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IN FOCUS: INVESTMENT ARBITRATION IN BRAZIL: YES OR NO?

By Elizabeth Whitsitt and Damon Vis-Dunbar

In 1991, Brazil began one of the world's largest privatization programs, selling more than US$100 billion worth of assets. Seventeen years later and with a Gross Domestic Product (GDP) that ranks tenth in the world, Brazil is an industrial power that, according to the World Bank, is experiencing stable economic growth, a reality that has, in part, been facilitated by Brazil's increased openness to foreign investment.

As of January 2006, Brazil had realized approximately US$88 billion in sales revenue and some US$18 billion in debt transfer as a result of its privatization program. Foreign investment accounted for approximately 48% of that total.

Despite the importance of foreign investment to its economy and unlike all other South American states, Brazil is not a party to any bilateral investment treaties (BITs) and has not ratified the ICSID Convention. One of the reasons for Brazil's apparent reluctance to bind itself to such agreements is legal uncertainty. Specifically, there is controversy in Brazil with respect to whether ratification of such agreements is prohibited under Brazilian law on grounds that it impedes the sovereign right of the state. However, others note that Brazil may lawfully, and in fact has previously consented to binding foreign arbitration by routinely entering into contracts that provide for such dispute resolution mechanisms.

Meanwhile, pressure to ratify BITs builds from Brazilian investors, who have become increasingly internationalized. Indeed, in 2006, Brazilian companies invested more overseas (US$28 billion) than the country received in foreign investment. While Brazil's outward foreign investment flows have since dipped, according to the United Nations Conference on Trade and Sustainable Development, Brazil remains one of Latin America's leading exporters of capital. Not surprisingly, Brazilian multinationals are asking for BITs and the protection they promise.

"Despite the importance of foreign investment to its economy and unlike all other South American states, Brazil is not a party to any bilateral investment treaties (BITs) and has not ratified the ICSID Convention."

ITN has interviewed three lawyers to seek their views on whether Brazil should begin ratifying bilateral investment treaties, and if so, why. Nathalie Bernasconi Osterwalder is the Managing Attorney at the Centre for International Environmental Law. Todd Weiler, is a professor, arbitrator, legal counsel and consultant in international economic law. Pedro Alberto Costa Braga de Oliveira is a Brazilian lawyer, and currently general counsel of Enel Brasil Participações, an indirect subsidiary company of Enel S.p.A.

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NEWS: INDIAN LAWYER PURSUES CLAIM AGAINST THE UNITED KINGDOM UNDER THE INDIA-UK BIT

By Damon Vis-Dunbar

An English court case reveals that an Indian citizen is quietly pursuing an investment treaty claim against the United Kingdom under the India-UK bilateral investment treaty.

Ashok Sancheti, a London-based lawyer of Indian nationality, brought the UK to arbitration in 2006 under the 1995 BIT. ITN is currently waiting confirmation from the UK government on whether this is the only investment treaty claim pending against the UK.

Sancheti's dispute relates in part to a disagreement with the Corporation of London, the body that governs the financial district at the heart of London, over the rent to be paid for a premise leased from the city. But his quarrel has spread wider. In his notice of intent, Sancheti complains of "blatant discrimination by different organs and functions of the United Kingdom in their dealing with me in my capacity as an Inward Investor." In addition to the Corporation of London, Sancheti also alleges discrimination by the Home Office, the Law Society, and the judiciary.

The arbitration is governed by the UNCITRAL rules of arbitration, and therefore the parties are under no obligation to make public any aspects of the proceedings.

According to an English court judgment, the Tribunal consists of Justice Umesh Chandra Banerjee, a retired judge of the Indian Supreme Court; Professor Michael Reisman, a professor at Yale law school and an arbitrator on numerous investment treaty tribunals; and H.E. Dr. Fracisco Rezek (Chairman) a Brazilian judge and former member of the International Court of Justice.

Sancheti declined to comment on the case when contacted by ITN.

