEZ BADIN, Michelle. **Reconceptualizing International Investment Law from the Global South**. Cambridge. Cambridge University Press. 2018. Pp. 68 *et seq.*

subtle tendency can be noticed in the way arbitration clauses are structured in Chinese investment agreements. In some cases, it can be inferred that a more opened or restricted arbitration clause is related to how economically powerful are its partners. In this sense, the bilateral investment agreement between China and the ASEAN provides in its article 14 (1) which disputes are arbitrable whilst article 14 (2) states the non-arbitrable disputes[62]. A similar pattern is visible in China's investment agreements with Canada[63] and Australia[64]. However, investment agreements signed with States like Tanzania[65] or Uzbekistan[66], to mention some of the most recent ones, have an opened arbitration clause. This approach to arbitration provisions based on strategic differentiation gives a more realistic shade to what the host State is materially prepared to bear as responsibility. The State accepts investor-State arbitration as a dispute settlement mechanism only when it is sure that it is not dangerously exposed to a chain of claims from investors. This is what is proposed to Brazil as a capital-importing State.

5 CONCLUDING REMARKS

This article aimed to provide some guidelines to Brazilian negotiators on some possible techniques of drafting an investor-State arbitration clause in an investment agreement. The article criticized the systematic repudiation of arbitration as a dispute settlement mechanism by Brazil, especially when this is done on the basis of non-technical reasons which are prejudicial to Brazilian investors investing abroad. Political considerations can always lurk in the background of any legal case and can blast in such a way to influence an arbitral tribunal's award. For this reason, the paper addressed a series of techniques which can help redefine arbitral tribunals' jurisdiction as per the States' interests. All in all, the article explains that there is no reason to fear investor-State arbitration or arbitral tribunals when the arbitration clause has been cautiously drafted.

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[62] Agreement on investment of the framework agreement on comprehensive economic cooperation between the People's Republic of China and the Association of Southeast Asian Nations (15/08/2009).
[63] Bilateral Investment Agreement between China and Canada (09/09/2012). Annex D.34.
[64] China-Australia Free Trade Agreement (17/06/2015). Art. 9.12 (1).
[65] Bilateral Investment Agreement between China and Tanzania (24/03/2013). Art.13.
[66] Bilateral Investment Agreement between China and Tanzania (19/04/2011). Art. 12.

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