INTERNATIONAL INVESTMENT REGULATION IN LATIN AMERICA: ALTERNATIVES TO BITS AND THE BRAZILIAN STRATEGY

REGULAÇÃO DO INVESTIMENTO INTERNACIONAL NA AMÉRICA LATINA: ALTERNATIVAS AOS BITS E A ESTRATÉGIA BRASILEIRA

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Abstract: The international investment regulation theme is one of the most relevant topics around global economic forums. Although discussed since the first attempts to regulate international trade and capital flow, until today there is no multilateral agreement on that matter. Also, bilateral alternatives have been criticised mostly since the start of this Century. In this context, the discussion for alternatives have been brought in order to find solutions to recurring issues regarding international investment. Latin America is one of the most affected regions by those problems, which explain the rise of demands concerning the theme. Regarding the Brazilian case, it is notable that the country is pursuing an alternative for this by promoting a treaty model of its own. The objective of this paper is to analyse how the Brazilian strategy represents and can contribute to alternatives that implement an international investment system that may be more suitable to Latin America reality in order to promote trade and investment in the region.

Key-words: Bilateral Investment Treaties. Foreign Investment. International Investment Regulation. Latin America.

Resumo: O tema da regulamentação dos investimentos internacionais é um dos tópicos mais relevantes nos fóruns econômicos globais. Embora seja discutido desde as primeiras tentativas de regular o comércio internacional e o fluxo de capitais, até hoje não existe um acordo multilateral sobre o assunto. Além disso, as alternativas bilaterais têm sido criticadas principalmente desde o início deste século. Nesse contexto, a discussão de alternativas tem sido trazida a fim de encontrar soluções para questões recorrentes em relação ao investimento internacional. A América Latina é uma das regiões mais afetadas por esses problemas, o que explica o aumento das demandas em torno do tema. Em relação ao Brasil, é de se notar que o país vem buscando uma alternativa para isso através da promoção de um modelo de tratado próprio. O objetivo deste artigo é analisar como a estratégia brasileira pode contribuir para alternativas que implementem um sistema internacional de investimentos mais adequado à realidade latino-americana de forma a promover o comércio e os investimentos na região.

Palavras-chave: Acordos Bilaterais de Investimento. América Latina. Investimento Estrangeiro. Regulação do Investimento Internacional.

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Recebido: 03/09/2020
Aprovado: 23/11/2020

Introduction

International investment is a subject whose regulation dates to a long period. However, and without doubt, it was during the twentieth century that the discussion of the subject was encouraged, especially in bilateral relations. The purpose of such regulation was to ensure greater security and predictability for increasingly frequent international transactions. Because of the growing relevance of this agenda, according to the 2016 World Investment Report of the United Nations Conference on Trade and Development (UNCTAD), in 2015 there were already 3304 investment agreements, of which 2946 were bilateral and 358 from other types (Gabriel, Mesquita & Thortensen, 2018, p. 8).

This finding illustrates well the role played by international investment in an increasingly connected world. According to Ribeiro (2014, p. 7), Baptista states that there are three pillars that ensure the act of investing abroad: access to economic activities of a country; the acquisition and disposal of goods for their own economic activities; and the guarantee of individual rights when in a foreign territory. These premises, although not enough, are necessary for the development of business outside the national territory, whether motivated by the need to survive internal competition or simply by the desire to expand the company.

In this context, according to Carvalho (2005, p. 4), one must accept that foreign investment will not go backwards in the globalisation process and that if not effectively controlled, it could substantially harm trade and the creation of public policies for countries. That is, it is a duty to create guidelines and conditions for international investments movements in order to make its dynamics flows as smoothly as possible.

Latin America appears in this context as a coveted target for investment, especially countries like Brazil and Mexico. After a first approach that was against foreign investment entry in the region, Latin America governments changed its strategy over time and tried to attract international investment flows, which eventually led to the signing of several Bilateral Investment Treaties (BITs).

However, the worldwide experience with these instruments was not very beneficial at all, leading to several challenges to the model. In addition, Latin American governments themselves, especially those with more economic relevance, have recently started to move internationally by expanding their investments and creating their own agenda. It became clear then that the mismatch between the traditional discussion of the theme and the evolution of international investment flows could no longer be sustained, thus requiring new solutions.