City of London seeks unpaid rent from Sancheti; effort to stay court proceedings is rejected

While Sancheti pursues his claim against the government of the UK, the city of London has launched its own case against Sancheti, seeking some £20 000 in unpaid rent.

Sancheti has been seeking to stay these court proceedings. A party to an arbitration agreement can apply for a stay in court proceedings on the grounds that the matter is to be referred to arbitration, under a provision in the English Arbitration Act.

"The arbitration is governed by the UNCITRAL rules of arbitration, and therefore the parties are under no obligation to make public any aspects of the proceedings."

Sancheti's request for a stay of the court proceedings has been rejected by two lower court judges, who determined that BIT arbitration agreement bound the UK government, but not the Corporation of London. Those decisions have now been upheld by the English Court of Appeal in a 21 November 2008 judgment.

The court of appeal rejected Sancheti's request on the grounds that the Corporation of London is not a party to the BIT arbitration, nor was a "mere affiliation" between the city of London and the government of the United Kingdom deemed sufficient to grant a stay of the court proceedings.

"The fact that in certain circumstances a State may be responsible under international law for the acts of one of its local authorities ... does not make that local authority a party to the arbitration agreement," writes Lord Justice Lawrence Collins.

Notably, Lord Justice Collins explicitly rejected a 1978 judgment in Roussel-Uclaf v GD Searle & Co Ltd, arguing that it was "wrongly decided and should not be followed." In Roussel-Uclaf v GD Searle & Co Ltd a subsidiary of a pharmaceutical company was entitled to a stay of court proceedings through an arbitration agreement held by its parent firm.

This is the first time an English court has overturned the judgment in Roussel-Uclaf v GD Searle & Co Ltd, said George Burn, head of the London international arbitration practice at the law firm Salans.

Burn said that Court of Appeal might have ruled differently, however, had it taken into account the distinction between commercial arbitration and investment treaty arbitration:

"The narrow construction the Court of Appeal put on its powers to stay litigation in favour of arbitration is based on two things: first, the fact that the English Arbitration Act is drafted for the supervision of commercial arbitration, not treaty arbitration, and secondly, the sanctity of the corporate veil in English law. Within those terms, the decision makes sense, and the formal rejection of the Roussel-Uclaf decision will surprise few.

"But the decision takes no account of the nature of the underlying arbitration in this case, and in particular the public international law doctrine of attribution, where a State is responsible at an international level for the acts of its organs and agents. Had the UK's responsibility for the acts of the Corporation of London under the doctrine of attribution been taken into account, the Court of Appeal might have ruled differently and stayed the litigation brought against the claimant in the underlying BIT arbitration."

NEWS: GUATEMALA'S OBJECTION TO JURISDICTION DISMISSED IN DR-CAFTA ARBITRATION

By Damon Vis-Dunbar

The first investment arbitration to be launched under the Dominican Republic – Central America – United States Free Trade Agreement (DR-CAFTA) is moving forward after the Tribunal dismissed Guatemala's objection to jurisdiction in November.

The Railroad Development Corporation (RDC), a U.S. company that won a public bid through its subsidiary, Compania Desarrolladora Ferroviara (FVG), to renovate and operate a railway line that had fallen into disuse, is suing the government of Guatemala for some US$65 million in damages and lost profits.

The firms charge that the state-owned company responsible for managing Guatemala's railway services broke its agreement with FVG when it missed trust-fund payments and failed to remove squatters from the railway tracks. In 2005, FVG launched two local arbitrations in Guatemala in response to the alleged contractual breaches. Soon after, the government of Guatemala introduced the so-called Lesivo Resolution, which declared the contract with FVG injurious to the state.

In July 2007, RDC filed a claim with ICSID claiming breaches of DR-CAFTA. Meanwhile, however, the local arbitration proceedings launched by FVG remain pending.

Guatemala complains of overlapping proceedings

At the root of Guatemala's objection to the Tribunal's jurisdiction is the fact that the local arbitration proceedings have not been discontinued. Under DR-CAFTA rules, the RDC "waived any right to initiate or continue ... other dispute settlement procedures" that pertain to the same measures alleged to constitute of breach of DR-CAFTA.

