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The Brazilian Cooperation and Facilitation Investment Agreement: Are Foreign Investors Protected?

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Brazil is an interesting actor in the field of investment-related treaties. For example, Brazil has been a major player when it comes to foreign direct investment ("FDI") outflows. This was not always the case. Brazilian outward foreign direct investment ("OFDI") was minor throughout the 1990s. However, after economic and institutional reforms, Brazilian companies became increasingly internationalized, and during the first decade of the 2000s they had almost doubled their investments abroad. Brazilian OFDI stock in 2000-2007 multiplied by 2.5 and grew at the same pace as the world OFDI stock overall. In addition, Brazil has traditionally also been one of the top destinations for inflow of FDI.

Notwithstanding this, Brazil's approach to investment regulation has historically been different from other countries. In this post, we will focus on the elements of investment agreements implemented by Brazil in recent years. We will analyze the provisions of these agreements and their actual impacts in relation to the protection of foreign investors. We observe that, on the one hand, there are strengths in terms of investment facilitation, but, on the other hand, that these agreements are still fragile and incomplete when it comes to dispute resolution mechanisms in particular.

Brazil's Unique Approach to Investment Protection and Facilitation

Brazil was never part of the global web of traditional Bilateral Investment Treaties ("BITs"). This exclusion has proved a double-edged sword in that it indeed ensured less exposure to investors' claims, but meanwhile (or incidentally) it has deprived foreign investors from international investment law protections in Brazil. Depriving investors of such protection may even have deterred investors from investing in Brazil. Moreover, the reciprocity in international investment agreements (IIAs) means that Brazilian investors have equally been deprived from such protection abroad. Following significant pressure from the private sector to protect Brazilian investments abroad, the Brazilian Government decided that it was time for an innovative draft of a model

investment agreement. Brazil issued a new model in 2015, namely the Cooperation and Facilitation Investment Agreement ("CFIA"). Brazil and Mozambique signed the first CFIA on 30 March 2015. Brazil has also signed BITs with Chile (2015), Morocco (2019), UAE (2019) and most recently with India (2020). The Brazil-Mexico BIT and Angola-Brazil BIT have already entered into force.

The CFIA model does not have much in common with traditional BITs. Brazil is instead exploring a different, less travelled, path. Given its origins from the private sector to protect outward investment, the model agreement focuses on the promotion and facilitation of investment, rather than on the investors' protection. It also concentrates on dispute prevention rather than resolution. On these lines, Brazil did not include Investor-State Dispute Settlement ("ISDS") in the CFIA.

The main concern we have with the CFIA is whether it provides adequate and sufficient guarantees to foreign investors. This post explores whether the focus on "conflict prevention" as opposed to "dispute resolution" represents a shift in the protection of foreign investments. We observe that Brazilian IIAs indeed provide good alternatives for the prevention of conflicts. That said, foreign investors (and Brazilian investors) are left with conflict prevention as a default protection. This is not sufficient! Parties need to protect their interests if things do not go well and in case the collaborative spirit has died. Then, investors will need to contract for this protection with investor-state contracts. The stronger the party, the more protection it will get. The CFIA does not (like BITs/MITs) protect SMEs by providing a robust default protection system. We would expect that multinational corporations with greater bargaining power than SMEs will probably negotiate contracts encompassing better-quality investor protections, waiver of immunities, and international arbitration. Incidentally, this may ultimately unravel competition.

Mechanisms of Dispute Prevention and Dispute Resolution in the CFIA

As indicated above, the CFIA relies on dispute prevention to maintain the strategic interest of the parties. The model agreement relies on dispute avoidance, primarily negotiation between the contracting parties in an attempt to resolve any disputes arising among them. In other words, the CFIA favors "dialogue" between the investor and the host state before the conflict escalates. The Government relies on the mutual interest of the host state and the investor as a guarantee for consensual conflict resolution. This is the reason why the instrument focuses on dispute prevention rather than dispute resolution. Profitable investments are ones which are not tied up in conflict. This approach has long term strategic implications for the investors and the host state. It is clear to us, at least, that the long-term interest of both parties is protected if the investment continues to earn both parties' tangible benefits. They will benefit more if there are no conflicts or if conflicts are solved in a prompt and friendly

manner. All parties should therefore work towards dispute prevention and de-escalation. But the concern is what will happen if dispute prevention were to fail.