That said, given the current scenario in which the discussion about the regulation of international investments is present, it is necessary to understand alternative strategies that effectively meet the demands of countries, especially those of Latin America. To this end, this article is divided into four parts: first, there is a brief historical presentation on the subject; then, it is addressed the issue of the impacts of BITs in Latin America; the third point makes an approach to the Brazilian case; and, finally, the paper concludes that Brazil's strategy has become a great alternative to the models proposed so far and it has a great relevance to the other countries in the region, mostly for their growth and integration. The study was developed through a bibliographical research consisting in the analysis of articles, books, news, treaties, official data and other relevant sources related to the theme.

1. Historical background

The international investment regulation is a fundamental issue for foreign trade and economic growth. Investment rules are stipulated so that an external investment can be admitted and have the right of establishment in a receiving country, which includes rules to guarantee protection, equality and impartial treatment for foreign investment.

There are several benefits in attracting foreign investment, such as facilitating the development of international supply chains, increasing jobs creation, contributing to resource allocation, increasing competitiveness, and promoting foreign trade. These benefits require nations to improve its legal instruments in order to increase capital flows attraction and to ensure the free repatriation of its funds (Gabriel, Mesquita & Thortensen, 2018, p.8).

However, due to the high complexity of the theme and the presence of several conflicts of interest, especially those between developed and developing countries, a multilateral investment agreement has not yet been reached. That debate dates to a long story of international fora and bilateral negotiations, which analysis is relevant to the understanding of the theme.

The first major modern approach to the regulation of international investment was the Havana Charter of the United Nations Conference on Trade and Labour in 1948. With international trade as a major debate in the global forums, the instrument brought several points to the topic, such as employment, commodities, development, restrictive business practices, and investment.

Moreover, in its third chapter on Economic Development and Reconstruction, the Charter brought the possibility of setting up an International Trade Organisation that would cover the topics that were discussed. However, the United States did not ratify the agreement, which led to its abandonment by other countries. However, Chapter Four on Trade Policy went forward, resulting in the General Agreement on Tariffs and Trade (GATT), thereby laying the foundations for what would become the World Trade Organisation (WTO).

Hence, although connected, international trade and international investment topics were separated and began to develop themselves separately until the creation of the WTO (Sornarajah, 2010, apud Gabriel, Mesquita & Thortensen, 2018, p.11). This divergence made international trade have a greater role than international investment, hence, having a much more relevant evolution in the global fora. Nevertheless, most countries were opposed to international investment regulation, especially those from Latin America and other developing nations. The Calvo Doctrine based their defense, which claimed that only the State has sovereignty to control its own jurisdiction.

During the Uruguay Round of the GATT, in 1986, those issues culminated in a clash between developed and developing countries. The United States was one of the leading promoters, as it was a major exporter of goods and capital and sought to protect its transnational corporations. As a result, in addition to the establishment of the WTO, the Agreement on Trade Related Investment Measures (TRIMS) was signed during the Uruguay Round.

With a binding effect on the members of the WTO, the agreement provided for the prevention of trade-related investment measures incompatible with the provisions of the GATT. It is worth mentioning that the agreement contained a list of measures that are merely illustrative, lacking any precise definition of the term investment (Kotschwar, 2009 apud Gabriel, Mesquita & Thortensen, 2018, p.13).

Other agreements that also came to regulate the subject, albeit indirectly, were the General Agreement on Trade in Services (GATS), the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs), and the Agreement on Subsidies and Countervailing Measures (SCM). In addition, in 1996, the Singapore Ministerial Declaration brought the investment subject to the present-day Doha Round, establishing a first working group on the topic that continued to issue reports until 2003 when halted its activities. This period of discussion hiatus would be extinguished only years later, something that allowed bilateral solutions to proliferate in the meantime.

For that reason, Bilateral Investment Treaties (BITs) were the main tools to regulate international investment, especially in the last two decades. They are conceptualised as instruments through which two countries, usually a developed country and a developing country, seek to regulate investment relations in order to increase their flow (Perrone- Moisés, 1998, p. 24 apud Gabriel, Mesquita & Thortensen, 2018, p.22).

