

Settlement of Disputes under International Agreements of the  
Republic Federative of Brazil: Opening up to New Possibilities

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XXIII – Minerva Program – SPRING 2008

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*“The settlement of disputes through adequate institutions acquires a unique importance in the context of transition from a command economy to a market economy. In the former, the function of dispute-settlement institutions is perhaps akin to an administrative one, mostly concerned with the timely fulfillment of an economic plan. In a market economy, by contrast, economic actors will be left, within certain limits defined by law, to pursue their own economic strategies. Long-term success of those strategies will depend on a climate of stability and predictability, where business risks may be rationally assessed, transaction costs lowered, market failures addressed and governmental arbitrariness reduced. In such context, fair and efficient dispute settlement institutions will be required as an integral part of the legal framework.” Page 63*

(Shitaka, 1998) *as quoted by* (Vicuña, 2001)

**I – INTRODUCTION AND MAIN OBJECTIVE**

Under the laws of Brazil, any agreement relating to the incurrence of external indebtedness to which the Federative Republic of Brazil is a party must provide that arbitration be the sole and exclusive legal remedy for the parties to such agreement for any dispute, controversy or claim brought outside of the Republic for the enforcement of such agreement against the Republic.

It seems that the Republic is the sole country to adopt such position. This has been a big issue in every negotiation with a new lender. We had problems particularly negotiating

with Ex-Im Bank of the United States when we could not overcome the impasse after four years of intense negotiation.

The material in this study will be primarily based on the experiences and observations of this student as an attorney of the national Treasury during fourteen years of negotiations and the history of this specific negotiation with Ex-Im Bank which will show in detail our policy and also our legal limits.

On the other hand, considering the situation of Brazilian courts and the delay in obtaining a settlement of a dispute, it seems convenient to consider a waiver of immunity in foreign courts. Speeding the decisions and enjoying the benefits of submitting ourselves to an effective legal system that has been already adopted by most of our creditors may result in a reduction of litigation's cost risks, besides facilitating economic exchange in the contract as a whole.

Besides bringing the facts due to my position, I would like to consider the risks and positive aspects of a waiver of immunity and the main objective will be to point out the prejudice around the subject and bring into considerations reasons for opening up to this possibility.

## **II – THE REPUBLIC POLICY AND LEGAL LIMITS FOR SETTLEMENT OF DISPUTES**

### **1. Immunity from suit and execution**

Under the laws of Brazil, pursuant to Decree-Law n° 1.312 of 1974, and to Senate Resolution n° 96 of 19891, any agreement related to the incurrence of external indebtedness to which the Republic is a party must provide that outside Brazil arbitration be the sole and exclusive remedy for the parties to such agreement in the event of a breach of such agreement.

In other words, the Republic is prohibited from submitting to the jurisdiction of a foreign court for the purpose of adjudication on the merits and may not waive its immunity from the jurisdiction of foreign courts.

Based on this legal restriction, there is a pacified understanding that any clause that may constitute a contractual consent to such waiver is not effective and enforceable under the laws of the Federative Republic of Brazil.

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#### **<sup>1</sup> RESOLUTION N° 96, OF 1989**

It limits on overall credit operations for external and internal of the Union, its municipalities and other entities controlled by the federal public power and sets limits and conditions for the granting of the guarantee of the Union in credit operations external and internal.

Art 1 ° It is subordinated to the standards laid down in this resolution credit operations internally and externally, including the rental market, conducted by the Union, for their municipalities and other entities controlled by the Federal Public Power, as well as the granting of the guarantee of the Union

Single Paragraph. For the purposes of this resolution, understands itself as credit operation any obligation arising from financing and loans, through the award of contracts, issuance of securities and accepted, or grant any guarantees, which represents commitments made with creditors located in the Country and abroad.

(...)

Art 5 ° Contracts for external credit operations may not contain any clause:

I - of a political nature;

**II – that is against to national sovereignty and public order;**

III - contrary to the Constitution and the Brazilian law;

IV - involving compensation automatic of debits and credits.

§ 1 ° **Any disputes between the Union or its municipalities and creditor or *arrendante*, under the contract, will be resolved before the Brazilian court or submitted to arbitration.**

Therefore, whenever the Republic enters into a loan agreement, as borrower or as guarantor, the lawyer designated to the respective negotiation has to assure that nothing contained in such agreement may constitute, under the applicable law, a contractual consent by the Republic to the jurisdiction of any court outside Brazil. Exception is applied only to the extent necessary to obtain judicial recognition of an arbitral award, including any proceedings required for the purposes of converting an arbitral award into a judgment.

It is important to underline that the concept of immunity is usually linked with the idea of sovereignty. Therefore, besides any legal aspects, issues related to immunity from foreign jurisdiction involve a strong policy position due to prejudices about a breach of sovereignty, which should be avoided.

Pursuant to Article 52, V, of the Constitution of the Federative Republic of Brazil, any agreement related to the incurrence of external indebtedness to which the Republic is a party must be presented and approved by the Federal Senate.

The Federal Senate, using its power of approving any and all contracts in which the Republic is involved, clearly delimited the boundaries of negotiations, by establishing that outside Brazil, disputes may be submitted only to arbitral courts. This, in fact, reflects its fear of waiving our immunity.

## **2. No Immunity under Brazilian Courts**

It's important to highlight that the Republic has no right of immunity from suit, execution, or any other legal process with respect to its obligations under any Loan Agreement in any competent court **in Brazil**, except for the limitation on the alienation of public property provided for in Article 100 of the Civil Code of the Federative Republic of Brazil.

So, any agreement with any foreign lender that shall be governed by, and construed in accordance with, a chosen foreign law, would be recognized and effective in the courts of Brazil in any action or proceedings involving the Republic arising out of or relating to the respective agreement, as long as giving effect to such law would not be against the principles of Brazilian public policy as set forth in Article 17 of Decree-Law 4,657, as will be mentioned below.

### ***3. Requirements for Enforcement under Brazilian Law***

Any execution against the Republic is only available in a specific form established for public sector to effect payments, in accordance with Article 100 of the Brazilian Constitution<sup>2</sup>.

On the other hand, any enforcement must also comply with the procedures set forth in Article 730 et seq. of the Brazilian Civil Procedure Code, which envisions the registration of the recognized award for inclusion in the budget for payment in a subsequent fiscal year of the Republic.

Any award which conforms to Brazilian public policy and law will be enforceable against the Republic in the Federal courts of Brazil without re-examination of the merits if such

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<sup>2</sup> Article 100. With the exception of the claims of salary nature, payments owed by Federal, State or Municipal level, because of judicial ruling, will be solely on the chronological order of presentation of such order in the account of their claims, prohibited the appointment of cases or people in budgetary allocations or in the additional credits opened for this purpose.

