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Cooperation and Facilitation Investment Agreements in Brazil: The Path for Host State Development

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Brazil has recently executed two new Cooperation and Facilitation Investment Agreements ("CFIAs") with the Federal Democratic Republic of Ethiopia on April 11, 2018; and with the Republic of Suriname on May 2, 2018. These are, respectively, the 7th and the 8th CFIAs that Brazil has executed since 2015 (the former ones were executed with Chile, Colombia, Malawi, Mexico, Angola and Mozambique). Following this same protection model, Brazil has also entered into two treaties with investment provisions: the Economic and Trade Expansion Agreement with Peru and the Intra-Mercosur Investment Facilitation Protocol. So far, the CFIA executed with Angola is the only one in force.

CFIAs are the model investment agreement proposed by Brazil to regulate the relationship between foreign investors and host countries. Focusing on cooperation and facilitation of investment flows, the CFIAs do not resemble traditional bilateral investment treaties ("BITs"). CFIAs regulate direct investment flows from the investor of a party into the territory of the other party; however, differently from BITs, they seek a greater balance between investment protection and host state's development agenda. To accomplish it, CFIAs bring new wording to old traditional clauses inserted into BITs (such as National Treatment, Most-favored-nation Treatment, and Expropriation), introduce new safeguard clauses to regulate investments and investors' behavior (as corporate social responsibility clauses and provisions to protect the environment, labor affairs and public health), as well as rely on a dispute resolution mechanism far from investor-state arbitration model widely included in BITs. The CFIAs executed with Ethiopia and Suriname have followed this same path.

When addressing National Treatment and Most-favored-nation Treatment, the referred CFIAs expressly state that "*treatment accorded in like circumstances*" shall be interpreted according to the totality of circumstances, including – and, therefore, excepting – whether the relevant treatment distinguishes between investors or investments on the basis of legitimate public welfare objectives (articles 5.2 and 6.3 of the Ethiopian CFIA; articles 5.4 and 6.4 of the Surinamese CFIA). As to Expropriation, both CFIAs also explicitly acknowledge that only direct expropriation – where an investment is nationalized or otherwise directly expropriated through formal transfer

of title or ownership rights – is under protection, excluding the well-known creeping expropriation so dreaded by host countries when adopting public policies to protect the environment, public health and other areas of public concern (article 7.5 of both Ethiopian CFIA and Surinamese CFIA).

Besides this new face to old clauses, CFIAs also contain dispositions which historically have been alien to investment treaties. Both Ethiopian and Surinamese CFIAs include articles on corporate social responsibility (article 14 and 15, respectively), stating that investors and their investment shall strive to achieve the highest possible level of contribution to the sustainable development of the host state and the local community, by means of a high degree of socially responsible practices on a voluntary basis. This approach is in line with modern investment agreements, which have included more socially responsible clauses – as can be noted, for example, from the investment chapter included in the Comprehensive and Progressive Agreement for Trans-Pacific Partnership; although this trend is recent, it has gained considerable relevance in the last years. The CFIAs also include articles which overtly acknowledge that host county is free to adopt, maintain and enforce any measure deemed appropriate to ensure the foreign investment is carried out according to national labor, environmental and health legislation (article 16 of the Ethiopian CFIA; article 17 of the Surinamese CFIA).

The aforementioned clauses evidence that the CFIAs executed with Ethiopia and Suriname follow the previous ones negotiated by Brazil within the last three years, consolidating a new model to regulate foreign investment. Investor protection is still a major concern in this Brazilian model; creating and maintaining favorable conditions for investments is an express objective included in the preamble, and several clauses intended to protecting investments are also part of the agreements (such as Compensation for Losses, Transparency, Transfers, among others). However, it comes accompanied by provisions intended to protect and, indeed, to promote the host country's development agenda.

This is even more evident when the dispute resolution mechanism is taken into account. The agreements executed with Ethiopia and Suriname address foreign investment-related claims as previous CFIAs: there is an initial dispute prevention phase, and, if no agreement is reached, the aggrieved party may initiate a state-to-state arbitration. Both choices may be seen as positive steps towards host state's development.

A high emphasis is placed in the amicable settlement of disputes. Two institutional arrangements created in the context of CFIAs – the Joint Committee and the Focal Point (or, Ombudsman) – are intended to address any issues or differences concerning investments in order to avoid litigation (articles 17 and 18 of the Ethiopian CFIA; articles 18 and 19 of the Surinamese CFIA). In case the dispute is not avoided, a settlement phase is initiated. The parties shall engage into negotiation proceedings and, by the end of a 60-day deadline, the Joint Committee shall issue a report with its recommendation; the parties, then, may decide whether to adopt it or not (article 23 of the Ethiopian CFIA; article 24 of the Surinamese CFIA). If no agreement is reached and the parties decide not to follow the Joint Committee's report, then arbitration

state-to-state may be initiated (article 24 of the Ethiopian CFIA; article 25 of the Surinamese CFIA).

The settlement approach, followed by this type of arbitration, may be seen as favorable to host state protection. No litigation is initiated unless several steps are taken in order to avoid the dispute itself. Both parties are invited to discuss their arguments and reach a settlement, while a preliminary report on the case, with the conclusions of the Joint Committee on their claims, is issued and made available. The fact both parties may discuss their arguments and even be provided with a first analysis of the case may avoid a lengthy and costly litigation, leading to an amicable settlement.

Even if this is not the case, and parties decide to proceed with litigation, it will not constitute an investor-state arbitration; this system has long been criticized as biased towards the investor's protection, with little regard to host states' interests. State-to-state arbitration, as proposed in the CFIAs, may be an alternative to reach a greater balance between investor and host state. The aggrieved investor shall persuade its home state that a damage was caused to the investment, so it may initiate an arbitration against the host state. It would be expected that only robust claims would proceed under this situation, avoiding adventurous litigators.

Brazil seems to be promoting the model agreement it has launched a few years ago, which is focused in finding a greater balance between investment protection and the development agenda of the host state. From new wording to old clauses, to the inclusion of provisions which were alien to traditional investment agreements, including new dispute resolution mechanisms, the fact is that CFIAs have come to provide a new meaning to the relationship between foreign direct investment and host state development. Nonetheless, we still have to wait whether these agreements will result in concrete facts.

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