Having gained strength after World War II and the ensuing decolonisation process that resulted in the creation of new countries and economies, the BITs came from the need for developed countries to have more security for their international operations. Therefore, at first, such treaties aimed at protecting international companies from these countries, only later acquiring a role as investment promoters. The leadership of countries, such as the ones from European Union and the United States towards elaborating the BITs, is so evident that their models have profoundly influenced that same type of agreement signed by other countries.

The growth of BITs was not regular, but rather saw an exponential increase in the 1990s due to the rise of the neoliberal model. Between 1950 and 1959, only one BIT had been signed; in the 1960s this number rose to 69; in the later decade they were 90 in total; by the 1980s there were 226 agreements; in the 1990s it rose to 1543, reducing to 1059 in the following decade and then 225 in the other one (CNI, 2018, p.16).

The upward movement of signatures, until the 1990s and its subsequent decline, is very clear when looking to those numbers. Much of this is due to the strong controversy arising from clashes between investors and States. Between 1990 and 1999, only one case of investor-State arbitration had been registered. But, in the following two decades, that rate rose to 303 and, then, to 397 cases (CNI, 2018, p.17). In 2014, the rates reached 608 cases, with at least 98 countries participating in at least one dispute, with three quarters of these disputes against developing countries, especially Latin American ones (Ministério da Economia, 2019). Despite that fact, even China has adopted, as part of its internationalisation strategy, models of bilateral agreements based on European and American regulations, although with some limitations.

What happened was that the instruments lacked greater efficiency in their clauses and, as complained by many countries, strongly reflected the unilateral interests of the most developed economies. Countries like India and South Africa were extremely critical about the many benefits given to foreign investors and the little protection afforded to host countries.

Another important factor for the BITs failure is the rise of an international understanding that business and society are tightly tied. Issues that did not have much importance such environment, health, crisis management, and social responsibility gained space in the discussions. It is worth remembering that the right to development is internationally recognised as a human right and, therefore, requires the intense cooperation between civil society, international society, and private entities, including investors (Carvalho, 2005, p.31-32).

This decline made room for other bilateral solutions and the resume of the multilateral discussion. In the 1990s, the Organisation for Economic Co-operation and Development (OECD) introduced the proposal for its Multilateral Agreement on Investment, but the negotiations turned out to be unsuccessful, resulting in non-adherence to the agreement. Large projects, such as the Trans-pacific Partnership and the Trans-atlantic Trade and Investment Partnership, although targeted by a lot of criticism and controversy, have brought relevant economic regions to the negotiation table in order to discuss various investment issues. However, recent clashes between the

United States and the European Union have slowed this movement, making the WTO once again the most relevant multilateral forum for discussion.

During the Buenos Aires Ministerial Conference, in 2017, the theme returned to international forums. The meeting featured five proposals on the international investment issue, supported by several countries, such as Argentina, Brazil, China, Korea, Indonesia, Pakistan, Russia, and Turkey. For example, the Chinese-led proposal sought greater transparency of domestic requirements and simplification of the investment process. On the other hand, countries like India, South Africa, and the United States of America opposed the initiative.

Additionally, another draft was prepared with the participation of 41 countries, plus the European Union and the United States, indicating the group's intentions to develop a multilateral framework for investment. Discussions on measures to increase transparency and predictability, simplification and acceleration of administrative processes and increased cooperation, information sharing, exchange of good practices, dispute prevention, and stronger and better stake-holder relations were considered topics pertinent to such discussion (CNI, 2018, p.23).

Issues that had great relevance in the past, such as market access, investment protection, and investor-State dispute settlement, were left out, since the aim of this new approach was to facilitate investment, not promote it. This created a friendlier scenario for multilateral negotiation, given the less complexity of themes and number of issues to be discussed. Instruments of its own, like it is already done with international taxation topics, on the other hand, could circumvent topics that were not included in this approach.

Finally, in February 2018, Brazil would issue its own proposal to the topic. The document contained nine sections: scope and general principles; institutional governance; electronic governance; procedures; regulatory environment; implementation; corporate social responsibility; institutional framework; and final provisions. Brazil, which in recent years has been intensifying its action on the subject, has set itself to a new level of international strategy, developing a leadership that was welcomed by various of its national sectors.

