# Has Brazil Made a Unilateral Binding Offer to Arbitrate in the 2016 Investment Partnership Program (PPI)?

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A provision enacted in 2016 seems to have created a revolutionary change in Brazil's approach to arbitration involving State parties. It is well-known that Brazil is not a party to the Washington Convention of 1965 nor of any ratified BIT (Bilateral Investment Treaty). The country has relied on commercial arbitration to resolve disputes with State parties, mostly based on arbitration clauses included in contracts. Provision Measure (MP) 752, issued by the federal government in November 2016, may dramatically change this scenario. At least with regard to certain existing projects governed by Law 13.334, of 2016 (the federal government's PPI – Investment Partnership Program).

MP is a form of provisional legislation, issued by the President and subject to confirmation or alteration by Congress in up to 120 days. The sectors comprised by PPI include highways, railways and airports and other fields, under many forms of contractual arrangements. PPI projects may be conducted by the federal government or by local governments based on delegation or association. PPI may include privatizations under Law 9.491, of 1996. These fields give PPI a potential breadth that covers most large-scale infrastructure projects.

MP 752 created additional tools to favor PPI projects. One of them is arbitration under special rules. Articles 1 and 2 of Law 9.307, of 1997, allow governments to include arbitration clauses in contracts or enter into submission agreements. But MP 752 brought about special regulations to govern arbitration in two situations.

The first one deals with termination and re-tendering. If parties wish to terminate and re-tender their current contracts, they shall enter into a submission agreement as part of a specific amendment (Article 15, section III, of MP 752).

The second one comprises disputes arising out of PPI contracts. There are two subcategories. If the conditions set forth in Article 25 are met, the provision functions as a unilateral binding offer to arbitrate from the Federal Government. If those conditions are not met, parties may arbitrate under an existing arbitration clause or one that is added through a contractual amendment (Article 25, paragraph 1). The conditions under Article 25 are as follows:

> Article 25. Disputes relating to disposable economic rights arising out of partnership

agreements within the sectors governed by this Provisional Measure may be resolved by arbitration or other alternative dispute resolution mechanism after a final decision by the competent authority.

Paragraph 1. The contracts that do not have an arbitration clause, including those in force, may be amended for the purposes of the head of this article.

Paragraph 2. The arbitration costs shall be anticipated by the private partner at the commencement of the proceedings and when applicable they will be reimbursed under the terms of a final decision in arbitration.

Paragraph 3. The arbitration shall be in Brazil and in Portuguese language.

Paragraph 4. For the purposes of this Provisional Measure, disposable economic rights are limited to:

I – issues relating to the reestablishment of the economic and financial balance of the contracts;

II – calculation of compensations resulting from the termination or transfer of concession contracts; and

III – non-compliance with contractual terms by any of the parties.
Paragraph 5. The accreditation of arbitral institutions for the purposes of this Provisional Measure shall be governed by an Act of the Executive Power.[1)]Free translation by the authors.

The main innovation by MP 752 is the introduction in Brazil of a mechanism widely known internationally for the protection of investments. A State may offer its investors the possibility of submitting investment disputes to arbitration. A unilateral offer may be provided for in multilateral investment treaties, BITs or domestic investment laws. Investors may accept the offer and give effect to the consent required for an arbitration agreement by several means, by simply submitting a request for arbitration.[2)]SALACUSE, Jeswald. The Law of Investment Treaties, 2nd edition. Oxford University Press, 2015. pp. 422-423.

MP 752 is indistinctly applicable to Brazilian national and foreign parties. The head of Article 25 provides that “disputes (…) arising out of partnership agreements within the sectors governed by this Provisional Measure may be resolved by arbitration or other alternative dispute resolution mechanism”. Such sectors are those covered by PPI, usually infrastructure projects under concession or PPP agreements.