§ 1 It is mandatory the inclusion in the budget of public law bodies, in order to pay their debts from sentences carried on trial, appearing on judicial awards (precatórios), that it has to be submitted before July 1st, and their respective payment will be made until the end of the Next year, when their values have monetarily updated.

§ 1-A Salary debts include those arising from wages, salaries, profits, pensions and complements, benefits and compensation for death or disability, based on the liability, because of sentence carried on trial.

§ 2 Such budget provisions and the respective credits will be opened directly into the Judiciary Branch budget, and the President of the Court that has to enforce the decision will determine the payment according to the possibilities of existing deposits, but interim measures are allowed if the order of preference is breached, in order to retain the amount required to satisfy the debt.



award is ratified by the ‘Superior Tribunal de Justiça’. Such ratification can be obtained if such award:

- (i) complies with all formalities required for the enforceability thereof under the laws of the country where the same was granted;
- (ii) was issued by a competent arbitral tribunal after service of such process upon the parties to the action as is required by the rules of such arbitral tribunal;
- (iii) is not subject to appeal;
- (iv) was authenticated by a Brazilian consulate in the country where the same was issued; and
- (v) is not against the principles of Brazilian public policy as set forth in Article 17 of Decree Law 4, 657.

In other words, the party who was successful in the judgment or arbitral award, and seeks its enforcement, will have to follow the specific procedures established under Brazilian Legislation, restricting attachment prior to judgment or in aid of execution are not allowed, based on the fact that public assets, under Brazilian law, have immunity of such measures

#### ***4. The Arbitrage Solution of Controversy***

Considering all legal restraints described above, agreements of the Republic have an almost standard arbitral clause that expressly limits the settlement of a dispute to two options only: Brazilian courts, whenever in Brazil, or arbitral courts, if brought outside Brazil.

In addition, in each agreement negotiated it is expressly declared that the Republic is prohibited from submitting to the jurisdiction of a foreign court for the purpose of an adjudication on the merits and the breach of such limitation would violate Brazilian law, rendering the loan agreement unenforceable in Brazil.

For transparency reasons, it is also pointed out the required procedures of enforcement under Brazilian law and reassured the immunity from attachment, including pre-judgment attachment, arrest, or any other *interim measure*.

## **5. Standard arbitration provision**

The arbitration provision included in all agreements is basically the same, despite different terms. As an example, I'll transcribe below, the "Arbitration and Enforceability" provision under Bonds issued by the Republic:

*"Under Brazilian law, Brazil is prohibited from submitting to the jurisdiction of a foreign court for the purposes of adjudication on the merits in any dispute, controversy or claim against Brazil arising out of or relating to the securities. Brazil has agreed, however, that any dispute, controversy or claim arising out of or relating to the securities (other than any action arising out of or based on United States federal or state securities laws), including the performance, interpretation, construction, breach, termination or invalidity of the securities, shall be finally settled by arbitration in New York, New York.*

*Under the terms of the securities, a holder of any security is deemed to have agreed to the use of arbitration to resolve any dispute, controversy or claim against Brazil arising out of or relating to the securities (other than any action arising out of or based on United States federal or state securities laws) unless such holder elects to bring such claim in an action in Brazil.*

*The decision of any arbitral tribunal shall be final to the fullest extent permitted by law. Brazil has agreed that any New York court lawfully entitled to do so may enter a judgment recognizing such an arbitral award. Brazil has agreed that in any arbitration or related legal proceedings for the conversion of an arbitral award into a judgment, it will not raise any defense that it could not raise but for the fact that it is a sovereign state and has consented to the jurisdiction of the United States District Court for the Southern District of New York for the limited purpose of converting into a judgment an arbitral award rendered against Brazil in New York. The realization upon an arbitral award rendered against Brazil would depend upon the application of the United States Foreign Sovereign Immunities Act of 1976, as amended (the “FSIA”).*

*Brazil has not otherwise consented to the jurisdiction of any court outside Brazil in connection with actions arising out of or based on the securities, has not appointed any agent for service of process other than for the purpose of converting an arbitral award into a judgment, and has not agreed to waive any defense of sovereign immunity to which it may be entitled in any action other than its immunity from jurisdiction in an action to recognize an arbitral award or in an action brought in Brazil. Brazil has agreed that any process or other legal summons in connection with obtaining judicial acceptance of any arbitral award in the United States District Court for the Southern District of New York may be served upon it by delivery to the Advogado Geral da União (Attorney General) of Brazil of letters rogatory or by any other means permissible under the laws of the State of New York and Brazil.*

*Because Brazil has not waived its sovereign immunity in connection with any action brought outside Brazil arising out of or relating to the securities (including without limitation any action arising out of or based on United States federal or state securities law) other than in the limited circumstances described above in connection with an action for the judicial recognition of an arbitral award, it will not be possible to obtain a United States judgment against Brazil unless a court were to determine that (i) Brazil is not entitled under the FSIA to*

*sovereign immunity with respect to such actions and (ii) the matter should not be referred to arbitration as contemplated by the securities. Any judgment rendered against Brazil by a court outside Brazil in an action in which Brazil has not submitted to the jurisdiction of such court or otherwise expressly waived its defense of sovereign immunity would not be enforceable against Brazil under its laws.*

*The enforcement by a Brazilian court of a foreign arbitral award is subject to the recognition of such award by the Federal Supreme Court of Brazil. The Federal Supreme Court will recognize such an award if all of the required formalities are observed and the award does not contravene Brazilian national sovereignty, public policy and “good morals”. Under Article 100 (formerly Article 67) of the Civil Code of Brazil, the public property of the Republic located in Brazil is not subject to execution or attachment, either prior to or after judgment. The execution of an arbitral award against the Republic in Brazil is only available in accordance with the procedures set forth in Article 730 et seq. of the Brazilian Civil Procedure Code, which envisions the registration of the recognized award for inclusion in the budget for payment in a subsequent fiscal year of the Republic.*

*Pursuant to legislation adopted in 1996, the constitutionality of which has been upheld by the “Superior Tribunal de Justiça” (formerly it was upheld by the Federal Supreme Court), recognition of foreign arbitral awards for purposes of enforcement in Brazil may be sought directly in the Federal Supreme Court without the need to first convert the arbitral award into a judgment in the place of arbitration.*

*Notwithstanding the foregoing, a holder of any security may institute legal proceedings against Brazil in the federal courts of Brazil, and Brazil has waived any immunity from jurisdiction or execution of judgment in Brazil (except for the limitation on alienation of public property referred to in Article 100 of the Civil Code of Brazil) to which it might otherwise be entitled in any such proceeding.”*

### **III – PROBLEMS WITH LENDERS RELATED TO THE IMMUNITY FROM JURISDICTION**

#### ***1. Immunity from execution***

As it said above, the enforcement of a judgment or arbitral award against, and the satisfaction of an arbitral award against the Republic may be made only in Brazil and in accordance with Article 100 of the Constitution of the Borrower's Country and the procedures set forth in Article 730 et. seq. of the Brazilian Civil Procedure Code, which specify under what conditions, and to what extent a judgment may be enforced.

