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Lucas Moreira Alcici
master, University of Lisbon School of Law
ORCID: 0000-0003-3995-9684
lucas.moreira.alcici@gmail.com

The Angola–Brazil Bilateral Investment Treaty: an introduction to its dispute settlement mechanism

Introduction

Despite having signed 27 Bilateral Investment Treaties (BIT) since 1994, Brazil has only ratified two of them: the Angola–Brazil BIT and the Brazil–Mexico BIT. While they were both signed in 2015, the former was ratified in 2017 and the latter in 2018.[1] That means that only those two BITs are in force between Brazil and other States, even though Brazil is the leading destination in Latin America for Foreign Direct Investment (FDI).[2]

Brazil is not a member of the International Center for the Settlement of Investment Disputes (ICSID), which means that Brazilian investors with investment abroad and foreign nationals with investment in Brazil do not have access to investment dispute settlement under the Convention on the Settlement of Investment Disputes between States and Nations of Other States (ICSID Convention).[3]

The fact that dispute settlement mechanisms under the ICSID Convention are not available to Brazilian investors regarding their investments in a foreign State usually means that they have to rely on the domestic courts of the host State – in the absence of a contract between the investor and the host State

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1 UNCTAD, Investment Policy Hub, https://investmentpolicy.unctad.org/international-investment-agreements/countries/27/brazil [accessed: 4.05.2021].

2 OECD, FDI in Figures – Latin America, https://www.oecd.org/investment/FDI-in-Figures-April-2019-Latin-America-English.pdf [accessed: 4.05.2021].

3 On 18 April 2021, ICSID had 163 Member States, amongst which 155 Contracting States and 8 Signatory States; ICSID, Database of ICSID Member States, https://icsid.worldbank.org/about/member-states/database-of-member-states [accessed: 4.05.2021].

establishing a particular dispute settlement means – to bring their claims against the host State. This could have been remedied if Brazil had ratified BITs providing for dispute settlement mechanisms at least with its major investment partners, as a way to guarantee a higher standard of protection to Brazilian investors abroad. Nevertheless, that is not the case. Up to date, only Brazilian investors investing in Angola and Mexico can benefit from a special bilateral mechanism for the settlement of their investment disputes, due to the ratification of the Angola–Brazil BIT and the Mexico–Brasil BIT.

This paper addresses only the Angola–Brazil BIT, whose ratification has been a milestone for the protection of Brazilian investors abroad, firstly, by giving an overview of the bilateral agreement and, secondly, by briefly presenting the main elements of the dispute settlement mechanism established by that investment agreement.

The Angola–Brazil BIT: an overview

The agreement concluded by Angola and Brazil aims at facilitating and fostering investment between the parties.[4] Each party established an Ombudsman, whose primarily responsibility is to give governmental support to investments made by investors of the other party in its country. While Brazil established its Ombudsman in its Foreign Trade Chamber (CAMEX), Angola established its Ombudsman in its Ministry of Foreign Affairs.[5]

Among other duties, the Ombudsman should act directly to prevent disputes, whenever possible, and to facilitate their settlement, collaborating with governmental authorities and the private parties concerned. It should interact with the competent government bodies to deal with suggestions and claims made by the government and investors of the other party.[6]

Brazil and Angola also agreed to set up a Joint Committee, with representatives of both states, whose aim is to: (i) monitor and discuss the implementation of the BIT; (ii) debate and share opportunities for the expansion of mutual investments; (iii) coordinate and implement the cooperation and facilitation agendas; (iv) request and embrace the participation of the private sector and civil society in matters related to the activities of the Joint Committee; (v) peacefully settle the investment disputes between investors of the

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4 UNCTAD, International Investment Agreements Navigator, *Acordo de Cooperação e Facilitação de Investimentos entre o Governo da República Federativa do Brasil e o Governo da República de Angola*, https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/4720/download [accessed: 4.05.2021].

5 Sections 5 (1), 5 (2) and 5 (3) of the Angola–Brazil BIT.

6 Section 5 (4) of the Angola–Brazil BIT.

parties; and (vi) establish a mechanism for the settlement of investment disputes through inter-State arbitration.[7]

The settlement of investment disputes under the Angola–Brazil BIT

The Angola–Brazil BIT established a means for the peaceful settlement of investment disputes which might arise between investors of one of the parties and the other party as an alternative to the ordinary settlement of those disputes in the domestic courts of the host State. The key elements of this bilateral inter-state dispute settlement mechanism will be dealt with in the following topics.

