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Strengthening multi-stakeholder cooperation in the international investment regime: The Brazilian model*

by

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There is an increasing understanding that investment promotion and protection should not be an end in itself, but should be a means to advancing the Sustainable Development Goals (SDGs). The question is how the international investment regime can better serve this ultimate purpose. First, there is no clear evidence of a robust relationship between international investment agreements and FDI and, also, that these treaties help to promote sustainable FDI. Second, investor-state dispute settlement (ISDS) has been described as reducing host countries' regulatory powers and producing regulatory chill.

The current reform agenda focuses on investor protection and ISDS only. Various proposals have been made, including the creation of a permanent investment court.¹ While some of these changes could improve the regime, marginally at least, meaningful reform requires taking a holistic approach to the relationship between FDI and the SDGs. It should deal with the benefits, costs and risks of all parties involved, i.e., not only foreign investors and states but also local communities and indigenous peoples. Also, it should strike a better balance between cooperation, the rule of law and dispute avoidance and settlement.²

Despite its imperfections, Brazil's approach with the investment cooperation and facilitation treaties suggests institutional reforms based on strengthened cooperation.³ At least two features of Brazil's treaties use cooperation to promote FDI: investment facilitation through state-state cooperation and dispute resolution.

Brazil's agreements aim to facilitate investment by enhancing cooperation through the creation of an institutional framework to promote cooperation amongst all the state parties involved, including through the crafting of thematic agendas. The objective is not only to increase FDI flows, but also to define the type of investment that the parties want to facilitate and the conditions that will govern the investment projects. The private sector is meant to be part of this process, promoting a private-public dialogue. The definition of "private sector," moreover,

could be interpreted broadly; arguably such dialogues should include not only foreign investors and host countries but also civil society, local communities and indigenous peoples.

The thematic agendas are a key policy tool of Brazil's investment agreements. They are a product of bilateral negotiations between the state parties and respond to their domestic demands. The content of these agendas remains subject to recurrent negotiations, allowing governments to tailor their priorities and balance the benefits, costs and risks of foreign investment. The parties are encouraged to expand or detail the thematic agendas, by negotiating special commitments, additional schedules and other supplementary agreements. Also, the thematic agendas could help developing countries put forward concerns related to domestic spillovers and linkages, technology transfer, capacity building, and other development-oriented matters.

In line with the importance of cooperation, Brazil's agreements provide mechanisms for risk mitigation and dispute prevention. They comprise diplomatic and cooperative mechanisms for implementing, overseeing and enforcing treaty obligations. The agreements create two types of institutions for this task: the Joint Committee and the Focal Points (or ombudspersons). The Joint Committee operates at the inter-state level and is composed of government representatives from both parties. This Committee is expected to meet at least annually. The Focal Points operate at the intra-state level, to provide government assistance to investors from the other party on a regular basis. Each party to the agreement must create or designate an existing governmental body, within their jurisdiction, to serve as Focal Point for investors.

Furthermore, Brazil's agreements discourage adversarial litigation. The Joint Committee and the Focal Point not only promote the regular exchange of information and prevent disputes but, if a dispute arises, they provide support to manage the dispute-settlement process through consultations, negotiations and mediation. These mechanisms function as dispute prevention mechanisms and seek to reduce the number of investor claims against host countries. For example, besides monitoring and discussing the implementation of the related agreement, the Joint Committee works as a mechanism to facilitate the settlement of investment disputes between the parties. Taking matters to the Joint Committee is a mandatory step before the parties are able to reach for state-to-state arbitration. The agreements do not provide for investor-state arbitration.

The rule of law and dispute avoidance and settlement may not be enough to turn FDI into a means to the realization of the SDGs. Multi-stake dialogue and cooperation should also be a central aspect of any institutional design. In this regard, the Brazilian model, at least in theory, scores better than most existing treaties and reform proposals.

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¹ Stephan Schill and Geraldo Vidigal, “Investment dispute settlement à la carte within a multilateral institution: A path forward for the UNCITRAL process?,” *Columbia FDI Perspectives*, No. 248, March 25, 2019.

² Nicolás M. Perrone, “The governance of foreign investment at a crossroad: is an overlapping consensus the way forward?,” *Global Jurist*, vol. 15 (2015), pp. 1-28.

³ Michelle Sanchez Badin and Fabio Morosini, “Navigating between resistance and conformity with the global investment regime: The new Brazilian agreements on cooperation and facilitation of investment”, in Fabio Morosini and Michelle Sanchez Badin, eds., *Reconceptualizing International Investment Law from the Global South* (Cambridge: Cambridge University Press, 2017), pp. 188-217.

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