2. Bits and its impacts on Latin America

Latin America is undoubtedly one of the main targets for international investment flows. Between 2009 and 2013, Latin America and the Caribbean increased its investment receipts from $ 15,656 billion to $ 379,613 billion, then having a slightly decline by 2018, reaching $ 287,021 billion (World Bank, 2019). It is clear that there is a great interest in the region, something that has been intensifying over the years.

On the other hand, investments abroad also have grown. There was a steady growth, until 2015, totaling an amount of $ 195,041 billion, falling sharply in 2016 to a sum of $ 93,706, but rebounding to $ 137,296 in 2018 (World Bank, 2019).

These numbers corroborate with Valenti's statement (2018) that Latin America's attitude toward investment can be illustrated as a straight line, something very similar to a parable . That is, there has been a steady growth in the participation of international investment flows over the time, which resulted in the signing of investment agreements, namely the Bilateral Investment Treaties (BITs).

In the first moment, when in the 1960s the BITs and the Washington Convention, that created the International Center for Settlement is Investment Disputes (ICSID), were introduced, Latin American countries were skeptical about the entry of foreign capital into their territories, opting for an Import Substitution Industrialisation strategy.

As Valenti (2018) observes, the Calvo Doctrine was initially adopted, arguing that domestic law could only regulate the entry of foreign investment, that is, disputes should take place by domestic courts without any special treatments or privileges given to foreign investors.

However, gradually, due to various political and economic factors, the Latin America opening process began. In the 1990s, with the heyday of neoliberal models around the world, the fear of foreign capital gave space to a dispute over attracting investments, which led to widespread signing of BITs and adherence to the ICSID Convention.

For example, in the South American region, the first record of a BIT signature dates from 1968, between Ecuador and Switzerland. By the early 1990s, only 10 agreements had been signed, a number that would grow exponentially until the turn of

the millennium: between 1990 and 1999, 222 BITs were signed, mainly with European countries (Castelan, 2012, p. 77).

Over the time, some questions began to emerge from developing nations. Criticism focused on the large number of benefits attributed to foreign investors, on the lack of guarantees for the host country, and on how easy an investor could bring an international court against the host country. This resulted, at the beginning of this century, in disapproval over topics like the inconsistency of international court rulings and the rules interpretation that favored investors.

When the BITs were created, the central argument for their promotion was to encourage direct investment flows. The agreements content predominantly followed the same logic in their clauses, approaching topics like scope, Most Favored Nation, fair and equitable treatment, expropriation, admission clauses, and dispute settlement, this one usually through an investor-State arbitration process. However, according to Harten (2016, p. 42-43), BITs have three fundamental flaws: a liberal forum-shopping approach that allowed the investor to choose the best destination country according to his or her interest; few obligations imposed on investors and their country of origin, resulting in no regulatory risk division; and the lack of empirical evidences that point that the BITs really foster international investment.

On the other hand, most of these problems appears during the conflict resolution process. According to Bas (2016, p. 136), the main forms of State-State or investor-State dispute settlement used by the BITs in the world are: *ad hoc* arbitration in ICSID (89%), regular domestic legal proceedings (71%), *ad hoc* courts under UNCTAD arbitration rule (63%), ICSID supplementary mechanisms (39%), and *ad hoc* arbitration (12%). It is worth noting that the predominance of dispute resolution through international mechanisms over the use of domestic jurisdiction has generated harsh criticism from Latin American countries and other developing states. Moreover, the fact that three quarters of the arbitration cases in the world were brought against developing countries, with the largest share being against those located in Latin America (29%) (Ministério da Economia, 2019), further contributes to the critics regarding those treaties and the belief of its ineffectiveness.

Harten (2016, p.42) indicates that through the signing of a BIT the investor automatically gained access to the arbitration system proposed by the agreement, a much more beneficial treatment than the one ordinarily offered to the national companies of the host country. This would create not only a framework for unfair competition between nationals and foreigners but would greatly affect the sovereignty of the host State.

Looking for solutions, countries began to approach different strategies. Valenti (2018) highlights two approaches to the situation, the Withdraw Approach, followed by countries like Bolivia, Ecuador, and Venezuela seeking to denounce the treaties and withdraw from the established international investment system, and the Reform Approach, which aimed at finding their own models of investment. In turn, it is worth remembering that countries such as Argentina, Chile, Peru, Colombia, and Paraguay still have a large base of signed BITs (Bas, 2016, p. 138), indicating a third strategy line that somehow sustains some of the traditional investment system.