It fell to the Tribunal, therefore, to determine whether the local arbitrations dealt with the same measures as concerned the DR-CAFTA claim.

For its part, the RDC maintained that its DR-CAFTA claim only concerned measures that occurred after the local arbitration proceedings were initiated. Specifically, the RDC said the DR-CAFTA claim begins with the Lesivo Resolution: the resolution introduced in 2006 which declared that FVG's contract was injurious to the state.

Nonetheless, the Tribunal found that there was some "ambiguity" in terms of the measures that the RDC complained of in its DR-CAFTA arbitration request. The request, for example, referenced the failure to make trust fund payments and remove squatters, which are the same grievances that are the focus of the local arbitration proceedings.

As such, the Tribunal asked if itself whether, "because of this overlap, the entire waiver is defective and affects the whole proceeding before this Tribunal or whether the waiver is only partially defective ..."?

In taking the latter approach, the Tribunal concluded that the RDC DR-CAFTA claim was, in effect, a package of multiple claims, not all of which overlapped with those submitted to local arbitration in Guatemala. Therefore, the RDC's waiver was deemed to be valid for the claims that referred to the Lesivo Resolution, and the acts that followed.

Having affirmed its jurisdiction, the Tribunal has ordered that the proceedings move to a consideration of the merits of RDC's claims.

NEWS: ALGERIA PREVAILS IN DISPUTE WITH ITALIAN CONSTRUCTION FIRMS

By Suzy H. Nikiéma

In a 12 November 2008 final award, an ICSID tribunal has dismissed all claims by two Italian investors, L.E.S.I S.p.A. and ASTALI S.p.A, in a dispute with the government of Algeria over a failed contract to construct a hydraulic dam.

While the contract with the National Agency for Dams (NAD) was signed in 1993, progress was severely hampered by security problems as Algeria descended into civil war. After nearly 10 years of delays, an amendment to the contract was proposed by the investors and accepted by NAD. However, the amendment required authorization from African Bank of Development, which provided funding for the project. The Bank refused authorization, and instead recommended a new contract, for which NAD would be required to put out another call for tenders. NAD consented and consequently terminated the contract.

In their claim, the Italians alleged breaches of the provisions on indirect expropriation, fair and equitable treatment, and full protection and security in the Algeria-Italy bilateral investment treaty.

In dismissing the charge of indirect expropriation, the Tribunal held that

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NEWS: BELGIUM DREDGING COMPANIES FAIL IN ARBITRATION AGAINST EGYPT

By Damon Vis-Dunbar

The Egyptian government has deflected a US$80 million dollar claim by two companies hired to dredge the Suez Canal.

Jan de Nul N.V. and Dredging International, both incorporated in Belgium, won a bid to dredge sections of the Suez Canal 1992, a job they completed some three years later. However, allegations that the Suez Canal Authority (SCA)—the Egyptian agency responsible for the canal—misrepresented the size of the task has led to protracted legal disputes in the Egyptian courts and international arbitration.

A claim for breaches of the Belgo-Luxembourg bilateral investment treaty was registered with ICSID in 2003 on the grounds of the alleged fraud, and on charges that a ten-year effort to seek redress in the Egyptian courts amounted to denial of justice.

In a 6 November 2008 award, these claims were dismissed by the three-person Tribunal of Prof. Pierre Mayer, Prof. Brigitte Stern and Prof. Gabrielle Kaufmann-Kohler (President).

> *"The Tribunal also found no reason to believe that the long legal dispute in the Egyptian courts could be considered denial of justice on either procedural or substantive grounds."*

In rejecting the first claim, the Tribunal determined that the SCA's actions could not be attributed to the Egyptian government. Although the SCA carries out a public service, the tribunal held that structurally it was independent of the state. Moreover, its dealings with the claimants were commercial, rather than governmental, in nature.

The Tribunal also found no reason to believe that the long legal dispute in the Egyptian courts could be considered denial of justice on either procedural or substantive grounds.

