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The Brazilian model of Investment Agreements and Socio-environmental Safeguards

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BRICS Policy Center Centro de Estudos e Pesquisas - BRICS

SOCIO ENVIRONMENTAL PLATFORM

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Summary

Abstract

With the purpose of contributing to expanding transnational investment flows, Brazil signed, in 2015, a series of Cooperation and Investment Facilitation Agreements (CIFAs) with African and Latin American countries. Among its provisions, the CIFAs feature distinctive characteristics in terms of direct (and indirect) expropriation, corporate social responsibility, dispute settlement mechanisms and national treatment clauses - ultimately, aiming to provide greater legal certainty for investors. However, civil society organizations have warned against the potential impact of this new model of investment agreements on the autonomy of states to establish regulations in the public interest. As such, this Quarterly Brief seeks to analyze similarities and differences between the new Brazilian CIFAs and traditional bilateral investment agreements - as well as to evaluate them in light of alternative frameworks, elaborated by civil society networks, aimed at balancing investment promotion with human and environmental rights protection.

Key-words

Cooperation and Investment Facilitation Agreements, Brazilian investments, Internationalization of Brazilian companies, Corporate social resposability, Investment regulation.

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1. Introduction

In March 30 2015, in Maputo, after extensive consultations with the private sector, the Brazilian government signed, with the government of Mozambique, the first of a series of new bilateral agreements aimed at “enhancing the internationalization of Brazilian companies by offering greater legal certainty for investors in signatory countries” (Portal Brasil, 2015). The model of the Cooperation and Investment Facilitation Agreements was elaborated in partnership with representatives of the Federation of Industries of the State of São Paulo (FIESP), the National Industry Confederation (CNI) and large enterprises in Brazil, in response to demands for measures aimed at protecting investments from potentially harmful state actions and regulations. Currently, Brazil is a signatory to bilateral CIFAs with seven partners in Africa and Latin America - as well as a Cooperation and Investment Facilitation Protocol recently signed within Mercosur - and considers expanding the list by signing a similar agreement with India (MRE, 2016; Equipe Pontes, 2017).

The adoption of this regulatory innovation also responds to a trend of exponential growth in Brazilian investments abroad and the internationalization of Brazilian companies. According to data from the Brazilian Central Bank, between 2001 and 2013 the stock of Brazilian investments abroad increased in six times, reaching the figure of US$ 295.4 billion in 2013 (Borges, 2015). Furthermore, until the adoption of the CIFAs, Brazil was remarked for its ability to attract large amounts of foreign investments even without bilateral agreements in force. Between 1994 and 1997, Brazil signed 14 bilateral investment treaties (BITs) - none of which were ratified, though, due to concerns in Congress about possible effects on the state`s freedom to regulate on critical issues, such as labor standards and environmental licensing (Picard, 2015). Despite the absence of BITs in force, Brazil has emerged in the 21st century as the main recipient of foreign investments in Latin America, having received the fourth largest FDI flow worldwide in 2011, as seen in the table below:

Table 01: Foreign Direct Investment Inward Flows Worldwide (US$ 1000)

	2008		2011		2014		2016	
1º	U.S.	318,449	European Union	424,946	China	268,097	European Union	538,949
2º	European Union	317,123	China	280,072	European Union	251,666	U.S.	468,330
3º	China	171,535	U.S.	242,155	U.S.	212,324	China	170,557
4º	Russia	75,856	**Brazil**	**96,152**	**Brazil**	**73,086**	**Brazil**	**57,933**
5º	Canada	61,520	Australia	58,907	Canada	59,137	India	44,458
6º	Australia	46,687	Canada	39,667	Australia	39,613	Australia	42,107
7º	**Brazil**	**45,058**	Russia	36,868	India	34,576	Russia	37,176

Source: *Own elaboration, based on OECD (2018).*

The paradoxical decision to inaugurate a new model of investment agreements, therefore, must be understood in light not only of the recent pattern in Brazilian inward and outward FDI, but also of the interests of the specific groups and sectors involved in its elaboration. Despite the benefits announced by the government in terms of investment attraction and promotion, civil society organizations have demonstrated concern over CIFA`s negative effect on the freedom of states to formulate public policies (*policy space*), besides concerns regarding the effectiveness of the corporate social responsibility commitments established by the agreements.

