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SYMPOSIUM ON THE BRICS APPROACH TO THE INVESTMENT TREATY SYSTEM

BREAKING THE BIT MOLD: BRAZIL'S PIONEERING APPROACH TO INVESTMENT AGREEMENTS

Henrique Choer Moraes and Felipe Hees***

Brazil only recently joined the collection of states that have adopted international investment agreements (IIAs), but in doing so it developed a noteworthy approach in the form of the Cooperation and Facilitation Investment Agreement (CFIA).[1] In this essay, we explore the characteristics and merits of this particular treaty model, making three points: First, the CFIA exhibits unique features that set it apart from traditional bilateral investment treaties (BITs), including the state-to-state management of investment relations and an emphasis on investment *facilitation* rather than investment *protection*. Second, the CFIA displays a degree of "interoperability" that has made it possible for Brazilian partners to sign these agreements while simultaneously holding BIT portfolios, despite significant differences between the two approaches. Finally, one of the CFIA's key features—that of investment facilitation—is a promising basis for reform in multilateral settings such as the World Trade Organization (WTO). In short, we believe that the CFIA offers an innovative and attractive option for states looking to supplement or revise traditional BITs, both bilaterally and multilaterally.

A Unique Investment Agreement

The Brazilian investment agreement breaks the BIT mold in several ways: First, it shifts the focus from investment *protection* to its *facilitation*. Second, it embeds investment guarantees within a broader regulatory context that takes other public policy objectives into account. Third, because the model agreement has emerged in—yet differs from—a world where the BIT format prevails, it is designed to maintain its own normative independence from staple BIT provisions. And finally, the model agreement operates as a classic piece of public international law in that it treats investment relations as horizontal interactions between the treaty parties. We briefly examine these elements in turn.

First, the Brazilian approach changes the conversation, by placing investment facilitation at its center. The idea is simply to make it easier for foreign investors to navigate domestic legal and regulatory hurdles. Two provisions illustrate how this works: (1) The model agreement promotes the establishment of *national focal points* (ombudspersons) whose mandate is to support and facilitate investors' interactions with local authorities, including by suggesting amendments to national legislation. Focal points also play a role in the early management of complaints that might emerge, as they are mandated to, among other tasks, assess "suggestions and complaints received from

* *Diplomat, Ministry of Foreign Affairs, Brazil, PhD candidate, Katholieke Universiteit Leuven, Belgium. The views and opinions expressed in this essay are the sole responsibility of the authors and do not necessarily reflect the positions of the government of Brazil.*

** *Diplomat, Ministry of Foreign Affairs, Brazil.*

[1] Cooperation and Facilitation Investment Agreement Between the Federative Republic of Brazil and ____ [hereinafter Brazilian Model].

the other treaty Party or investors of the other Party and recommend, as appropriate, actions to improve the investment environment."[2] (2) Each CFIA signed so far sets out investment facilitation and cooperation *agendas* in areas where further work may improve the investment environment, such as visa processing for business people.[3] The agendas vary depending on each investment relationship, enabling customization for each agreement.

These provisions differ from BIT provisions on investment protection. The traditional BIT approach has been to confer rights—such as the right to fair and equitable treatment—that ultimately enable investors to seek redress against the host state in cases of alleged breach. In contrast, the CFIA's investment facilitation provisions are fundamentally about streamlining the domestic regulatory context in which investors must operate. The BITs were conceived as a means of compensating for institutional shortcomings in the protection of investments in host states, while the Brazilian model focuses precisely on rectifying those shortcomings.

An historical explanation lies behind the Brazilian option. Brazil is the only Group of Twenty (G20) member never to have ratified a traditional BIT. This unique position resulted from a virtually unprecedented event in the history of international investment: just as most developing countries were flocking to sign BITs, the Brazilian government, faced with vocal and effective opposition in Congress, terminated its ratification processes for the fourteen BITs it had signed in the 1990s.[4] The Brazilian lawmakers' criticisms of the BITs in the early 2000s largely resemble the debates taking place elsewhere today: the provisions on investor-state dispute settlement (ISDS) were considered discriminatory against national investors, rules on indirect expropriation were seen as a possible hindrance to the adoption of public policies, and little or no causal link was identified between adopting BITs and attracting foreign direct investment.[5]

Even without any BIT in force, Brazil did not become a pariah destination for foreign investment. Quite the contrary: Brazil has consistently ranked among the top destinations globally.[6] Thus, unlike many countries, Brazil has been less concerned about attracting new investment than increasing the outward flow of investments *from* Brazil. The CFIA was designed in large part for this purpose.[7] The new template emerged from close consultation between the Brazilian government and the private sector, which sought support in setting up shop in third countries. In other words, the CFIA resulted in part from an urgent call for investment facilitation on the part of Brazilian investors.

