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The arbitrator Epitácio Pessoa and the Brazilian approach to arbitration: an analysis of the settlement of disputes between public entities and foreign investors

O árbitro Epitácio Pessoa e a abordagem brasileira sobre arbitragem: uma análise da solução de disputas entre entes públicos e investidores estrangeiros

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The arbitrator Epitácio Pessoa and the Brazilian approach to arbitration: an analysis of the settlement of disputes between public entities and foreign investors*

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Abstract

Reiterated since the 1960s by consecutive yet ideologically different federal administrations, Brazilian resistance to international investor-State dispute resolution has been taken for granted in many arbitral circles, especially due to a perception that Brazil had adhered to Calvo and Drago Doctrines. This paper questions those assumptions as it analyzes neglected arbitral awards issued in 1916 and 1918 by famous international jurist Epitácio Pessoa, renowned jurist at the time and President of Brazil from 1919 to 1922, who settled disputes between public entities – the Municipality of Rio de Janeiro and the Brazilian Federal government, on the one side – and foreign investors, on the other side, on questions derived of tramway and railway concessions. This article investigates the legal bases over which Brazil has always had a different instance on arbitration than the other Latin American countries, aiming at contributing to understanding contemporary resistances to investor-State dispute settlement. In so doing, this paper unprecedentedly analyzes the awards under a broader investigation of Epitácio's ideological context and his own ideas.

Keywords: investment arbitration; investor-state dispute settlement; Epitácio Pessoa; Calvo Doctrine; Drago Doctrine; arbitration in Brazil.

Resumo

Reiterada desde 1960 por sucessivos Governos, embora ideologicamente diferentes, a resistência brasileira à solução de disputas investidor-Estado tem sido pressuposta nos círculos da arbitragem, especialmente devido a uma percepção de que o Brasil aderiu às doutrinas Calvo e Drago. Este artigo questiona essa suposição, ao analisar negligenciados laudos arbitrais proferidos entre 1916 e 1918 pelo famoso internacionalista Epitácio Pessoa, renomado jurista à época e Presidente do Brasil entre 1919 e 1922, o qual solucionou disputas entre entes públicos – o Município do Rio de Janei-

ro e a União, de um lado – e investidores estrangeiros, de outro lado, em matéria de concessão de vias férreas. Este artigo investiga as bases jurídicas pelas quais o Brasil sempre teve uma posição diferente sobre arbitragem em relação a outros países da América Latina, visando a contribuir para a compreensão de resistências contemporâneas à solução de disputas investidor-Estado. Fazendo isso, este artigo, de forma inédita, analisa os laudos de Epitácio à luz de uma investigação mais ampla de seu contexto ideológico e de suas próprias ideias.

Palavras-chaves: arbitragem de investimentos; solução de disputas investidor-Estado; Epitácio Pessoa; Doutrina Calvo; Doutrina Drago; arbitragem no Brasil.

1 Introduction

The legacy of Epitácio Pessoa, who was Judge of the Permanent Court of International Justice and held the highest public offices in Brazil, including the Presidency from 1919 to 1922, has been receiving greater attention by international legal scholars, due to Epitácio's prolific activity of both theoretical and practical relevance.

Besides contributing with a thorough project for a Code of Public International Law, Pessoa's rulings in the Brazilian Supreme Court and in The Hague remain important to clarify many concepts in the recently established Republican constitutional law and in international law respectively.

Keeping in mind the particularity of Pessoa's position in International Law – particular because he is a representative not only of Latin America but also of one of its most influential countries –, this paper intends to shed light on a less discussed facet of this prominent scholar: Epitácio Pessoa as an arbitrator.

A neglected compendium of arbitral awards published in 1961 shows that, despite a historical resistance to international investor-State arbitration in Latin America – especially persistent in Brazil, who has never been a party to the ICSID Convention –, Pessoa was appointed as arbitrator to two disputes involving the Municipality of Rio de Janeiro and the Brazilian Federal government, on the one side, and foreign investors, on the other side.

Most importantly, the conflict with the federal entity involved the concession of railways due to a contract signed in 1856, still under the rule of Emperor Dom Pedro II, though the arbitration would only be triggered by 1918, one year before Epitácio was sworn in as President of the Republic.

Why has an arbitration clause, signed under an entirely different political and legal regime, been enforced so many decades later, even among a continental resistance to investment arbitration? What apparently shows a strong sense of legal certainty contrasts with a later – and still fierce – Brazilian resistance to investor-State arbitration.

That is the link this paper wants to test: did Epitácio Pessoa, analyzing foreign investments in a private dispute resolution arena, convey any comments in his intra-State arbitrations that would relate to or influence the Brazilian discussion on investment arbitration?

Based on such question, the paper is divided in three parts. The first brings the legal and historical context in which Latin American resistance to arbitration was developed from late nineteenth century to early twentieth century, with special reference to Carlos Calvo and Luis Maria Drago of Argentina, and also the Brazilian stance on arbitration. The second examines the arbitral awards of Epitácio Pessoa, focusing on whether the arbitrator's showed a particular position on the enforceability of the arbitration clause before a governmental entity and the legitimacy of the private dispute resolution mechanism. The third part analyzes other works of Pessoa as an international theorist and international Judge to check if his favourable position towards investment arbitration was circumstantial or was based on a much broader concern on international dispute settlement.

Following the proposed structure, this paper unprecedentedly investigates the legal bases under which Brazil has always had a different instance on arbitration than the other Latin American countries. By bringing the arbitrator Epitácio Pessoa to the conversation, the paperaims at contributing to understand contemporary resistances to investor-State dispute settlement.

2 Latin American and Brazilian resistance: an outline

Whereas there is a strong perception that Brazil resists investment arbitration due to its systematic refusal

of ratifying conventions with arbitral clauses, intended to protect investors, such view might be contradicted – if not totally denied – by the analysis of a long-standing tradition of fostering arbitral practices. This first section will contribute to the historical review of such position as it comprises Brazilian traditions and compares it to the Latin American perspective.

2.1 Arbitration, war and investment

Two doctrinal references from Argentina are usually mentioned on the matter of Latin American resistance to investor-State dispute resolution: Carlos Calvo and Luis María Drago.

