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# Is investment facilitation a substitute or supplement? a comparative analysis of China and Brazil practices\*

## A facilitação de investimentos é um substituto ou suplemento? Uma análise comparativa das práticas da China e do Brasil

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Ning Hongling\*\*\*

### Abstract

While traditional investment protection regime is at the crossroad of reform, investment facilitation, which tackles ground-level obstacles to FDI and has no substantial challenges to regulatory space, is emerging as a new trend of global governance. Meanwhile, the content and method to implement investment facilitation are still evolving. The purpose of this article is to find the appropriate way to facilitate investment through comparative legal research between Brazil and China. Brazil and China share many similarities but adopt different approaches towards investment facilitation. Due to traditional resistance to BITs network, Brazilian developed a new model of investment treaty, i.e., Cooperation and Investment Facilitation Agreement (CIFA), focusing on investment facilitation rather than investment protection. China is a practitioner of investment facilitation as well as a proponent of IIAs with a balanced ISDS mechanism. It contends that the policy of investment facilitation is complementary to existing international investment regime. On the one hand, while investment protection and liberalization system are essential part of good business environment, IIAs don't necessarily lead to friendly regulatory environment to attract FDI inflows. On the other hand, access to justice is still important to foreign investors, the policy of investment facilitation can't act as a total substitute of traditional BITs worldwide. Therefore, it is suggested that China draws some experiences from Brazil in terms of institutional governance and establishing a similar and effective dispute prevention system, and China's open and liberal policies are worth learning for Brazil considering the Brazilian investors' increasing outbound investment and the growing needs of investment protection.

**Key words:** investment facilitation; investment protection; CIFA; FDI.

### Resumo

A facilitação de investimentos, que aborda os obstáculos básicos ao IDE e não apresenta desafios substanciais ao espaço regulatório, está emergindo como uma nova tendência da governança global. Enquanto isso, o conteúdo

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e o método para implementar a facilitação de investimentos ainda estão evoluindo. Tanto como principais destinos de IED quanto como maiores países emergentes na América do Sul e na Ásia, respectivamente, o Brasil e a China adotaram abordagens um tanto diferentes em relação à facilitação de investimentos. Devido à tradicional resistência à rede de BITs, o Brasil desenvolveu um novo modelo de tratado de investimento, ou seja, Acordo de Cooperação e Facilitação de Investimentos (CIFA). Os CFIA se concentram principalmente na facilitação do investimento por meio da cooperação institucional, mas o escopo e o grau de proteção ao investimento são bastante insuficientes. As abordagens da China em relação ao regime de investimento são inclusivas, ou seja, é um praticante de facilitação de investimento, bem como um proponente de IIAs com um mecanismo ISDS equilibrado. Por um lado, embora a proteção do investimento e o sistema de liberalização sejam parte essencial de um bom ambiente de negócios, os IIAs não levam necessariamente a um ambiente regulatório favorável para atrair fluxos de IDE. A este respeito, a política de facilitação do investimento é complementar ao regime de investimento internacional existente. Sugere-se que a China extraia algumas experiências do Brasil em termos de governança institucional e estabelecimento de um sistema similar e eficaz de prevenção de disputas. Por outro lado, o acesso à justiça ainda é importante para os investidores estrangeiros, a política de facilitação de investimentos não pode substituir totalmente os BITs tradicionais em todo o mundo. Considerando o crescente investimento externo dos investidores brasileiros e as crescentes necessidades de proteção do investimento, sugere-se que vale a pena aprender com o Brasil as políticas abertas e liberais da China.

**Palavras-chave:** facilitação de investimento; proteção de investimento; CIFA; FDI

## 1 Introduction

It is undoubted that Foreign Direct Investment (FDI) is crucial for sustainable development, especially for developing countries. According to the United Nations Conference on Trade and Development (UNCTAD), about \$3.9 trillion is needed per year over the period 2015-2030 to fully meet the Sustainable Development

Goals (SDGs) in developing countries alone.<sup>1</sup> But growth in investment levels towards the SDGs has not been happening at the necessary scale or pace. The outbreak of COVID-19 pandemic has made it even harder to secure the needed sustainability financing.<sup>2</sup>

Traditional tool to promote FDI is international investment agreement (IIA) featured with Investor-State Dispute Settlement (ISDS) mechanism. However, whether traditional IIAs have substantial positive impact on FDI inflows is inconsistent and uncertain. Research shows that IIAs have been found to be less important than domestic regulatory environment, beyond economic fundamentals such as market size, infrastructure and labor.<sup>3</sup> Market access oriented IIAs may be somewhat different. Moreover, ISDS mechanism faces increasing criticisms. Some of them are perceptions, some of them are realities.<sup>4</sup> According to an empirical research, public criticisms are triggered by the nature of substantive rights that IIAs confer upon investors, institutional design of ISDS mechanism, and other factors such as discrimination against domestic investors.<sup>5</sup> While reform discussions primarily focus on the role of states in and states' expectations towards ISDS,<sup>6</sup> a fundamental question that whether ISDS is a feature worth keeping in IIAs remains.<sup>7</sup>

A new tool to promote FDI and sustainable development is emerging. The Brazilian model of Cooperation and Investment Facilitation Agreement (CIFA)

<sup>1</sup> UNCTAD. *World Investment Report* 2014. Available at: [https://unctad.org/system/files/official-document/wir2014\\_en.pdf](https://unctad.org/system/files/official-document/wir2014_en.pdf). Access on: 12 Oct. 2022. p. 140.

<sup>2</sup> UNCTAD. *Promoting Investment in the Sustainable Development Goals*. 2021. Available at: [https://unctad.org/system/files/official-document/diaepcb2021d1\\_en.pdf](https://unctad.org/system/files/official-document/diaepcb2021d1_en.pdf). Access on: 12 Oct. 2022. p. 6-7

<sup>3</sup> WORLD BANK. *Global Investment Competitiveness Report 2017/2018: Foreign Investor Perspectives and Policy Implications*. Washington, DC, 2018.

<sup>4</sup> See WAIBEL, Michael *et al.* (ed.). *The Backlash against Investment Arbitration: Perceptions and Reality*. Alphen aan den Rijn: Kluwer Law International, 2010.

<sup>5</sup> MARCEDDU, Maria Laura; ORTOLANI, Pietro. What Is Wrong with Investment Arbitration? Evidence from a Set of Behavioural Experiments. *European Journal of International Law*, v. 31, n. 2, p. 405-428, 2020.

<sup>6</sup> MARCEDDU, Maria Laura; ORTOLANI, Pietro. What Is Wrong with Investment Arbitration? Evidence from a Set of Behavioural Experiments. *European Journal of International Law*, v. 31, n. 2, p. 405-428, 2020.

<sup>7</sup> See e.g. BRONCKERS, Marco. Is Investor-State Dispute Settlement (ISDS) Superior to Litigation before Domestic Courts? An EU View on Bilateral Trade Agreements? *Journal of International Economic Law*, v. 18, n. 3, p. 655-677, 2015.

departs from traditional IIAs. Its predominant feature is facilitating investment without ISDS mechanism. Ever since 2015, Brazil has played a leading role in investment facilitation at the national, regional and international level.

As of October 2022, Brazil has concluded CIFAs with some Latin American countries, African countries and Asian countries,<sup>8</sup> all of which are developing countries. Notably, the EU launched negotiations for a first-ever Sustainable Investment Facilitation Agreement (SIFA) with the Republic of Angola on 22 June 2021. As of October 2022, the negotiators have completed three rounds of negotiations on basis of EU textual proposal.<sup>9</sup> The SIFA, similar to Brazilian CFIA, focusing on investment facilitation, could represent a strong orientation toward investment facilitation.

