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What is Brazil Bringing to the Table? Dispute Prevention and Resolution under the Brazilian Agreements on Cooperation and Facilitation of Investments (ACFI)

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For a long time, Brazil remained one of the few main economies without foreign investment agreements – in the 1990s, 14 Bilateral Investment Treaties (“BITs”) were signed, but never ratified.

This landscape began to change in 2015, with the emergence of the model Agreement on Cooperation and Facilitation of Investments (“ACFI”), promoted by the Brazilian government as an alternative to the “traditional” BITs.

Up to now, Brazil has signed ACFIs with seven countries (Mozambique, Angola, Malawi, Mexico, Colombia, Chile and Peru) and entered into a Protocol on Cooperation and Facilitation of Investments (“PCFI”) with its Mercosur partners.

One of the main features that sets the ACFIs apart from the traditional BITs model is the absence of an Investor-State dispute resolution mechanism. With a view to promote foreign investment without sacrificing regulatory autonomy, the ACFI model focuses on dispute prevention and bilateral governance, limiting arbitration to the State-to-State level. But with investors not having what is allegedly their most effective guarantee, this question resounds: what is Brazil bringing to the table?

Foreign investment-related claims under the ACFIs are addressed in two different manners: (i) a dispute prevention mechanism, that can be accessed by both investors and States, and (ii) a dispute settlement phase, comprising a State-to-State arbitration.

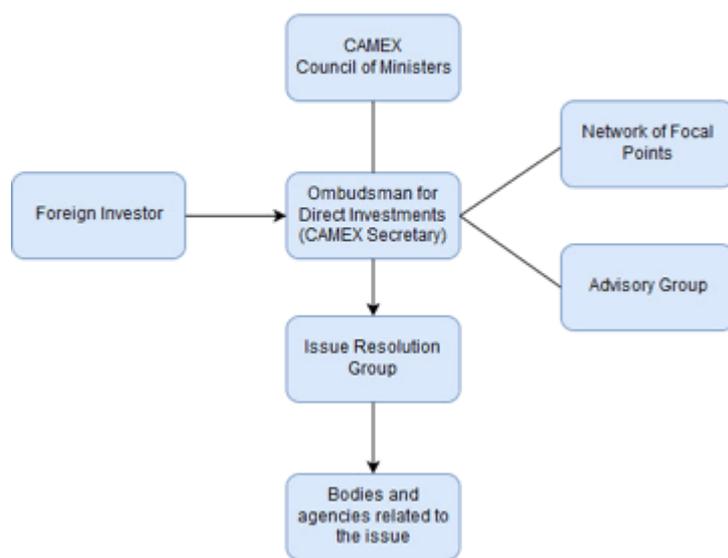
In terms of the procedural aspects, the ACFIs already signed vary slightly from each other. Although the dispute prevention provisions remained practically the same, the dispute settlement mechanisms became increasingly complex and detailed.

The ACFIs provide for the creation of two institutional arrangements in order to maximize the chances of dispute prevention being successful: (i) the Focal Point or ombudsman, within each government, which addresses concerns of investors; and (ii) the Joint Committee, with representatives of the governments, responsible for the administration of the agreement.

The Focal Point was established in Brazil by Decree n. 8.863/2016 and is named Ombudsman for Direct Investments (“OID”). It was included in the structure of the Foreign Commerce Chamber (“CAMEX”), an inter-ministerial body in charge of the trade and investment policy in Brazil.

Its main functions are addressing foreign investors’ concerns (orientation and problem-solving) and engaging in a permanent discussion with the other Focal Points and with the Joint Committee. The Ombudsman procedure, that can only be accessed by ACFI-covered investors, has been further detailed by CAMEX Regulation n. 12/2017, as summarized in the Flowchart 1 below.

THE BRAZILIAN OMBUDSMAN FOR DIRECT INVESTMENT



In brief, whenever a foreign investor is concerned with a measure that affects its investment in the host-State, it may submit a request for consultation to the Ombudsman Secretariat. The Advisory Group and the Network of Focal Points will aid the CAMEX Secretary in assisting, providing information and guiding the investors. The CAMEX Secretary may establish an Issue Resolution Group to analyze the issue presented by the investor. In a final report, the OID will provide a summary of the issue and possible proposals and recommendations formulated by the Issue Resolution Group.

The second institution for dispute prevention is the Joint Committee. In general terms, parties request a meeting to the Joint Committee in which their concerns will be presented and they may engage in negotiation procedures. After 60 days of the request to establish the meeting, the Joint Committee will issue a report with its recommendation concerning the dispute.

If the parties are not satisfied with the Joint Committee report, they can move on to the dispute settlement phase, in which the parties can resort to State-to-State arbitration – or to the Mercosur dispute settlement mechanisms in the PCFI.

However, while the first ACFIs limit themselves to providing for the option to arbitrate, the complexity of the arbitration procedure increased incrementally in the subsequent ACFIs. The most recent ones foresee the possibility of ad hoc and institutional arbitrations, prescribing deadlines, form of nomination of the arbitrators, requests for clarifications and enforcement.

Three of the ACFIs have already been ratified by the Brazilian Parliament, but are not yet in force because the promulgation decrees by the Brazilian President and ratification by the other State-

Parties are still pending. Since December 2016, Brazil and India have been negotiating an investment agreement.

The exclusion of investor-State arbitration may seem disappointing to those who feel uncomfortable with the States having the power to decide which disputes are worth taking to arbitration and interfering in the conduct of the case. However, the ACFIs have the advantage of bringing a new and potentially useful tool for both Brazilian companies investing abroad and foreign investors in Brazil. These agreements also have the benefit of re-introducing Brazil – after a long absence – in the discussion of the international legal framework for foreign investments.

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