Two practitioners and researchers of International Law, they both contributed to an alleged regional approach to investment disputes: while Mr. Calvo, from the late 19th century, advocated that diplomatic intervention on behalf of the damaged investor – but not the use of force – would only be allowed after local Courts ruled on the matter exhaustively, Mr. Drago, from the early 20th century, understood that no force could be used to enforce payments for foreign investors.

The Calvo Doctrine, during the 19th[1] and the 20th century, influenced the inclusion of treaty clauses demanding that the investor waived any intervention or protection from their home country.[2]

The Calvo Doctrine had its resonance in a continent where wars were fought to collect debt during the 19th century[3], and as early as 1889 the First International Conference of American States recognized the identity of rights between nationals and foreigners. However, in 1902, German warships bombarded ports of Venezuela following massive unpaid debts the government held before English, French, German and Italian banks, which prompted the manifestation of Drago.

In 1907, the Second International Peace Conference of The Hague advocated arbitration for dispute resolution, with massive adhesion by Latin American States.[4] The corresponding treaty, signed by numerous European governments and also by Argentina, Bolivia, Chile, Colombia, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Mexico, Panamá, Paraguay, Peru and Uruguay, stated that force would not be the rule to collect debt, but the exception; wars would only be fought if the debtor State resisted to an arbitral clause or refused to enforce an arbitral award.[5]

Though such convention appears to represent a victory for Drago, it recognized, even as an exception, a justification for war, and it received several reservations from Latin American governments. Rui Barbosa, the Brazilian representative in The Hague, advocated for the legitimacy of war to collect debt if the debtor refused to arbitration.[6]

Therefore, in the matter of investment arbitration, Brazil held an isolated position and did not adhere automatically to Calvo or Drago doctrines, but rather tried to conciliate arbitration and good faith. At this point, it is important to make a distinction between the open-

[1] "Calvo's theory would soon be tested: in 1873, the Mexican Minister of Foreign Affairs sent a note to the US ambassador, stating that Mexico was not responsible for the harm caused to foreigners during the civil war as clearly indicated by Dr. Calvo's theory. The ambassador responded that Dr. Calvo was a young lawyer whose theories had not been accepted internationally. This was the first of many rejections of the theory by the United States". BLACKABY, Nigel; PAULSSON, Jan. Arbitration in Latin America: was Carlos Calvo misunderstood? *In:* VERÇOSA, Haroldo Malheiros Duclerc (ed.). *Aspectos da arbitragem institucional:* 12 anos da Lei 9.307/1996. São Paulo: Malheiros, 2008. p. 341-351. p. 343.

[2] CORRÊA, A. A. C. Rui e a Doutrina Drago. *Revista da Faculdade de Direito, Universidade de São Paulo*, v. 62, n. 1, p. 267-282, 1966. p. 269; SHIHATA, Ibrahim F. I. Towards a greater depoliticization of investment disputes: the roles of ICSID and MIGA. *ICSID Review:* Foreign Investment Law Journal, v. 1, n. 1, p. 1-15, 1986.

[3] The French-Mexican War of 1861-1867, that resulted on the French appointment of an Emperor for Mexico, was triggered by a moratorium declared by the President of Mexico, Benito Juárez.

[4] CORRÊA, A. A. C. Rui e a Doutrina Drago. *Revista da Faculdade de Direito, Universidade de São Paulo*, v. 62, n. 1, p. 267-282, 1966. p. 269; BLACKABY, Nigel; PAULSSON, Jan. Arbitration in Latin America: was Carlos Calvo misunderstood? *In:* VERÇOSA, Haroldo Malheiros Duclerc (ed.). *Aspectos da arbitragem institucional:* 12 anos da Lei 9.307/1996. São Paulo: Malheiros, 2008. p. 341-351. p. 344.

[5] As stated in article 1 of the Convention Respecting the Limitation of the Employment of Force for the Recovery of Contract Debts: "The Contracting Powers agree not to have recourse to armed force for the recovery of contract debts claimed from the Government of one country by the Government of other country as being due to its nationals. This undertaking is, however, not applicable when the debtor State refuses or neglects to reply to an' offer of arbitration, or, after accepting the offer, prevents any *compromis* from being agreed on, or, after the arbitration, fails to submit to the award". Available at CONVENTION Respecting the Limitation of the Employment of Force for the Recovery of Contract Debts. *The American Journal of International Law*, v. 2, n. 1/2, supplement: official documents, Jan./Apr. 1908. Available at: https://doi.org/10.2307/2212500. Accessed on: 12 ago. 2022.

[6] CORRÊA, A. A. C. Rui e a Doutrina Drago. *Revista da Faculdade de Direito, Universidade de São Paulo*, v. 62, n. 1, p. 267-282, 1966. p. 278 and 281.

ness towards inter-State arbitration and the resistance to intra-State arbitration.

Inter-State arbitration is opposed to war and has been historically supported by Latin America as a substitute to armed conflict; Haroldo Valladão, one of the most relevant international jurists from Brazil, advocated that solidarity and the defense of arbitration instead of war had been the greatest contribution of Latin America to International Law.[7]

On the other hand, the idea that even the standing world Tribunal – originally, the Permanent Court of International Justice – should have a facultative clause of mandatory jurisdiction was proposed by Brazilian delegate Raul Fernandes, under the leadership of Epitácio Pessoa.[8]

Intra-State arbitration is opposed to the national Judiciary and, as Blackaby and Paulsson argue, was systematically resisted by Latin American governments; by the time the League of Nations concluded the Geneva Protocol of Arbitration Clauses in 1923, Latin American States resisted to enforce arbitration clauses because such countries stimulated recourse to domestic Courts, including for investment dispute resolution.[9]

Interestingly, Brazil was the only Latin American Nation to sign the Geneva Protocol; in what Blackaby and Paulsson consider merely "an accident of history",[10] it is important to notice that the protocol was signed by Brazil through representative Afrânio de Mello Franco without reservations and it entered into force in 1932 through Presidential Decree n° 21.187.[11]

In sum, not only did Brazil sustain a different position regarding investment arbitration, but it also was isolated in its instance towards private arbitration. To fully understand Brazilian perspective, a specific historical account follows below.

2.2 Arbitration in Brazil

As this paper tries to bring a new historical approach to the Brazilian position towards arbitration, it is important to mention that the Political Constitution of the Empire of Brazil, in 1824, expressly authorized arbitration in its article 160 and even indicated the enforcement of arbitral rulings without recourse, should parties so convene.