The Tribunal concurred that "there is no doubt that ten years to obtain a first instance judgment is a long period of time." Nonetheless, the tribunal did not find a lack of due process; nor, given the complexity of the case, could the duration of the proceedings amount to denial of justice.

The Tribunal also found no fault with the substance of the court's decision. While the claimants alleged fraud on the part of the SCA, through a "willful withholding of information", the Tribunal agreed with the Egyptian court that no deception appeared evident.

Having dismissed all claims on the merits, the Tribunal ordered that costs of the arbitration should be split between the parties, and each was ordered to cover its own legal fees.

Egypt has won half of the ten cases that it has faced at ICSID, the World Bank's investment arbitration facility.

NEWS: ARGENTINA MOVES TO EXPROPRIATE AIRLINE UNDER THREAT OF US$1 BILLION ARBITRATION CLAIM

By Fernando Cabrera Diaz

The government of Argentina is driving ahead with its plan to expropriate the country's largest airline from its Spanish owners in the face of a threatened US$ 1 billion arbitration claim. The Madrid-based Grupo Marsans had agreed to sell the troubled Aerolineas Argentinas to the government in July, but the two sides have failed to bridge their wildly divergent estimates of the airline's value.

The airline has been subject to numerous employee strikes and flight delays in recent months, for which the government blames the company for mismanagement. Argentine President Cristina Kirchner says her government has been forced to intervene because the airline is on the verge of failure, something which would devastate the national economy. Meanwhile, Grupo Marsans blames government regulation, including rate hike preventions, for the airline's problems.

A valuation of the airline performed by Argentina's Planning Ministry determined that Aerolineas Argentinas, and its subsidiary Austral, were US$832 million in debt. However, a Credit Suisse valuation requested by Grupo Marsans estimated the airlines' combined worth at between US$350-445 Million.

With negotiations reaching a deadlock over Aerolineas Argentinas' worth, on 24 November Argentine lawmakers introduced a bill in the senate to expropriate the airline. A parliamentary committee determined a few days later that the airline was a public necessity and therefore subject to expropriation. Based on its estimate of the airline's worth, Argentina plans to pay a symbolic sum of US$1 in compensation.

ITN interviewed Angel del Rio, head of communications at Grupo Marsans, who said that under the July agreement both sides had arranged to

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NEWS: REPORT SAYS TANZANIA IS SIGNING BAD DEALS WITH FOREIGN MINING COMPANIES

By Damon Vis-Dunbar

Tanzania is losing large amounts of money from foreign investment in the mining sector due to low royalty rates and generous tax exemptions, while contracts with so-called stabilization clauses have locked the government into this tax regime for up to 50 years, says a report published by a consortium of church-based groups.

Tanzania, Africa's third largest producer of gold, but also one of the world's poorest countries, has seen its gold mining industry swell in the last ten years thanks to the introduction of a variety of investment incentives. But Tanzania's mineral investment laws are too liberal, robbing the country of potential revenue, argue the authors of *A Golden Opportunity? How Tanzania is Failing to Benefit from Gold Mining.*

In written responses to the report, two mining companies operating in Tanzania have countered that Tanzania's investment incentives are "conventional" and "essential" if the country is to draw long-term investment to the mining sector.

The report takes aim at a host of tax incentives - allowing companies to offset a 100% of their capital expenditure, for example - that the authors argue amount to hidden subsidies. Higher royalties are also recommended. The government currently levies a 3% royalty on gold. If the rate was 5%, the same that Botswana charges, Tanzania would have netted an extra US$ 58 million over the last five years, estimate the report's authors, Mark Curtis and Tundu Lissu.

The report also alleges that mining companies have evaded taxes, pointing to a 2003 audit commissioned by the government of Tanzania from the American firm Alex Stewart Assayers Government Business Corporation (ASA). The audit has not been made public, and the audited mining companies say that they have not seen the final report, although a copy has been leaked to the news media and was obtained by Kurtis and Lissu.

