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Possible reform of investor-State dispute settlement (ISDS)

Submission from the Government of Brazil

Note by the Secretariat

The present note transmits a submission received on 28 March 2019 from the Government of Brazil, in preparation for the thirty-eighth session of Working Group III.



Annex

Dispute prevention under the Brazilian Cooperation and Facilitation Agreement (CFIA) Model

I. Background

1. The Brazilian Cooperation and Facilitation Investment Agreement (CFIA) emerged in the context of increasing dissatisfaction with the traditional Bilateral Investment Treaties (BITs) containing ISDS provisions. The lack of evidence that BITs promote FDI, the controversial nature of investment agreements that unduly protect investors at the expense of the right of host countries to regulate in the public interest and the growing demand for a more balanced approach between investors and States reinforced Brazil's decision to develop a model that would overcome the shortcomings of traditional BITs.
2. The creation of Brazilian CFIA responds to a demand from the national private sector to provide for an alternative system based on dispute prevention. In extensive consultations with Brazilian multinational companies, the government realized that investors were more interested in the improvement of the institutional framework for investment with foreign governments than in after-the-fact remedies that would provoke long and expensive litigation.
3. Brazilian policymakers were convinced that excessive litigation resulting from BITs harms the business environment and the effort to attract investments to developing countries, as well as the regulatory capacity of the State to pursue legitimate policy interests in areas such as health, environment, and public safety. In this context, dispute prevention becomes a preferred regulatory alternative, both in attraction and retention of the investment. By focusing on dispute prevention and improving the business framework, the host government will have the major responsibility of helping to resolve disputes amicably and make ISDS less important for national companies investing abroad as well as for foreign investors investing in the country.
4. When developing the CFIA, the Brazilian government believed that making dispute prevention mechanisms readily available to foreign investors to resolve potential grievances before they would turn into an investment arbitration would be a preferable choice. Attentive to this, the CFIA provides apparatuses of institutional cooperation for the Parties to avoid disputes and to achieve early settlement of potential grievances. To accomplish this purpose, the CFIA commitments encourage Parties to act before damages have been done and disputes that are difficult to solve have arisen. In this manner, the host country would anticipate possible causes of investment arbitration, thus taking necessary action much earlier. In doing so, the difficulties and costs, including political costs, could be avoided entirely.
5. Brazil's CFIA found inspiration in international benchmarking, particularly in the Korean Office of the Foreign Investment Ombudsman (OFIO). The Korean experience of providing investment aftercare to support investors who face grievances in their day-to-day business and to make sure that the investment environment is appropriate seemed to be the ideal way forward to Brazil. Another feature of the OFIO that seemed appropriate to Brazil was its possibility to "request the relevant administrative agency or the foreign investment-related agency to cooperate for the purpose of solving problems experienced by foreign-capital invested companies and performing duties related thereto". Furthermore, the current statistics, which show that the services of the Korean Ombudsman are frequently used by foreign investors, helped consolidate the idea that Brazil's approach should focus strongly in dispute prevention.

II. Dispute prevention: the Ombudsperson and the Joint Committee

6. The dispute prevention mechanism under CFIA consists of bilateral dialogue through the Ombudsperson and the Joint Committee, responsible for the preliminary examination of specific issues brought by the other Party or investors of the other Party. Those provisions are the institutional core of the CFIA, as they contribute to the fulfilment of the commitments undertaken in the agreement and to the strengthening of the dialogue between the Parties with regard to investments and appropriate assistance to investors.

7. The Ombudsperson's role is to act as a facilitator of the relationship between the investors and the host country government, both in terms of dialogue with the relevant authorities and by providing government support, with the ultimate goal of improving the business environment to attract and maintain investments. In Brazil, the Ombudsperson was established by a Federal Decree.

8. The main responsibilities of the Ombudsperson involve the following-up on requests and inquiries made by the other Party or investors of the other Party with the competent authorities and inform the stakeholders on the results of its actions. It is also the Ombudsperson's responsibility to assess, in consultation with relevant government authorities, the complaints received from the other Party or investors of the other Party, and to issue recommendations to the Joint Committee regarding actions necessary to improve the investment environment.

9. The Joint Committee, composed of government representatives of both Parties, is in charge of monitoring the implementation of the Agreement, the sharing of information regarding investment opportunities, bilateral investment cooperation, facilitation initiatives, and, above all, joint action to prevent disputes and amicable settlement of any issues involving bilateral investment. In order to develop its tasks in detail as well as to work closely with investors, the Joint Committee has the possibility to establish ad hoc working groups and to invite the private sector to participate in it.

III. From dispute prevention to dispute resolution

10. The dispute prevention mechanism under the CFIA is composed of two distinct phases. In the first one, the Ombudsperson proactively assesses the complaints received from the other Party or investors of the other Party and recommends adequate actions to resolve it. The Joint Committee operates the second phase, reactively, whenever it receives a written request inquiring about the incompatibility of a specific measure and the Agreement.

11. If a Party considers that a specific measure adopted by the other Party constitutes a breach of the Agreement, it shall submit a written request to the other Party, identifying the specific measure in question, and presenting the relevant allegations of fact and law. Then, the Joint Committee shall meet within sixty days from the date of the request. After that, the Joint Committee shall consider the request in a time frame agreed in the text of the CFIA (normally sixty days) – extendable by mutual agreement – and issue a report identifying the measure in question, the alleged breach of the Agreement, and the affected investments.

12. In its report, the Joint Committee will try to find an amicable solution to the measure in question, which can encompass, for example, a recommendation to the relevant government agency to bring the measure in conformity with the CFIA. Only after the complaining Party has exhausted the dispute prevention procedure through the Ombudsperson and the joint committee without satisfactorily resolving the dispute, can Parties initiate arbitral proceedings between States.

13. Another noteworthy innovation of CFIA aimed at enhancing the transparency of the Dispute Prevention procedure is the possibility to invite other interested stakeholders to participate as *amicus curiae*, whenever relevant to the consideration of the measure in question, to appear before the Joint Committee and present their views on such measure. By doing so, CFIA responds to the long-lasting criticism of

investment disputes being resolved behind closed doors, without the desirable scrutiny from the society and other stakeholders.

14. The dispute settlement clause of the CFIA foresees the submission of a complaint, after the exhaustion of all prevention measures, to an ad hoc arbitral tribunal. The Brazilian model carves out the following topics: (i) security exceptions; (ii) compliance with domestic legislation by investors; (iii) corporate social responsibility; (iv) investment measures combating corruption and illegality; and (v) provisions on investment and environment, labour affairs and health. Furthermore, the CFIA establishes specific criteria for the appointment of arbitrators (three) and for the establishment of the tribunal procedures, which may reflect, in a subsidiary manner, the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL) effective on the date of entry into force of the agreement. The decision of the arbitral tribunal, which shall be rendered in a time frame of nine months (extendable for ninety days), is final and binding the Parties, in accordance with the terms of the CFIA.

IV. Conclusion

15. In conclusion, the CFIA is an innovative alternative to traditional investment agreements, seeking to overcome its limitations and litigious approach by fostering a more dynamic, constructive and long-term interaction between the Parties and their investors. By establishing a permanent channel for dialogue (Ombudsperson) and requiring previous consultation in the Joint Committee before initiating an arbitration, the CFIA gives the right nudge towards an amicable dispute settlement. The model also recognizes the essential role of governments in encouraging a favourable environment for investment that meets both the needs of the private sector and the development priorities of host countries.