Brazilian law establishes a specific procedure for the Public Power to effect payments due to judicial awards, and besides this specific way of recovering money from the public entities, there is no other possible way to do so, once the public property of the Republic is not subject to execution or attachment, either prior to or after judgment.

In other words, once the arbitral award is recognized, and the party who was successful wants to seek its "enforcement", usually, creditors have access to all the enforcement remedies against the debtor assets. Although a judgment against the Republic is binding and enforceable, the creditor execution rights are limited due to the immunity from attachment, including pre-judgment attachment, arrest, or any other *interim measure*.

This limitation, of course, has always been a very complicated issue for foreign lenders because it submits the satisfaction of their claims to a form and timetable established in the Brazilian law, leaving no room for protecting their property rights and adjudicates their contract disputes in a different way.

## ***2. Interim Measures***

The same restriction described above for enforcement procedures applies for interim measures.

Rules of Arbitration in many dispute resolution services worldwide, however, establishes the possibility of ordering interim or conservatory measures whenever the correspondent Arbitral Court deems appropriate, including injunctive relief and measures for the conservation of property.

Considering that our policy differs in this respect from prevailing rules of arbitration, in each agreement they are adopted, expressly exclusion of such measures is made.

Here are some of the Arbitration Rules that include conservatory and Interim Measures:

### **2.1 ICC International Court of Arbitration**

The International Chamber of Commerce, was founded in 1919, and its fundamental objective of is to further the development of an open world economy with the firm conviction that international commercial exchanges are conducive to both greater global prosperity and peace among nations.<sup>3</sup>

In sharp contrast to the Brazilian position, the Rules of Arbitration, in force as from 1 January 1998, and the Rules of conciliation, in force as from 1 January 1988, of such Court establishes:

*“Article 23*

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<sup>3</sup> <http://www.iccwbo.org/id93/index.html>

## *Conservatory and Interim Measures*

*1*

*Unless the parties have otherwise agreed, as soon as the file has been transmitted to it, the Arbitral Tribunal may, at the request of a party, order any interim or conservatory measure it deems appropriate. The Arbitral Tribunal may make the granting of any such measure subject to appropriate security being furnished by the requesting party. Any such measure shall take the form of an order, giving reasons, or of an Award, as the Arbitral Tribunal considers appropriate.*

*2*

*Before the file is transmitted to the Arbitral Tribunal, and in appropriate circumstances even thereafter, the parties may apply to any competent judicial authority for interim or conservatory measures. The application of a party to a judicial authority for such measures or for the implementation of any such measures ordered by an infringement or a waiver of the arbitration agreement and shall not affect the relevant powers reserved to the Arbitral Tribunal. Any such application and any measures taken by the judicial authority must be notified without delay to the Secretariat. The Secretariat shall inform the Arbitral Tribunal thereof.”*

## **2.2 Commercial Arbitration and Mediation Center for the Americas**

The Commercial Arbitration and Mediation Center for the Americas, effective March 15, 1996, on its turn, establishes:

### *“Interim Measures of Protection”*

*At the request of any party, the Tribunal may take whatever interim measures it deems necessary, including injunctive relief and measures for the conservation of property.*

*Such interim measures may be take in the form of an interim award and the tribunal may require security for the costs of such measures.*

*A request for interim measures addressed by a party to a judicial authority shall not be deemed incompatible with the agrrement to arbitrate or a waiver of the right to arbitrate.”<sup>4</sup>*

### **2.3 The United Nations Commission on International Trade Law (UNCITRAL)**

The United Nations Commission on International Trade Law, also known as UNCITRAL, was established by the General Assembly in 1966. In establishing the Commission, the General Assembly recognized that disparities in national laws governing international trade created obstacles to the flow of trade, and it regarded the Commission as the vehicle by which the United Nations could play a more active role in reducing or removing these obstacles.<sup>5</sup>

The United Nations Commission on International Trade Law - UNCITRAL, in its “Procedures for Cases under the UNCITRAL Arbitration Rules”, also allows the Interim Measures of Protection, as it appears below , *in verbis*:

#### *Interim Measures of Protection*

##### *Article 26*

*At the request of either party, the arbitral tribunal may take any interim measures it deems necessary in respect of the subject matter of the dispute, including measures for the conservation of the goods forming the subject matter in dispute, such as ordering their deposit with a third person or the sale of perishable goods.*

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<sup>4</sup> <http://www.iccwbo.org/policy/arbitration/id1777/index.html>

<sup>5</sup> <http://www.uncitral.org/uncitral/en/about/origin.html>



*Such interim measures may be established in the form of an interim award. The arbitral tribunal shall be entitled to require security for the costs of such measures.*

*A request for interim measures addressed by any party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of that agreement.”*

#### **2.4 American Arbitration Association (AAA)**

The American Arbitration Association, with its long history and experience in the field of alternative dispute resolution, provides services to individuals and organizations who wish to resolve conflicts out of court.

On its turn, in its “*International Dispute Resolution Procedures*”, as amended in April 1st, 1997, also provides:

##### *“Interim Measures of Protection*

###### *Article 21*

*1. At the request of any party, the tribunal may take whatever interim measures it deems necessary, including injunctive relief and measures for the protection or conservation of property.*

*2. Such interim measures may take the form of an interim award, and the tribunal may require security for the costs of such measures.*

*3. A request for interim measures addressed by a party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate or a waiver of the right to arbitrate.*

4. *The tribunal may in its discretion apportion costs associated with applications for interim relief in any interim award or in the final award.* <sup>6</sup>

Considering the provisions listed above, whenever any of those rules is chosen, an express exception is added at the clause, in order to avoid the application of inconvenient provisions, as it appears bellow:

*“Any Dispute shall be finally settled by arbitration in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law (excluding Article 26 thereof) as in effect on the date of this Agreement (the “UNCITRAL Arbitration Rules”).” Or, “in accordance with the provisions of the Rules of Conciliation and Arbitration of the International Chamber of Commerce – ICC excluding Article 23 (Conservatory and Interim Measures)”*

#### **IV – IMPASSE WITH US EX-IM BANK**

There is a negotiation that shows exactly our boundaries and the consequences of rigid positions. It happened with The Export-Import Bank of the United States, also known as Ex-Im Bank.

At the end of 1999, an American manufacture won a competitive bidding and proposed a contract with the Republic to be financed by Bank Boston with the export credit insurance of the Export Import Bank of the United States. The Ex-Im Bank is the official export credit agency of the United States and its mission is to assist in financing the export of U.S. goods and services to international markets that supports the financing of U.S. goods and services.

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<sup>6</sup> <http://www.adr.org/about>

As almost all other export agencies, Ex-Im Bank assumes credit and country risks that the private sector is unable or unwilling to accept and, as informed in its homepage, “helps to level the playing field for U.S. exporters by matching the financing that other governments provide to their exporters”.<sup>7</sup>

The Ex-Im Bank usually does not take part of the negotiation process and just approves or not the final draft negotiated between the Lender and the Borrower.