According to Kurtis and Lissu's description of auditor's report, four companies are alleged to have over-declared losses by US$502 million between 1999 and 2003, representing a loss in government revenue of US$132.5 million. The auditors also reportedly complained of thousands of missing documents and accused the mining companies of frustrating their investigation.

> *"Tanzania, Africa's third largest producer of gold, but also one of the world's poorest countries, has seen its gold mining industry swell in the last ten years thanks to the introduction of a variety of investment incentives."*

Tanzania's government revenue from mining has been placed at between US$13 to US$36 million a year by various sources. The authors of the report say it is likely about US$ 28 million, the figure provided by the Tanzanian Chamber of Mines.

Notably, efforts to boost government revenue in the mining sector may be hampered by the contracts that Tanzania has negotiated with foreign mining companies. While these contracts are normally kept confidential, occasionally they are leaked. Such was the case with a 2007 agreement with Barrick, a Canadian company, for a new mining operation in the north of Tanzania.

According to Kurtis and Lissu, the contract commits the government to maintain current tax levels for 25 years, with an option for the company to renew for another 25 years on the same terms. Compensation is guaranteed under contract should the government change the terms in such a way that the company is put "in a worse off situation".

Barrick, the mining company, has dismissed Kurtis and Lissu's report as "basically an advocacy piece by a hired Tanzanian anti-mining activist which encourages the Government of Tanzania to extract much higher taxes, rents, and royalties from Tanzania's nascent gold mining industry irrespective of its impacts on that industry, or the benefits that flow from it."

In a three-page response sent to the Business & Human Rights Resource Centre, Barrick says that Tanzania's nascent mining industry has required large upfront investments from foreign mining companies, suggesting that the investment incentives have been necessary to attract foreign capital.

Nor are Tanzania's mineral investment laws out of step with the rest of the world, said Barrick, adding that Tanzania's royalty rate is higher than those imposed in Australia, Canada, the United States, South Africa and China - the world's largest gold producers. At a time when the mining industry is feeling the effect of lower mineral prices, "the authors proposed changes in law to make the Tanzanian investment climate vastly less attractive couldn't possible be any insensitive to global economic reality," wrote Barrick.

A Golden Opportunity? How Tanzania is Failing to Benefit From Gold Mining was commissioned by the Christian Council of Tanzania, the National Council of Muslims in Tanzania, the Tanzania Episcopal Conference, and financed by Norwegian Church Aid and Christian Aid.

NEWS: DISGRUNTLED FISHING OUTFITTERS PUT CANADA ON NOTICE

By Damon Vis-Dunbar

The Canadian government has been sent two letters from outdoor tour companies signaling intent to sue for alleged breaches of the North American Free Trade Agreement. Both outfitters complain that their businesses suffered when the Province of Quebec changed the rules for distributing fishing licenses.

The two businesses led American tourists on fishing trips in the rivers of Quebec. As part of the service they offered, fishing licenses would obtained by lottery, and then transferred to clients. However, in an effort to curb fishing activity, the Province of Quebec adjusted the lottery system; as of 2006, licenses could not be obtained by one individual and transferred to another.

> *"The Canadian government has received four so-called Notices of Intent since July 2008."*

The companies complain that they invested in their businesses on the basis that licenses could be transferred to clients, and thus are owed compensation for what amounts to expropriation of their investments.

William Jay Greiner and Malbaie River Outfitters filed their notice of intent to submit a NAFTA claim in September, while David Bishop followed up with his letter just under a month later. They are both represented by the same New York-based lawyer.

The Canadian government has received four so-called Notices of Intent since July 2008. These letters must be delivered before an arbitration claim can be submitted under NAFTA's chapter on investment. Nonetheless, not all letters of intent lead to arbitration.

EVENT: SECOND ANNUAL FORUM OF DEVELOPING COUNTRY NEGOTIATORS

By Damon Vis-Dunbar

On 2-4 November 2008, the International Institute for Sustainable Development, the South Centre, and the Moroccan Department of Investment held the 2nd Annual Forum of Developing Country Investment Negotiators in Marrakech, Morocco.