Brazil has clearly opted for the Reform Approach, undoubtedly being the largest exponent in the region for the fact that it created its own agreement model. This underscores the importance of the Brazilian case for understanding alternatives to addressing the international investment issue and new trends that must be discussed.

3. The Brazilian case

Regarding the discussion on the regulation of international investments, Brazil has always maintained, to a certain extent, an attitude consistent with its needs and interests. Historically, the country has always been an important host country for investment, being the nation that receives the most resources in Latin America and the fifth most attractive country for foreign investment in the world (Gabriel, Mesquita & Thortensen, 2018, p. 56).

Hence, Brazil's priority was not to facilitate or promote the investment of its companies abroad, but to protect its sovereignty vis-à-vis foreigners operating in the country. In this respect, protection does not mean to regulate the activities of transnational companies, but legally to act over subsidiaries, branches or headquarters established in the national territory (Carvalho, 2005, p.7). This explains a first moment

of great fear about discussing the theme, as well as signing BITs and similar agreements.

Between 1994 and 1997, Brazil signed 14 BITs that would never come into force. Partners included Belgium and Luxembourg, Chile, Cuba, Denmark, Finland, France, Germany, Italy, South Korea, the Netherlands, Portugal, Switzerland, the United Kingdom, and Venezuela. It is noticeable the predominance of treaties with more developed countries, which illustrates a greater initiative and interest of such nations in signing these treaties. Brazil also signed in 1994, within the scope of Mercosur, the Cologne, and Buenos Aires Protocols that dealt with the theme. None of them would be ratified.

According to the opinion of the Brazilian Legislative Advisory Chamber of Deputies, the legal reasons why Brazil was prevented from signing the BITs was due to: the definition of the term investment being too broad; the presence of Most Favored Nation, National Treatment and Fair and Fair Treatment Provisions clauses; the prohibition of nationalisation and expropriation, which disagrees with the article 184 of the 1988 Brazilian Constitution; the expiration and termination clause; and the investor-State dispute settlement clause (Gabriel, Mesquita & Thortensen, 2018, p.61).

It is visible that such arguments illustrate the Brazilian interest in maintaining its sovereign and regulatory role over the territory. Moreover, the condition as a host country for investments and the little national interest in those treaties contributed to a protectionist view against the ratification of the BITs. Finally, the process to internalise an agreement, which is often too long, was also a major impediment to the ratification of these agreements.

These characteristics have long influenced the country's approach on the international investment subject. More recently, however, Brazilian companies have begun to increase their investment abroad. This shift from host country to investing nation has led to both corporate and government changes, reshaping the domestic international investment agenda.

Between 2003 and 2017, the amount invested abroad increased from US$ 55 million to US$ 359 million, while in the same period foreign direct investment stock in Brazil grew from US$ 133 million to US$ 778 million (CNI, 2018, p. 28-29). That is,

while the reception of investments increased significantly by 580%, the investment abroad went to high levels with an increase of about 650%. It is worth remembering that during most of this period Brazil had no current investment agreement, being the only country with a relevant economic power to do so (CNI, 2018, p. 29).

Despite the presence in more developed countries, Latin America and Africa were the regions responsible for changing the bias of Brazilian national investment policy and the creation of ACFIs, the Brazilian international investment treaty model. These regions, in the view of investors, may pose risks to Brazilian investors, as occurred with the cases of expropriation in Bolivia in 2006 and Ecuador in 2008. On the other side, today the eastern world is also a major contributor to investment agreements proliferation as well, especially the Arab and East Asian countries through continued negotiations. In overall, sectors that have huge participation abroad and lead the expansion of those agreements are oil, mining, and construction (Gabriel, Mesquita & Thortensen, 2018, p. 63).

According to the Dom Cabral Foundation's 2018 survey "Trajectories of Internationalisation of Brazilian Companies", which considered 69 companies operating abroad, it should be followed the international profile of Brazilian transnationals: majority of the presence in the American continent, especially in the United States, Argentina, Mexico and Colombia; relevant presence in countries that attract capital, such as China, United Arab Emirates and India; internationalisation mostly through subsidiaries; franchise concentration in South America; and a higher rate of business opening in new countries compared to the number of business closures that were already established abroad (Alvim et al*.,* 2018, p. 43-45).