After an intense period of negotiation, both parties directly involved achieved an agreement and the final draft was immediately submitted by the commercial bank to the analysis of the Ex-Im Bank. Such agreement, as expected, besides the adjustments of some commercial points, established the arbitration to be the sole and exclusive remedy for the parties to settle any dispute outside Brazil.

Surprisingly, Ex-Im Bank refused to issue the required export credit insurance alleging that they would not accept an arbitration provision and that all disputes should be submitted to the Courts of New York.

Considering the small degree of flexibility in respect of this particular point, the Brazilian negotiators insisted in the maintenance of the clause as negotiated, reassuring our legal constrains. In addition, reference was made to previous agreements in which Ex-Im had already accepted arbitration provision.

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<sup>7</sup> <http://www.exim.gov/>

In an attempt to avoid a deadlock, copies of agreements with many different ECA's were presented, demonstrating that ECA's of the major foreign competitors of the US, such as Canada (EDC), France (COFACE), United Kingdom (ECGD), Italy (SACE), Germany (Hermes), Japan (JBIC, JICA), Austria (OEKB), Spain (CESCE), Israel (IFRIC), Sweden (EKN), have all agreed to international arbitration in loan agreements with the Brazilian Government and this has never prevented us from achieving an agreement on such negotiations.

As explained by Ex-Im Bank, from their perspective, the problem would come from the fact that they conduct transactions with many different countries and they were afraid that whatever agreement reached with the Republic on this issue would take them to, in all likelihood, have to also enact with any number of other Sovereigns.

“This could put Ex-Im Bank in the position of being subject to arbitration in many situations it would find untenable. Therefore, when we negotiate this matter with you, on behalf of the Republic of Brazil, we have to be mindful that we may be agreeing to a provision that, for various reasons, we will have to enact with any number of other countries. It is for this reason that we cannot simply agree to an "open-ended" arbitration provision.”, informed Ex-Im Bank

### **1. Ex-Im first proposal**

Aware of our limitations, Ex-Im tried to identify our constraints, but they reduced it to two aspects: 1) any dispute, controversy or claim has to be solved by arbitration only and the prohibition from submitting to the jurisdiction of a foreign court.

Based on that, and trying to address the problem for both parties, Ex-Im accepted an arbitration provision envisaging that if Ex-Im chooses to enforce the obligation against the

Republic, it can only do so in arbitration. However, the Republic itself could not commence arbitration.

With this proposal, they believed the Republic would not be submitting to the jurisdiction of any foreign court, but, at the same time, Ex-Im would not be subject to arbitration unless it chose that route.

## ***2. Refusal to Ex-Im proposal***

From the Brazilian side, however, it was not acceptable.

In reviewing the proposed arbitration clause, we identified that it would permit an action to be brought by either Ex-Im Bank or the Republic “in any court on any claim, controversy, or dispute arising from or relating to the BankBoston loan agreement or any guarantee issued by the Republic in connection with this Agreement, called the ‘Guarantee Documents’, including, without limitation, any question as to the existence, validity, interpretation, performance, breach or termination of any of the Guarantee Documents, and also including, without limitation, any tort or other common law or statutory claims arising out of or relating to the negotiation, execution or performance of any of the Guarantee Documents.”

The clause further provided that, “at the sole option of the party against whom the action is brought,” the judicial action may be terminated and the claim, controversy or dispute shall be submitted to arbitration under the ICC arbitration rules. We understand that, in practical terms, what is likely to happen is that the court proceeding would be stayed pending the referral of the matter to arbitration.

In our view, the arbitration clause that Ex-Im has proposed was problematic in at least two respects. First, there is an implicit submission to the jurisdiction of any court within or

outside Brazil. The scope of that submission is very broad and includes, as noted above, tort and other common law claims that may go beyond the type of claims contemplated by these Senate Resolutions, Decree-Law n° 1,312. As noted above, any submission by the Republic to the jurisdiction of a foreign court for purposes of adjudication on the merits would violate Brazilian law and render the Agreement under negotiation unenforceable under Brazilian law. The scope of the clause is also problematic and would probably render such Agreement unenforceable under Brazilian law even if these Senate Resolutions, Decree-Law n° 1,312, permitted the Republic to submit to the jurisdiction of a foreign court for an adjudication on the merits.

Second, Ex-Im proposed arbitration provision would violate Decree-Law n° 1,312, in that it provides for a possible remedy other than arbitration. As noted above, Decree-Law n° 1,312 stipulates that any agreement relating to the incurrence of external indebtedness to which the Republic is a party must provide that arbitration be *the sole and exclusive remedy* for the parties to such agreement. Although Ex-Im proposed arbitration provision permits a claim initially brought as a judicial action to be referred to arbitration, this is “at the sole option of the party against whom the action is brought.” Moreover, while the arbitration proceeding is pending, the judicial action will only be stayed; an adjudication on the merits is therefore not precluded.

As we note above, the arbitration provision that appears in the BankBoston loan agreement is substantially in the form used in the Republic’s external debt agreements for more than two decades. The provision appears not only in loan agreements with commercial banks, but also in the Republic’s international bond agreements and in agreements with international financial institutions like the World Bank and the Inter-American Development Bank.

We once again reminded Ex-Im Bank that it has previously agreed to clauses that complied with Decree-Law n° 1,312. We attach, for your information, representative clauses from previous agreements.

Furthermore, the Brazilian delegation urged Ex-Im Bank to reconsider and agree to accept the arbitration provision in the draft of the BankBoston agreement as negotiated.

### ***3. Ex-Im new proposal***

As an attempt to overcome the impasse, a meeting was scheduled in Washington. At that moment, all parties have already realized that despite the fact that this issue arose in the context of a specific transaction, it was not related to the transaction per se, and, at bottom was a government to government issue between the U.S. and Brazil, and by them should be directly carried.

Ex-Im came up with a new proposal on the table and listed some items that they identified as still remaining to be addressed. The result of this round of negotiation will be now summarized.

Under the new proposal Ex-Im Bank agreed to only enforce the debt obligations by way of an arbitration or the Brazilian Courts. In order to try to address Brazil's unique refusal to waive sovereign immunity in any other forum, Ex-Im Bank would give-up its normal and preferred right to enforce by way of litigation in courts in the United States. The Republic, for its part, would not be able to commence any arbitration relating to the debt obligation or the documents.

The Brazilian delegation informed that enforcement of any arbitral award or judgment could also only be accomplished in Brazil.

Under Ex-Im perspective, the proposal, as set forth in the preceding two paragraphs, would meet the requirements of Resolution No. 96 of 1989, once that Resolution – as they insisted - states that any "litigation between the Union ... and the creditor ... stemming from the contract, will be resolved before a Brazilian forum or will be subject to arbitration". So, Ex-Im insisted that its proposal would meet the requirements of such Resolution, because it limits all such litigation to Brazilian Courts or arbitration.