The Forum provided representatives of developing country governments with an opportunity to share their experiences and knowledge of investment treaties and investment arbitrations. In addition to investment treaty negotiators, the Forum also included representatives of regional organizations negotiating development-minded international investment agreements, law professors specializing in international investment law, and experts from the South Centre, IISD and the United Nations.

Altogether, the Forum brought together 49 government investment negotiators from more than 35 developing countries with a wide geographic distribution. First Annual Forum of Developing Country Investment Negotiators was held in Singapore on 1-2 October 2007, and was attended by over 30 negotiators from 25 developing countries.

> *"Altogether, the Forum brought together 49 government investment negotiators from more than 35 developing countries with a wide geographic distribution."*

The topics discussed included changes in the field of international investment law at the multilateral, regional and bilateral levels; the role of development policy space and home country and investor obligations; and the link between investment agreements and climate change.

Participants stressed, among other things, that: it is critical to strike a balance between the rights of investors and host states in investment treaties; it is important to negotiate investment treaties for the specific needs the country and not to accept other countries' model treaties without careful negotiation; the lack of precedent in international arbitration means that the only certain way to ensure these issues are addressed is through express provisions in the treaties; and international investment agreements may potentially be used to help to address climate change and clean energy needs but they may also present obstacles in doing so.

These themes are also discussed in a number of background papers that were produced for Forum. These papers, along with the Forum agenda, are available from the website of the IISD at http://www.iisd.org/investment/capacity/dci_forum_2008.asp.

INVESTMENT ARBITRATION IN BRAZIL: YES OR NO?...

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INTERVIEW WITH NATHALIE BERNASCONI OSTERWALDER

ITN: How has Brazil been negatively impacted (economically, politically or otherwise) by its reluctance to enter BITs or ratify the ICSID Convention?

Brazil has not been negatively impacted at all by not ratifying BITs or the ICSID Convention. Foreign investors continue to invest in the Brazilian economy with their interests protected by contracts negotiated with the Brazilian government. Moreover, to my knowledge Brazil has been quite successful at resolving the problems encountered by foreign investors through diplomatic means, an approach that is inevitably less costly and less time consuming for all parties involved.

ITN: In your view, what consequences may result should Brazil decide not to enter into BITs or ratify the ICSID Convention?

To be honest, I do not see any negative consequences for Brazil should it continue with its current strategy regarding the treatment of foreign investors within its economy. Brazil will continue to attract foreign investment, and it will continue to protect such interests by negotiating contracts that provide foreign investors the protection they require without sacrificing Brazil's sovereignty.

ITN: Should Brazil decide to ratify BITs and/or ICSID Convention, what economic or other benefits would Brazil realize that it does not already enjoy?

First, it is important to note that studies typically show that countries do not attract more foreign investment when they enter into BITs. Given that Brazil already has healthy foreign investment flows into its economy, it is difficult to see how the ratification of BITs and/or the ICSID Convention would enhance the investment climate in Brazil.

> *"Given that Brazil already has healthy foreign investment flows into its economy, it is difficult to see how the ratification of BITs and/or the ICSID Convention would enhance the investment climate in Brazil."*

While Brazilian investors with investments outside Brazil might have an interest in obtaining the protections typically provided for in BITs, such as recourse to international arbitration, the potential negative consequences to Brazil of such ratification outweigh any potential benefits to Brazilian investors, especially when one considers that Brazilian investors can negotiate their own contracts with foreign governments thereby ensuring that their interests are protected.

ITN: What are the potential negative consequences Brazil could face should it decide to ratify BITs and/or ICSID Convention?

BITs give foreign investors the right to bring claims directly to arbitration typically without exhausting domestic remedies. While Brazil might prefer to settle disputes within its own courts given its experience with that system and given that those courts' familiarity with Brazilian law, Brazil would foreclose the possibility of resolving investment disputes domestically should it become party to BITs or ICSID. Brazil could find itself in a position of justifying its laws and decisions to an arbitral tribunal that does not understand Brazilian laws or policy, a negative consequence that seems unnecessarily risky for Brazil given the success it has with resolving disputes diplomatically.