Article 25 sets forth two requirements. First, it requires a final decision by the competent administrative authority prior to arbitration. In other words, arbitration under the special conditions of Article 25 is only possible after a decision from an administrative authority. Second, the dispute’s subject matter must deal with disposable economic rights referred to in paragraph 4. For the specific purposes of the unilateral offer to arbitrate, the objective arbitrability is limited to the subject-matters specified in such provision. Paragraph 5 of Article 25 deals with accreditation of arbitral institutions, but this is not a condition for the offer under the head of Article 25 to be effective.

Article 25 must be interpreted as a unilateral and irrevocable expression of consent by the Federal

Government to submit the dispute to arbitration provided such conditions are met.

Consent by the private party may arise from an amendment to a contract without an arbitration clause or even by filing the request for arbitration or through a unilateral statement. The private party then enters into an arbitration agreement and is entitled to all its effects. The private party may initiate arbitration, including through the system to compel arbitration through national courts set forth by articles 6 and 7 of Law 9.307.

The head of Article 25 does not require the conclusion of the amendment provided for in paragraph 1 for consent to exist.[3)]A suggestion to that effect can be found in the reasons (Exposição de Motivos) submitted by the Federal Government when it issued MP 752, but such reasons are not binding nor do they supersede the language of the MP 752 provisions. It would have been simple for MP 752 to provide otherwise, but it has not done so.

The most important and final confirmation of such interpretation of Article 25 arises from reading Article 25 and its paragraph 1 in their context.

Law prior to MP 752 already provides for arbitration agreements for disputes involving disposable economic rights between the Federal Government and its private partners or concessionaires. There would be no point in MP 752 simply repeating such provisions. It has gone beyond that.

The possibility of conclusion of arbitration agreements has been expressly provided by Law 11.079 (PPPs Act) and Law 8.987 (Public Concessions Act), since 2004 and 2005. Several sectorial laws had provided for arbitration since the mid-1990s. Such possibility was reaffirmed by the 2015 amendments to the Brazilian Arbitration Act (Law 9.307) introduced by Law 13.129. One can assume that MP 752 has not merely repeated what had already been historically built and consolidated through several acts that led to the legislative reform in 2015.

Most importantly, this interpretation gives sense to the provision that arbitration is possible “after a final decision by the competent authority” (Article 25). Such requirement has created perplexity among specialists. The discussion relates to whether the provision causes a restriction to access to jurisdiction.

The interpretation of the Article 25 condition is clear and simple if one understands such administrative decision is one of the conditions for the unilateral offer to arbitrate. Once an administrative decision exists, the dispute shall be submitted to arbitration under Article 25, depending only on the private party’s expression of consent. If such decision does not exist, the special mechanism introduced by Article 25 does not apply.

The notion of “final decision by the competent authority” requires clarification. Article 25 merely requires some administrative decision before any party can resort to arbitration. For the unilateral offer to arbitrate to be effective, the subject matter of the dispute must have been previously resolved by an administrative decision. This is not the general rule. If there is an arbitration agreement, a private party may commence arbitration without having to wait for an administrative decision, provided there is a dispute and the party has standing to arbitrate.

The condition of a “final decision” does not require a decision by the highest possible authority nor exhaustion of all available administrative appeals. An express or implied waiver of the administrative discussions suffices to give the challenged administrative decision a final character.

Article 25 of MP 752 brings an important innovation to the Brazilian legal system concerning arbitration involving State entities. It creates a unilateral and binding offer from the government to

arbitrate certain categories of disputes arising from PPI (infrastructure) contracts in which a competent authority has already rendered a final decision. A private party may conclude the arbitration agreement by a formal submission agreement with the government or by submitting the dispute to arbitration after a final administrative decision or a waiver of subsequent administrative appeals.

References


1. ↑ Free translation by the authors.
2. ↑ SALACUSE, Jeswald. The Law of Investment Treaties, 2nd edition. Oxford University Press, 2015. pp. 422-423.
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