The Commercial Code of 1850 not only referred to arbitration but also instituted it as mandatory for several corporate and maritime issues; in 1866, Law nº 1.350 altered the Code to indicate that arbitration should always be voluntary and to authorize arbitrators to rule "ex aequo et bono" if parties so decided.

During the Second Empire (1840-1889), Brazil would also foster voluntary arbitration internationally and be recognized as a relevant voice in peaceful settlement: when the United States of America and Her Britannic Majesty signed the Treaty of Washington of 1871 and referred to arbitration the disputes known as the Alabama claims, the Tribunal would be composed of five members, one of which was to be appointed by the Emperor of Brazil – who nominated Viscount of Itajubá, a Brazilian diplomat and nobleman.[12]

Even though Brazilian favourable position in defense of inter-State arbitration was a constant throughout the twentieth century, the Republic – beginning in 1889 – did not have the same instance towards intra-State arbitration. The greatest obstacle to what is contemporarily known as commercial arbitration might be found in the Civil Code of 1916[13], which indicated the need for

[7] CORRÊA, A. A. C. Rui e a Doutrina Drago. *Revista da Faculdade de Direito, Universidade de São Paulo*, v. 62, n. 1, p. 267-282, 1966.

[8] REZEK, Francisco. *Direito internacional público:* curso elementar. São Paulo: Saraiva, 2016. p. 428.

[9] BLACKABY, Nigel; PAULSSON, Jan. Arbitration in Latin America: was Carlos Calvo misunderstood? *In:* VERÇOSA, Haroldo Malheiros Duclerc (ed.). *Aspectos da arbitragem institucional:* 12 anos da Lei 9.307/1996. São Paulo: Malheiros, 2008. p. 341-351. p. 346.

[10] BLACKABY, Nigel; PAULSSON, Jan. Arbitration in Latin America: was Carlos Calvo misunderstood? *In:* VERÇOSA, Haroldo Malheiros Duclerc (ed.). *Aspectos da arbitragem institucional:* 12 anos da Lei 9.307/1996. São Paulo: Malheiros, 2008. p. 341-351. p. 346.

[11] Once again, respect towards arbitration in Brazil was apparently immune to political turmoil, as in 1930 the country went through a Revolution that deeply altered governmental institutions, but did not affect arbitration directly.

[12] As convened by Great Britain and the United States of America, the other arbitrators – in a total of five – were appointed by the King of Italy and the President of the Swiss Confederation, alongside with two party-appointed. Available at: http://legal.un.org/riaa/cases/vol_XXIX/125-134.pdf. The Brazilian diplomat and jurist Marcos Antônio de Araújo, Viscount of Itajubá, was the Brazilian ambassador in Paris at the time. Furthermore, Itajubá was one of the initial enthusiasts and first supporters of the creation of the International Law Association, 150 years ago.

[13] Brazil has had two Civil Codes, published in the years 1916 and 2002. Until 1916, civil matters were regulated by sparse legislations but mostly by the Philippine Ordinations, a compilation of legal standards published in 1603 by the King of Spain, Phillip II, then holding the Portuguese crown as Phillip I. Even though Lisbon re-

judicial homologation of an arbitral award as a condition for its enforcement. The Civil Procedural Code of 1939[14] went even further in creating several procedural requirements for arbitration, contradicting the relative informality of such method, a position which was kept by its substitute of 1973.[15]

Besides, both the material and the procedural legislation lacked a provision for the enforcement of the arbitration clause, focusing on the "compromis d'arbitrage", that is, on the arbitration agreement specific to a conflict; defiance of a hypothetical contractual provision for arbitration would entail only damages against the resisting party.[16]

Consistent with the Republican obstacles to private arbitration, Brazil participated in the launch of the Inter-American Convention on Commercial Arbitration in Panamá, in 1975, which received a high number of signatures by members of the Organization of American States, but ratification did not follow so quickly.

Though its article 4 brought the impacting provision that "[*a*]n arbitral decision or award that is not appealable under the applicable law or procedural rules shall have the force of a final judicial judgment"[17], it would only enter into force in Brazil a few months before the publication of the Brazilian Arbitration Act in 1996. Still, the resistance to private dispute resolution persisted.

In fact, even though Brazil gained an UNCITRAL-based arbitral legislation in 1996, the relevant project had been proposed in the Senate in 1992 and faced the opposition mainly of those who believed that private justice could not be opposed to the mandatory intervention of the Judiciary.[18] The Constitution of 1988 actually provides in its catalogue of fundamental rights that no law can prevent "judicial analysis" of an act capable of or prone to causing damage to a right[19], a strongly enforced clause against governmental acts, which are growingly subject to judicial appreciation. Opponents to the recognition of the jurisdictional nature of arbitration in Brazil then focused on its unconstitutionality, and the Arbitration Act would only be declared constitutional by the Supreme Court in 2001.[20]

Brazil has recently developed as a mature country for commercial arbitration, after it approved in 1996 legislation based in the UNCITRAL Model Law on International Commercial Arbitration and ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards in 2002. Regarding alternative dispute resolution for private companies, Brazilian arbitration institutions, arbitrators and practitioners have developed a solid reputation, especially because the Superior Court of Justice – in charge of unifying interpretation of national law such as the one that regulates arbitration – has repeatedly assured independence for arbitrators to rule on the merits of contracts.[21]

The success of commercial arbitration as regulated by Law n. 9.307/1996 has been so high since it was declared constitutional, that more and more areas of Brazilian law have been opening themselves to the applicability of such law. Several disputes involving shareholding[22], copyrights[23], labor issues[24] and companies

gained independence in 1640, the Ordinations were upheld as law for Portugal and its colonies in 1643. Analogically, even after the independence of Brazil in 1822, the Emperor in 1823 decided to maintain the enforcement of the same set of rules until the emergence of a proper Civil Code.

14 Brazil has had three Civil Procedural Codes, published in the years 1939, 1973 and 2015. The most recent one not only converges to Brazilian Arbitration Act but it also creates mediation and conciliation hearings prior to the presentation of a defense.

15 It would be out of the scope of this paper to investigate if there was a conscious preoccupation towards the applicability of the Geneva Protocol of Arbitration Clauses, but reading such treaty – which was in force in Brazil by the time the Civil Procedural Code was published – allows one to conclude that it was only applicable to international arbitration (article 1) and did not preclude procedural requirements to be eventually created by national law (article 2).