Another premise considered during the drafting of the CFIA is investment facilitation through a strong institutional governance model, which involves the establishment of two main government bodies. The Joint Committees, which are bodies made up by government representatives from all the parties to the CFIA and the Focal Points, also called *Ombudsman*, which works as a single window for investor. The Focal Point (Direct Investments Ombudsman) is already in place in Brazil and its goal is to answer enquires about investments and to address the excessive Brazilian bureaucracy.

The provisions relating to the facilitation of investment can help the investor solve daily matters, bureaucratic hurdles, issues involving the concession of licenses and other documents, or even more serious issues, as long as they are in their early stages. A must for any investor. The objective of these cooperation and facilitation units is to open an easily accessible window between the foreign investor and a government entity with the autonomy to find and implement a given solution. Joint Committees, Focal Points and Thematic Agendas are the various pillars that constitute what is described as the institutional governance in the CFIA model.

Pursuant to Article 5-1 of Brazil-Angola CFIA, the contracting parties shall set up the Focal Point. Its goal is to reduce tension among stakeholders during their investment project in order to avoid its escalation into a legal dispute. We believe that the main advantage of such focal point is to provide foreign investors with a single defined place where they can have any issues settled, without having to rely on different agencies which handle varied matters such as local legislation issues or license grants or conflicts with administrative bodies. The *Ombudsman* institute is also a promising innovation in terms of solving small and medium-sized conflicts. Indeed, mediation through Focal Points are effective methods of conflict avoidance. This is, in our view, one of the highlights of the Brazilian investment agreements.

If the problem presented to the Focal Point cannot be solved, investors must seek the aid of their country's government authorities so their disputes can be submitted to the Joint Committees established by both signatories' countries. Their main goals are to monitor the implementation of the CFIA's provisions, share investment opportunities, and use diplomacy to prevent disputes. In addition, they can render interpretative decisions that are binding for future State vs State arbitration and manage the CFIA compliance. The main role of Joint Committees is to amicably solve any controversies regarding the investment. The main objective of these Dispute Prevention Mechanisms pursuant to the CFIA Preamble and defined objective is to avoid as much as possible the judicialization of disputes between investors and host countries through dialogue and alternative proposals for solutions. At this point, it is not certain who will actually

benefit from the intervention of Joint Committees. Again, SMEs will be the least likely to benefit and might be put at a disadvantage. Overall, it would appear that we are going back to the times of diplomatic protection.

Are Foreign Investors Protected?

While the innovative approach of dispute prevention is welcome, the fact that Brazil chose not to incorporate ISDS in the CFIA will leave the investors without a reliable mechanism of dispute resolution.

If a dispute or disagreement cannot be resolved through the governmental bodies, such as the Joint Committee or the Focal Points, the case may be taken to commercial arbitration and not ISDS. Unfortunately for the foreign investor, the CFIA does only contemplate state-state arbitration thus leaving the foreign investors in the hands of member states again, depending on diplomacy and governmental influence. This approach ends up repoliticizing investor-state disputes when ICSID's greatest goal was exactly the opposite i.e., the depotilization of international disputes.

Should the investor's home country fail to bring the case to state-state arbitration, the alternatives may be:

1. to file the claim before domestic courts; and
2. to file the claim before arbitral tribunals pursuant to arbitration clause contained in the underlying contract. Brazil is currently an arbitration-friendly jurisdiction. However, only contractual clauses can be discussed in such a case.

Conclusions

Although the Brazilian model discussed above has a modern and imaginative approach with regard to conflict prevention and the promotion and facilitation of investments, it is known that prevention and reconciliation are not always possible in real life. When drafting these investment agreements, Brazil lacked a more direct and courageous approach. It is like the top is missing.

If the drafters of these instruments rely so much on their dispute prevention mechanisms, they could have provided investors with a decent alternative, such as ISDS, should they fail to resolve their disputes with the proposed dispute prevention system. Cooling-off periods and multi-tier clauses are common features. Brazil has obviously chosen to explicitly avoid and do away with investor recourse to ISDS. This is very much in line with the current adverse trend witnessed at the international level

whereby some states do entirely avoid ISDS or impose significant limitations on the regime. At the end of the day, this means that foreign investors will have to structure their investment pursuant to a contract with an efficient dispute resolution clause. As seen, this again puts SMEs at disadvantage, as they are the ones who mainly benefits from the default international investment law and ISDS world-order. Multinational companies with a good bargaining power should be able to defend their interests more efficiently with investor-state contracts. This gulf between SMEs and multinational companies must be closed down significantly to ensure that all investors have equal protection.

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