Investment facilitation refers to series of practical measures that make FDI flow more smoothly and easily without necessarily causing substantive challenges to domestic regulatory policies.<sup>10</sup> In other words, facilitating investment is for countries to tackle ground-level obstacles to FDI, and is easier for countries to accept. Its main objective is to build a transparent, predictable and efficient regulatory and administrative framework. Investment facilitation contributes to good governance on FDI, and thus helps to attract FDI and promote sustainable development. Therefore, some recently concluded IIAs, such as Regional Comprehensive Economic Partnership Agreement (RCEP), integrate investment facilitation provisions. Which approach is better? Will the investment facilitation dominated model be a substitute or just a supplement to investment protection dominated model?

Brazil and China share many similarities, both as top FDI destinations and largest emerging countries in South America and Asia respectively. But Brazil and China

have adopted completely different approaches to IIAs, locating at opposite sides of a spectrum.<sup>11</sup> Therefore, it is worthwhile to compare the practices of the two typical countries in investment facilitation and find what can China and Brazil learn from each other. For this purpose, this article first describes the state of the art concerning the trend of investment facilitation. Then, it summarizes Brazil's unique and China's traditional practices respectively. At last, on basis of comparison, it concludes that investment facilitation is complementary to existing international investment protection regime, rather than a total substitute thereof. It is suggested that China should learn from Brazil in respect of institutional governance and establishing a similar and effective dispute prevention system and Brazil should learn from China in respect of open and liberal policies.

## 2 Investment facilitation: a new trend

The landscape of traditional IIAs seems to have come to a turning point. According to UNCTAD, as in 2017, for the first time, the number of effective treaty terminations exceeded the number of new treaty conclusions; in 2019, the number of IIA terminations in a year exceeded the number of treaty conclusions for the second time.<sup>12</sup> Meanwhile, the content and style of investment-related treaty are changing. It is widely recognized that investment flow expansion depends more on a transparent, efficient and investment-friendly business climate. Unnecessary red tape, bureaucratic overlap or complex procedures can become impediments to domestic and foreign investments.

In 2008, Asia-Pacific Economic Cooperation (APEC) adopted an Investment Facilitation Action Plan (IFAP).<sup>13</sup> It defines investment facilitation as follows: 'Investment facilitation refers to actions taken by governments designed to attract foreign investment and maximize the effectiveness and efficiency of its administration through all stages of the investment cycle.' According to IFAP, the principles of investment facili-

<sup>8</sup> See UNCTAD. *Investment Policy Hub-Brazil*. Available at: <https://investmentpolicy.unctad.org/international-investment-agreements/countries/27/brazil>. Access on: Oct.12, 2022.

<sup>9</sup> EUROPEAN COMMISSION. *EU-Angola negotiations on a Sustainable Investment Facilitation Agreement*. Available at: <https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/southern-african-development-community-sadc/eu-angola-negotiations-en>. Access on: 12 Oct. 2022.

<sup>10</sup> AXEL, Berger *et al.* Investment Facilitation for Development: A New Route to Global Investment Governance. *Briefing Paper, No.5/2019, Deutsches Institut für Entwicklungspolitik (DIE), Bonn*. Available at: <http://dx.doi.org/10.23661/bp5.2019>. Access on: 12 Oct. 2022.

<sup>11</sup> WEI, Dan. Bilateral Investment Treaties: An Empirical Analysis of the Practices of Brazil and China. *European Journal of Law and Economics*, v. 33, p. 663–690, 2012.

<sup>12</sup> UNCTAD. *World Investment Report (2020)*. Available at: [https://unctad.org/system/files/official-document/wir2020\\_overview\\_en.pdf](https://unctad.org/system/files/official-document/wir2020_overview_en.pdf). Access on: 12 Oct. 2022. p. 106-107.

<sup>13</sup> APEC. *Investment Facilitation Action Plan*. Available at: [http://www.apec.org/Groups/Committee-on-Trade-and-Investment/-/media/Files/Groups/IEG/08\\_mrt\\_r\\_004.doc](http://www.apec.org/Groups/Committee-on-Trade-and-Investment/-/media/Files/Groups/IEG/08_mrt_r_004.doc). Access on: 12 Oct. 2022.

tation include promoting accessibility and transparency in administrative policies, enhancing investments protection, enhancing predictability and consistency in investment-related policies, improving the efficiency and effectiveness of investment procedures, building constructive stakeholder relationships, utilizing new technology to improve investment environments, establishing monitoring and review mechanisms for investment policies, and enhancing international cooperation. The aim of IFAP is improving investment climates, encouraging and facilitating investment, and finally strengthening regional economic integration.

In 2016, UNCTAD released its first version of Global Action Menu for Investment Facilitation. It proposes 10 action lines for investment facilitation to guide individual countries and international collaboration. In the 2017 updated version, investment facilitation is defined as ‘the set of policies and actions aimed at making it easier for investors to establish and expand their investments, as well as to conduct their day-to-day business in host countries’. Besides, UNCTAD published ‘Investment Facilitation: A Review of Policy Practices’ in 2017, which provides an overview of domestic and international policy practices, especially the use of online information portals and single windows.<sup>14</sup>

The Group of 20 (G20) is an important forum raising attention on investment facilitation. The non-binding G20 Guiding Principles for Global Investment Policymaking adopted at the G20 Hangzhou Summit in 2016 regards investment facilitation as a key dimension of investment policy. ‘Policies for investment promotion should, to maximize economic benefit, be effective and efficient, aimed at attracting and retaining investment, and matched by facilitation efforts that promote transparency and are conducive for investors to establish, conduct and expand their businesses’.<sup>15</sup>

Investment facilitation is getting more and more attention in countries and international institutions. The current model of global governance in investment facilitation is setting up common guidelines for countries

and promoting international cooperation to reduce practical barriers to FDI flows. In addition, rules of investment facilitation are evolving from non-binding principles to binding agreements.

Ever since 2017, multilateral discussions on investment facilitation have been proceeding at the World Trade Organization (WTO). Due to the entry into force of Trade Facilitation Agreement in 2017, some members began seeking to put investment facilitation on WTO agenda. Proposals on investment facilitation were submitted by Argentina, Brazil, China, Kazakhstan, and Russia respectively. In addition, the MIKTA group (Mexico, Indonesia, Korea, Turkey and Australia) and Friends of Investment Facilitation for Development (FIFD) also engaged in informal dialogue at the WTO. At the 11<sup>th</sup> Ministerial Conference in Buenos Aires in December 2017, 70 WTO members signed the Joint Ministerial Statement on Investment Facilitation for Development, calling for the start of ‘structured discussions with the aim of developing a multilateral framework on investment facilitation’. The Joint Ministerial Statement on Investment Facilitation for Development in 2017 identified and developed the elements of a multilateral framework. The second Joint Ministerial Statement on Investment Facilitation for Development, issued by 98 WTO Members in November 2019, excludes market access, investment protection and ISDS that are well established in IIAs.<sup>16</sup> Formal negotiation for a multilateral investment facilitation agreement started on 25 September 2020, and text-based negotiations may be concluded within 2022. Meanwhile, the European Commission (EC) started a first round of negotiations with the Republic of Angola for a Sustainable Investment Facilitation Agreement (SIFA) on 22 June 2021, which focused on investment facilitation. The SIFA, similar to Brazilian CFIAs, is ‘the first-ever bilateral agreement on investment facilitation that the EU is negotiating’, which could represent a new model with a strong orientation toward investment facilitation.