ITN: What should potential foreign investors looking at investment opportunities in Brazil do to protect their interests?

Those investors should continue to do what investors coming into Brazil have done for almost twenty years; they should negotiate contracts with the Brazilian government to ensure their interests are protected.

INTERVIEW WITH TODD WEILER

ITN: Would it be advantageous for Brazil to enter into BITs or ratify the ICSID Convention? Why or Why not?

Yes. In the long run, Brazil will need to follow China's lead if its leaders want to fully capitalize on economic growth that, in the decades to come, will render it as much a state reputed for investment abroad as a host state. China is a decade or so further down that road, although Brazil is already far ahead of the game on crucial infrastructure fundamentals such as a solid, modern banking system and broad access to high speed bandwidth. Brazil also benefits from a much more heterogeneous and metropolitan population than most aspiring middle-powers. It cannot maximize these advantages, however, if it cannot bring itself to promise basic standards of transparent and fair treatment, and

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protection for property, on a reciprocal basis with governments of the states that promise to become the hosts and customers of Brazil's most successful transnational enterprises.

ITN: In order for Brazil to do so, what qualifying conditions must first be achieved?

Currently, Brazil is party to the Colonia and Buenos Aires Protocols under the MERCOSUR, which has largely suited their purposes as a regional power. For investment in its natural resources or utility sectors, it always has the ability to include an ICSID clause in concession agreements concluded with foreign investors anyway. There is also a deeply inculcated perception on the part of many Brazilians that an investor must submit itself to Brazilian law and Brazilian courts if it requires relief from government action, just like Brazilian nationals. Many haven't fully grasped that the reciprocity they should be worried about will increasingly concern the protection of Brazilian investment abroad. International law provides a neutral forum for two states seeking protection and promotion of both inbound and outbound investment.

Necessity is the mother of invention, so it is likely that the political and economic case for joining the world community in negotiating and abiding by the terms of investment treaties will be pressed increasingly often by Brazil's business leaders. However, it may take a while longer for a consensus to build amongst the populace that would not oppose such progress taking place.

The Chinese state is not yet fully democratic, which frees the hands of policy makers - at least to a certain extent - to jump into the lead on such far-sighted programs of economic development as an active treaty programme.

That's not to say that I would ever suggest that a country should delay taking positive steps towards liberalizing economic regulation, but I think one needs to be practical and realistic about how to get there. After so many years of being schooled in the beliefs that foreign investment from traditional donor countries was a necessarily evil, at best; and that the only way to achieve economic success was through the promotion of heavily-protected and subsidized national champions, one must accept that it may take a little time for them to adjust to new realities. That includes the tremendous promise that awaits many of the country's larger enterprises, in the coming years, if they are permitted to freely access markets abroad. Switching from a Calvo-inspired, infant industry narrative to a world-beating, export and investment oriented success story may take a little time.

ITN: In your view, could Brazil face any negative consequences if it commenced its own investment treaty program?

No. As long as the treaties promoted a transparent dispute settlement process that permitted investors to vindicate their rights through damages claims before an international tribunal, and the protections included were not watered down or subjected to broad reservations for favoured local industries, the programme could only add value to the existing investment climate.

ITN: What consequences may result should Brazil decide not to enter into BITs or ratify the ICSID Convention?

The consequences of not embarking upon a treaty programme with haste will ultimately be stilted economic growth and higher marginal risks of regulatory unfairness abroad for Brazilian investors. Such risks constitute uncertainties that will increase the marginal cost of capital committed abroad, thereby dissuading Brazilians from investing abroad rather than promoting it. This is not to say that Brazil cannot realize significant economic growth in the years to come without such a programme in place, but not having one could impede the rate and scope of such growth.

INTERVIEW WITH PEDRO ALBERTO COSTA BRAGA DE OLIVEIRA

ITN: How has Brazil been negatively impacted by its reluctance to enter BITs or ratify the ICSID Convention?

