



Investment Treaty Arbitration

in 20 jurisdictions worldwide

2014

Contributing editors: Stephen Jagusch and Epaminontas Triantafilou



Published by
Getting the Deal Through
in association with:

Abeledo Gottheil Abogados

Amarchand & Mangaldas & Suresh A Shroff & Co

Anderson Mori & Tomotsune

Castaldi Moure & Partners

Esin Attorney Partnership

Gleiss Lutz

Grata Law Firm

Herbert Smith Freehills LLP

Homburger AG

I K Rokas & Partners Law Firm

Linklaters LLP

Obeid Law Firm

PLMJ – Law Firm

Quinn Emanuel Urquhart & Sullivan LLP

Sayenko Kharenko

Shin & Kim

Torys LLP

Von Wobeser & Sierra

Wayar & von Borries Abogados



Investment Treaty Arbitration 2014

Contributing editors

Stephen Jagusch
Epaminontas Triantafilou
Quinn Emanuel Urquhart & Sullivan LLP

Publisher

Gideon Robertson

Business development managers

Alan Lee, George Ingledew,
Dan White, Robyn Horsefield,
Adam Sargent

Account managers

Megan Friedman, Joseph Rush,
Dominique Destrée,
Emma Chowdhury, Lawrence Lazar,
Andrew Talbot, Hannah Mason,
Jac Williamson, Ellis Goodson

Media coordinator

Parween Bains

Administrative coordinator

Sophie Hickey

Research coordinator

Robin Synnot

Marketing manager (subscriptions)

Rachel Nurse
subscriptions@gettingthedealthrough.com

Head of editorial production

Adam Myers

Production coordinator

Lydia Gerges

Senior production editor

Jonathan Cowie

Production Editor

Claire Ancell

Director

Callum Campbell

Managing director

Richard Davey

Investment Treaty Arbitration 2014

Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 7908 1188
Fax: +44 20 7229 6910
© Law Business Research Ltd 2013

No photocopying: copyright licences
do not apply.

First published 2013
1st edition

ISSN 2053-8960

The information provided in this publication is general and may not apply in a specific situation. Legal advice should always be sought before taking any legal action based on the information provided. This information is not intended to create, nor does receipt of it constitute, a lawyer-client relationship. The publishers and authors accept no responsibility for any acts or omissions contained herein. Although the information provided is accurate as of November 2013, be advised that this is a developing area.

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112

Global Overview Stephen Jagusch and Epaminontas Triantafilou <i>Quinn Emanuel Urquhart & Sullivan LLP</i>	3
Argentina Luis A Erize <i>Abeledo Gottheil Abogados</i>	6
Bolivia Bernardo Wayar Caballero and Bernardo Wayar Ocampo <i>Wayar & von Borries Abogados</i>	10
Canada John Terry and Geoff Watt <i>Torys LLP</i>	13
France Julien Fouret and Pierre Daureu <i>Castaldi Mourre & Partners</i>	19
Germany Stephan Wilske, Lars Markert and Laura Bräuninger <i>Gleiss Lutz</i>	24
Greece Antonios D Tsavdaridis and Maria Demirakou <i>I K Rokas & Partners Law Firm</i>	29
India Cyril S Shroff and Vijayendra Pratap Singh <i>Amarchand & Mangaldas & Suresh A Shroff & Co</i>	34
Japan Yoshimasa Furuta and Aoi Inoue <i>Anderson Mori & Tomotsune</i>	41
Kazakhstan Bakhyt Tukulov and Askar Konysbayev <i>GRATA Law Firm</i>	47
Korea Beomsu Kim and John M Kim <i>Shin & Kim</i>	52
Lebanon Nayla Comair-Obeid and Ziad Obeid <i>Obeid Law Firm</i>	57
Mexico Claus von Wobeser and Adrián Magallanes <i>Von Wobeser & Sierra</i>	61
Netherlands Daniella Strik <i>Linklaters LLP</i>	66
Portugal Tiago Duarte and Tomás Pessanha <i>PLMJ – Law Firm</i>	70
Switzerland Kirstin Dodge, Simon Vorbürger and Gabrielle Nater-Bass <i>Homburger AG</i>	73
Turkey Ismail G Esin, Ali Yesilirmak, Dogan Gultutan and Demet Kasarcioglu <i>Esin Attorney Partnership</i>	77
Ukraine Tatyana Slipachuk, Olena Perepelynska and Tetyana Makukha <i>Sayenko Kharenko</i>	82
United Arab Emirates Mike McClure and Robert Stephen <i>Herbert Smith Freehills LLP</i>	87
United Kingdom Stephen Jagusch and Epaminontas Triantafilou <i>Quinn Emanuel Urquhart & Sullivan LLP</i>	91
United States Tai-Heng Cheng, David M Orta and Julia Peck <i>Quinn Emanuel Urquhart & Sullivan LLP</i>	95