Second, the CFIA innovates by situating foreign investment within a broader regulatory context. The agreement acknowledges the state's right to regulate in areas such as health, labor, and the environment[8] and helps to combat corruption, money laundering, and terrorism financing relating to investments by, for instance, exempting signatories from protecting "investments made with capital or assets of illicit origin."[9] Regarding investors, the CFIAs

[2] *Id.*, art. 18.4 (c).

[3] *See, e.g.*, Investment Cooperation and Facilitation Agreement Between the Federative Republic of Brazil and the Republic of Malawi ann. I(b), June 25, 2015.

[4] Daniela Campello & Leany Barreiro Lemos, *The Non-Ratification of Bilateral Investment Treaties in Brazil: A Story of Conflict in a Land of Cooperation*, 22 Rev. Int'l Pol. Econ. 1055 (2015).

[5] Martino Maggetti & Henrique Choer Moraes, *The Policy-Making of Investment Treaties in Brazil: Policy Learning in the Context of Late Adoption*, *in* Learning in Public Policy: Analysis, Modes and Outcomes 295 (Claire Dunlop et al. eds., 2018).

[6] In 2017, Brazil was the fourth-ranked destination for foreign direct investment in the world. *See* UN Conference on Trade & Dev., World Investment Report 2018 – Investment and New Industrial Policies.

[7] Michelle Ratton Sanchez Badin & Fabio Morosini, *Navigating Between Resistance and Conformity with the International Investment Regime: The Brazilian Agreements on Cooperation and Facilitation of Investments (ACFIs)*, *in* Reconceptualizing International Investment Law from the Global South 218, 248 (Fabio Morosini & Michelle Ratton Sanchez Badin eds., 2017).

[8] Brazilian Model, *supra* note 1, art. 16.

[9] *Id.*, art. 15.

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include provisions on corporate social responsibility.[10] Unlike traditional BITs, which often evade the question of investor obligations,[11] recent CFIAs also subject investors to obligations that cover compliance with the domestic law of the host state.[12]

Third, the CFIA avoids language that might jeopardize its normative independence from traditional BITs. It omits basic BIT standards of investment protection, such as fair and equitable treatment, indirect expropriation, and full protection and security. In fact, the Brazilian agreements explicitly exclude these provisions,[13] recognizing that their use might encourage arbitrators to transplant BIT norms into the CFIA context.

Finally, the Brazilian model differs from BITs in that it is firmly embedded within public international law. Although commentators recognize that investment rules have recently moved closer to the public (international) law end of the spectrum,[14] most investment agreements are unlikely ever to fall neatly into a single classification, given their hybrid character. Yet this longstanding definitional challenge does not apply to the Brazilian model. Its purpose is ultimately to facilitate foreign investment by private parties, but the CFIA approaches investment relations as state-to-state interactions.

This point emerges most clearly in the CFIA's provisions on investment disputes, which do not incorporate ISDS mechanisms. Rather than accord investors *locus standi* before arbitrators, the agreement provides a forum for dispute prevention in the form of "Joint Committees," where investors and other stakeholders have an opportunity to voice concerns and resolve issues arising from a given investment.[15] For those cases where friction continues to escalate, the CFIA provides only for interstate arbitration.

Some might argue that placing the authority to proceed to third-party dispute settlement in the hands of states will politicize cases in a way that disserves the purposes of international investment law. Yet there is reason to question this view. For one, the accumulated experience of investment arbitration offers strong evidence that traditional BITs are themselves politicized, both conceptually and in practice.[16] Moreover, the relevant features of the CFIA are not so radically dissimilar from those of the WTO, where disputes are subject to (diplomatic) consultations followed by state-to-state dispute settlement. One does not often hear that the absence of *locus standi* for affected private parties has politicized the WTO system.[17]

Some might also criticize the CFIA for undermining the uniformity of international investment law. At present, there are nearly three thousand BITs,[18] and these "establish rather uniform general principles that order the

[10] *Id.*, art. 14.

