The Brazilian Approach to Cooperation and Facilitation of Investments Agreements – A South-South Perspective

“We cannot be an island of prosperity surrounded by a sea of poverty and social injustice”

–Lula da Silva

Abstract: The international investment protection regime, based essentially in the traditional model of bilateral investment treaties (BIT), allows investors to initiate direct arbitration against the host States. In Brazil’s point of view, this represents a limitation on the political spaces of the States and the imposition of unequal costs on developing countries, which are the largest recipients of foreign investment. Based on this perception and driven by its new role as both an recipient and an increasingly active participant in contributing to foreign investments, Brazil has developed a new model of agreement aimed to protect the investor without threatening the sovereignty of the State. The most innovative aspect of the new approach is the focus on cooperation rather than on litigation, as this article shall present.

The Brazilian and Indian SSC Approaches

From the Brazilian point of view, South-South cooperation can be understood as the horizontal exchange of knowledge and experiences originating from cooperating developing countries1 (Brazilian Cooperation Agency). It is based on the sharing of experiences learned by countries that face the same kind of challenges in their development process. South
South Cooperation focus on the development of capabilities and on knowledge generation and expansion to promote local autonomy and quality structural changes.

The importance attached to South South Cooperation (SSC) as an external relations instrument has increased significantly in Brazil over the last twenty years, especially from 2003 to 2015, when South South relations became a priority for Brazilian foreign policy. The move towards the South had a very pragmatic rather than ideological reason: acting together as a group with other developing countries eases the pressure from powerful countries, counterbalancing their power and giving developing countries some bargaining space. The same rationality rests on Brazil’s preference for multilateral arrangements.

Cooperation among people for the progress of mankind, rather than a political choice, is an obligation under the Brazilian Constitution. Brazil’s international relations also rely on the constitutional principles of national independence, prevalence of human rights, non-intervention, equality among States, defense of peace, peaceful settlement of conflicts, repudiation of terrorism and racism and granting of political asylum.

In this sense, Brazil has been cooperating with Latin American and the Caribbean, Africa, the Middle East and some Asian countries. Special attention is devoted to Latin America and the Community of Portuguese-Speaking Countries (CPLP). The cooperation projects with these southern countries are mainly focused on areas such as agriculture, education, justice, health, environment, IT, urban development, biofuels and professional training (Cerqueira and Santos).

Like Brazil, India attaches great importance to relations with the global South. For India, South South Cooperation is a commitment to development in the partner country, based on the principles of non-conditionality, mutual benefit, respect for sovereignty, national ownership, horizontality and demand driven actions.

Although the basic principles of South South Cooperation are shared, the modalities of actions and the methodologies differ from country to country. From the Indian perspective, the modalities can be categorized in capacity building, grants, technology, concessional finance and trade and investments, forming the modern development compact approach.

**Cooperation on Trade and Investments**

The modality Trade and Investments, under the development compact approach, relates to duty free trade preference, trade permits, trade facilitation, business facilitation, trade promotion and trade services, regulatory capacity, investment funds, development of supply chains, regional and sub-regional trade agreements and tax preference do FDI, among others (Chaturvedi, 2015).

Brazilian cooperation efforts have been embracing foreign trade and investments in various ways. For instance, Brazil has signed a large number of commercial agreements with developing countries as an individual country (i.e. Suriname, Venezuela, Mexico) or with its MERCOSUR partners (i.e. Egypt, India, Palestine, Cuba, Colombia, SACU).

MERCOSUR itself represents a major integration effort among Brazil, Argentina, Paraguay and Uruguay. Created in 1991, the South American bloc is today a central instrument for cooperation and development in the region.

Brazil is making progress with its BRICS partners, in the implementation of the BRICS Action Agenda on Economic and Trade. Likewise, the BRICS Contact Group on Economic and Trade Issues (CGETI) is putting efforts into promoting collaboration in areas as trade, investments, e-commerce, MSMEs, regulation and intellectual property rights.

**The Brazilian Model of Investment Agreements**

With regard to investments, Brazil has made a major contribution to debate on the reforming of the current international investment protection
regime, unable to meet the needs of developing countries, which are mainly investment import States.

In 2015, Brazil submitted to its southern partners a proposal for a new model of investment agreements. The proposal came from Brazil’s perception that the Bilateral Investment Treaties (BIT) - which aim to regulate the treatment an investor receives in a foreign country - are based on specific investor protection clauses, as the investor-state dispute settlement that allows foreign investors to initiate international arbitration against recipient States.