To achieve the objective of facilitating investments, the first step is to identify elements of investment facilitation. Consensus has been reached on core aspects of investment facilitation, i.e., transparent and efficient administrative procedures. In practice, numerous countries are streamlining or simplifying administrative pro-

<sup>14</sup> UNCTAD. *Global Action Menu for Investment Facilitation*. 2017. Available at: [https://investmentpolicy.unctad.org/uploaded-files/document/Action%20Menu%202023-05-2017\\_7pm\\_print.pdf](https://investmentpolicy.unctad.org/uploaded-files/document/Action%20Menu%202023-05-2017_7pm_print.pdf). Access on: 12 Oct. 2022.

<sup>15</sup> G20. *G20 Guiding Principles for Global Investment Policymaking*. 2016. Available at: <http://www.oecd.org/daf/inv/investment-policy/G20-Guiding-Principles-for-Global-Investment-Policymaking.pdf>. Access on: 12 Oct. 2022.

<sup>16</sup> WTO. *Joint Ministerial Statement on Investment Facilitation for Development*, WT/L/1072. 2019.

cedures.<sup>17</sup> Still, questions remain.<sup>18</sup> Notably, what is the relationship between the policy of investment facilitation and existing international investment regime? How could agreements of investment facilitation coordinate with traditional IIAs featured with ISDS?

### 3 Brazilian model: investment facilitation as a substitute

#### 3.1 Resistance to BITs

Brazil is the second largest economy in the Western Hemisphere behind the United States. According to UNCTAD, Brazil is the world's ninth largest FDI recipients in 2018 with inflows of \$60 billion and the sixth largest FDI recipient in 2019 with inflows of \$72 billion, which increased 20 percent.<sup>19</sup> But on the other hand, FDI outflow was minus \$16 billion and \$16 billion in 2018 and 2019 respectively, ranking 160<sup>th</sup> and 20<sup>th</sup> respectively in the world. In 2020, due to the impact of COVID-19, FDI flows to Brazil fell drastically by 50%.<sup>20</sup>

Before 2000, Brazil's outbound investments were low, thus Brazil was mainly a net FDI recipient.<sup>21</sup> Brazil was deeply influenced by Calvo Doctrine. In 1990s, Brazilian government signed several Bilateral Investment Treaties (BITs), but Brazilian Congress ratified none of them. In 2002, Brazil declared that ISDS was unconstitutional.<sup>22</sup> Specific reasons of non-ratifications of BITs mainly lie in three aspects: firstly, concerns of

sovereignty and hostility to the inequality of BITs between home countries and host countries; secondly, unclear effect of BITs on attracting FDI inflows; thirdly, conflicts between some BIT clauses and domestic legal order of Brazil.<sup>23</sup> Beside resistance to BITs, Brazil remains out of ICSID Convention.

An empirical investigation reveals that BITs act more as complements than as substitutes for regulatory quality and domestic rule of law in attracting FDI inflows.<sup>24</sup> There are many signatory countries received little FDIs. By contrast, Brazil continuously ranks among top FDI recipients in the world. The Brazilian experiences seem to prove BITs are not determinant factors for attracting FDI, other factors such as market factors, domestic institutions may be more important. Isolated from BITs networks, Brazil endeavored to give international investments effective protection by Brazilian law, e.g., Arbitration Law No.9307 in 1996.

More and more Brazilian companies invested abroad after 2000. Brazil's outward FDI was about \$52 billion, \$149 billion and \$181 billion in 2000, 2010 and 2015 respectively, which increased more than 3 times from 2000 to 2015.<sup>25</sup> Brazil increasingly became a home state of FDI. Consequently, there was growing need for effective mechanisms of investment protection. However, Brazil remained resistant to ISDS and BITs. It is proposed that there are mainly two reasons, one is the model of Brazilian state capitalism, the other is the possibility of treaty shopping for Brazilian investors.<sup>26</sup>

#### 3.2 Practices on investment facilitation

##### 1 Bilateral and Regional Effort: CIFAs

In 2013, Brazil developed a new model of international investment rule-making, namely, CIFA. Brazil has concluded several CFAs since 2015 with: Mozambique

<sup>17</sup> UNCTAD. *World Investment Report (2020)*. Available at: [https://unctad.org/system/files/official-document/wir2020\\_overview\\_en.pdf](https://unctad.org/system/files/official-document/wir2020_overview_en.pdf). Access on: 12 Oct. 2022. p. 102.

<sup>18</sup> See GHOURI, Ahmad. What Next for International Investment Law and Policy? A Review of the UNCTAD Global Action Menu for Investment Facilitation. *Manchester Journal of International Economic Law*, v. 15, n. 2, p. 190-213, 2018.

<sup>19</sup> UNCTAD. *World Investment Report (2020)*. p. 12.

<sup>20</sup> UNCTAD. *Investment Trends Monitor*. 2021. Available at: [https://unctad.org/system/files/official-document/diaeiainf2021d1\\_en.pdf](https://unctad.org/system/files/official-document/diaeiainf2021d1_en.pdf). Access on: 12 Oct. 2022. p. 3.

<sup>21</sup> See MONEBHURUN, Nitish. Novelty in International Investment Law: The Brazilian Agreement on Cooperation and Facilitation of Investments as a Different International Investment Agreement Model. *Journal of International Dispute Settlement*, v. 8, p. 79-100, 2017.

<sup>22</sup> U.S. DEPARTMENT OF STATE. *2020 Investment Climate Statements: Brazil*. Available at: <https://www.state.gov/reports/2020-investment-climate-statements/brazil/>.

<sup>23</sup> WEI, Dan. Bilateral Investment Treaties: An Empirical Analysis of the Practices of Brazil and China. *European Journal of Law and Economics*, v. 33, p. 663-690, 2012.

<sup>24</sup> HALLWARD-DRIEMEIER, Mary. *Do Bilateral Investment Treaties Attract FDI? Only a bit...and they could bite*. Available at: [http://documents1.worldbank.org/curated/en/113541468761706209/105505322\\_20041117160010/additional/multi0page.pdf](http://documents1.worldbank.org/curated/en/113541468761706209/105505322_20041117160010/additional/multi0page.pdf). Access on: 12 Oct. 2022.

<sup>25</sup> UNCTAD. *World Investment Report (2016)*, Annex, Table 2.

<sup>26</sup> REIS, Marcelo Simões dos; RIBEIRO, Gustavo Ferreira. Revisiting Brazilian Aversion towards the Investor-State Clause: Capitalism of State and Treaty-shopping. *Brazilian Journal of International Law*, v. 16, n. 1, 2019.

(2015), Angola (2015), Mexico (2015), Malawi (2015), Colombia (2015), Peru (2015), Chile (2015), Iran (2016), Azerbaijan (2016), Armenia (2017), Ethiopia (2018), Suriname (2018), Guyana (2018), the United Arab Emirates (2019), Morocco (2019), Ecuador (2019) and India (2020).<sup>27</sup> The following CFAs are in force: Mexico, Angola, Armenia, Azerbaijan, and Peru. In 2017, Brazil signed with MERCOSUR an Intra-MERCOSUR Cooperation and Facilitation Investment Protocol and ratified it in 2019.<sup>28</sup> Notably, CFAs concluded are different from each other in some aspects.<sup>29</sup> The features of CFAs are as follows.<sup>30</sup>

Firstly, CFAs focus on regulatory power of states and investment facilitation. Different from IIAs imposing obligations on host states, CFAs put emphasis on regulatory power of states. For example, transfers clause stipulates some restrictions for capital transfer. The host state could prevent transfer in circumstances of bankruptcy or insolvency, criminal infractions, enforcement of judicial or administrative decisions, serious difficulties in the balance of payments and external financial difficulties or threat.<sup>31</sup> Notably, CFAs contain an agenda for further investment cooperation and facilitation, to address topics such as transfers, visas and so on.