[11] Jonathan Bonnitcha et al., The Political Economy of the Investment Treaty Regime 14 (2017).

[12] MERCOSUR Protocol on Cooperation and Facilitation of Investments art. 13, Apr. 4, 2017. Pursuant to Article 23(3)(c), occasional breaches by the investor may be raised in a report prepared in the process of dispute prevention.

[13] *See, e.g.*, *id.*, art. 4(3).

[14] *See, e.g.,* Gus Van Harten, Investment Treaty Arbitration and Public Law 4 (2007); Reassertion of Control Over the Investment Treaty Regime (Andreas Kulick ed., 2017); Anthea Roberts, *Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System*, 107 AJIL 45, 58 (2013).

[15] Brazilian Model, *supra* note 1, art. 17.

[16] For a recent account with evidence-based arguments supporting this claim, see Geoffrey Gertz et al., *Legalization, Diplomacy, and Development: Do Investment Treaties De-politicize Investment Disputes?*, 107 World Dev. 239 (2018); Joachim Pohl, *Societal Benefits and Costs of International Investment Agreements: A Critical Review of Aspects and Available Empirical Evidence* 50–54 (OECD Working Papers on Int'l Inv. 2018).

[17] Similarity to the WTO system is also apparent in the purpose of dispute settlement under the CFIAs, which is to bring those measures deemed inconsistent with the agreement into conformity with it.

[18] The most recent number as of August 2018 is 2,952 BITs signed. *See* UNCTAD Investment Policy Hub.

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relations between foreign investors and host States in a relatively uniform manner."[19] But it is not clear that this uniformity is necessary or even desirable. Indeed, the claim in favor of the existence of a single investment "regime" seems valid only to the extent that states continue to sign agreements incorporating similar commitments. The fact that one particular template—the BIT—has gained global acceptance is perhaps best explained by path dependence,[20] rather than by merit or tacit recognition of overriding principles against innovation. The CFIA shows that investment law permits such innovation, unhampered by structural—or "constitutional"—restraints.

Interoperability and the Diffusion of the Brazilian Model of Investment Agreement

Although the design of the CFIA owes a great deal to the particular Brazilian experience with the international investment regime, the agreement is attractive because it displays a degree of interoperability with a varied range of investment policy options. This versatility is chiefly due to the CFIA's investment facilitation rules, which stand apart from the topics that are typically controversial in the context of investment regime reform. For example, investment facilitation measures do not conflict with the options advocated by states with respect to investment dispute settlement mechanisms, standards of protection, or the right to regulate, among other issues.[21] In committing to adopt investment facilitation measures, such as domestic legislation that is more friendly to foreign investment, a signatory state does not diminish the rights it agreed to accord investors from a third state under a BIT. The two approaches to investment rule-making are certainly different, but they can coexist within the portfolio of any given state.

This interoperability seems to have contributed to the growing use of the CFIA. The first agreement, with Angola, entered into force in October 2017. Brazil has signed nine additional CFIAs, on the bilateral and regional levels, with the following eleven states (in chronological order): Mozambique, Malawi, Chile, Colombia, Mexico, Peru, Brazil's partners in MERCOSUR (Argentina, Paraguay, and Uruguay), Ethiopia, and Suriname. Rather than suggesting "rule maker–rule taker" dynamics, this development seems to indicate that the CFIA's approach to investment lawmaking has intrinsic appeal. For one, some of the states have signed a CFIA even while maintaining BIT portfolios—a testament to interoperability. In addition, Argentina, Paraguay, and Uruguay have agreed to manage investment relations in accordance with the CFIA blueprint not only in their bilateral relations with Brazil, but also amongst themselves under the MERCOSUR Protocol on Investment Cooperation and Facilitation.[22]

From this perspective, the emergence of the CFIA offers insights into the evolution of IIA reform. The recent developments demonstrate that investment rules can cover a broader array of areas than is typical under BITs. States looking for options to reform their investment treaties might focus on provisions so far not incorporated into BITs, such as those on investment facilitation, and thus contribute to the increasing pluralism of international investment rules. The Brazilian experience with the CFIA also shows that states can sign up to innovative rules without necessarily detracting from their commitments under BITs. And it suggests that state portfolios of investment agreements might become more diversified over time, including BITs with some states and other types of investment agreements with partners that are willing to explore alternatives.