That data indicates, despite some concentration, that there is a good range of the Brazilian companies outside the country. It is visible that there is a movement of expansion of Brazilian companies abroad, with more enterprises being opened than closed. In this context, in 2012, the Brazilian government began planning a new type of investment agreement that in the following year would be approved by the name of Investment Cooperation and Facilitation Agreement (ACFI in Portuguese). The result was a joint elaboration between various government entities in partnership with the private sector.

According to former Brazilian Foreign Trade Secretary, Daniel Godinho, the three central pillars of the ACFIs would be: achieving institutional governance; setting mechanisms for risk mitigation and dispute prevention and resolution; and promoting facilitation of investments through thematic agendas (Gabriel, Mesquita & Thortensen, 2018, p. 64).

In a short period, Brazil was already able to sign a small number of agreements. Firstly, with the African countries, then, with the Latin American ones. In addition, ACFI was used as a template for the Mercosur Investment Cooperation and Facilitation Protocol. Institutions such as UNCTAD and OECD have recognised the merits of the Brazilian model and its contribution to investment facilitation, mainly through the simplification of procedures, regulatory transparency, and accessibility of information (CNI, 2018B, p.31).

The preference for partnership with Latin American and African countries reflected the movement of Brazilian companies, which were beginning to establish themselves in those regions. Moreover, the establishment of business into such countries was viewed as risky for the Brazilian business community, due to the political and economic structure of those countries, a fact that the agreements aimed to soften. What eventually happened was the establishment of an initial safer investment channel and, at least, the formalisation between States of a mutual desire to dispose of the matter, hence, opening the possibility of future construction of a legal framework.

ACFIs have several provisions designed to reduce investor exposure to risk and possible controversy against the host country. A fundamental principle found in the agreements is non-discrimination, expressed by National Treatment and Most Favoured Nation clauses. Additionally, there are transparency clauses, specific conditions for direct expropriation, compensation in case of conflicts, and transfer of currency.

One of the most peculiar factors of ACFIs, and maybe even innovative, is the prediction of focal points, or Ombudsmen, and joint committees in each country. The former contributes to the strengthening of the dialogue between the parties and the fulfillment of the signed commitments, also serving as an additional channel in the more technical relationship between investors and the receiving state. The latter, in turn, is made up of government representatives and aims to monitor the implementation of the

agreement, share opportunities, coordinate agendas and act together for dispute prevention and friendly settlement.

Finally, other stipulations include provision for information exchange, encouragement of private sector involvement, the development of thematic agendas and provisions on transparency and corporate social responsibility. As noted, the ACFIs do not seek to promote Brazilian companies, but to ensure their protection and presence in the host country through the development of friendly diplomatic relations.

With this model, based on cooperation and dialogue that is very typical of the Brazilian foreign policy, added to the Brazilian force over other developing countries, it is not by chance, as listed, that Latin American and African countries were chosen as the first partners. By 2019, the country had already established investment agreements with Guyana, Suriname, Ethiopia, Chile (incorporated into the Free Trade Agreement signed in late 2018), Colombia, Angola, Malawi, Mozambique, Mexico, Ecuador, Peru (through a Mercosur expansion agreement), Morocco, the United Arab Emirates, and Mercosur. In addition to it, at the beginning of 2020, Brazil managed to finish negotiations with India and both countries signed an ACFI.

Moreover, Brazil has established memorandums for trade and investment with many countries, such as the Dominican Republic, Azerbaijan, Russia, Iran, Oman, and Armenia, as well it is finalising negotiations with Jordan and has recently started dialogues with Nigeria and Malaysia. It is possible to perceive a certain movement of expansion to the East, especially in the relationship with the Arab and East Asian countries, which enables new markets for national companies, besides strengthening those already established. However, negotiations with bigger economies, such as the United States, China, and Japan, are too part of this strategy.