Secondly, CFAs emphasize institutional governance to promote intergovernmental dialogues and cooperation. CFAs establish institutions, a Joint Committee and Focal Points or Ombudspersons, to ensure continued communication between foreign investors and host states. The Joint Committee is a political decision-making treaty organ, composed of government representatives of both parties to the treaty, acting jointly and responsible for administering the relevant agreement.

Focal Points are domestic governmental institutions of the parties that comply with directives issued by the Joint Committee. Moreover, Focal Points give investors support and hear their complaints, serving as points of first contact for foreign investors in the host state.

Thirdly, CFAs establish substantive obligations for investors to ensure sustainable development. CFAs reaffirm the obligations of investors to comply with all local laws of the host state in all stages of investments, particularly the obligations concerning anti-corruption and taxation. CFAs set up guidelines and standards for responsible business conduct, such as respecting human rights, protecting environment, and so on.

Fourthly, the most distinctive feature of CFAs is the dispute prevention mechanism and dispute settlement mechanism without ISDS. Unlike traditional IIAs, CFAs do not include ISDS mechanism. Instead, CFAs establish a mechanism of dispute prevention through institutional governance, which include: 1) an Ombudsman and a Joint Committee act as mediators to amicably settle any dispute; 2) the Joint Committee hears the parties, evaluates the submission presented and issues report about the dispute if amicable settlement fails; 3) the Joint Committee calls for special meetings to review matters that have been submitted. During the procedure, the Joint Committee may invite the specific investor affected or other interested stakeholders to present views. If the dispute remains unsettled within the Joint Committee, one party may initiate interstate arbitration. Similar to existing interstate arbitration, the objective of CFIA state-state arbitration is to rectify non-confirming measures. CFAs confer the power of granting compensation on interstate arbitral tribunal only upon specific agreement of the parties. It is advocated that the compliance-oriented interstate adjudication mechanism of CFAs is inspired by WTO rules.<sup>32</sup>

## 2 Multilateral Effort

Brazil participated in the submission of the Proposal for a WTO Informal Dialogue on Investment Facilitation for Development in 2017 as a member of FIFD. Besides, Brazil submitted a proposal Possible Elements of a WTO Instrument on Investment Facilitation to

<sup>27</sup> UNCTAD. *Investment Policy Hub*. Available at: <https://investmentpolicy.unctad.org/international-investment-agreements/countries/27/brazil>. Access on: 12 Oct. 2022.

<sup>28</sup> MERCOSUR. *Protocolo de Cooperación y Facilitación de Inversiones Intra Mercosur*. Available at <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5548/download>. Access on: 12 Oct. 2022.

<sup>29</sup> See NATHALIE, Bernasconi-Osterwalder; MARTIN, Dietrich Brauch. Comparative Commentary to Brazil's Cooperation and Investment Facilitation Agreements (CFAs) with Mozambique, Angola, Mexico and Malawi. *International Institute for Sustainable Development*, p. 1-16, 2015.

<sup>30</sup> See WEI, Dan; TANG, Yanyan. From the Outsider to the Pioneer of International Investment Rules: On Brazil CFIA Model. *Wuhan University International Law Review*, v. 5, p. 63-83, 2019.

<sup>31</sup> See CFIA, Article 10.

<sup>32</sup> GERALDO, Vidigal; BEATRIZ, Stevens. Brazil's New Model of Dispute Settlement for Investment: Return to the Past or Alternative for the future? *Journal of World Investment & Trade*, v. 19, n. 3, p. 488, 2018.

gether with Argentina in 2017.<sup>33</sup> The elements of investment facilitation include transparency, requirements and process, single electronic window, National Focal Point or Ombudsperson, and so on. In January 2018, Brazil submitted a draft multilateral Investment Facilitation Agreement, which covers similar elements.<sup>34</sup>

### 3 Domestic Reform

Except bilateral, regional and multilateral efforts, Brazil continues domestic reform on investment facilitation. The Brazilian Trade and Investment Promotion Agency (APEX) plays a leading role in attracting FDI to Brazil. APEX is not a one-stop-shop for foreign investors, but the agency can assist free of charge in all steps of the investor's decision-making process, include identifying and contacting potential industry segments, sector and market analyses, and general guidelines on legal and fiscal issues.<sup>35</sup> In 2019, the Ministry of Economy created the Ombudsman's office to provide foreign investors with a single point of contact for concerns related to FDI. The plan seeks to eventually streamline foreign investments in Brazil by providing investors, foreign and domestic, with a simpler process for the creation of new businesses and additional investments in current companies. Currently, the Ombudsman's office is not operating as a single window for services, but rather as an advisory institute for FDI.<sup>36</sup>

The Economic Freedom Law 13.874 adopted in September 2019 includes several regulatory simplification provisions. Since 2019, it has been easier for foreign investor to get investment permission from the Brazilian federal government. Foreign companies can make request for establishment on government's Portal. According to World Bank's Doing Business Report from 2019 to 2020, some Brazilian states (São Paulo

and Rio de Janeiro) made starting a business easier by allowing expedited business registration and by decreasing the cost of the digital certificate.

Brazil is in the process of setting up a 'one-stop-shop' for international investors. In May 2020, Government of Brazil published No.43 Resolution (RESOLUÇÃO NO 43 DE 4 DE MAIO DE 2020) which carries further reform on the Direct Investments Ombudsman (DIO) Mechanism. Initially, the service scope of Ombudsman's office was limited to foreign investors covered by CFAs. No.43 Resolution expands the mandate of DIO to all foreign investors in Brazil, regardless of their nationality. The DIO is a 'single window' for investors, provided by the Executive Secretariat of CAMEX. The DIO is responsible for receiving requests and inquiries about investments, to be answered jointly with the public agency responsible for the matter at the Federal, State and Municipal levels involved in each case (the Network of Focal Points).<sup>37</sup>

On basis of factors outlined above, Brazil offers an innovative model of international investment treaty, and an alternative model of international investment governance. CIFAs create a new regime for protecting foreign investment excluding ISDS and establishing a hybrid system of dispute prevention mechanisms and state-to-state arbitration.<sup>38</sup> Moreover, Brazilian practices reflect a new trend of international investment law and policy. It seems FDI policy is shifting from investment protection and investment liberalization to investment facilitation. Nonetheless, CIFAs may not necessarily perform the same role as BITs but act as a complementary.<sup>39</sup>

There is still much room for Brazil to improve on facilitating investments. In World Bank Doing Business Report 2020, Brazil ranked 124th out of 190 countries in terms of overall conveniences of doing business in 2019. Brazil's lowest score was in annual administrative burden for a medium-size business to comply with Brazilian tax codes at an average of 1,501 hours, much

<sup>33</sup> WTO. *Possible Elements of a WTO Instrument On Investment Facilitation, Communication From Argentina And Brazil*. 2017. JOB/GC/124 □ WTO Documents. Available at: [https://docs.wto.org/dol2fe/Pages/FE\\_Search/FE\\_S\\_S009-DP.aspx?CatalogueIdList=236414,236189,236149,235996,235960,235961,235962,235526,235438&CurrentCatalogueIdIndex=6](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?CatalogueIdList=236414,236189,236149,235996,235960,235961,235962,235526,235438&CurrentCatalogueIdIndex=6). Access on: 12 Oct. 2022.

