

The Cooperation and Facilitation Investment Agreement

In the last decades, many efforts were undertaken to create a new and comprehensive international regulatory framework for foreign investment. Due to the lack of understanding between capital exporting and importing countries, Bilateral Investment Treaties (BITs) emerged as an alternative.

Most of the BITs in force were influenced by a model conceived during the late 80's by the Multilateral Investment Guarantee Agency (MIGA), one of the bodies of the World Bank Group. Those treaties are characterized by specific protection provisions, which aim to provide foreign investors with greater guarantees in host countries, for example, through indirect expropriation mechanisms and investor-state dispute settlement.

According to the United Nations Conference on Trade and Development (UNCTAD), throughout the 90's, the number of signed BITs increased significantly. There are currently over 2860 existing agreements of such nature. The unexpected surge verified during that period encouraged many critical analyses on the limitations of BITs, including: restrictions to policy space; most favored treatment of foreign investors in relation to national investors; high economic and political costs of arbitral procedures; imposition of high compensations; and the lack of transparency in arbitral decisions.

In the wake of this substantial number of treaties, by the end of 2013, according to the UNCTAD, there were 568 publically known cases of Investor State disputes, and the number of States appearing as defendants in at least one dispute totaled 98. Three quarters of these cases were filed against developing and transition economies. Latin American and Caribbean countries account for the largest share (29%).

Excessive litigation resulting from BITs is considered to affect not only the business environment and the effort to attract investments by developing countries, but also the State's regulatory capacity to pursue public interest needs through legitimate policies in the fields of health, environment, security, etc. Avoiding disputes is, thus, a better option both to attract and to maintain investments.

In addition, given the fact that signed BITs between developed countries hardly exist, one can note that, in the last few years, the negative experience of many countries unveiled the limitations of this type of agreement, and particularly the inadequacy of the investor-State dispute settlement mechanism. In light of this, countries like South Africa, Indonesia, India, Australia, among many others, are currently reviewing and even terminating their BITs.

In this context, the Brazilian Government drafted a new investment treaty model based on a positive approach aimed at improving institutional cooperation and facilitating bilateral investments. The Cooperation and Facilitation Investment Agreement (CFIA) is based on a thorough review of international organizations' studies, consultations with the Brazilian private sector, and international benchmarking.

The CFIA, which had its main elements approved in Brazil by the Ministers of the Chamber of Foreign Trade (CAMEX), differs from traditional BITs, and seeks to meet, in a concrete, pragmatic and proactive manner, investors' needs, without neglecting development strategies and policy space for host countries.

The CFIA is based in 3 pillars: a) risk mitigation; b) institutional governance; and c) thematic agendas for investment cooperation and facilitation.

The Agreement contains a set of tools to mitigate investment risks and to avoid situations that may lead to formal disputes between the parties. Accordingly, the text lays down guarantees of non-discrimination, such as national treatment and most favored nation principles, transparency provisions, as well as specific conditions for direct expropriation, compensation in case of conflicts and the free transfer of funds.

Additionally, the CFIA establishes Focal Points (Ombudsmen) in each Party of the agreement and a Joint Committee. These bodies can be considered as the institutional core of the agreement as they contribute to the achievement of commitments and to strengthen dialogue between Parties.

Focal Points are designed to serve as an important communication and support channel between investors and the host country and to improve investment conditions in the latter. In Brazil, CAMEX, an inter-ministerial body linked to the Presidency, has been designated as the Ombudsman of the Agreement.

The Joint Committee, composed of government representatives of both parties, is responsible for monitoring the implementation of the Agreement, sharing investment opportunities, coordinating cooperation agendas and, especially, preventing disputes and solving possible disagreements related to bilateral investments in an amicable manner.

The CFIA also focuses on pursuing working agendas in areas that can potentially stimulate an attractive business environment. These agendas may cover a vast array of specific issues identified by the Parties as relevant for both the improvement of investment conditions and the resolution of investors' punctual challenges, always in accordance with national development strategies.

Hence, the CFIA represents a dynamic instrument that leaves space for the gradual construction of specific commitments between the Parties, to be detailed in annexes or additional protocols to the agreement. Possible topics of interest include, e.g., transfer of funds, business visas, technical and environmental regulations, institutional cooperation for sectorial regulation and other forms of cooperation in which there are common interests.

As for the interests of host countries, the Agreement also encourages the adoption of social, environmental and corporate responsibility standards by investors and their investments. By encouraging a high degree of social

responsible business conduct, the CFIA contributes to enhance the quality of investments and to boost sustainable development, benefiting local communities and host States.

Furthermore, while investor-State Dispute Settlement is the backbone of traditional BITs, the Brazilian model favors mechanisms to prevent disputes based on dialogue and bilateral consultations, prior to the initiation of a State-State arbitration procedure. Such mechanisms call for the direct and continuous involvement of the above mentioned Focal Points and Joint Committee, which are in charge of previously assessing specific queries presented by the Parties.

In summary, the CFIA consists of an innovative alternative to traditional investment agreements that seeks to overcome BITs' limitations by fostering a more dynamic and long term relation between Parties. The model recognizes the essential role of governments in encouraging a favorable environment for investment, taking into full consideration the interests of the private sector along with the Parties' development needs.

As for the negotiation process, given the horizontal and multidisciplinary aspects related to investments and the intention to reach an understanding with its partners, the Brazilian government considers important and desirable to establish a dialogue involving, as much as possible, the various competent governmental bodies.

In the case of Brazil, a technical negotiating team of representatives from the Ministry of External Relations, the Ministry of Development, Industry and Foreign Trade, the Ministry of Finance, CAMEX and the Central Bank has been established.

In 2015 Brazil signed CFIA's with Mozambique, Angola, Malawi Mexico, Colombia and Chile. There are ongoing negotiations with partners in Africa - South Africa, Algeria, Malawi, Morocco and Tunisia- and South America - Peru.