When analysing the content of the agreements, despite the faithful reproduction of the fundamental points provided in the ACFI model, there are visible differences in the clauses established that depends on which country is negotiating with Brazil. For example, investment protection clauses were further developed in agreements with Latin American countries than with Africans (CNI, 2018, p.31). On the other hand, it is known that the Brazilian draft prevailed more strongly in the case of agreements signed with African countries (Ferreira & Schlee, 2016, p.302). Still, it is worth noting that

fundamental clauses of BITs, such as indirect expropriation, investor-State dispute settlement mechanism, and the concept of fair and equitable treatment, are not present in the ACFIs (CNI, 2018, p.31).

However, despite the great innovation brought by the ACFIs, few agreements were ratified, such as the ones signed with Angola and Mexico. This is largely due to the difficulty of internalising agreements through a lengthy and bureaucratic process. After signing the agreement and presenting them to the ministries, they are voted in two rounds by the National Congress, only then to proceed for ratification. That is, it consists of several steps, many of which are considered unnecessary, with naturally long procedures. This explains why the delay in the entry into force of agreements, which leads to a delay in their effects and benefits, intended for companies.

On the other hand, agreements such as the ones signed with Mozambique, Malawi, and Colombia are being ratified by the other party, which demonstrates a risk that comes from the disinterest or lack of fast procedures by the other country. This also gives uncertainty to companies that need assurances to secure their investment abroad, as well as support for any obstacles that may arise in the meantime. It should be noted that it is an important role of the government to monitor the ratification process, using diplomatic means to achieve it.

Another crucial point is the lack of certain partners in the Brazilian agreements network. For instance, it has not yet been possible to sign ACFIs with most of the BRICS (acronym for Brazil, Russia, India, China, and South Africa) members, and the one signed with India in the beginning of 2020 still has a long process to ratification. Also, countries, such as the United States, Germany, France, Italy, and Japan, did not sign those agreements and may represent difficulties for negotiation due to their political and economic power. In addition, the benefits and importance of ACFIs need to be made clear to the business community in order to make them use their current benefits and participate in international negotiations.

Finally, two of the most complex issues involved in the international investment regulation discussion are expropriation and dispute settlement. The first one is characterised as the taking of private property by the State, under certain conditions and requirements, in a discretionary and automatic manner. (Ribeiro, 2014, p.16-17). With

that said, the major difficulties related to expropriation are: the arbitrariness that a State can use to trigger the mechanism, which may be due to retaliation or discrimination; the difficulty of setting compensation standards; the problem of defining indirect expropriation and those made for regulatory reasons; and the debate on conduct and procedural jurisdiction.

The second point is intrinsically linked to the issue of dispute settlement, which is generally configured by arbitration. In the case of BITs, establishing such a procedure between an investor and the host State requires the former to demonstrate that he or she is a national of the investing country that signed the agreement, which may be a problem for individuals with more than one nationality and companies established in more than one country (Schreuer, 2010, p.521, apud Fernandes & Fiorati, & 2015, p. 254). There are also strong debates about matters that may hurt the concept of national sovereignty in some country's conceptions.

In the case of the Brazilian ACFIs, those problems are absent, for the traditional dispute settlement system is replaced by focal points and joint committees. On the one hand, it is possible to infer that investor protection capacity would depend on convincing the government of his or her home country that it would be beneficial to defend his or her business interests (Costa, 2015, apud Ferreira & Schlee, 2016, p.302). In this case, companies with less political and economic relevance would have less security guarantees to their investments. On the other hand, the measures adopted by Brazil circumvent an already lengthy and costly judiciary, establishing a direct communication channel between the parties. Obviously, countries with greater international importance, such as the Europeans ones and the United States, might pose greater difficulties in this process.

However, Brazil did not limit itself to the ACFI strategy and, in 2018, took the lead in international investment discussions through its WTO proposal. Following the rejection of further discussions by more than ninety countries during the Buenos Aires ministerial meeting in late 2017, Brazil and few other leaders were able to bring together seventy members to present and defend a model proposal.

The great advantage of a WTO agreement is that it has binding effect to all its members. This means a wider range of its impacts, without the need to negotiate so

many treaties. In addition, being inserted in the WTO makes this agreement effective in accordance with the other established norms and the dispute settlement procedures. This conception contrasts with the point of view of developed states, as it is more viable for them to conclude bilateral agreements because they have greater bargaining power, a fact that at the multilateral level is not possible due to the union of smaller countries to claim a cause (Fernandes & Fiorati, 2016, p. 248).