<sup>34</sup> WTO. *Structured Discussions Investment Facilitation: Communication from Brazil*. Available at: [https://docs.wto.org/dol2fe/Pages/FE\\_Search/FE\\_S\\_S009-DP.aspx?language=E&CatalogueIdList=241891&CurrentCatalogueIdIndex=0&FullT](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=241891&CurrentCatalogueIdIndex=0&FullT). Access on: 12 Oct. 2022.

<sup>35</sup> U.S. DEPARTMENT OF STATE. *2020 Investment Climate Statements: Brazil*. Available at: <https://www.state.gov/reports/2020-investment-climate-statements/brazil/>.

<sup>36</sup> U.S. DEPARTMENT OF STATE. *2020 Investment Climate Statements: Brazil*. Available at: <https://www.state.gov/reports/2020-investment-climate-statements/brazil/>.

<sup>37</sup> See DIO's website. Available at: <http://oid.economia.gov.br/en/menus/8>. Access on: 12 Oct. 2022.

<sup>38</sup> GERALDO, Vidigal; BEATRIZ, Stevens. Brazil's New Model of Dispute Settlement for Investment: Return to the Past or Alternative for the future? *Journal of World Investment & Trade*, v. 19, n. 3, p. 487, 2018.

<sup>39</sup> TITI, Catharine. International Investment Law and The Protection of Foreign Investment in Brazil. *Transnational Dispute Management*, v. 2, Special Issue on Latin America, 2016. v. 1.



higher than the 160.7 hour average of OECD high-income economies. Business managers often complain of not being able to understand complex and sometimes contradictory tax regulations.

## 4 China's practices: investment facilitation as a supplement

### 4.1 Follower of Investment Treaty regime

In 1978, the Chinese government adopted 'open door policy', which altered China's development strategy from one based on closed economy to one of active participation in world economy.<sup>40</sup> Since 2001, China has pursued a 'going-out' investment policy. China continues to be one of the top host economies and top home economies in the world in recent years. According to UNCTAD, China was the fourth largest economy of outbound FDI and the second largest economy of inbound FDI in 2019.<sup>41</sup> China has concluded more than 100 IIAs since 1980s, most of which include ISDS mechanism. China's attitude towards ISDS has shifted from 'cautious' to 'proactive'.<sup>42</sup> It could be concluded that China's current policy toward IIAs backed with ISDS mechanism has evolved to a balanced one.

China's approaches to IIAs echoed with the main trend of IIAs revolution worldwide. It is contended that China's investment treaty-making practice is largely inspired by its partner countries, which result in the inconsistency of China's approaches to international investment rule-making.<sup>43</sup> As more and more ISDS cases initiated against China and by Chinese mainland investors, China is unsatisfactory to the current ISDS system.<sup>44</sup> On 28 December 2018, China submitted writ-

ten comments on the proposed amendments of ICSID Arbitration Rules, addressing issues of treaty interpretation, conflict of interest of arbitrators, parallel proceedings, third-party funding and so on.<sup>45</sup> On 31 July 2020, China submitted further comments.<sup>46</sup> On 19 July 2019, China submitted a proposal on ISDS reform to the United Nations Commission on International Trade Law (UNCITRAL) Working Group III.<sup>47</sup> Under this proposal, China reaffirmed its commitment to ISDS as an important mechanism for resolving investor-state disputes while admitted the necessity to reform ISDS mechanism and made recommendations thereto.

On 30 December 2020, China and the EU concluded in principle negotiations on the Comprehensive Agreement on Investment (CAI). CAI didn't cover ISDS mechanism, but relegate it to future negotiations. Perhaps due to the EU's proposal on Multilateral Investment Court, the parties have to take into account the work undertaken in the context of UNCITRAL on a Multilateral Investment Court. It is contended that China is open to possible proposals to improve ISDS mechanism and may vary its position when necessary.<sup>48</sup>

### 4.2 Practices on investment facilitation

China is a positive participant of global governance of investment facilitation. Declaration on the Establishment of the Shanghai Cooperation Organization (SCO) and Vision and Actions on Jointly Building Silk Road Economic Belt and 21st-Century Maritime Silk Road both mentions promoting investment facilitation and reducing barriers to investments. International cooperation on investment facilitation would reduce the barriers to and costs of Chinese outbound investments and

<sup>40</sup> HUAN, Guocang. China's Open Door Policy, 1978-1984. *Journal of International Affairs*, v. 39, n. 2, p. 1-18, 1986.

<sup>41</sup> UNCTAD. World Investment Report (2020). p. 12-15.

<sup>42</sup> CHI, Manjiao. The Evolution of ISA Clauses in Chinese IIAs and Its Practical Implications: The Admissibility of Disputes for Investor-State Arbitration. *Journal of World Investment & Trade*, v. 16, p. 869-898, 2015.

<sup>43</sup> BERGER, Axel. Hesitant Embrace: China's Recent Approach to International Investment Rule-Making. *Journal of World Investment & Trade*, v. 16, p. 843-868, 2015.

<sup>44</sup> See NING Hongling; QI Tong. A Chinese Perspective on the Investment Court System in the Context of Negotiating EU-China BIT. *Tsinghua China Law Review*, v. 11, p. 91-127, 2018.

<sup>45</sup> CHINA. *Comments on the Proposed Amendments to the ICSID Rules Submitted by China*. Available at: [https://icsid.worldbank.org/sites/default/files/amendments/state-input/China\\_Comments\\_12.28.18.pdf](https://icsid.worldbank.org/sites/default/files/amendments/state-input/China_Comments_12.28.18.pdf). Access on: 12 Oct. 2022.

<sup>46</sup> CHINA. *Comments submitted by China on ICSID Secretariat Working Paper #4*. Available at: <https://icsid.worldbank.org/sites/default/files/amendments/state-input/20200731-%20China%20on%20ICSID%20Secretariat%20Working%20Paper%20%234.pdf>. Access on: 12 Oct. 2022.

<sup>47</sup> CHINA. *Possible Reform of Investor-State Dispute Settlement (ISDS): Submission from the Government of China*, A/CN.9/WG.III/WP.177, Jul. 2019.

<sup>48</sup> KATIA, Fach Gomez. EU-China Negotiations on Investor State Dispute Settlement within the Cai Framework: Are We on the Right Track? *Revista General de Derecho Europeo*, v. 55, 2021. Available at SSRN: <https://ssrn.com/abstract=3947782>. 12 Oct. 2022.

foreign investments. An empirical study shows that an increase of 1% in the level of investment facilitation of the host state can generally bring a 2.173% increase of China outward FDI along the Belt and Road.<sup>49</sup>

### 1 Multilateral Effort

On 4 April 2017, China participated in the submission of WTO Informal Dialogue on Investment Facilitation for Development as an initial member of FIFD. On 21 April 2017, China proposed a Possible Elements of Investment Facilitation, which mainly included enhancing transparency, improving efficiency, and responding to developing and least-developed members' needs. On 31 August 2017, Outlines for BRICS Investment Facilitation was approved at the 7th Meeting of the BRICS Trade Minister held on in Shanghai, China. It identifies some good practices, including enhancing transparency, improving efficiency and promoting cooperation.