16 TEIXEIRA, Sálvio de Figueiredo. A arbitragem no sistema jurídico brasileiro. *Revista dos Tribunais*, v. 735, p. 39-48, 1997.

17 ORGANIZATION FOR AMERICAN STATES. Inter-American Convention on International Commercial Arbitration. Panama City, 30 jan. 1975. Available at: http://www.oas.org/en/sla/dil/inter_american_treaties_B-35_international_commercial_arbitration.asp.

18 MUNIZ, Petronio R. G. *Operação arbiter:* a história da Lei n° 9.307/96 sobre a arbitragem comercial no Brasil. Brasília: ITN, 2005. p. 72.

19 Such remedy figures as a clear reaction to the fact that governmental acts involving the "revolutionary" measures of the military were immune to judicial control between 1968 and 1978 due to decrees taken by the rulers, especially Institutional Act n. 5 of 1968.

20 BRAZIL. Supremo Tribunal Federal. *SEC 5206-7*. December 12, 2001.

21 For instance, the Superior Court of Justice has stated that public judges could not even analyze the merits of an arbitral decision. Reference of the case: REsp 1636113/SP, DJe Sep. 05, 2017.

22 Arbitration between companies and their stockholders are authorized by Law n. 6.404/1976, as amended by Law n. 10.303/2001 and Law n. 13.129/2015.

23 Arbitration and mediation for copyright disputes are authorized by Law n. 9.610/1998, as amended by Law n. 12.853/2013.

24 Arbitration for labour disputes is authorized by the Consolidation of Labour Law (Decree n. 5.452/1943), as amended by Law n.

controlled by the government[25] such as Petrobras, the national oil giant, have been finding their adjudication in private rather than in public fora, including foreign ones.[26]

In sum, contemporary success of private arbitration in Brazil superseded a century-long prejudice to non-judiciary dispute resolution as the country retakes – unconsciously, as the debates in the arbitration law show[27] – pro-arbitral traditions found in the Empire. Regardless, resistance to investment arbitration persists, as depicted in the next topic.

2.3 Brazil and investment arbitration

Apart from the openness to commercial arbitration, even though it is not possible to state there is a common doctrinal – or even political – core between Brazil and other Latin American countries on the matter of investor-State arbitration, it is well known that Brazil has systematically refused to be part of investment arbitration clauses since at least the inception of ICSID.

In fact, the main consequence of the creation of the International Center for the Settlement of Investment Disputes – technically a permanent arbitral entity and not an international Tribunal in the strict sense – was the fact that foreign investors would no longer need diplomatic protection, a political position that superseded Calvo Doctrine. ICSID's institutional arbitration would offer definitive international decisions, that would not be subject to appeal within the Center nor subject to ratification or confirmation by national Courts.[28]

Whereas the Jay's Treaty of 1794 and the corresponding arbitrations on debt collection in the early 19th century inaugurated new standards for international arbitration – in this case, between the United States and Great Britain involving British subjects' investments in the former colonies –,[29] it was not until after the Second World War that countries realized it should not be in the scope of their foreign policy to seek State-to-State dispute resolution involving private nationals' investments in foreign Nations,[30] which fostered the emergence of direct litigation between individuals and States.

Investment Tribunals, in fact, would be located above domestic law,[31] considering that the spread of rule of law towards investments would attract investors in a "race to the top",[32] preventing multiple and sometimes parallel litigations in the investor's country, in the host State or in any other territory where assets were located.[33]

In practical terms, investment arbitration clauses may be instituted under bilateral or multilateral investment agreements – BITs or MITs– as well as under direct contracts between the investor and the State. Even though "ad hoc" arbitrations are still possible, ICSID has consolidated itself as the main forum for investment dispute resolution, considering the Washington Convention has been ratified by more than one hundred and fifty countries – among them, the most relevant economies such as the United States, Germany, Japan and China. Most part of Europe and Oceania has adhered, and relevant actors from other regions are also parties to the Convention – for example, Israel and Saudi Arabia; Argentina, Chile, Colombia, Mexico and Peru; Algeria, Egypt, Nigeria and Tunisia.[34]

13.467/2017.

[25] Arbitration with public companies is authorized by the Commercial Arbitration Act (Law n. 9.307/1996), as amended by Law n. 13.129/2015.

[26] For example, Petrobras has been litigating before the ICC International Court of Arbitration. BLOUNT, Jeb. Brazil's Petrobras must pay higher royalty in Whale Park dispute. *Reuters*, June 06, 2015. Available at: https://www.reuters.com/article/brazil-petrobras-royalties-idUSL1N0ZM2ED20150707. Accessed on: June 25, 2022.

[27] MUNIZ, Petronio R. G. *Operação arbiter:* a história da Lei n° 9.307/96 sobre a arbitragem comercial no Brasil. Brasília: ITN, 2005.

[28] BROWNLIE, Ian; CRAWFORD, James Crawford. *Brownlie's principles of public international law*. 8. ed. Oxford: Oxford University Press, 2012. p. 741-743; REZEK, Francisco. *Direito internacional público:* curso elementar. São Paulo: Saraiva, 2016. p. 199.

[29] HULSEBOSCH, Daniel J. From imperial to international law: protecting foreign expectations in the early United States. *UCLA Law Review*, v. 65, n. 4, p. 4-18, 2018.

[30] WERNER, Jacques. Limits of commercial investor-state arbitration: the need for appellate review. *In:* DUPUY, Pierre-Marie; FRANCIONI, Francesco; PETERSMANN, Ernst-Ulrich (ed.). *Human rights in international investment law and arbitration*. New York: Oxford University Press, 2009. p. 115-117.

[31] HUNTER, Martin; SILVA, Gui Conde e. A ordem pública transnacional e a sua operação nas arbitragens relativas a investimentos. *In*: LEMES, Selma Ferreira; CARMONA, Carlos Alberto; MARTINS, Pedro Batista (ed.). *Arbitragem:* estudos em homenagem ao Prof. Guido Fernando Silva Soares. São Paulo: Atlas, 2007. p. 168.

[32] FRANCK, Susan D. Foreign direct investment, investment treaty arbitration and the rule of law. *McGeorge Global Business and Development Law Journal*, v. 19, p. 337-373, 2007. p. 367-368.