The document contains 20 articles that address the following themes and objectives: a multilateral framework of principles and rules for facilitating the flow of investments; establish coherence with the applicable legal framework on service sectors and others economic fields; provide investors with a transparent, predictable and effective regulatory and administrative framework; facilitate the dialogue between governments and investors, including the focal points provided for in the ACFIs; encourage business seeking mutual benefit; facilitate the participation of developing countries in investment flows by strengthening their internal regulatory framework; and other topics, such as Most Favoured Nation, electronic documentation, and institutional governance (KANTH, 2018).

The proposal, in turn, does not deal with public purchases, public concessions, market access, taxation, social security, or any change to what has already been agreed by the GATS, and does not address any form of dispute settlement. For most of these issues, Brazil has been acting through its own instruments, having a strategy of expanding treaties, improving its application and revising its contents. According to the Brazilian government, the proposal itself is not intended to be a negotiating text, but merely a concrete illustration of how an investment agreement could be given, hence, attracting more countries for the discussion (ICTSD, 2018).

It is possible to perceive the great influence of ACFIs on the model proposal, hence, identifying the Brazilian interest in inserting its own agenda in the Organisation, even though the proposal is just a draft. This also illustrates the entry of national private interests into the WTO, mainly through their participation in the creation of ACFIs. This channel of dialogue between business and government is essential for both the preparation of a dialogue agenda and the preparation of proposals.

Additionally, as mentioned, participation in the WTO allows the country to gain the support of several other members in its proposals, especially those that have already signed ACFIs with Brazil and those whose interests in receiving or depositing investments in the country grow. It is also worth noting that an agreement in the WTO already guarantees the establishment of a legal framework with countries that Brazil bilaterally could not approach or did not considered it at a first moment.

It is worth pointing out, however, some issues pertinent to a multilateral discussion. First, the difficulty of negotiations due to a wide range of participants and divergent interests. Secondly, a multilateral agreement requires giving up many points in favour of its conclusion, which leads to departing from the original scope and may undermine the national strategy. Finally, it is essential to notice that a multilateral agreement not only facilitates access to foreign markets, but also allows entry into its territory under the same conditions, also requiring the signatory countries to extend their legal framework to all other members. If not well thought out and planned, the proposal may backfire.

Conclusion

The theme of international investment regulation is one of the most pertinent issues today to discuss world development. Latin America as a great host of investments flows, and now of origin too, is an actor of great importance in this discussion, since for a long time it did not find a satisfactory way to regulate the subject according to its interests.

Experience with the BITs has not yielded results as beneficial as expected for the countries of the region. On the contrary, these instruments generated several criticisms from local agents. In this matter, the most disapprouved point was the establishment of a dispute settlement system through arbitration that favors the foreign investor over the sovereignty of the host State.

For that reason, it is understandable that the investment system that have started in the 60's can no longer be sustained. Those old models and concepts require revisions and alternatives so that they can create greater benefits for countries that are part of the

global investment flows, encouraging both reception and promotion of capital movements.

This is a priority theme that comes in the wave of the new issues that discuss improvement of the international economy, not limiting itself to classic issues, such as tariffs. The evolution of Latin America gives rise to changes, alternative strategies, in order to keep up with the new reality and demands of the countries of this region.

Brazil, especially since 2015, and due to its regional relevance, has been standing out as one of the leaders in the search for alternatives. Its new strategy based on the signing of ACFIs, as well as its proposal in the WTO, provokes a movement of attempted change, thus diverging from the classic models adopted.

It is a fact that such agreements are not without flaws, nor do they cover all issues relevant to the promotion, facilitation, and security of global investments. However, one cannot deny an approach that aims to avoid falling into the same problems present in the BITs, while adopting a more coherent approach to the agenda of countries with less economic power, even though these countries have several differences between them.

Although the practical effects of the Brazilian strategy are not yet known, a movement of change and opening of new opportunities for global economies is noticeable. That said, in order to improve global discussions on the subject, negotiations should be fostered, both bilaterally and multilaterally, as well as seek alternatives that improve the mechanisms already established and address their shortcomings. Hence, it creates greater competitiveness, foster investment flows that result in economic growth and imposes a more sympathetic agenda to the various international's demands, namely those of Latin America.

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