### 2 Bilateral and Regional Effort

Besides multilateral participation, China also promotes investment facilitation at bilateral and regional level. Unlike Brazil, bilateral agreements focusing on investment facilitation are very rare and limited. In 2015, China and Australia signed Memorandum of Understanding between the Government of Australia and the Government of the People's Republic of China on an Investment Facilitation Arrangement, which focuses primarily on the issue of visas to Chinese companies investing in Australia.

Nonetheless, China is still a proponent of traditional IIAs. Investment facilitation provisions are incorporated in traditional IIAs. For example, in the Regional Comprehensive Economic Partnership Agreement (RCEP) signed in 2020, Article 10.17 of the investment chapter deals with rules of investment facilitation, its content is as follows:

1. Subject to its laws and regulations, each Party shall endeavour to facilitate investments among the Parties, including through:

(a) creating the necessary environment for all forms of investment;

(b) simplifying its procedures for investment applications and approvals;

(c) promoting the dissemination of investment information, including investment rules, laws, regulations, policies, and procedures; and

(d) establishing or maintaining contact points, one-stop investment centres, focal points, or other entities in the respective Party to provide assistance and advisory services to investors, including the facilitation of operating licences and permits.

2. Subject to its laws and regulations, a Party's activities under subparagraph 1(d) may include, to the extent possible, assisting investors of any other Party and covered investments to amicably resolve complaints or grievances with government bodies which have arisen during their investment activities by:

(a) receiving and, where appropriate, considering referring or giving due consideration to complaints raised by investors relating to government activities impacting their covered investment; and

(b) providing assistance, to the extent possible, in resolving difficulties experienced by the investors in relation to their covered investments.

3. Subject to its laws and regulations, each Party may, to the extent possible, consider establishing mechanisms to make recommendations to its relevant government bodies addressing recurrent issues affecting investors of another Party.

4. The Parties shall endeavour to facilitate meetings between their respective competent authorities aimed at exchanging knowledge and approaches to better facilitate investment.

5. Nothing in this Article shall be subject to, or otherwise affect, any dispute resolution proceedings under this Agreement.

### 3 Domestic Reforms

Domestic reforms relating to investment facilitation is ongoing. In 2013, the State Council announced the Shanghai Pilot Free Trade Zone to provide more open and higher standard trade and investment services to foreign companies. In the same year, China published the first Special Management Measures for Foreign Investment Access (Negative List). For industries not included in the Negative List, foreign investors would receive national treatment with regard to the establish-

<sup>49</sup> CHEN, Jiyong *et al.* Investment Facilitation and China's Outward Foreign Direct Investment along the Belt and Road. *China Economic Review*, v. 61, p. 1-16, 2020.

ment and approval requirements and process. China gradually scaled up its Pilot Free Trade Zone to 18 Pilot Free Trade Zones. Experiences and good practices would be shared by all Pilot Free Trade Zones.<sup>50</sup> Meanwhile, the Negative List in Pilot Free Trade Zone is updated annually, becoming shorter and shorter.

In 2018, the General Office of the Ministry of Commerce(MOC) and the General Office of the State Administration for Industry and Commerce jointly issued the Notice on the Implementation of the Acceptance of the Single Window and Single Form for Business Filing and Industrial and Commercial Registration of Foreign-Invested Enterprises in order to simplify the procedures for the establishment of foreign-funded enterprises and to further enhance the facilitation of the foreign investment throughout the country.

In March 2019, the National People's Congress passed the new Foreign Investment Law that effectively replaced previous laws governing foreign investment. It came into force on 1 January 2020. The Foreign Investment Law intends to abolish the case-by-case review and approval system on market access for foreign investment and standardize the regulatory regimes for foreign investment by including the Negative List management system, a foreign investment information reporting system, and a foreign investment security review system all under one document. In addition, it establishes a complaint mechanism for investors to report administrative abuses.

In October 2019, the State Council approved the Regulation on Optimizing the Business Environment, which was intended to provide investors with a transparent, equitable, predictable and efficient regulatory and administrative framework. Accordingly, several rounds of 'reform, abolish, and interpretation' of current laws and regulations have been carried out, and a number of relevant laws and regulations have been formulated and issued. The list of powers and responsibilities of the three-level government departments of provinces, cities and counties and the list of approval items of the State Council have been announced to the public.

Online service platforms are established to facilitate investments. The State Council established a new

and user-friendly website in English to assist foreign investors looking to do business in China. In December 2019, China also launched a Chinese-language nationwide government service platform on the State Council's official website. The platform connected 40 central government agencies with 31 provincial governments, providing information on licensing and project approvals by specific agencies. The central government published the website under its 'improving the business climate' reform agenda, claiming that the website consolidates information and offers cross-regional government online services. On 24 February 2021, a Chinese-language National Laws and Regulations Database opened, which make available all of the national and local laws and regulations to the public.<sup>51</sup>

From the above-mentioned practices, it could be found that China's policy towards international investment regime is inclusive. Without a unique style, China's approaches to IIAs are influenced by contracting partners and thus inconsistent to some extent. As a top FDI recipient and home state, China is determinate to improve domestic business environment by protecting, liberalizing, promoting and facilitating investments. Except the proposal to WTO, investment facilitation measures are not clearly departed from investment liberalization and protection measures. Instead, investment facilitation policies are incorporated in IIAs. In other words, investment facilitation is regarded as a supplement rather than a total substitute for existing investment regime.

In 2019, China climbed more than 40 spots in the World Bank's Ease of Doing Business Survey to 31st place out of 190 economies. This was partly due to regulatory reforms that helped streamline some business processes, including improvements to addressing delays in construction permits and resolving insolvency. Of course, there is still much room for improvement. The World Bank Global Indicators of Regulatory Governance gave China a composite score of 1.75 out of 5 points, attributing China's relatively low score to the futility of foreign companies appealing administrative authorities' decisions to the domestic court system; not having easily accessible and updated laws and regulations; the lack

<sup>50</sup> See CHINA STATE COUNCIL. *Notice on Replication and Promotion of the Sixth Batch Pilot Experiences by State Council on 7 July 2020*. Available at: [http://www.gov.cn/zhengce/content/2020-07/07/content\\_5524720.htm](http://www.gov.cn/zhengce/content/2020-07/07/content_5524720.htm). Access on: 12 Oct. 2022.

<sup>51</sup> The website is available at: <https://flk.npc.gov.cn/>. Access on: 12 Oct. 2022.

of impact assessments conducted prior to issuing new laws; and other concerns about transparency.<sup>52</sup>

## 5 What can China and Brazil learn from each other?

China and Brazil share many common elements on investment facilitation, such as transparency, efficiency, establishment of focal points, amicable resolution of complaints and so on. Meanwhile, there are some obvious distinctions between China and Brazil. Brazil's proposal and Brazilian model covers a wider range of measures, including corporate social responsibility and anti-corruption, while China's proposal involves only limited issues. In a broader context, China is still a proponent of traditional IIAs, which is different significantly from Brazil. By comparison of elements of the Brazilian model of investment facilitation and the practice of China, it could be found that China and Brazil could draw some lessons from each other.