Portugal

Tiago Duarte and Tomás Pessanha

PLMJ – Law Firm

Background

1 What is the prevailing attitude towards foreign investment?

For many years, Portugal has been a country that is especially receptive to foreign investment, and has been guided by the principle of non-discrimination on the grounds of nationality.

There are no restrictions on the entry of foreign capital, and no specific obligations on the foreign investor or limitations on repatriation of profits, because foreign companies enjoy the same rights and are subject to the same obligations as Portuguese companies.

2 What are the main sectors for foreign investment in the state?

When it comes to attracting foreign investment, the priority sectors for the Portuguese state are those that produce tradeable goods and services. This is because they have a positive impact on exports, generate added value for the Portuguese economy and contribute to the creation of employment. These sectors include aeronautics, agro-industry, automotive, renewable energies, mining, shipbuilding, production of construction materials, the mould industry and engineering, pulp and paper production, chemicals and petrochemicals, health care, shared services and outsourcing, information technology and communications and the textiles sector.

3 Is there a net inflow or outflow of foreign direct investment?

According to statistics published by official bodies with reference to 2012 (the most recent currently available), foreign investment in Portugal is greater than Portuguese investment abroad. While net foreign investment in Portugal in 2012 stood at €6.939 billion, net Portuguese investment abroad amounted to €1.490 billion.

4 Describe domestic legislation governing investment agreements with the state or state-owned entities.

Investment agreements for large-scale investment projects are regulated by the Single Contracting System (Decree-Law No. 203/2003 of 10 September 2003).

Large-scale investment projects are those with a value in excess of €25 million or, if they do not reach this threshold, are promoted by a company with annual consolidated turnover exceeding €75 million or by a non-business entity with an annual budget in excess of €40 million, regardless of the sector of activity or the nationality of the investor.

The projects that qualify for this system are subject to agreements negotiated and made between the Portuguese Agency for External Investment and Trade (AICEP), representing the state, and the investors.

Under this system, the state may grant the following benefits:

- financial incentives;
- tax incentives; and

- co-financing of the project using venture and development capital of public origin.

In exceptional circumstances, specific benefits may also be granted to reduce contextual costs.

These agreements are subject to prior approval by a joint order of the minister who supervises AICEP and the ministers responsible for the sectors involved or by resolution of the Council of Ministers if tax benefits are granted in respect of the investment. The ministerial order or resolution of the Council of Ministers approving the agreement is published in the Official Gazette.

We would also draw your attention to the existence of bilateral investment treaties between Portugal and other states, which ensure, on a reciprocal basis, the more favourable treatment of investors from one of the signatory states in the territory of the other and the guarantee of the full protection and security of investments already made.

Portugal is also a signatory to a vast number of conventions to avoid international double taxation (the list of countries with which conventions of this type exist can be seen at http://info.portaldasfinancas.gov.pt/pt/informacao_fiscal/convencoes_evitar_dupla_tributacao/convencoes_tabelas_doclib/).

International legal obligations

- ### 5 Identify and give brief details of the bilateral or multilateral investment treaties to which the state is a party also indicating whether they are in force.

Portugal is a member of the Energy Charter Treaty and has signed 55 bilateral investment treaties, although not all of them have entered into force.

- ### 6 Is the state party to the ICSID Convention?

Yes, Portugal has been a contracting state since 1 August 1984.

- ### 7 Does the state have an investment treaty programme?

If Portugal has an investment treaty programme, it is not publicly available.

Regulation of inbound foreign investment

- ### 8 Does the state have a foreign investment promotion programme?