Therefore, from Ex-Im perspective, the legal issues preventing an agreement would already have been satisfied, but two outstanding issues still have to be resolved.

First, because Brazilian delegation has stated, on behalf of the Republic, that the Republic must be able to commence litigation against the creditors - i.e. Ex-Im Bank - in the Brazilian courts. Ex-Im, however, allege, at the meeting, that it would not, as an institution, agree in a writing to submit to jurisdiction in Brazil.

However, Ex-Im provided us with a copy of the Ex-Im Bank Charter provision, and a related opinion of the Office of the Attorney General of the United States, in which, according to them, it was clear that Congress has waived Ex-Im Bank's sovereign immunity.

Based on that, Ex-Im concluded that it would be up to Brazilian delegation to determine if the Brazilian Courts would take jurisdiction over Ex-Im Bank. As they remarked, though, jurisdiction is not necessarily created by contract.



Ex-Im, then, once again, point out that Resolution No. 96 does not require that Brazil have the ability to commence litigation against Ex-Im Bank, but according to their interpretation, it only requires that any litigation be limited to Brazil or arbitration. From their perception, they do not see this as a legal issue arising from the Resolution, but rather a "policy" issue for Brazilian legal side to determine.

The second issue has to do with limiting enforcement of any arbitral award or judgement to Brazil. According to Ex-Im, this was not a restriction they had anticipated.

The Brazilian Delegation, in fact, argue that this would have to be the case and that, in fact, it would be better for us to enforce in Brazil. You directed me to Art. 67 of the Civil Code, Art. 730 of the Civil Procedure Code, and Art. 100 of the Constitution, but Ex-Im declared that they would have to examine this issue and make a determination as to whether we are comfortable with such a limitation.

#### ***4. Problems of the new proposal***

Considering that the proposal required knowledge of US Laws, the new proposal was, then, submitted to the appreciation of Arnold & Porter that, issued the following opinion:

*“You have forwarded to us a message from John Connor of the Office of General Counsel of the Export-Import Bank of the United States (“Eximbank”) proposing that in a forthcoming loan from Eximbank to the Federative Republic of Brazil (“Brazil” or the “Republic”), the Republic forego an arbitration clause and rely instead on a purported general waiver of Eximbank’s immunity to suit contained in the charter of the Eximbank. As part of the proposal, the Eximbank would also agree that it would only enforce the debt*

*obligations arising from the loan by way of an arbitration or a suit in the courts of Brazil. Further, Eximbank understands that enforcement of any arbitral award or judgment would only be undertaken in Brazil.*

*In connection with your review of Eximbank's proposal, you have asked us to advise whether the relevant provision of the Eximbank charter cited by Mr. Connor constitutes a waiver of the sovereign immunity of Eximbank for purposes of a suit initiated by Brazil in the courts of Brazil. As you are aware, we are U.S. lawyers and cannot opine on the position that a Brazilian court ultimately might take on the point, particularly if it were to apply Brazilian law to the question. On the other hand, to the extent that a Brazilian court would determine that U.S. law governs the question of the authority of Eximbank to waive its immunity and the scope of any waiver, we can provide you the following advice.*

*U.S. law is clear that the immunity of an entity such as the Eximbank may only be waived by statute. The U.S. Executive Branch engages in specific transactions but is only authorized to waive immunity to the extent that there is a legislative grant therefor. In the case of the Eximbank, the source of that legislative authority to waive is alleged by John Connor to be the provision in the charter of the Eximbank which states that*

*in connection with and in furtherance of its objects and purposes, the Bank is authorized and empowered . . . to sue and to be sued, to complain and to defend in any court of competent jurisdiction; to represent itself or to contract for representation in all legal and arbitral proceedings outside the United States; . . .*

*Connor's claim is that the foregoing language, particularly the language "to sue and be sued," constitutes a waiver of Eximbank's immunity. In support of this argument, he has supplied an opinion of the [U.S.] Attorney General No. 79-36 of May 22, 1979. That opinion addressed the question whether arbitration of a contract claim by a private commercial bank against Eximbank is authorized by law and, if so, whether the Department of Justice is authorized to represent Eximbank before the arbitral tribunal.*

*In Opinion No. 79-36, the Office of Legal Counsel of the U.S. Justice Department cited a number of U.S. Supreme Court decisions upholding the proposition that, where Congress has authorized the corporate instrumentality to engage in commercial transactions, statutory authority to “sue and be sued” should be construed as a complete waiver of sovereign immunity for any suit not clearly shown to be inconsistent with the instrumentality’s function.*

*We have reviewed the opinions in the cases cited in Opinion No. 79-36, as well as some more recent decisions of the United States Supreme Court. Our research reveals that the charters of the corporations involved in such cases contain additional language limiting the scope of the waiver to suits in the courts of the United States or of the States. For example, in *Kiefer & Kiefer v. Reconstruction Finance Corp.*, the general powers of the corporation included authority “to sue and be sued, to complain and to defend, in any court of competent jurisdiction, State or Federal.” The charter of the Federal Housing Administration, the entity involved in *Federal Housing Administration, Region No. 4 v. Burr*, also authorized that agency’s administrator “to sue and be sued in any court of competent jurisdiction, State or Federal.” The cases relied on, therefore, clearly address the situation of suits brought in courts located in the United States. They do not necessarily address the question of suits against Eximbank initiated elsewhere.*

*In response, Eximbank may point to the language in its charter allowing it to “represent itself or to contract for representation in all legal and arbitral proceedings outside the United States.” This language was added by Public Law No. 93-646 of January 4, 1975. We have examined the legislative history of this law, which is rather extensive. We have discovered no clear statement that it constitutes a waiver or is intended to affect the scope of the language in Eximbank’s charter concerning authority to sue or be sued. Senate Report No. 93-1097, the August 15, 1974 Report of the Committee on Banking, Housing and Urban Affairs of the United States Senate to accompany S.3917, does not demonstrate a clear intent to waive immunity with respect to foreign*

*proceedings. In fact, it may be read to say that Eximbank contemplates that its only involvement in foreign proceedings will be in pursuit of its own claims:*

*Section 2(2) would amend paragraph 2(a)(1) of the Act to permit the Bank to contract for legal representation in legal and arbitration proceedings outside the United States, where neither the Export-Import Bank nor Justice Department attorneys are currently permitted to appear.*

*While the Export-Import Bank currently employs foreign counsel after obtaining a waiver from the Justice Department, there is some question as to whether the Justice Department possesses the necessary authority to provide such a waiver. The Committee believes the appropriate means to resolve an ambiguity is through the above amendment.*