As such, it is crucial to analyze the balance between protection to human/environmental rights and protection to investors proposed by the new Brazilian CIFAs. In this sense, this Quarterly Brief seeks, on the one hand, to analyze the central characteristics of CIFAs and variations in relation to traditional bilateral investment treaties and, on the other hand, compare CIFA`s provisions with those proposed in alternative frameworks for responsible investment regulation advocated by civil society actors, such as the document "*Hacia la construction de un marco legal alternativo a los acuerdos internacionales de inversion*".

2. The Cooperation and Investment Facilitation Agreements (CIFAs)

Throughout 2015, Brazil signed six CIFAs with partners in Africa and Latin America - Angola, Mozambique, Malawi, Mexico, Chile and Colombia - followed by the signature, in 2016, of an Economic and Trade Expansion Agreement with Peru (including a chapter on investments following CIFA`s model) and a Cooperation and Investment Facilitation Protocol within Mercosur, in April 2017. Announced as regulatory innovations, the agreements feature substantive variations in relation to traditional bilateral investment treaties, particularly concerning clauses on indirect expropriation, corporate social responsibility, dispute settlement, most favored nation and national treatment – with uncertain impact from the point of view of human rights and environment protection. Also, although the agreements follow an overall common pattern, it is possible to identify variations between the provisions of each agreement in specific topics.

Expropriation

Internationally recognized as an inherent right of the state, the expropriation of properties located within national jurisdiction - belonging to nationals or foreigners - is considered legitimate as long as it meets four basic requirements: **(i)** motivation by public interest, **(ii)** nondiscrimination among investors, **(iii)** observance of due legal process, **(iv)** payment of compensation to the owner. The possibility of expropriation, though, constitutes element of legal uncertainty to investors, who face the risk of incurring in losses due to states' decision to expropriate their investments – representing a natural disincentive to capital attraction and promotion. As such, BITs traditionally include clauses which provide compensation in cases of expropriation, including specific rules on its due amount and international transfer rights (Fernandes & Fiorati, 2015).

The case of the CIFAs is not different: in all seven signed agreements, the right of states to expropriate in the public interest is reiterated – provided that the four requirements are met – and criteria are established for investor compensation. Although the agreements vary in the terminology employed to refer to the act of expropriating – while the CIFAs with Mozambique, Angola and Malawi use "nationalization", the agreements with Colombia and Chile employ "dispossession" – there is little variation in the content itself of the chapters. Indeed, all seven CIFAs reiterate the duty of states to compensate for investments in their "market value during expropriation date", a basic demand from investors. On the other hand, only the agreements signed with Colombia, Malawi and Peru direct the parts to cooperate and exchange information about their respective legal systems in the field of investment expropriation.

All seven CIFAs reiterate the duty of states to compensate for investments in their "market value during expropriation date", a basic demand from investors.

However, it is currently understood that the "threat" of direct expropriation is losing importance in face of the proliferation of cases of indirect expropriation – situations in which the action of the state, even without involving direct transfer of property rights, results in the devaluation of investments or is detrimental to investors' control (Fernandes & Fioriati, 2015). Measures labeled as indirect expropriation may include regulations on taxes, trade, labor, the environment, or even related to health and human rights. There is not, however, a precise and consensual definition of measures classified as indirect expropriation; hence it is crucial that investment treaties include specifications on the matter in order to direct possible disputes (Nikièma, 2012).