The programme of the current government recognises that capturing direct foreign investment, whether for greenfield projects or for mergers and acquisitions, is essential to increasing exports, generating employment and improving national competitiveness. The factors essential to achieving this objective are, among others:

- the concentration of the management of national and EU incentives, maximising their use (particularly providing incentives to

the participation of specialist international investors in association with tools for co-investment of public venture capital);

- the establishment of the Ministry of Foreign Affairs as the leading protagonist in the efforts to promote and attract investment and internationalise the Portuguese economy; and
- the definition and promotion of strategic clusters in emerging areas with high potential for growth (such as health care, education and knowledge, and technology and entertainment).

These policies have been put into effect through sector-specific programmes. The most recent example of this approach is the Special Scheme for Residence Permits for Investment Activity (the ‘Golden Visa’ programme). This scheme provides for residence permits to be granted to foreign nationals for the purpose of carrying on investment activity. Besides meeting certain legal requirements, investors must carry out one of the following activities:

- transfer of capital in an amount of €1 million or more;
- creation of at least 10 jobs; and
- acquisition of real estate with a value of €500,000 or more.

Also relevant to this issue is the Single Contracting System itself (see question 4). Under this system, large-scale domestic or foreign investment projects are subject to positive discrimination and may receive financial incentives, tax benefits and project co-financing. Projects of greater relevance to the Portuguese economy, principally because of their size, which are classified as projects of national interest, and projects of national interest with strategic importance, will receive special public endorsement.

- 9** Identify the domestic laws that apply to foreign investors and foreign investment, including any requirements of admission or registration of investments.

Until 2003, it was mandatory in Portugal to register (a posteriori) foreign investment operations (for the purposes of administrative and statistical information), but this requirement was removed with the approval of the above-mentioned Single Contracting System (see question 4).

Since then, no distinction has been drawn between foreign and domestic investment and Portuguese law applies to foreign investors in the same way it does to domestic ones. However, there may be specific restrictions, in sectors of public administration or in relation to activities subject to a special regulatory framework, such as banking and insurance activities, which require prior authorisation in order to carry on activity in the country.

- 10** Identify the state agency that regulates and promotes inbound foreign investment.

AICEP is the Portuguese agency with the exclusive mission of capturing domestic or foreign investment, as well as promoting Portuguese direct investment abroad. It is competent in the case of:

- domestic investors with annual consolidated turnover exceeding €75 million or entities with the legal form of a non-business entity with an annual budget in excess of €40 million wishing to carry out an investment project;
- an investment equal to or greater than €25 million; and
- an investment (regardless of its size and the legal nature of the investor) which, because of its merit or the effects it produces in the value chain, may contribute to the expansion of Portuguese companies through the development of innovative activities in certain areas, human capital, technological centres and research and development activities.

In the case of micro, small or medium Portuguese companies (with consolidated annual turnover equal to or lower than €75 million) or non-business entities with an annual budget equal to or lower than

€40 million wishing to carry out an project investment that does not reach €25 million, the competent entity is the Institute for Support of Small and Medium Companies and Innovation, unless the project is for development in the area of tourism and does not reach the €25 million threshold, in which case the competent authority is the Portuguese tourism institute.

- 11** Identify the state agency that must be served with process in a dispute with a foreign investor.

When a foreign investment is not contracted with the Portuguese state, there is no public agency with competence for this purpose.

In cases where the foreign investor has entered into investment agreements with the Portuguese State under the above mentioned Single Contractual System (see question 4), and the parties have agreed to settle any disputes by means of arbitration (which is legally admissible with the exception of issues relating to tax incentives), it falls to the AICEP to represent the state in the corresponding proceedings.

Investment treaty practice

- 12** Does the state have a model BIT?

If it has, it is not publicly available.

- 13** Does the state have a central repository of treaty preparatory materials? Are such materials publicly available?

We assume that the Foreign Affairs Ministry holds preparatory materials, but it is not publicly available.

- 14** What is the typical scope of coverage of investment treaties?

The definitions of investor and investment in the BITs signed by Portugal follow the mainstream broad definitions that are common in almost all BITs.

- 15** What substantive protections are typically available?

The bilateral investment treaties signed by Portugal cover the most relevant substantive standards, such as fair and equitable treatment, national treatment, full protection and security, no expropriation without a public purpose and with due compensation, no discriminatory measures and most favourable nation clause. Some BITs also have an umbrella clause.

- 16** What are the most commonly used dispute resolution options for investment disputes between foreign investors and your state?

The most common dispute resolution option is ICSID arbitration, although in some BITs UNCITRAL arbitration is also an option.