In terms of inward investment, I don't think Brazil has suffered any negative consequences from not ratifying bilateral investment treaties. Year after year we have been very successful in attracting foreign investment. This, of course, is one of the arguments used to advise against ratifying these treaties. However, Brazil has become a capital exporter, with Brazilian multinationals doing business all over the world. Therefore, the worst consequence of failing to sign the ICSID Convention and not ratifying BITs is that Brazilian companies are unprotected.

ITN: In your view, what consequences may result should Brazil decide not to enter into BITs or ratify the ICSID Convention?

If Brazil signed the ICSID Convention and entered into bilateral investment treaties it would send the world the right signal to foreign investors. That

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said, I don't know if it would lead to more foreign capital into the country. Brazil is a large market with a growing middleclass. It is also stable. In the last several years there have no cases of expropriation. So in terms of inward investment, I doubt that companies would decide to invest Brazil simply because of BITs.

ITN: What are the potential negative consequences Brazil could face should it decide to ratify BITs and/or ICSID Convention?

The treaties would need to be so-called next generation treaties. In other words, they must be crafted to allow for sufficient governmental policy space, so that what has happened in Argentina, for example, doesn't happen in Brazil.

ITN: What should potential foreign investors looking at investment opportunities in Brazil do to protect their interests?

Investors should push for arbitration agreements in their contracts. The court system can be very slow and cumbersome. There are several layers of appeals, so cases can often take several years. At my company, we don't enter into a single contract without an arbitration clause. One of the reasons that BITs have not been ratified is that when those treaties were signed, arbitration law in Brazil was non-existent. There was also doubt as to whether the government could submit to arbitration under Brazil's constitution. But investors should know that this is no longer the case.

ALGERIA PREVAILS IN DISPUTE...

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violating the contract does not, by itself, amount to expropriation. The Tribunal noted that the national laws of Algeria allow the unilateral termination of a contract by the State if compensation is provided. Given that NAD had committed to pay compensation, it concluded that expropriation cannot result from the mere absence of agreement on the amount to be offered.

The Tribunal also found no breach of Fair and Equitable Treatment provision, having determined that NAD's decision to terminate the contract and launch a second call for tender was transparent and non-discriminatory.

(Notably, the Algeria-Italy BIT does not contain a Fair and Equitable Treatment clause; however, by use of Most Favourable Nation clause, the Italian investors benefited from the F&E clause in the Algeria-Belgium BIT).

Finally, in regards to the alleged breach of the full protection and security standard, the Tribunal held that this commitment is weaker during periods of war or civil strife. As with many BITs, the Algeria-Italy treaty provides two levels of application for this standard: one general offer of full protection and security to covered investors, and a second that prohibits treatment less favourable than that offered to national or third-party foreign investors during periods of war or civil strife. In a departure from some other tribunals, who have held states to a high level of protection in spite of civil unrest, this Tribunal determined that the two provisions cannot be used simultaneously, and considered armed conflicts to be exceptional situations which lead to a dispensation from the general principle.

ARGENTINA MOVES...

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commission separate valuations of the company in order to determine a fair price. In the event that the valuations did not match, the agreement called for a third independent valuation, claims Mr. del Rio. However, Mr. del Rio said Argentina has refused the company's attempts to coordinate the third valuation, and accussded the government of using its internal valuation to cover up its unjust expropriation of the airlines.

If the expropriation is executed, Grupo Marsans will filed a claim with the International Centre for the Settlement of Investment Disputes (ICSID), seeking some US$1.5 billion, said Mr. Del Rio. Grupo Marsans is protected by the Spanish-Venezuela bilateral investment treaty.

Aerolineas Argentinas was a state-owned airline until 1990, when it was privatized and sold to Iberia Airlines. The airline switched hands several times before it was acquired by the Marsans Group in 2001. At the time, the airline, deeply affected by Argentina's financial crises, was on the verge of bankruptcy.

Grupo Marsans initially brought the airline into profitability, but began to have troubles in 2005 when it butted heads with employee and pilots unions as it sought to control its costs. The problems have aggravated by the fluctuations in oil prices in recent years.