One of the criticized aspects of the new CIFAs is precisely the absence, in most signed agreements, of specifications about cases of indirect expropriation – which, according to Picard (2013), "may have left a door open for investors to make claims on indirect expropriation". The ambiguity concerning the boundaries of indirect expropriation may significantly harm the policy space of states through the so-called *chilling effect*: when a state refrains from adopting regulations of public interest due to the anticipation of the payment of compensation to potentially harmed investors (Fernandes & Fiorati, 2015). As such, CIFAs differ from traditional BIT by abstaining from specifying indirect expropriation, with potentially detrimental effects on the capacity of the state to regulate in behalf of the public interest.

Corporate Social Responsibility

The alignment between corporate practices and human rights/environmental commitments is a controversial topic and often subject to criticism from civil society actors, particularly concerning the observance of labor rights and the formation of sustainable value chains. As such, the inclusion of clauses on corporate socio-environmental responsibility in investment agreements is a basic demand from civil society organizations (Borges, 2015).

In the case of Brazilian CIFAs, it is possible to observe positive developments in this respect, although subject to substantive limitations. All seven signed agreements, in their respective preambles, mention the importance of "promoting sustainable development (…), poverty reduction (..) and human development", therefore placing socio-environmental considerations in the "spirit of the treaty". Also, all seven agreements contain chapters about corporate social responsibility in which investors are encouraged to "respect environmental protection and sustainable development", "respect the internationally recognized human rights of those involved in corporate activities", "stimulate (…) cooperation with local communities" and "abstain from wrongful interference in local political activities".

However, Borges (2015) highlights the predominance of purely exhortative language in the agreements, which does not establish binding commitments for investors: in the field of corporate social responsibility, the agreements direct the parties to "*stimulate* companies (…) to apply sustainability and corporate social responsibility policies" and encourage investors to "perform their *best efforts*", "*strive* to achieve" and "*aspire* to observe" human rights and environmental protection norms.

As such, by not determining the compulsory nature of corporate social responsibility commitments, CIFAs deviate from international best practices and significantly weaken their capacity to hold companies and investors accountable for human and environmental rights violations.

Dispute Settlement Mechanisms

The past couple of decades has witnessed the unprecedented strengthening of supranational dispute settlement systems, in a movement driven by the demands of investors and "shaped in practice" by arbitrators, without active participation of state institutions (Bernasconi-Osterwalder, 2016). In this context, multiple international investment treaties have started to contemplate the possibility of investors initiating arbitration proceedings against states, claiming compensation for alleged breaches of legal guarantees.

However, more recently, numerous states have become increasingly concerned about the limitations of this system, particularly regarding the lack of transparency of arbitration proceedings, conflicts of interest among arbitrators – who often act as both arbitrators and company lawyers – and, mainly, the restrictions implied for states' freedom to formulate public policy.

In the Brazilian case, differently from other Latin American countries, it is possible to observe a traditional reluctance regarding the adoption of mechanisms allowing for investor-state dispute settlement. Brazil is one of the few emerging economies (besides India and South Africa) which has not signed the 1965 Washington Convention – which originated the International Center for Settlement of Investment Disputes (ICSID) – based on the argument that some of its clauses would contradict the national constitution (Biasutti & Panzini, 2016).

In the Brazilian case, it is possible to observe a traditional reluctance regarding the adoption of mechanisms allowing for investor-state dispute settlement.

Thus, the new model for Cooperation and Investment Facilitation Agreements features continuity with the reluctant Brazilian position, insofar as it establishes a governance structure focused on dispute prevention and which excludes the possibility of investor-state dispute settlement. Alternatively, arbitration is treated as a last resource and only allowed between states (Biasutti & Panzini, 2016).