[33] RUBINS, Noah D. Investment arbitration in Brazil. *In:* ALMEIDA, Ricardo Ramalho (ed.). *Arbitragem interna e internacional:* questões de doutrina e de prática. Rio de Janeiro: Renovar, 2003. p. 95-128. p. 98.

[34] MERRILS, J. G. *International dispute settlement*. 6. ed. New York: Cambridge University Press, 2017. p. 113; RUBINS, Noah D. In-

Despite the strong legal bases and international adhesion that characterize ICSID, Brazil has not even signed the Washington Convention and has also refused ratification of a number of BITs it has signed in the 1990s. During the original debates promoted by the World Bank on the Convention, the justification of the government was that Brazilian Constitution prevented judicial institutions other than the Judiciary, and that foreigners would be granted a greater privilege than nationals in accessing arbitral Tribunals in spite of local Courts. On the other hand, between 2015 and 2016, Brazil signed Agreements on Cooperation and Facilitation of Investments (ACFIs) with Angola, Chile, Colombia, Malawi, Mexico, Mozambique and Peru,[35] though the dispute settlement mechanisms in such treaties still focused on State-to-State arbitration.

In turn, in 2017, Law n. 13.448 expressly permitted arbitration between the federal government and investors in context of the recently created Program for Partnerships in Investments, conditioning the referral to alternative dispute resolution to the existence of a definitive decision of the competent administrative authority on relevant patrimonial rights; with regard to arbitration, the law requires it to be seated in Brazil and be conducted in Portuguese. Moreover, even though the contractor must be constituted under Brazilian laws, the national company might have a foreign society as a sole shareholder,[36] which represented a great innovation in a country that only recently allowed its aviation market to receive foreign capital.

From what has been shown, "investment arbitration" could be considered a gender that encompasses both State-to-State and investor-State dispute resolution. In The Hague, in 1907, parties to the Convention Respecting the Limitation of the Employment of Force for the Recovery of Contract Debts made reference to the Convention for the Pacific Settlement of International Disputes[37], which in turn was only applicable to State-to-State arbitration.[38] In such a sense, Brazil has indeed maintained a resistance to investor-State dispute resolution under public international arbitration. To further analyze its position, the awards of Epitácio Pessoa are a great aid, which will be focused on at the next section.

3 The forsaken awards

This section examines the arbitral awards of Epitácio Pessoa, focusing on whether the arbitrator's showed a particular position on the enforceability of the arbitration clause before a governmental entity and the legitimacy of the private dispute resolution mechanism.

3.1 An overview of the arbitrator's legacy

A consultation on the complete works of Pessoa, published by the National Institute of the Book between 1955 and 1965, shows that he was appointed as adjudicator to the following disputes:[39]

Year of the award	Parties	Dispute
1916	Municipality of Rio de Janeiro and The Rio de Janeiro Tramway, Light and Power Company Limited	Scope of tax exemptions granted by the Municipality in tramway concessions
1916	Municipality of Rio de Janeiro and company São Cristóvão	Legality of the company's modification of lines and increase of ticket tariffs for a tramway concession

vestment arbitration in Brazil. *In:* ALMEIDA, Ricardo Ramalho (ed.). *Arbitragem interna e internacional:* questões de doutrina e de prática. Rio de Janeiro: Renovar, 2003. p. 95-128. p. 97.

[35] KALICKI, Jean; MEDEIROS, Suzana. Investment arbitration in Brazil: revisiting Brazil's traditional reluctance towards ICSID, BITs and Investor-State Arbitration. *Revista de Arbitragem e Mediação*, v. 4, n. 14, p. 57-86, 2007. p. 68-70; MAGGETTI, Martino; MORAES, Henrique Choer. The policy-making of investment treaties in Brazil: policy learning in the context of late adoption. *In*: DUNLOP, C.; RADAELLI, C.; TREIN, P. (ed.). *Learning in public policy*. London: Palgrave Macmillan, 2018. p. 295-316.

[36] Articles 31 and 36 of Law n. 13.448/2017.

[37] Article 2 reads as follows: "It is further agreed that the arbitration mentioned in paragraph 2 of the foregoing Article shall be subject to the procedure laid down in Part IV, Chapter III, of The Hague Convention for the Pacific Settlement of International Disputes.8 The award shall determine, except where otherwise agreed between the parties, the validity of the claim, the amount of the debt, and the time and mode of payment". Available at: https://www.loc.gov/law/help/us-treaties/bevans/m-ust000001-0607.pdf.

[38] Article 37 reads as follows: "International arbitration has for its object the settlement of disputes between States by Judges of their own choice and on the basis of respect for law. Recourse to arbitration implies an engagement to submit in good faith to the Award". Available at: http://avalon.law.yale.edu/20th_century/pacific.asp.

[39] PESSOA, Epitácio. *Obras completas de Epitácio Pessoa:* laudos arbitrais. Rio de Janeiro: Instituto Nacional do Livro, 1961. v. 16.

Year of the award	Parties	Dispute
1918	Federal Government of Brazil and São Paulo Railway Company	Extension of governmental powers to analyze the company's books in order to verify its profits and validate the increase of tariffs for a railway concession
1920	Brazilian States of Paraná and São Paulo	Territorial limits
1922	Brazilian States of Goiás and Minas Gerais	Territorial limits
1922	Empresa da Baixada and Fazenda do Iguaçu	Compensation for expropriation
1926	Brazilian States of Minas Gerais and São Paulo	Territorial limits

Considering that all the awards involved public law issues, it is worth noting that, despite keeping a private practice, Epitácio Pessoa held positions in the judicial structure of Brazilian Republic since a young age, including district attorney, Minister for Justice, Attorney-General and Justice of the Supreme Federal Tribunal. It is not surprising, then, that he was nominated as arbitrator for questions involving concessions and territorial limits of States.

Besides, the reasoning of the awards varies depending on the issues at hand: while territorial limits were settled with reference to several historical and geographical arguments, the first three awards – that involved investors and public entities – were rather focused on contractual arrangements than on the alleged superiority of governmental power over its subjects.

At this point, it is important to realize that the awards issued from 1920 to 1926, involving territorial limits, dealt with controversies that cannot be easily classified within contemporary requirements of private arbitration; indeed, no "patrimonial and negotiable" rights – as Brazilian Arbitration Act considers objective arbitrability – were being analyzed.

