Kluwer Arbitration Blog

Brazil’s New Investment Treaties: Outside Looking … Out?

Pedro Martini (University of California, Berkeley) · Tuesday, June 16th, 2015

On May 26, 2015, Brazil signed its third investment treaty of 2015 with Mexico. Given the agreements previously signed with Angola and Mozambique, this certainly comes as a confirmation of a new Brazilian attitude towards the regulation of foreign investment. The instrument mostly follows the same model used for the previous two: a Cooperation and Facilitation Investment Agreement (“CFIA”).

The CFIA model and the two treaties have been briefly analyzed elsewhere by outstanding practitioners. But one may still wonder: what exactly are these CFIAs and how do they fit in both the Brazilian and the international contexts? CFIAs may represent more than they initially appear to.

In its press releases the Brazilian Ministry of Foreign Affairs referred to the model as means of promoting investment “through governmental dialogue.” The CFIAs would also ensure “disclosure of business opportunities, exchange of information about regulations and an adequate mechanism for the prevention and, eventually, settlement of disputes.”

From a substantive point of view, it is important to note that there is no mention of “protection of investments.” Nevertheless, the CFIAs include provisions that *inter alia* prohibit direct expropriation (Art. 9), ensure national and most-favored-nation treatment (Art. 11), and require regulatory transparency (Art. 13) and the observance of undertakings (Art. 11). On the other hand, the treaty creates an obligation on the investors and the investments to attempt (i.e. an obligation of means/“best efforts”) to observe principles of corporate social responsibility (Art. 12).

From a procedural point of view, Art. 15 of the CFIAs appears to adopt three different steps for the settlement of any “issue of interest of an investor.” First, an ombudsmen (Art. 5) and a Joint Committee (Art. 4) appointed by the Parties will act as mediators of sorts to amicably settle any dispute. Second, if amicable settlement fails, any Party may bring the dispute to the attention of the Joint Committee. Third, if the dispute is not settled within the Joint Committee, “the Parties may [“*poderão*”] resort to interstate arbitration mechanisms” (Art. 15.6). The Mozambique CFIA further states that the Parties may resort to such mechanisms “if the Parties deem it convenient.”

In short: (a) any dispute is considered a State-State dispute; (b) it is highly doubtful that there is binding consent to arbitration – certainly not in the Mozambique CFIA; and (c) there are no further provisions on the details of how the State-State arbitration should take place – no choice of rules nor a method for appointing a tribunal. On the other hand, the CFIA signed with Mexico is clearer, certainly incorporating consent and providing for a method of appointing the arbitral tribunal (in that treaty, Art. 19).

The Brazilian Context

Why has Brazil, a long-standing objector to the current international investment system, decided to dip its toes in the water now? There may certainly be interests related to the current political unrest in Brazil, with which this author does not wish to bore its reader – even if it could just as well be transformed into a Netflix series. But more than that, it seems that Brazil is starting to see itself as a capital exporting country that needs to seek better conditions for its investors abroad.

After more than 15 years since its last signed but not ratified BIT, Brazil finally decided to resume its investment policies, starting precisely with countries in which Brazilian multinationals such as Vale and Odebrecht have been undertaking major projects. The Mexican CFIA follows closely behind, amidst a nearly US$4 Billion oil project in which State-owned Brazilian National Development Bank (BNDES) was the biggest funder.

But Brazil's first flirtation with investment treaties in years is still a very shy one. If Brazil's true intention is to provide a safer framework for foreign investors, it seems the result would be the same as that of trying to "block the sun with a sieve." The absence of, in particular, more effective means of enforcing the CFIA's few treaty standards does not bring much to the table.

A cautious approach in the Mexican CFIA may at least be explained (if not justified), by considering the fact that Mexico is one of Brazil's largest capital exporters, in particular due to América Móvil group's investment in the Brazilian telecommunications sector. But this is not so regarding Mozambique and Angola.