As such, CIFAs' governance is conducted by two main mechanisms: On the one hand, a Joint Committee, composed by representatives of both parties, monitors received investments and identifies opportunities for business expansion. On the other hand, a Focal Point – a type of ombudsman based on similar South Korean agreements – serves as link between the state and investors, facilitating dialogue in order to prevent conflicts. If these channels prove insufficient to prevent a dispute and an investor wishes to proceed to arbitration, the agreements require, previously, a complete evaluation on the matter to conducted by the Joint Committee, responsible for submitting a report in 120 days. This governance model is considered overall dynamic, allowing for continuous adaptations, promoting cooperation between parties and the continuous identification of new investment opportunities (Morosi & Badin, 2016).

If, even after the evaluation process, the parties decide to proceed to arbitration, the seven signed CIFAs' feature variations between their provisions: While the Latin American agreements – with Mexico, Colombia, Chile and Peru – include criteria for the selection of the arbitration court and a code of conduct for arbitrators, the remaining CIFAs simply determine that "the parties may resort to arbitration mechanisms between states, to be developed by the Joint Committee". According to

Picard (2015), even in the Latin American CIFAs' case, the absence of specifications on the matter of dispute settlement may result in their inefficiency to ensure the impartiality of arbitrators and to prevent conflicts of interest.

CIFA's approach of favouring state-state arbitration and eliminating the possibility of investors initiating arbitration proceeding against states, besides sparking other countries' interest (Biazutti & Panzini), is recognized by civil society organizations as a positive step towards reducing excessive protections to investors (Borges, 2016). However, it is possible to observe some limitations in this model: According to Hamilton & Grando (2016), state involvement in investor demands may result in their politization or association to national foreign policy issues, with potential advantages or disadvantages to the investor. Furthermore, arbitration proceedings between states would be more susceptible to the influence of power asymmetries among the parties involved, particularly "if such agreements were to be signed with G8 countries" (Picard, 2015).

Most-Favoured-Nation and National Treatment

Finally, following the model of traditional BITs, Brazilian CIFAs include clauses on most-favoured-nation (MFN) and national treatment, according to which "each party (…) shall allow investors from the other party to establish investments and conduct businesses in conditions no less favourable than those available to other domestic or foreign investors". Such clauses, commonly found in trade agreements, respond to one of the main demands of foreign investors concerned with ensuring fair competition. Although all seven CIFAs include such clauses, the agreements also feature some exceptions, such as the possibility of "adopting and applying new legal requirements or restrictions to investors and their investments, as long as they are not discriminatory" – or, notably, the possibility of nullifying the application of national treatment clauses to tax issues regulated by other agreements.

It is important to highlight, furthermore, that all seven signed agreements reiterate the exception to the most-favoured-nation principle towards benefits negotiated in the field of regional integration: the CIFAs reiterate that states are not obliged to concede preferences to investors of another party deriving from "existing or future customs unions, common markets, free trade zones or international economic cooperation agreements that each party is a member of".

In conclusion, based on these traditional overall characteristic of bilateral investment treaties, it is possible to observe both similarities and differences between Brazilian CIFAs and traditional BITs: although CIFAs preserve investors` right to compensation in cases of direct expropriation, they create risks by not excluding the possibility of investors demanding compensation in cases of indirect expropriation. On the other hand, the main innovation of the agreements is the establishment of a governance structure aimed at preventing disputes, eliminating the possibility of investor-state arbitration. However, by employing exhortative and non-binding language in their corporate social responsibility commitments, CIFAs perpetuate criticism made by civil society organizations to the voluntary nature of international instruments aimed at compelling corporations to respect human and environmental rights in their activities.

As such, CIFAs respond only partially to the demands of civil society organizations and their criticism to traditional BITs, converging in some aspects with ideal frameworks for investment regulation developed in past years.

3. Alternative frameworks for international investment regulation

Considering the growing dissatisfaction, on the one hand, with the voluntary character of the international regime to promote corporate social responsibility and, on the other, with the proliferation of BITs considered excessively intrusive in relation to states' policy space, it is possible to observe the growing engagement of civil society organizations in initiatives aimed at establishing alternative legal frameworks for investment regulation. In this sense, it is worth noting the document "*Hacia la Construcción de un marco legal alternativo a los Acuerdos Internacionales de Inversión*", published by the Working Group on Investment in the Americas and supported by dozens of NGOs across the continent.