On the contrary, territorial limits are at the very core of a political entity, and the Brazilian Constitution of 1891 actually attributed to National Congress a specific competence to determine such limitations.[40] The fact that the sitting President in 1920 and 1922 – or the former President, in the case of 1926 – was asked to settle the territorial disputes is a great evidence of the reputation Pessoa held in his era and once more confirms Brazilian favorable tendencies towards arbitration.

Regarding the award involving compensation for expropriation, unfortunately the book only brings the succinct text with a brief reasoning and the final decision; a consultation of newspapers at the Brazilian National Library[41] could not provide any more information about the award. Even though there is no data on which is the actual political entity interested in the expropriation, it is possible to infer by the name of the company – Empresa de Melhoramentos da Baixada Fluminense – and of the relevant territory – Fazenda do Iguaçu – that it is most probably related to the current Municipalities of Nova Iguaçu and Duque de Caxias, in the State of Rio de Janeiro.

Due to the scope of this paper, it is not possible to go further in such investigation, however the most important aspect of the award is that it also involved the patrimonial and negotiable interest of a public entity in opposition to the rights of an individual, in a closer manner to what is contemporarily expected in arbitration with public entities in Brazil.

The other three awards in the list, involving the Municipality of Rio de Janeiro and the Federal government against foreign investors, will be analyzed separately in the next topic.

3.2 The investor-state awards

The most relevant awards amongst those issued by Epitácio Pessoa were published in 1916 and 1918, before he was sworn in President of the Republic.

The first award involved tax exemptions. In 1907, the Municipality of Rio de Janeiro granted three companies – Carris Urbanos, São Cristóvão and Vila Isabel – the concession of tramway lines, and the relevant contract authorized the transfer of the concession to a different company with the exemption of any taxes. In 1913, the companies required their concession to be transferred to The Rio de Janeiro Tramway, Light and Power Company Limited, but in 1914 and 1915 the Mayor would deny the tax exemptions, claiming that

[40] Article 34, item 10, of the Constitution of 1891, which was maintained after the amendment of 1926.

[41] Such collection is available for researchers at: http://memoria.bn.br/hdb/periodico.aspx.

such privilege should only be granted with regard to the concession itself, whereas in the case at hand the companies actually had their property transferred to Light. Interestingly, tax on the acquisition of property was in the federal scope in 1913 but later fell under municipal competence; the Mayor considered that the clause should not be interpreted as waiving property transfer tax, because the Municipality could not have waived a tax that was not under its competence then.

The arbitrator Pessoa considered that, since the concession was already being executed by the time of the negotiations with Light, the transfer as indicated in the original contract should include any property of the original three companies. Regarding the tax exemption, he indicated that the tax had always been "municipal", because it was only collected by the Federal government to facilitate the achievement of common budgetary projects, since Rio de Janeiro was then the Capital of the Republic.

Therefore, since the responsibility for its collection had returned to the municipal competence by the time the concession was transferred, it should be considered as municipal for the purposes of exemption. Avoiding a restrictive interpretation, the arbitrator concluded that if the contract did not encompass future taxes, the company would have been deceived by the Municipality, because this entity could create more taxes apart from those already existing by the time the contract was signed.

In sum, the first award invalidated the decisions of the Mayor and ruled in favor of the company.

The second award involved the legality of São Cristóvão's increase of ticket tariffs for a tramway concession. As aforementioned, São Cristóvão was one of the three companies which were originally granted the concessions of several tramway lines in the Municipality of Rio de Janeiro. After popular dissatisfaction regarding the suppression of tramway lines and the consequent modification of tariffs, the Mayor required the company to reestablish lines and prices; the company resisted to the request and referred the dispute to arbitration.

The arbitrator Pessoa considered that the logical interpretation of the relevant contract and the history behind the Municipality's negotiations could not base the suppressions adopted by the company – on the contrary, the lines should be kept in spite of the tramway technical unification. On the other hand, considering that a Mayor's decree implicitly approved some of the modifications in the project, the arbitrator affirmed that before the contract there was a law stating the conditions of the concession; in such a sense, the Executive branch could not diverge from the legal standards.

In the end, he repelled the allegation of vested rights invoked by the company, which had made the modification eight years before; Pessoa argued there could not be vested rights against an express provision of law. Interestingly, he expressly affirmed that an arbitrator should not relate to the interests of the company or of the population's, but rather judge according to the law and the contract.

In sum, the second award dismissed the company's claims and sustained the provisions of the contract.

The third award involved the São Paulo Railway Company, a ninety-year concession made by Emperor Dom Pedro II in behalf of three Brazilian entrepreneurs. The point of interest to this research is that the decree of concession authorized the businessmen to incorporate the company abroad. They created the São Paulo Railway Company in England and eventually all the capital was controlled by Englishmen. Therefore, the premise is that there is a dispute between foreign investors and the government; this is not about a subsidiary established under Brazilian law, because, since its inception, there was a clear intention of involving foreigners. It is understandable why the Brazilian businessmen needed British expertise at the time, but it is not clear why the Emperor was so explicit about the organization of the company.[42]

The arbitrator begins this award stating his impartiality, in spite of allegations that the company – which appointed him to a three-arbitrator panel – already knew his position. He states that his award was the result of his study and conviction, which did not depend neither on the government nor on companies.

As of the original contract, profit should be limited from 7% to 12% and subject to analysis in two consecutive years. If the company profited more than 12%, the government was entitled to demand cheaper tariffs for

[42] The concession ended in 1946 when a new President was sworn in after the fifteen-year authoritarian rule of Getúlio Vargas, including an eight-year dictatorship. It would only be privatized again in 1996.

passengers; if less, the company could raise prices. The problem came in 1895: the company was authorized to deduce the costs of an expansion from the calculus of profits, but, whereas the government wanted to be given powers to oversee its accounts thoroughly, the company intended to hand the corresponding papers unilaterally. Actually, the company had been given a financial benefit in exchange of permitting the government's intervention; later it renounced the benefit and now was saying the exam of accounts would be a form of intervention.

Pessoa's strategy to achieve a solution is to examine not only the law but the contract and to analyze how parties behaved and how other contracts of that kind were conducted under Brazilian law. It is interesting because it is a long-term contract and Brazil suffered many political changes during its execution, passing from a constitutional monarchy to a military dictatorship and then to an authoritarian and instable Republic. In 1915, government began to change its requirement and increased oversight for concessions. Still, Pessoa said only contemporary law and the contract would bind the company.