Interestingly, these CFIAs without an investor-state dispute settlement ("ISDS") provision come at a time when Brazil has finally buried any doubts relating to the participation of the Public Administration in arbitral proceedings. On the same date of the signature of the Brazil-Mexico CFIA, the Brazilian Arbitration Law was amended (Law No. 13.129) to expressly clarify this issue. If the new Brazilian treaties are not as advantageous as they could be for investors, this amendment may have brought certainty and security to foreigners or nationals that are parties to State contracts containing arbitration clauses.

Notwithstanding the above, CFIAs seem to be exactly what their name indicates: an agreement for the cooperation and facilitation – not the protection – of investments.

The International Context

Perhaps Brazil's approach may be explained by how the Brazilian CFIAs fit in the current international investment law system.

The first question one may ask in this regard is whether CFIAs are BITs. Although they are bilateral and regulate investments, it does not seem to be the case. This is particularly so if one considers BITs to be treaties for the promotion and protection of investments. Indeed, this view seems to be shared by UNCTAD, who classified CFIAs as international investment agreements ("IIAs"), but not as BITs.

Now, why Brazil chose this particular model. The fact that the choice comes in the middle of heated debates over the legitimacy of ISDS, in particular in the middle of negotiations of treaties such as the Transatlantic Trade and Investment Partnership ("TTIP"), does not go amiss.

Criticism of the current international investment system has included the absence of obligations imposed on investors, as well as the alleged excessive protection of the investors' interests in detriment of those of States, even the home State. This may certainly explain why CFIAs do not provide for fair and equitable treatment, but nevertheless contain a provision for corporate social responsibility – even if in the latter case the intent may be frustrated by the adoption of an obligation of means/best efforts.

Moreover, the critics add that the current system allows frivolous claims and also limits States' power to develop policies and regulate public interest issues. For these reasons, the drafters of TTIP have considered the implementation of a filter for claims, through which the State parties would be able to decide which claims would go to ISDS or not. This seems to be precisely one of the reasons behind the creation of the Joint Committee in the CFIAs – with the exception that claims would still go to State-State arbitration and not ISDS. All these elements point towards a possible intention on the part of States to regain control over the foreign investment aspect of international economic relationships.

If States are looking to regain (or in the case of Brazil, to retain) a certain amount of control over disputes between their investors and other States, what does this indicate about the current system of investment protection and ISDS? If investors have been, so far, mostly in control of their rights and disputes, how can the current relationship between investor, home State and host State be described?

The debate over the nature of investors' rights under investment treaties is not new and was brought to light in Zachary Douglas' seminal analysis. Joining the debate, it seems to me that investors are the true holders of investment treaty rights. As a rule, IIAs containing ISDS grant investors independent substantive rights, in addition to means of invoking State responsibility for the enforcement of such rights. This opinion is substantially based on one of the most prominent purposes of IIAs with ISDS: distancing the home State from the investment relationship between foreign investor and host State. This distance is conditioned by two distinct roles of States, namely as treaty/regulating parties and disputing/regulated parties. That is to say that, as treaty/regulating parties, States are still collectively the masters of the IIA. But as disputing/regulated parties, States are not able to interfere with the relationship between investors and host States, in particular with the rights that are independently granted to investors by the IIA.

Such a rule would certainly be subjected to exceptions whenever the language of the IIA indicates otherwise. And, in my view, that is exactly the case of CFIAs. The features described above, especially the requirement that the dispute be brought by the State Parties on behalf of investors, indicate that the CFIAs, as opposed to IIAs with ISDS are still based on the classic system of diplomatic protection. And the inevitable conclusion is that CFIAs do not grant independent rights to investors of the Parties.

Whether this is a sign that rule and exception will gradually change places… only the future will tell.

To make sure you do not miss out on regular updates from the Kluwer Arbitration Blog, please subscribe here. To submit a proposal for a blog post, please consult our Editorial Guidelines.

This entry was posted on Tuesday, June 16th, 2015 at 12:05 am and is filed under Brazil, Investment agreements, Investment Arbitration, Investment protection, ISDS, Recognition and enforcement of arbitral award
You can follow any responses to this entry through the Comments (RSS) feed. You can skip to the end and leave a response. Pinging is currently not allowed.