- 17** Does the state have an established practice of requiring confidentiality in investment arbitration?

Portugal has never been a respondent in any investment protection arbitration.

Investment arbitration history

- 18** How many known investment treaty arbitrations has the state been involved in?

Portugal has never been the respondent in any investment treaty arbitration.

Update and trends

The most important topics concerning arbitration include the following:

- the definition of ‘international public policy’ in the new Arbitration Law – no precedents exist and even the ‘public policy’ issue in arbitration has not been an object of judicial decisions in Portugal;
- the independence and impartiality of arbitrators – up until now, the judicial trend has been to not scrutinise this in detail. This is wrong as it considers that the favor arbitratis rule covers some degree of acceptance of lack of independence or even impartiality of co-arbitrators;
- the application of the ‘neutrality rule’ – whenever at least one of the parties is not Portuguese the appointing authorities, in accordance with the Arbitration Law, should consider to nominate

as president a practitioner who is not of the same nationality as the parties (and therefore not Portuguese). The courts (for ad hoc arbitration), and even some institutions that administer arbitrations, do not appear to be prepared for it; and the criteria for appeal court decisions in relation to arbitrator’s fees in ad hoc arbitrations – whenever the parties do not agree the fees with the arbitrators prior to the nomination of the president and constitution of the tribunal, it is possible to appeal against the arbitrator’s decision and the lack of enough precedents may cause uncertainty. Institutional arbitration appears to be outwith these rules.

19 Do the investment arbitrations involving the state usually concern specific industries or investment sectors?

Not applicable.

20 Does the state have a history of using default mechanisms for appointment of arbitral tribunals or does the state have a history of appointing specific arbitrators?

Not applicable.

21 Does the state typically defend itself against investment claims? Give details of the state’s internal counsel for investment disputes.

Not applicable.

Enforcement of awards against the state

22 Is the state party to any international agreements regarding enforcement, such as the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards?

Portugal has ratified the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) which entered into force on 16 January 1995.

23 Does the state usually comply voluntarily with investment treaty awards rendered against it?

Not applicable.

24 If not, does the state appeal to its domestic courts against unfavourable awards?

Not applicable.

25 Give details of any domestic legal provisions that may hinder the enforcement of awards against the state within its territory.

According to Portuguese arbitration law, when an international arbitration is based in Portugal and therefore Portuguese arbitration law is applicable, a state may not use its own national legislation to avoid being part of the proceedings on jurisdictional grounds and may not invoke its national legislation against the award.

The public policy and sovereign immunity clauses, as referred into in the New York Convention, the Washington Convention and the Vienna Convention are also applicable.



Tiago Duarte
Tomás Pessanha

tiago.duarte@plmj.pt
tomas.pessanha@plmj.pt

Av. da Liberdade, 224
1250-148 Lisbon
Portugal

Tel: +351 213 197 300
Fax: +351 213 197 400
www.plmj.pt

GETTING THE DEAL THROUGH®

Annual volumes published on:

Acquisition Finance
Air Transport
Anti-Corruption Regulation
Anti-Money Laundering
Arbitration
Asset Recovery
Banking Regulation
Cartel Regulation
Climate Regulation
Construction
Copyright
Corporate Governance
Corporate Immigration
Data Protection & Privacy
Dispute Resolution
Dominance
e-Commerce
Electricity Regulation
Enforcement of Foreign
Judgments
Environment
Foreign Investment Review
Franchise
Gas Regulation
Insurance & Reinsurance
Intellectual Property &
Antitrust
Labour & Employment
Licensing
Life Sciences
Mediation
Merger Control
Mergers & Acquisitions
Mining
Oil Regulation
Outsourcing
Patents
Pensions & Retirement Plans
Pharmaceutical Antitrust
Private Antitrust Litigation
Private Client
Private Equity
Product Liability
Product Recall
Project Finance
Public Procurement
Real Estate
Restructuring & Insolvency
Right of Publicity
Securities Finance
Shipbuilding
Shipping
Tax Controversy
Tax on Inbound Investment
Telecoms and Media
Trade & Customs
Trademarks
Vertical Agreements



**For more information or to
purchase books, please visit:
www.gettingthedealthrough.com**



Strategic research partners of
the ABA International section



THE QUEEN'S AWARDS
FOR ENTERPRISE:
2012



The Official Research Partner of
the International Bar Association