*The foreign litigation the Export-Import Bank engages in often arises under transactions involving the extension of credit to a foreign borrower or insurance or guarantees of obligations of foreign purchasers which are owed to U.S. exporters. Due to the nature of this kind of litigation, the Export-Import Bank needs counsel with extensive experience in commercial legal matters and knowledge of law and procedures unique to a particular foreign country. However, the Committee expects the Bank to exercise the authority granted under this section only where necessary and, whenever possible, to make use of the resources of the Justice Department.*

*Senate Report No. 93-1097, at 3.*

*The reference in this Senate Report language to the “nature of this kind of litigation” is to “obligations of foreign purchasers owed to U.S. exporters.” The Report language would therefore seem to contemplate only collection actions initiated by Eximbank. At best, the language in question from Eximbank’s charter relates only to the question of who represents Eximbank in foreign and arbitral proceedings, and should not be interpreted as a gloss on Eximbank’s charter language about authority “to sue and be sued.”*

*It might also be argued that the absence of the words “State or Federal” in the key charter language about authority to sue and be sued means that the scope of the waiver is worldwide. Clearly the possibility that Eximbank would initiate litigation overseas was contemplated. This reason alone may*

*account for the elimination of the words “State or Federal,” that appear in the charters of so many other federal corporations. On the other hand, the language in question was included in Eximbank’s charter in 1935, at a time when the United States still applied the rule of absolute immunity. The statutory language extends the right to sue or be sued in “any court of competent jurisdiction.” The Congress may have understood a “court of competent jurisdiction” to be one in which there was no immunity. Since the United States observed the absolute rule of immunity, the only way to eliminate immunity would have been by means of an explicit waiver. Although it is subject to doubt, the U.S. Congress may have been authorizing the officers of the Eximbank to provide an explicit waiver in individual cases. It is highly doubtful, however, that the U.S. Congress would have considered the statute itself as constituting a necessary explicit waiver for purposes of waiving immunity in another country. Since Mr. Connor has not proposed that the United States explicitly waive its immunity from suit or submit to jurisdiction in Brazil in the relevant loan documentation, the door may be left open to the United States to argue that it has retained immunity.*

*In order to clarify the matter, Brazil could consider two courses of action. First, if Eximbank truly believes that the charter language authorizing the bank to sue or be sued constitutes an authorization by the U.S. Congress to waive Eximbank’s immunity, Brazil could ask Eximbank to include an explicit waiver in the loan documentation. Even an explicit waiver, however, might be challenged as a waiver without statutory authority. Alternatively, Brazil could ask Eximbank to obtain from the Office of Legal Counsel an opinion of the Attorney General to the effect that the charter language of the Eximbank itself constitutes a waiver of immunity by the United States in foreign proceedings.*

*Connor has proposed that the Eximbank would have the right to initiate an arbitration against Brazil, but that Brazil would not have such a right against Eximbank. This asymmetry seems inappropriate. In ordinary circumstances, we would suggest that Brazil propose that the agreement to arbitrate be reciprocal. The legal opinion provided by Connor, however, raises*

*the question whether Eximbank is authorized by its charter to agree to arbitrate when Eximbank would be the defendant. The answer to this question turns on an analysis of the same statutory language discussed above. Opinion 79-36 concluded that arbitration of a claim by a private commercial bank against Eximbank was authorized by law. This conclusion was reached primarily as a construction of Eximbank's statutory authority, but the opinion did acknowledge that judicial authorities and opinions of the Attorney General did not agree on the circumstances in which an agency of the United States may submit claims against it to arbitration. Furthermore, the Comptroller General had held that clear statutory authority is required to arbitrate contract claims against the United States. The opinion then stated that the power of each government agency or instrumentality to submit a claim to arbitration must be considered on the facts of the particular case.*

*Since there seems to be doubt about whether the United States would retain an argument that it was entitled to immunity if sued in the courts of Brazil, Brazil might ordinarily suggest to Eximbank that disputes be resolved by means of arbitration. Since, on the other hand, there seems also to be doubt about the authority of the Eximbank to agree to arbitrate, Brazil may also want to suggest to Eximbank that an opinion of the Attorney General be obtained on the question of Eximbank's authority to agree to arbitrate with Brazil. Of course, if Eximbank will clarify to Brazil's satisfaction the question of the authority and scope of Eximbank's waiver of immunity to suit in Brazil, the Republic may decide that a non-reciprocal arbitration provision is acceptable."*

##### ***5. Attempt to resolve the differences***

It was immediately informed to Ex-Im Bank the issues raised by our lawyer in United States, and after a short time, they proposed to accept the arbitration provision set forth in the Prospectus accompanying Bond Offerings by the Federative Republic of Brazil.

For sure, if they had proposed the precise language to which Brazil has agreed with purchasers of Brazil Bonds, there would be no problem for Brazil to utilize the same language with Ex-Im Bank.

However, when the wording of the proposal was submitted, there was a broad waiver of immunity, as if it were not limited to arbitration proceedings and to the conversion of an arbitral award into a sentence.

In such draft, there were no references to the limitation on alienation of public property referred to in Article 100 of the Civil Code of Brazil and to Article 100 of the Constitution of the Republic, listing all procedures and limitations regarding enforcements.

Ex-Im informed us that they would like an express waiver for the establishment of an arbitral award and for the conversion of an arbitral award into a judgment, if they intended to do so.

We fully accepted that and clarified that the extension of the waiver of immunity should be restricted only to the conversion of an arbitral award into a judgment. Regarding enforcement, however, there would be no waiver of immunity and we insisted in the inclusion of exceptions of Civil Code of Brazil and to Article 100 of the Constitution of the Republic, in order to avoid room for any doubt in the future.

We proposed the following wording:

*“ To the extent that the Borrower or any of its property, assets or revenues is or becomes entitled to any immunity from suit, judgment, execution, attachment (whether in aid of execution, before judgment or otherwise) or other legal process or order or from the enforcement of any arbitration award or judgment with*

*respect thereto in the Borrower's Country, whether on the grounds of sovereignty or otherwise, the Borrower hereby irrevocably and unconditionally agrees not to plead or claim any such immunity at any time with respect to its obligations or any other matter under or arising out of or in connection with this Loan Agreement (except for the limitation on the alienation of public property referred to in Article 100 of the Civil Code of the Borrower's Country and subject to Article 100 of the Constitution of the Borrower's Country and Article 730 et. seq. of the Civil Procedure Code of the Borrower's Country)."*

The clause was, then, fully rewritten and perfectly adjusted, but, at the end, a new statement was included:

*"Subject to the foregoing sections of this Guarantee, Brazil hereby agrees that to the extent that it or any of its assets has or may hereafter acquire any right of immunity, whether characterized as sovereign immunity or otherwise, from any legal proceedings, whether in the United States or Brazil, to enforce or collect upon the Guarantee, including, without limitation, immunity from service of process, immunity from jurisdiction or judgment of any court or tribunal, immunity from execution of a judgment, and immunity of any of its property from attachment prior to any entry of judgment, or from attachment in aid of execution upon a judgment, Brazil hereby expressly and irrevocably waives any such immunity and agrees not to assert any such right or claim in any such proceeding, **whether in the United States or Brazil or elsewhere.**"*



We asked the exclusion of the last sentence, what was accepted by the Ex-Im, but when the final version was submitted, another new statement was added, saying: [The undersigned acknowledges that this Guarantee constitutes commercial activities.](#)

With this insertion the whole immunity question was brought back once again, as the Foreign Sovereign Immunity Act (FSIA) establishes that a State is not immune from the jurisdiction of U.S. courts in any case involving a commercial activity, no matter what else is written in the Agreement.