(a) Definition of investor and investment

Firstly, in order to seek protection under the Angola–Brazil BIT – and be able to take advantage of its dispute settlement mechanism – the individual or legal entity shall be considered an "investor" under the terms of the agreement.[8] This means that the investor shall (i) be a national or resident of one of the parties, if a natural person, or (ii) if a legal entity, (a) be incorporated under the laws of one of the parties, have its headquarters or exercise substantial business activities in one of the parties, or (b) be owned or effectively controlled by nationals or permanent residents of one of the parties[9].

Defining who should be considered an investor under the agreement is standard practice of BITs. As Schlemmer points out: "All BITs and other international instruments dealing with investment provide definitions of whom they consider to be investors. The decisive criterion is the nationality of the investor. This is normally apparent from the different bilateral investment treaties which would accord protection to the nationals of the relevant contracting parties".[10]

An individual is a national of a State if it is considered to be according to the domestic law of that State. This rule was established in the 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws,

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7 Sections 4 (2) and 4 (4) of the Angola–Brazil BIT.

8 Z. Douglas, *The International Law of Investment Claims*, Cambridge University Press, New York 2009, p. 285.

9 Section 16 (3) of the Angola–Brazil BIT. A legal entity might have the nationality of a State based on different factors, such as its place of incorporation, the seat of its management or the main place of business; E.C. Schlemmer, *Chapter 2: Investment, Investor, Nationality, and Shareholders*, [in:] *The Oxford Handbook of International Investment Law*, eds. P. Muchlinski, F. Ortino, C. Schreuer, Oxford University Press, New York 2008, p. 74.

10 E.C. Schlemmer, *op. cit.*, , p. 68.

which reads: "It is for each State to determine under its own law who are its nationals. This law shall be recognized by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognised with regard to nationality"[11].

In order to meet the *ratione personae* requirement of the Angola–Brazil BIT, the investor shall have the nationality of Brazil to be guaranteed protection under the bilateral agreement to their investments in Angola, or the nationality of Angola to be rendered protection to their investments in Brazil.

Secondly, only investments considered to be an "investment" under the terms of the Angola–Brazil BIT could be protected. Many BITs define "investment" by a non-exhaustive list of categories of assets, which generally include (i) properties, (ii) shares and stocks of companies, (iii) contracts, (iv) intellectual property rights and (v) rights conferred by law or under contract.[12]

Nevertheless, differently from most BITs,[13] there is no definition of "investment" in the Angola-Brazil BIT. The parties opted not to define this key term in the agreement, leaving that definition to their domestic legislation.[14] The term "investment" should, therefore, be interpreted according to the national legislation of the State parties.

This means that in order to fulfill the *ratione materiae* requirement of the Angola-Brazil BIT, the assets held by investors of one of the parties should be considered an "investment" according to the domestic legislation of the host State.[15] Hence, a Brazilian investor could only claim protection under the agreement in regard to their assets in Angola if those assets are classified as "investment" by the domestic legislation of Angola. The same is true for the assets held by Angolan investors in Brazil, which are only protected under the agreement if they are considered an "investment" under Brazilian law.

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[11] Article 1 of the Convention on Certain Questions Relating to the Conflict of Nationality Laws.

[12] This is the case of the UK, Germany, France and the Netherlands model BITs, for instance. C. Mclachlan, L. Shore, M. Weiniger, *International Investment Arbitration: Substantive Principles*, 2nd ed., Oxford University Press, Oxford 2017, pp. 419-420.

[13] BITs usually contain definitions of "investment"; E.C. Schlemmer, *op. cit.*, p. 55; C. Mclachlan, L. Shore, M. Weiniger, *op. cit.*, p. 458; Z. Douglas, *op. cit.*, p. 170.

[14] It should be noted, however, that: "In a number of cases tribunals have employed the concept of estoppel to defeat the jurisdictional objections of a respondent State seeking to rely upon its domestic investment registration processes as a basis for arguing that a non-registered investment had not been made according to the law". C. Mclachlan, L. Shore, M. Weiniger, *op. cit.*, p. 441.

[15] Section 3 of the Angola–Brazil BIT. The domestic law of the host State will determine whether an asset should be considered an investment having the protections guaranteed by the bilateral agreement. Nonetheless, international law shall prevent a State from using its domestic law to wrongfully deny investment's status to an asset solely with the purpose of avoiding the obligations of a BIT; *ibidem*, pp. 443–444.