### 5.1 Brazilian experiences: investment prevention mechanism

Cooperation, openness and inclusiveness are three fundamental features of The Belt and Road Initiative. Chinese culture cherishes the idea 'a bad compromise is better than a good lawsuit'. Chinese mainland investors are generally reluctant to make use of ISDS mechanism to protect their rights. Meanwhile, the number of ISDS cases against China is rising. So, it is for China's benefit to prevent investment disputes. It is suggested that China should draw lessons from Brazil, and enhance international coordination and cooperation to prevent investment disputes.<sup>53</sup>

Article 26 of the new Foreign Investment Law stipulates that 'the State establishes a complaint and settlement mechanism for foreign-invested enterprises, with a view to promptly handling problems raised by foreign-invested enterprises or their investors, and coordinating and improving relevant policies and measures'. In

August 2020, MOC issued the rules on handling complaints from foreign-invested enterprises, i.e., Measures for Processing Complaints of Foreign-invested Companies (hereinafter referred to as Measures), which came into force on 1 October 2020. Article 26 of the Foreign Investment Law and the Measures reflect the willingness of China to establish a prevention mechanism for investment disputes.

However, obvious distinctions exist between the complaint system of China and the dispute prevention mechanism of Brazil. CFAs prevent disputes through institutional governance. Focal Points or Ombudsmen combine two types of functions. The first function is to provide support and assistance for foreign investors. The second function is to investigate and hear complaints from investors as well as from local governments, to prevent the emergence of formal disputes. Easing tension among stakeholders early on in an investment project can avoid their escalation to a legal dispute.<sup>54</sup> Responsibilities of Focal Points or Ombudspersons include:

- a) Endeavour to follow the recommendations of the Joint Committee and interact with the National Focal Point of the other Party, in accordance with this Agreement;
- b) Follow up on requests and enquiries of the other Party or of investors of the other Party with the competent authorities of the Party and inform the stakeholders on the results of its actions;
- c) Assess, in consultation with relevant government authorities, suggestions and complaints of the Party received from the other Party or investors of the other Party and recommend to the Joint Committee, as appropriate, actions to improve the investment environment;
- d) Seek to prevent differences in investment matters, in collaboration with government authorities of the Party and relevant private entities and report to the Joint Committee;

<sup>52</sup> See Global Indicators of Regulatory Governance. Available at: <https://rulemaking.worldbank.org/en/data/explorecountries/china#>. Access on: 12 Oct. 2022.

<sup>53</sup> QI Tong, On the Prevention Mechanism of Investment Disputes along the Belt and Road. *Law Review*, v. 3, p. 86, 2018.

<sup>54</sup> NATHALIE, Bernasconi-Osterwalder; MARTIN, Dietrich Brauch. Comparative Commentary to Brazil's Cooperation and Investment Facilitation Agreements (CIFAs) with Mozambique, Angola, Mexico and Malawi. *International Institute for Sustainable Development*, p. 6, 2015.

e) Provide timely and useful information on regulatory issues, which could affect general investment or specific projects; and

f) Report its activities and actions to the Joint Committee, when appropriate.

Different types of functions require different degrees of independence. For the second function, it will be important to ensure that the National Focal Point be independent as far as possible, and broadly represented in terms of interests.<sup>55</sup> National Focal Point, or Ombudsman is a single and neutral agency or authority assessing complaints from foreign investors. In Brazil, the National Focal Point is CAMEX, which is part of the Government Council of the Presidency of the Federative. CAMEX's main body is the Council of Ministers, which is an inter-ministerial body. The structure supporting the Ombudsman involves a network of focal points across different levels and branches of governmental agencies.<sup>56</sup>

By contrast, the institutions handling complaints from foreign investors in China are less independent. According to the Measures, the mandate of National Center for Complaints of Foreign-Invested Enterprises only includes handling complaints from foreign investors against ministerial bodies or provincial governments. Other complaints have to be submitted to local or regional level institutions. Whether this system would provide for consistent application in cases handled across the country remain to be seen. Moreover, as the complaint center is buried within MOC which has little influence over the complaint process, it is doubted that it could not do much apart from passing the complaint to the relative authority.<sup>57</sup> In addition, local or regional institutions lack independence because they are affiliated to local government.

<sup>55</sup> NATHALIE, Bernasconi-Osterwalder; MARTIN, Dietrich Brauch. Comparative Commentary to Brazil's Cooperation and Investment Facilitation Agreements (CIFAs) with Mozambique, Angola, Mexico and Malawi. *International Institute for Sustainable Development*, p. 6, 2015.

<sup>56</sup> DROUBI, Sufyan. Investment Facilitation Mechanisms and Access to Justice in Brazilian Investment Agreements. *ASIL Insights*, v. 24, n. 9, 2020.

<sup>57</sup> GIOLZETTI, Don. China's New Complaint Measures for Foreign Companies: Substance or Style? *China Business Review*, Feb. 2021. Available at: <https://www.chinabusinessreview.com/chinas-new-complaint-measures-for-foreign-companies-substance-or-style/>. Access on: 12 Oct. 2022.

Though the Measures broaden the scope of complaints, making it clear that foreign companies could air grievances, as well as report problems in the investment environment and make suggestions to improve relevant policies and measures, the function of the complaint system is still limited. It may not prevent the investment dispute at an early stage. Therefore, it is suggested that China draws some experiences from Brazil in terms of institutional governance, establishing a similar single national focal point capable of providing comprehensive assistances to foreign investors to facilitate investments and enhance coordination among different shareholders.

Joint Committee exists in many Free Trade Agreements. The Joint Committee established under the CFIA is similar to that in U.S. FTAs which are also responsible for supervising the implementation of the FTA.<sup>58</sup> In addition, in U.S.-Korea FTA, the Joint Committee shall also seek to resolve disputes that may arise regarding the interpretation or application of this Agreement.<sup>59</sup> The Joint Committee in CFIA is mandated with preventing, managing and resolving any dispute regarding investments. The Joint Committee in CFIA examines the dispute, hear the parties and issue a report on the dispute, seeking to resolve any issues or disputes concerning investments of investors from the other Party in an amicable manner. This could lead to more constructive solutions, especially if the search for solutions is implemented more broadly, extending to a range of stakeholders.<sup>60</sup> Furthermore, before initiating state-state arbitration, the parties must first submit their dispute to the Joint Committee. The pre-arbitration procedure may reduce the number of formal disputes.

The Joint Committee and National Focal Points interact with each other, creates a chain of communication linking investors and authorities of state parties. This mechanism creates opportunities for them to speak at strategic points in time (before the adoption of a new

<sup>58</sup> See e.g. U.S.-Korea FTA, Article 22.2. Available at: <https://ustr.gov/trade-agreements/free-trade-agreements/korus-fta/final-text>. Access on: 12 Oct. 2022.

<sup>59</sup> U.S.-Korea FTA, Article 22.2.

<sup>60</sup> NATHALIE, Bernasconi-Osterwalder; MARTIN, Dietrich Brauch. Comparative Commentary to Brazil's Cooperation and Investment Facilitation Agreements (CIFAs) with Mozambique, Angola, Mexico and Malawi. *International Institute for Sustainable Development*, p. 6, 2015.

regulation or a line of action), which may prevent the formation of certain disputes.<sup>61</sup>

## 5.2 Chinese experiences: inclusive investment policies

Brazil's approaches focus heavily on investment facilitation, rather than on investment protection and market access. The Brazilian model is obviously less protective for investors. Substantive obligations of CFIA include national treatment, Most-Favored-Nation treatment, direct expropriation, (not full) compensation for losses and so on. Typical clauses in traditional BITs, such as fair and equitable treatment, indirect expropriation, are absent. Particularly, CFIA emphasize the obligation of investors to comply with domestic law, which may result in the lack of protection by international standards. If damages to investors are caused by unreasonable domestic legislations, investors may find no remedies.