In fact, BITs carry heavy costs and represent limits on political space, especially for developing countries. According UNCTAD, 41 per cent of the 647 dispute settlements cases against 98 states concluded by July 2019 were against Latin American countries (USCTAD, 2019). The burden imposed on the developing countries by lack of transparency on court decisions and imposition of heavy penalties on the States represents an obstacle for investment attraction.

It is worth mentioning that most of the traditional BIT was signed between developed countries and developing countries, on a North-South basis, resulting in arrangements that reflect the unfair balance of bargain power between countries of unequal levels of development. It is noteworthy that BIT between North countries are almost nonexistent.

In fact, Brazil had signed fourteen BITs during the 1990 decade. However, only six were sent to the Congress, and none of them was ratified, as a result of strong political opposition to their terms. Brazil became the only major economy with no agreement regarding foreign investment protection (Fernandes and Fiorati, 2015).

Nevertheless, in the early 2010s, Brazilian companies were profoundly increasing their investments abroad, especially in Latin America and Africa. The growth of this flow urged the creation of a risk mitigation and investment facilitation mechanism that could contemplate both Brazil’s position as a recipient and an exporter of investments, while taking into account the domestic needs and the priority given by Brazilian foreign policy to the global south.

In response to this demand, in 2012 the Brazilian Chamber of Foreign Trade (Camex) established a strategic technical group to elaborate a proposal to foster investments and trade. The group came up with the first model of a Cooperation and Facilitation Investments Agreement (CFIA).

The model was developed with the support of major international organisations of the investments field and was based on benchmarking studies and extensive consultations to the Brazilian private sector, which at the time had already some experience as investment exporters. Thus, the Brazilian proposition offered a new approach, embracing both the interests of states and investors, in a more balanced manner and without threatening State sovereignty (Morosini and Bandin, 2015)

Form the investor perspective, it offered transparency, non-discrimination, most favored nation and national treatments clauses, while maintaining the same protection offered by the BITs, as clear expropriation rules.

As for the States, the CFIA respect their development strategies and their regulatory policies. The preamble of the text incorporates legislative autonomy and public policy space, focusing on reciprocal benefits for the parties. In addition, the text precludes dispute settlement initiated directly by the investor against the State.

The CFIA aims to prevent disputes to arise. In this regard, it creates a Joint Committee composed by government members, where the parties can share investment opportunities, common agendas and cooperation strategies to foster investments and prevent disputes.

It also proposes a focal point, or Ombudsman, responsible for centralising foreign investors questions and concerns regarding investments. The idea was inspired by the Foreign Investment Ombudsman created by the Korean Investment Act to provide government assistance to investors.

The main innovation brought by the model is the focus on cooperation rather than litigation.
Indeed, the model ratifies the need of establishing a partnership to ensure broad mutual and reciprocal benefits for the parties. A specific section of the CFIA is dedicated to cooperation. The section requires the Joint Committee to develop working cooperation agendas comprising areas of mutual interest, always reflecting the development strategies of each part. Additional protocols can be attached to the Agreements, giving room for a gradual construction of cooperation initiatives and turning the CFIA into living documents.

The working agendas on Annex 1 of the CFIA between Brazil and Angola (ACFI Brazil-Angola, 2015), for instance, include programs on money transfers, visa procedures, technical and environmental regulation, sectorial legislation and institutional cooperation. With the working agendas, the Agreements are dynamic instruments of cooperation.

**Conclusion**

Incentives for cooperation between developing countries have gained strength in recent years as the aid flows from developed countries were reduced. The strengthening of SSC has also resulted from the growing realisation that common problems require shared solutions, thus the exchange of experiences and knowledge works as an important tool for promoting national development.

Developing countries have found in South-South cooperation a way to obtain mutual benefits through solidarity and respecting the principles of unconditionality, mutual benefit, respect for sovereignty, national property, horizontality and demand-driven actions.

The Brazilian CFIA model arose in this context as an option for Southern countries for their strategies on investment promotion and attraction in response to the current international regime, which represents an unbalanced balance of power in favor of the North.

The network of CFIA signed by Brazil is in continuous expansion. The first ones were signed on March 30th and April 1st, 2015 with Mozambique and Angola, and later that year with Mexico. To date, thirteen agreements have been signed with sixteen countries (Angola, Argentina, Chile, Colombia, Ecuador, Ethiopia, Malawi, Mexico, Morocco, Mozambique, Paraguay, Peru, Suriname, Guyana, United Arab Emirates and Uruguay). In 2019 alone, three new agreements were signed, the last being the CFIA Brazil-Ecuador, signed on September 25, 2019.

**Endnotes**

As defined by the Brazilian Cooperation Agency.

Five Modalities of Development Compact. Shaping South South cooperation

Assessment template, norms and plurality in SSC. A consultation note.

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**References**


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