(b) Expropriation of foreign investment

According to the Angola-Brazil BIT, the investments made by investors of one of the parties in the territory of the other party cannot be expropriated or nationalised, except: (i) for reasons of public interest; (ii) in a non-discrimination manner; (iii) provided a just compensation, which should be equivalent to the market value of the investments expropriated, is paid to the investor; and (iv) according to the due process of law.[16]

Those requirements listed above are cumulative. That is the reason why the taking of property owned by the foreign investor by the host State without compensation, calculated in accordance with the fair market value of the investment, ought to be considered unlawful under the agreement.[17]

The act of expropriation could either be direct or indirect. On the one hand, there is a direct expropriation when the host State seizes the foreign investor's assets while implementing economic reform or when it directly deprives the investor of their assets without any compensation.[18] On the other hand, the expropriation is indirect when "the value of the investment is undermined to such an extent by the governmental action as to deprive the investor of the reasonably expected benefits of the investment".[19]

(c) Negotiation and State-State arbitration

When a dispute has arisen between an investor having the nationality of one of the parties and the other party over an investment made by the former, the Angola–Brazil BIT provides for a mechanism for the peaceful settlement of disputes.[20]

Firstly, there is a negotiation phase, when the Ombudsmen should act together with the Joint Committee to settle disputes which have arisen between the parties. Thus, before initiating an arbitral proceeding, any dispute between the parties over the interpretation or application of the treaty shall be subject to consultation and negotiation and dealt with, preliminarily, by the Joint Committee.[21]

In this phase, each of the parties may submit claims concerning their investors before the Joint Committee. To initiate proceedings, the State shall

16 Section 9 of the Angola–Brazil BIT.

17 P. Muchlinski, *Chapter 1: Policy Issues*, [in:] *The Oxford Handbook...*, *op. cit.*, p. 28.

18 C. Mclachlan, L. Shore, M. Weiniger, *op. cit.*, p. 359.

19 P. Muchlinski, *op. cit.*, p. 27.

20 It should be noted that, according to Section 16 (1), the Angola–Brazil BIT cannot be invoked for a claim that: (i) has already been settled by the courts of any of the parties, (ii) which is res judicata and (iii) has been settled before the entry into force of the treaty.

21 Section 15 (1) and 15 (2) of the Angola–Brazil BIT.

submit its claims to the Committee, indicating the name of the investor and the challenges and difficulties faced by that investor regarding their investment in the host State. The Joint Committee will then have 60 days, which could be extended for another 60 days, to present information regarding those claims.[22]

The Joint Committee might make recommendations for the settlement of the dispute referred to it. Nevertheless, if the parties are not able to reach a settlement over the investment claims, they could refer the dispute to inter-State arbitration.[23]

Arbitration is the most frequently used method for the settlement of investment disputes. Even though Investor-State arbitration has replaced State-State arbitration in most BITs,[24] Brazilian and Angolan investors still need to rely on their home State to bring a claim on their behalf against the host State through arbitration as Investor-State arbitration is not provided for in the agreement.

Concluding remarks

The ratification of the Angola–Brazil BIT was a milestone – being the first agreement of its kind to be ratified by Brazil – as it guarantees a higher standard of protection to Brazilian investors with investment in Angola.

The BIT allows Brazilian investors to seek compensation for the expropriation of their investment by Angola through a particular mechanism for the settlement of disputes. They might request Brazil to act on their behalf by bringing their claims before the Joint Committee for negotiation and, if no settlement is reached by the parties in this phase, by initiating State-State arbitral proceedings against Angola. This means that Brazilian investors have a new dispute settlement mechanism available – and do not need to rely exclusively on the domestic courts of Angola anymore – to seek compensation for direct or indirect expropriation of their investments. However, they still need to rely on Brazil to bring their claims on their behalf, as Investor-State arbitration is not provided for in the BIT.

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[22] Section 15 (3) of the Angola–Brazil BIT.

[23] Section 15 (6) of the Angola–Brazil BIT.

[24] C. Schreuer, *Chapter 21: Consent to Arbitration*, [in:] *The Oxford Handbook...*, *op. cit.*, pp. 830–831.

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Abstract
The Angola–Brazil Bilateral Investment Treaty: an introduction to its dispute settlement mechanism

This article presents an overview of the Angola–Brazil BIT and briefly analyses the dispute settlement mechanism for investment disputes provided for by that agreement. The ratification of the BIT by Brazil a few years ago means that Brazilian investors are now able to seek protection to their investments in Angola through the bilateral dispute settlement mechanism established by the BIT. Although Investor-State arbitration is not envisaged in the agreement, Brazilian investors can request Brazil to act on their behalf bringing their claims before the Joint Committee for conciliation and, if this proves unsuccessful, initiating State-State arbitration proceedings against Angola.

Key words: Angola–Brazil BIT, foreign investment, expropriation, dispute settlement, State-State arbitration