Directed to policymakers, the document aims to "propose control mechanisms in order to halt human rights violations committed by transnational companies" and to ensure foreign investment plays a positive role within a long term strategy to promote "sustainable and inclusive development" (Berrón & Brennan, 2014). As such, its central guidelines include **(i)** recovering states` ability to implement legislation and public policies", **(ii)** establishing a framework which prevents the concession of privileges to investors via weakening of national regulations (race-to-the-bottom), and **(iii)** ensuring the "real participation of civil society " in this process.

Furthermore, the document encourages states to nullify, denounce or radically renegotiate their BITs, according to specific guidelines on traditional investment agreements: In terms of expropriation, for example, the document proposes the complete elimination of the concept of indirect expropriation from international law, understood as a legitimate state action which does not require compensation for investors. On the other hand, the document reiterates states' obligation to compensate investors in cases of direct expropriation, when tangible goods are appropriated in the public interest (Berrón & Brennan, 2014).

In the field of dispute settlement, the alternative framework is clear in determining that "in any case it must be allowed that disputes between investors and states be submitted to arbitration, which would imply an infringement to (…) states' sovereignty" (Berrón & Brennan, 2014). Alternatively, the document proposes that disputes among investors must be settled only in national courts and according to the legal system of the country receiving investments. According to Echaide & Picard (2015), regional or international courts must represent a last resource, aimed at merely revising the due legal process – and only if ensuring the "equal access and participation of affected communities" in the proceedings. The document reiterates, additionally, individuals' right to appeal to international human rights courts in pursuit of reparation for violations committed by corporations.

Furthermore, the document advocates the elimination of retroactive effect clauses in investment agreements – which extend the applicability of agreements to investments conducted prior to their signature – as well as of extension clauses, which would effectively invalidate the denunciation of an agreement by extending its validity for up to 15 years after being denounced. In the case of Brazilian CIFAs, Picard (2015) praises the decision of not including traditional extension clauses: the agreements would remain in force for a maximum period of only one year after their denunciation. Furthermore, CIFAs restrict the notion of retroactive-effect, insofar as it does not apply to "matters already being judged elsewhere in the national sphere" (Picard, 2015).

Finally, concerning traditional most-favored-nation and national treatment clauses, the document recommends the complete elimination of such provisions from investment agreements: according to Echaide & Picard (2015), besides "paralyzing the design and implementation of public policies consistent with national priorities", such clauses would inhibit the possibility of mutual concessions within regional integration schemes, insofar as any benefits negotiated regionally would be automatically extended to BIT signatories from outside the region, according to the MFN clause. Nonetheless, Brazilian CIFAs preserve national treatment and most favored nation clauses – though restricted by the possibility of adopting "new regulations on national and foreign investors"; by the possibility of adopting "preferential regulations in the field of taxation"; and by the establishment of an explicit exception to the MFN principle when applied to benefits negotiated within regional integration schemes.

4. Conclusion

The new Brazilian model of CIFAs promotes investment facilitation as a key-element to stimulate capital flows and a more dynamic and long-term relationship between parties. However, it falls below expectations in terms of environmental responsibility, since it reaffirms the voluntary nature of corporate socio-environmental responsibility commitments. This point has received much criticism concerning the capacity of placing foreign investments within a long-term project for sustainable and inclusive development. However, the results of this model will depend on the nature of the investments effectively facilitated after the recent ratification of the CIFAs – which will display, in practice, the degree of balance promoted by the agreements between, on the one hand, human and environmental rights protection, and on the other, protection to investors.

The new Brazilian model of CIFAs promotes investment facilitation as a key-element to stimulate capital flows and a more dynamic and long-term relationship between parties.

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