Apparently we were almost reaching an Agreement, but, at the bottom, the question was far away from being solved. After a while, we finally realized that we were trying to adjust words, but the principal question was not really settled.

After five years of negotiation, such an impasse leaves a bitter taste. At the end, all efforts from both sides did not bring us to an agreement on this specific issue so we could not move forward with trade transactions what would have been beneficial to both of our countries.

I do believe that, if both parties involved accomplished their respective tasks, but didn't get the best result, it's time to re-evaluate their concepts.

#### **IV – PREJUDICES AGAINST A CHANGE IN THE STATE'S IMMUNITY POLICY**

The main concern about waiving our immunity is closely linked to the own concept of state immunity. The state immunity's concept is based on the principle of non-intervention in the internal affairs of other state. According to this idea, a Sovereign State will not be submitted to the judicial power of any other sovereignty state unless under its express license.

In other words, any judgment rendered against a sovereign State by a foreign court in an action in which sovereignty has not submitted to the jurisdiction of such court or otherwise expressly waived its defense of sovereign immunity would not be enforceable.

However, as noted by Mary L. Volcansek and John F. Stack Jr, this idea might be outdated.

*“Sovereignty was initially conceived as absolute and indivisible and connoted a single source of power. (...)*

*When most people today speak of Sovereignty, they are referring to Westphalian Sovereignty, associated with the 1648 Peace of Westphalia that ended the Thirty Years War. That view of sovereignty grants nations the authority, both de jure and de facto, to exercise a monopoly of power within their borders and implies that one nation cannot intervene in the domestic affairs of another nation. Samuel Finer identified, however, variations within the understanding of sovereignty from the medieval era to the present, based on public and private rights and functional and territorial consolidation. Not surprisingly, since variations on the concept of sovereignty have been present since the sixteenth century, degrees and deviations from a single understanding persist today.*

*The view of national sovereignty as monolithic eroded as cross-national transactions increased. (...)*

*Consensus exists among international relations scholars that globalization, in particular, has taken its toll on the traditional nation-state and its singular claim to sovereignty power.*

*(Jr., 2005) ,page 13.*

## **V – ADVANTAGES AND DISADVANTAGES OF SUBMITTING TO A FOREIGN JURISDICTION**

Some important points should now be taken into consideration.

Undoubtedly, an effective legal system is intrinsically valuable and promotes development, once it protects citizens and their property and allows peaceful resolution of disputes. Such environment certainly facilitates economic exchange, and let citizens hold their government accountable.

A well-functioning judicial system is crucial to guarantee economically sustainable development of a country, as well to improve governance, combat corruption and consolidate the democratic order.

The World Bank, in a recent work, states:

*“Almost all forms of legitimate economic activity and exchange are reliant, albeit implicitly, on the enforcement of contracts. Yet in many developing countries, judicial remedies to those seeking enforcement of contracts are slow, costly and often unreliable. An essential step in promoting economic development is thus to enhance the confidence of economic actors in the capability of the judiciary to enforce contracts. The results of ICAs and Doing Business help us to assess the efficiency of contract enforcement by providing information on the complexity of procedures, the time and cost to enforce a contract, and the confidence of firms in the local judiciary.”*

(Andrew Beath under the supervision of Qimiao Fan)

However, the improvement of the performance of legal institutions depends on many different and profound changes that may not be easily taken, although certain judicial reforms have been already enacted in Brazil.

Before we look ahead further, it might be well to make some observations on our recent history.

### ***1. Recent reforms of Brazilian Judicial power***

In November 2004, Congress approved Constitutional Amendment No. 45 dated December 8<sup>th</sup>, 2004, a set of reforms intended to improve the efficiency of the judicial system. Constitutional Amendment No. 45, among other things, amends Articles 102 and 105 of Brazil's Constitution to provide that the Superior Court of Justice, and not the Federal Supreme Court, is to determine whether foreign judgments and foreign arbitral awards are enforceable in Brazil.

The enforcement by a Brazilian court of a foreign arbitral award is subject to the recognition of such award by the Superior Court of Justice. The Superior Court of Justice will recognize such an award if all of the required formalities are observed and the award does not contravene Brazilian national sovereignty, public policy and “*good morals*”.

Other reforms introduced by Constitutional Amendment No. 45 include: (i) the right of all parties to a judicial process of reasonable duration and to the means necessary to attain it; (ii) the submission by Brazil to the jurisdiction of the International Criminal Court, the governing statute of which was ratified by Brazil in June 2002; (iii) a provision barring a retired or removed judge from practicing, for a period of three years, before the court in which he or she sat; (iv) a rule providing that decisions of the Federal Supreme Court on the merits of lawsuits challenging the constitutionality of certain acts (*ações diretas de inconstitucionalidade* and *ações declaratórias de constitucionalidade*) constitute binding precedents for the lower courts and the direct and indirect administration; (v) a rule providing that the Federal Supreme Court may issue summary legal principles (*súmulas*) that are binding on the lower courts and the direct and indirect administration; (vi) the establishment of a fifteen-member National Council of Justice (*Conselho Nacional de Justiça*) to oversee the administrative and fiscal management of the

judiciary; and (vii) the establishment of a fourteen-member National Council of the Public Ministry (*Conselho Nacional do Ministério Público*) to oversee the administrative and fiscal management of the public prosecution service.

Law No. 11,187 dated October 19<sup>th</sup>, 2005, introduced further reforms by amending Brazil's Civil Procedure Code to limit interlocutory appeals (*agravos*). In December 2006, Law No. 11,417 sanctioned the binding clause – the mechanism which obligates lower court judges to follow decisions adopted by the Federal Supreme Court (STF). Pursuant to this Law, lower court judges are required to follow STF precedents, which may reduce the amount of appeals and expedite court decisions. In December 2006, two other laws regarding court reform were sanctioned: Law No. 11,418 which limits the analysis of appeals by STF to general pertinent questions considered relevant to society as a whole; and Law No. 11,419 which provides for the digitalization of the judicial process, thereby allowing judges in all of Brazil to work with electronic documents in order to expedite the judicial process.