Even more fiercely than in the previous award, Pessoa understood that parties should keep to its contractual obligations and be subject to the consequences of abiding by them. Implicitly he indicated not to be interested in the supremacy of the public interest as a premise, which is precisely why investment arbitration would suffer so much opposition in Brazil.

In sum, the third award ruled in favor of the company as it understood that the government could exercise its right of analyzing the books and profits of the company as long as it did not encompass the proceeding known as "tomada de contas", that is, a detailed examination of all revenues and expenditures. Whereas the arbitrator appointed by the government adopted a different position, the umpire voted with Epitácio Pessoa.

Despite the conclusions adopted by Epitácio Pessoa in the three awards that involved foreign investors and public entities, there was not any preoccupation regarding the enforceability of the arbitral clause or any problems regarding the legitimacy of arbitration. Considering the arbitrator seemingly exhausted every argument parties brought, it is quite probable that the governmental parties did not object to the admissibility of the proceedings.

On the other hand, whereas every award was based on legal standards, the arbitrator did not consider there was a principled need for assuring efficacy of governmental acts for the sole fact of having been practiced by the government itself, that is, contracts should be enforced in spite of administrative decisions. Finally, there was not an explicit manifestation on the fact that foreigners were accessing private dispute resolution. Regarding Epitácio Pessoa's broader positions on such issues, it is in order to examine other works of his, which is the object of the next section.

4 **Epitácio Pessoa:** international theorist and Judge

This section analyzes other part of Epitácio Pessoa's extensive works to check if his favourable position towards investment arbitration was circumstantial or was based on a much broader concern on international dispute settlement.

As President of Brazil, Epitácio Pessoa was characterized by a friendly approach towards foreign investors, which were open to participate in several infrastructure endeavors. For instance, the companies that participated in public contracts for "açudes", constructions against semi-arid weather conditions, in Northeastern region between 1920 and 1922 were either American or British,[43] and industries like Ford began their operations in Brazil under his leadership. Many Belgian investments also arrived in Brazil during his presidency.

In contrast, after the Revolution of 1930 in Brazil, there would be a great preoccupation with foreign presence, and the growingly authoritarian government of Getúlio Vargas recurrently adopted measures intended at restricting foreign investment or immigration. Despite their irrelevant practical consequences, President Vargas instituted decrees to limit foreign workforce at a rate of one third of some economic sectors, and the fascist-inspired Constitution of 1937 brought a fierce nationalist stance, which would affect from Labor Law to Private International Law.[44]

[43] GUERRA, Paulo de Brito. *A civilização da seca.* Fortaleza: DNOCS, 1981. p. 62.

[44] MAGANO, Octavio Bueno. *Manual de direito do trabalho:* direito tutelar do trabalho. São Paulo: LTr, 1987. v. 4. p. 131; RAMOS, André de Carvalho. Direito internacional privado de matriz legal: os

GUEDES, Henrique Lenon Farias; FILHO, Marcilio Toscano Franca. The arbitrator Epitácio Pessoa and the Brazilian approach to arbitration: an analysis of the settlement of disputes between public entities and foreign investors. Revista de Direito Internacional, Brasília, v. 19, n. 3, p. 87-101, 2022.

Pessoa's three-year presidency, however, might not be enough to the proposed analysis, because it becomes minor in comparison to his major achievements as an academic and legal practitioner.

As a matter of fact, it also would not be recommendable to examine the entirety of Pessoa's works, due to the vastitude of forensic petitions, political speeches, national and international rulings, and also doctrinal publications. Therefore, considering the expected scope of this paper, two facets of Epitácio Pessoa were chosen for analysis – international theorist and international Judge – and in such a sense two works will be now depicted: his Project for a Code of Public International Law and his vote as Judge of the Permanent Court of International Justice in the Case Concerning the Payment in Gold of Brazilian Federal Loans Contracted in France.

Conciliating these two manifestations of Epitácio Pessoa – one before the investment awards and one after them, one as a theorist and one as a Judge –, it is clear that, whereas the Project of Code incorporated the main lesson of the Calvo Doctrine, Judge Pessoa raised no objections to State-to-State arbitration involving the interests of foreign investors, without prior recourse to national Courts, and in the merits of the claim the Judge was more concerned with interpretation of contracts and conduct of the parties than with nationalist arguments such as "public order". Judge Epitácio Pessoa, then, was much closer to arbitrator Pessoa than to theorist Pessoa.

4.1 The international theorist Pessoa

The codification of International Law had been deliberated in the Second and in the Third Pan-American States Conferences in 1902 and 1906, and the Baron of Rio Branco – in his capacity of Minister of Foreign Affairs - required Epitácio Pessoa to elaborate the Project for a Code of Public International Law, which was published in 1911. In spite of the lack of practical enforcement of the Project, it remains as one of the most relevant codification attempts in the field and reinforces Latin American traditions in defense of balance and predictability in International Law.[45]

In the interest of the scope of the paper, it is important to quote article 24 of the Project[46], according to which every time foreign individuals have claims in civil, criminal or administrative matters against one State or its nationals, they should seek remedy before local Courts; diplomatic intervention would only be admissible if such Tribunals incur in denial of justice or violation of principles of international law. When it comes to arbitration, article 358 establishes it as the key means for dispute settlement should negotiations or other pacific means fail, but curiously the constitutional principles of the State are grounds to refuse arbitration.[47]

There is not a clear instance on whether armed force would be considered a legitimate diplomatic intervention; nonetheless, it is clear that inter-State arbitration would only be appropriate after the foreigner tried to access national justice. On this specific point of view, the Calvo Doctrine made its way into Pessoa's Project.

4.2 The international Judge Pessoa

The PCIJ case (A21) was ruled by the Court on July 12, 1929. The French Republic decided to bring to the Tribunal a matter concerning the difference of opinion between the Brazilian government and French bondholders, concerning loans whose payment, according to Brazil, should be made in paper, whereas the holders

arts. 7º a 19 da Lei de Introdução às Normas do Direito Brasileiro. *In:* RAMOS, André de Carvalho; GRAMSTRUP, Erik Frederico. *Comentários à Lei de Introdução às Normas do Direito Brasileiro*. São Paulo: Saraiva, 2016. p. 185-186.