[19] Stephan W. Schill, The Multilateralization of International Investment Law 16 (2009).

[20] Wolfgang Alschner, *The Impact of Investment Arbitration on Investment Treaty Design: Myth Versus Reality*, 42 Yale J. Int'l L. 1, 51 (2017).

[21] Anthea Roberts, *Investment Treaties: The Reform Matrix*, 112 AJIL Unbound 191 (2018).

[22] Facundo Pérez Aznar & Henrique Choer Moraes, *The MERCOSUR Protocol on Investment Cooperation and Facilitation: Regionalizing an Innovative Approach to Investment Agreements*, EJIL: *TALK!* (Sept. 12, 2017).

Investment Facilitation: A Promising Option for Multilateral Reform

Finally, the CFIA is noteworthy because its innovations could serve as the basis for multilateral reforms in the future. During the 2017 WTO Buenos Aires Ministerial Conference, seventy members endorsed a Joint Ministerial Statement on Investment Facilitation for Development.[23] In doing so, these states called for the WTO to "identify and develop the elements of a framework for facilitating foreign direct investments that would: improve the transparency and predictability of investment measures; streamline and speed up administrative procedures and requirements; and enhance … relations with relevant stakeholders, including dispute prevention."[24] The Joint Statement is the culmination of an active and broad debate that draws on technical work promoted particularly by the UN Conference on Trade and Development[25] and the G20,[26] but it hints at areas of considerable disagreement elsewhere. For example, the Joint Statement made clear that WTO "discussions shall not address market access, investment protection, and Investor-State Dispute Settlement."[27] In contrast, the UN Commission on International Trade Law has encountered formidable difficulties in advancing discussions on ISDS reform.[28]

To stimulate further discussion, Brazil in January 2018 submitted a proposal that injects certain elements emerging from its treaty-making experience with the CFIAs into the proceedings, such as the concept of national focal points.[29] Although debates on one issue do not preclude or undermine deliberations on the other, it appears so far that investment facilitation is less divisive than the topic of ISDS reform. Indeed, preliminary reactions from other states have been positive, despite the novelty of the approach. The dual role of the national focal point—assisting investors and acting as ombudspersons of the national regulatory environment—has attracted significant interest, and the provision on corporate social responsibility has also been welcome in the discussions.

Conclusion

At a moment when some states are decreasing their exposure to the BIT-dominated international investment system—or even exiting from it—Brazil decided to introduce its own model, the CFIA. As we have explained, this model innovates in a variety of ways, including by introducing the important concept of investment facilitation, and Brazil's recent experience suggests that other states are willing to embrace the CFIA alongside BITs. This shows that there is room for innovation in international investment lawmaking. Even though the CFIA distances itself from BITs, it by no means challenges investor protection. Nor is it mutually incompatible with the BIT model. It is simply different. In this sense, it offers an alternative to the BIT *within the system*, and thus helps to produce greater pluralism in the universe of IIAs.[30]

[23] World Trade Org., Joint Ministerial Statement on Investment Facilitation for Development, WTO Doc. WT/MIN(17)/59 (Dec. 13, 2017).

[24] *Id.* at para. 4.

[25] UN Conference on Trade & Dev., UNCTAD Global Action Menu for Investment Facilitation, UN Doc. TD/B/63/CRP.2 (Sept. 16, 2016).

[26] G20 Guiding Principles for Global Investment Policymaking, G20 Trade Ministers Meeting Statement, Shanghai, ann. III (July 9–10, 2016).

[27] World Trade Org., *supra* note 23, at para. 4.

[28] Anthea Roberts, *UNCITRAL and ISDS Reform: Not Business as Usual*, EJIL: *TALK!* (Dec. 11, 2017).

[29] World Trade Org., Structured Discussions on Investment Facilitation, Communication from Brazil, WTO Doc. JOB/GC/169 (Feb. 1, 2018).

[30] Anthea Roberts, *UNCITRAL and ISDS Reform: Pluralism and the Plurilateral Investment Court*, EJIL: *TALK!* (Dec. 12, 2017).

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