In June 2006, the new Law of Civil Execution (Law No. 11,232/05 of December 22, 2005), was enacted. It defines new procedures to expedite debt judgments. Pursuant to this Law, after the judge's decision, the debtor will be required to pay the outstanding debt in 15 days. In the case of non-payment there will be a fee of 10% of the amount due. Pursuant to this Law, the debtor also shall not auction its products in order to avoid its debts and the automatic stay against the execution of the judgment has been eliminated.

Law No. 11,382, sanctioned in December 2006 and relating to extra-judiciary bank certificates execution, may expedite debt judgments in the Republic and favors banking spread reduction and more credit concession. The new legislation shall permit the petitioner to obtain a certificate in order to block the debtor's physical goods (vehicles, real estate) from being

sold before the debt payment. The new distraint system shall also be utilized and the debtor's goods will be impounded in order to guarantee the debt payment and sold if payment does not occur. Evaluation of physical goods shall be done by the judicial officer and the transfer of goods from the debtor to the creditor shall have priority in such evaluation. The debt may be paid in installments by the debtor if it recognizes its debts and has previously made a deposit of 30% of the total value of the debt.

The National Congress is also considering Constitutional Amendment Proposal No. 358/05, which relates to the second stage of the judiciary reform. The proposal, among other things, would provide for lifetime tenure of magistrates only after 3 years of practice, forbid nepotism in the judicial system, modify the composition of the Superior Military Court and expand the authority of the Federal Supreme Court and of the Superior Court of Justice.

All these changes help improv the investment climate.

Despite all these changes, a long way remain to be paved and some necessary steps should be taken in order to go further.

It is common sense that Judiciary Branch in Brazil faces an ever-increasing problem of delayed justice and escalating costs of litigation. Moreover, there is a general perception that the litigation results are not predictable and with no consistency what highlights difficulties related to settlement of disputes in Brazil.

It seems that we should now consider the advantages and complications involved in maintaining or changing the policy adopted until now.

#### ***4. Advantages***

As already discussed above, economic development depends on the existence of an adequate dispute settlement system and efficient enforcement mechanisms.

As the World Bank pointed out aforementioned study, comparing the investment climate in Brazil, India and South America, that:

*“In Brazil, the duration of contract enforcement is particularly lengthy, around 18 months, compared to less than 8 months in OECD countries, although Substantial variation exists within Brazil, however, as to the efficiency of judicial enforcement.*

(Andrew Beath under the supervision of Qimiao Fan)

After such comparison, the report concluded that:

*“In summary, enforcing commercial contracts in Brazil and India is generally lengthy and expensive, although substantial variation exists within both countries. In South Africa, contract enforcement is relatively efficient.”*

This bad perception inevitably raises business costs, both indirectly in terms of preparing for multiple eventualities of interpretation and enforcement, and even directly –what can be worse - in terms of irregular payments to unscrupulous officials seeking private gain.

Of course, litigation is not the only way of settlement of disputes.

*“Just as the developments in international society relating to decentralization suggest the need for a centralized court to ensure the constitutional unity of such society, so too the process of globalization requires that participants in the system have adequate access to international dispute*

*settlement. The significant participation of individuals and corporations in the global society creates a need for them to have access to dispute settlement, which thus far has been only a limited feature of the inter-state system.” Page 29 Vicuna*

In Brazil, however, Public Sector is allowed to accept arbitration only in international agreements, but no investor-State arbitration has been adopted. In an Investor-state arbitration, also called Investment Arbitration, the investors direct claims against sovereignty States alleging violations of International Law usually under a bilateral investment treaty.

Even domestically, there is a controversy over the submissions of State entities to arbitration, regarding the Brazilian Arbitration Law, Law n° 9.307, of 1996.

As it can be concluded, the current policy allows Public Sector to submit itself only to Brazilian Courts and, as an exception, arbitration can be accepted when dealing with foreign states.

Considering, however, the consequences of this political choice, it seems a time has come to redefine our interests.

A less costly and faster jurisdiction is important.

World Bank, in a Study known as Doing Business 2008-Brazil, that compares regulation in 178 economies, highlights that “Businesses that have little or no access to efficient courts must rely on other mechanisms, both formal and informal – such as trade associations, social networks, credit bureaus or private information channels – to decide whom to do business with and under what conditions. Or they might adopt a conservative approach to business, dealing only with a small group of people linked through kinship, ethnic origin or previous



dealing and structuring transactions to forestall disputes. In either case economic and social value may be lost.”<sup>8</sup>

The protection of property rights

In contrast to the current policy, using a jurisdiction that serves as a reference point for settling disputes around creditors all over the world maybe would be a fast way of eliminating the cost of Judiciary risk.

A waiver of immunity would allow us to obtain access to a foreign jurisdiction that settle disputes fast and with consistency. And we would be submitting ourselves to the same rules of our partners and opponents.

### *5. Disadvantages*

- 1) A proposal of change differs in important respects from prevailing conceptions of the value of immunity;
- 2) Once you open your immunity there is no turning back. If you waive it once, it will be a definitive change;
- 3) There is no perfect jurisdiction system and every Country must persevere and keep on working at introducing administrative, procedural and technological reforms aimed at improving the quality of justice. Waiving our immunity somehow seems that we are giving up this necessary improvement.

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<sup>8</sup> Doing Business 2008 – Brazil. A Project Benchmarking the Regulatory Cost of Boing Business in 178 Economies. Copublication of the World Bank and the International Finance Corporation

## **V – CONCLUSION**

1. A well-functioning judiciary is crucial to promote economic development.
2. We have to access an efficient and accountable justice.
3. In order to enhance the confidence of economic actors in the capability of

a particular judiciary to enforce contracts, two things should be done:

I – continue with judicial reforms for improving governance /to contribute enhance the development of a more impartial, independent, accountable and effective judiciary;

II – consider the possibility of waiving our immunity...

This last option certainly represents a big change in our current policy, and although I cannot predict all the consequences of such change, evidence here suggests that it would be for the better.

At the end of the day, what we should always take into account is that the best policy will be the one that may foster economically sustainable development.

We have to deconstruct the problem to its essence in order to identify the main concern. We leave now in a global world. Should we keep ourselves in a shell and not play according the world rules in an equal position? Does a waiver of immunity really matter? Again I answer with an emphatic no. I really don't think so.

I would like to quote some words of Thomas Jefferson that appears on the panel of the southeast interior wall of his Memorial, as redacted and excerpted from a letter to Samuel Kercheval, July 12, 1816:

*“I am not an advocate for frequent changes in laws and constitutions. But laws and institutions must go hand in hand with the progress of the human mind.*

*As that becomes more developed, more enlightened, as new discoveries are made, new truths discovered and manners and opinions change, with the change of circumstances, institutions must advance also to keep pace with the times. We might as well require a man to wear still the coat which fitted him when a boy as civilized society to remain ever under the regimen of their barbarous ancestors.”*

As Frank O. Gehry said, “If we are going to get anywhere, rules have to be broken”. Rules and prejudices, I would dare to add.

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