45 For a broad and comprehensive commentary on the Project, cf. FRANCA FILHO, Marcílio Toscano; MIALHE, Jorge Luís; JOB, Ulisses da Silveira (ed.). *Epitácio Pessoa e a codificação do direito internacional*. Porto Alegre: Sergio Antonio Fabris Editor, 2013.

46 "Art. 24 Sempre que os particulares estrangeiros tiverem reclamações ou queixas de ordem civil, criminal ou administrativa contra um Estado ou seus nacionais, deverão fazer valer os seus direitos perante os tribunais competentes. Em tais casos, a reclamação diplomática não será admissível senão quando houver da parte desses tribunais recusa injustificável do direito de estar em juízo, demora anormal ou violação evidente dos princípios do Direito Internacional". FRANCA FILHO, Marcílio Toscano; MIALHE, Jorge Luís; JOB, Ulisses da Silveira (ed.). *Epitácio Pessoa e a codificação do direito internacional*. Porto Alegre: Sergio Antonio Fabris Editor, 2013. p. 387.

47 "Art. 358 Os Estados submeterão à arbitragem todas as controvérsias que não tenham podido resolver por negociações diretas ou outro meio pacífico, desde que não ponham em causa os seus princípios constitucionais". FRANCA FILHO, Marcílio Toscano; MIALHE, Jorge Luís; JOB, Ulisses da Silveira (ed.). *Epitácio Pessoa e a codificação do direito internacional*. Porto Alegre: Sergio Antonio Fabris Editor, 2013. p. 410.

claimed to be paid in gold. In a dissenting opinion, Epitácio Pessoa made several observations.[48]

Firstly, he did not consider the case to be "international" and hence within the jurisdiction of the Court, since the matter involved Brazil and French individuals, not exactly the French government, therefore the matter would not be between States and not regulated by international law.

Specifically, Pessoa argued that the settlement of the dispute depended on determining the applicable law – Brazilian or French –, and in any result one municipal law rather than international law would prevail. Furthermore, even though he did not oppose to the French government's intervention, he observed that the actual bondholders were not defined by France and therefore might even do not exist anymore. Concluding his manifestation on jurisdiction, he claimed that direct agreement or arbitration between Brazil and France would be proper methods of dispute settlement rather than recourse to the PCIJ.[49]

In the merits, it is noticeable that Pessoa did not mention any Brazilian constitutional limitations or other legal or political restrictions towards being subject to foreign law; he discuss French "public policy" – that is, mandatory provisions in statutory law – but does not indicate any problems regarding Brazilian public order.

5 Conclusion

"The arbitrator Epitácio Pessoa" was a facet absent not only to the accounts on Brazilian position towards arbitration but also to the analyses of an important arbitrator. As an early and vocal representative of Latin America in the international arena, Pessoa's – as Brazil's – instance towards investor-State dispute settlement is worth being separately depicted because historical accounts have wrongfully reduced Brazil to the Calvo Doctrine.

It is true that, as this paper has shown, the Project for a Code of Public International Law was inspired in the Calvo Doctrine. However, as it was intended as a contribution to Inter-American debates, it is probable that the Code was less a manifestation of Pessoa's individual instance than an attempt to conciliate recent views on International Law, especially those produced in Latin America.

After the publication of the Code in 1911, Pessoa's position as arbitrator, from 1916 to 1918, and as Judge of the PCIJ in the 1920s were more in line between one another, because in both capacities he advocated the possibility of internal or international arbitrations in which the government in debt would be considered as subject to private law, holding no special privileges as a political entity.

Such a view is shown when the award concerning The Rio de Janeiro Tramway, Light and Power Company Limited expressly altered the scope of Mayoral decisions, or when the award involving the São Paulo Railway Company interpreted the contract according to the conduct of the government. Just as administrative law did not supersede private law in such matter, in the Franco-Brazilian affair before the PCIJ no reference to national "public order" was made.

In any case, implicit respect to good faith in investor-State relations and an interpretation focused on the contractual obligations are relevant. Moreover, in the PCIJ, Pessoa expressly understood that direct arbitration would be appropriate, therefore encompassed the possibility of diplomatic protection.

In its brief and certainly only inaugural exercise in the History of International Law, this paper draws some conclusions on its object. Firstly, both internal arbitration – contemporarily known as commercial arbitration – and international State-to-State arbitration were fostered by the Brazilian Empire (1822-1889); as Carlos Calvo advocated his doctrine of internal remedies for foreign investors, Brazil was being recognized as an appointing authority in international arbitration.

Secondly, private arbitration would only find fierce legal obstacles in the third decade of the Republic

[48] PESSOA, Epitácio. *Dissenting opinion:* Brazilian loans. Available at: https://jusmundi.com/en/document/opinion/en-brazilian-loans-dissenting-opinion-by-m-pessoa-friday-12th-july-1929. Accessed on: 12 ago. 2022.

[49] "For the reasons set out above, in my opinion the Court, instead of disregarding its own jurisprudence and interfering with questions of private law at the risk of providing serious disputes in the future, should have declared that it had no jurisdiction and thus left France and Brazil free to have recourse to direct agreement or arbitration, which are the only appropriate methods of settling such disputes". PESSOA, Epitácio. *Dissenting opinion:* Brazilian loans. Available at: https://jusmundi.com/en/document/opinion/en-brazilian-loans-dissenting-opinion-by-m-pessoa-friday-12th-july-1929. Accessed on: 12 ago. 2022.

(1916), a few years after Brazilian representative to The Hague Peace Conference, Rui Barbosa, stepped away from the Drago Doctrine (1907).

Thirdly, even though the Calvo Doctrine was included in the Project for a Code of Public International Law (1911), drafted by Epitácio Pessoa, the activities of one of Brazil's most prominent international jurists as investment arbitrator and as international Judge indicate that such doctrine was not encompassed.

It is clear that neither Brazil nor Latin America have opposed to arbitration as a peaceful alternative to war in international dispute settlement. It is also true that the countries of the region shared a common resistance to commercial arbitration in the 20th century and a common openness to it in the wake of the 21st.

But whereas the Calvo Doctrine and the Drago Doctrine permeated Latin American foreign policy between late 19th century and early 20th, Brazil has not adhered to it, as its resistance to contemporary investor-State dispute settlement is inspired in constitutional restraints, most probably due to the nationalist legacy of Getúlio Vargas and too far from Epitácio Pessoa's.

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