Access to justice may not be guaranteed. The excessive bureaucratization and formalism may aggravate inefficiency and affect legitimacy, especially when the amount of work increases significantly. It is unclear how the Ombudsman will manage the complexities of interacting with other authorities and the network of domestic focal points in a complex federal system.<sup>62</sup> The Joint Committee is a good platform to conduct dialogue and bilateral consultations. While it is likely that the Joint Committee might be able to prevent disputes to some extent, it will be more difficult for it to resolve disputes, since it is composed of representatives of the parties rather than third-party mediators.<sup>63</sup> The Joint Committee entrusted with a large role would bring back an element of diplomacy to the investment protection regime.<sup>64</sup> Particularly, the Joint Committee,

with an important role in dispute settlement involving affected investors, may even cause high tensions between state parties when state parties have direct involvement in a dispute. Moreover, the remedies provided in CFIA are prospective rather than retrospective, which seems meaningless for affected investors. The compliance obligations in CFIA may make expropriation without compensation *de facto* permissible when carried out through a one-time taking. This could generate a perverse incentive for host state to extract rent from foreign investors.<sup>65</sup> In this sense, CFIA are viewed as a return to the pre-BIT phase of politicized investment protection.<sup>66</sup> In a word, despite the value of mechanisms in CFIA, it is necessary to take a critical approach towards the role and functioning of Focal Point and the Joint Committee.<sup>67</sup>

Structured discussions at the WTO exclude investment protection, market access and ISDS due to WTO's limited mandate. ISDS is also explicitly excluded in UNCTAD' initiative because it is another complex issue dealt with by specific working group. The focus of multilateral effort on investment facilitation does not mean investment facilitation policies can be isolated from other investment policies. Investment protection is the foundation of international investment regime. Without a predictable and safe business environment, foreign investors may refrain from investing in a state with weak rule of law, even if administrative procedures are efficient. Otherwise, they would face unpredictable risks. Market access is another important factor to foster international investment. Restrictions on market access could reduce directly a number of FDI inflows. In practice, the delineation between investment facilitation on the one hand, and investment liberalization and protection on the other hand is blurry. For example, mandatory time limits for government decisions on the admission of proposed investments go directly

<sup>61</sup> DROUBI, Sufyan. Investment Facilitation Mechanisms and Access to Justice in Brazilian Investment Agreements. *ASIL Insights*, v. 24, n. 9, 2020.

<sup>62</sup> DROUBI, Sufyan. Investment Facilitation Mechanisms and Access to Justice in Brazilian Investment Agreements. *ASIL Insights*, v. 24, n. 9, 2020.

<sup>63</sup> NATHALIE, Bernasconi-Osterwalder; MARTIN, Dietrich Brauch. Comparative Commentary to Brazil's Cooperation and Investment Facilitation Agreements (CIFA) with Mozambique, Angola, Mexico and Malawi. *International Institute for Sustainable Development*, p. 14, 2015.

<sup>64</sup> GERALDO, Vidigal; BEATRIZ, Stevens. Brazil's New Model of Dispute Settlement for Investment: Return to the Past or Alternative for the future? *Journal of World Investment & Trade*, v. 19, n. 3, p.

489, 2018.

<sup>65</sup> GERALDO, Vidigal; BEATRIZ, Stevens. Brazil's New Model of Dispute Settlement for Investment: Return to the Past or Alternative for the future? *Journal of World Investment & Trade*, v. 19, n. 3, p. 497, 2018.

<sup>66</sup> GERALDO, Vidigal; BEATRIZ, Stevens. Brazil's New Model of Dispute Settlement for Investment: Return to the Past or Alternative for the future? *Journal of World Investment & Trade*, v. 19, n. 3, p. 511, 2018.

<sup>67</sup> TITI, Catharine. Non-adjudicatory State-State Mechanisms in Investment Dispute Prevention and Dispute Settlement: Joint Interpretations, Filters and Focal Points. *Brazilian Journal of International Law*, v. 14, n. 2, p. 47, 2017.

to market access questions and the ability of governments to evaluate proposed investments effectively before making decisions.<sup>68</sup> Notably, national security concerns about foreign investment intensified in recent years, particularly in developed countries.<sup>69</sup> Investment facilitation reform can't be ongoing smoothly without addressing concerns of national security. UNCTAD points out that any investment facilitation initiative cannot be considered in isolation from the broader development agenda.

China has a strong impetus to integrate itself with global economy and improve its business environment all around. Domestic reform measures include not only investment facilitation, but also investment protection, liberalization and promotion. In international investment treaty-making, China actively promotes investment facilitation while supporting IIAs and ISDS. In RCEP, each Party shall endeavor to facilitate investments in its own territory, but nothing in this Article (investment facilitation) shall affect any dispute resolution proceedings under the RCEP. In a word, China's investment policies are inclusive, which may be critical to China's rapid development in recent decades.

Though the envisaged FICA may imply that the Brazil's approach becomes more and more popular, it can hardly replace traditional IIAs network worldwide. Considering the Brazilian investors' increasing outbound investment and the growing needs of investment protection, it is suggested that China's open and liberal policies are worth learning for Brazil.<sup>70</sup>

## 6 Conclusion

Traditional investment protection system is often accused of harming developing countries for the benefit of wealthy multinationals. Investment facilitation,

which is deemed beneficial to attract FDI inflows and having no substantial challenges to regulatory space, is emerging as a new trend of global governance. Multilateral effort, from APEC initiative to WTO negotiation, offers practical guidelines for countries to adopt and promote international cooperation on facilitating investments. While the policy of investment facilitation is complementary to existing international investment regime, it can't act as a total substitute thereof worldwide. An empirical study reveals that for period before the mid-to-late 1990s, investment arbitration was a means to impose the rule of law in non-democratic states with a weak law and order tradition, as well as a neo-colonial instrument to strengthen economic interests of developed states; after the mid-to-late 1990s, investment arbitration serves to promote the international rule of law to some extent.<sup>71</sup>

Brazil is a typical country that shows strong resistance to traditional BITs. Unlike BITs that gears toward investment protection, CFIA's primarily focus on investment facilitation through institutional cooperation. CFIA's offer an alternative model for countries reluctant to accept ISDS while finding ways to resolve conflicts relating to investors. Brazil model of investment facilitation is carried out at the domestic, bilateral and regional level, which also exerts influence on multilateral discussions. However, the scope and degree of investment protection are quite insufficient. Particularly, the Joint Committee entrusted with an important function of dispute settlement seems to bring back some elements of diplomacy by acting as an alternative for ISDS mechanism. Currently, there are still numerous political, administrative and judicial barriers in Brazil. It is advisable for Brazil to draw some experiences from China and adopt an open and liberal investment policy.

As one of top largest economy of outbound and inbound FDI, China's attitude towards international investment regime is inclusive. China is a proponent of IIAs with a balanced ISDS mechanism, and a practitioner of investment facilitation as well. In China's practice, the scope of elements of investment facilitation is limited to core aspects, i.e., transparency, efficiency and amicable resolve of disputes between foreign investors and Chinese governments. In other words, investment

<sup>68</sup> BALINO, Sofia; NATHALIE, Bernasconi-Osterwalder. *Investment Facilitation at the WTO: An Attempt to Bring a Controversial Issue into an Organization in Crisis*. IISD Investment Treaty News. Jun. 2019. Available at: <https://www.iisd.org/itn/en/2019/06/27/investment-facilitation-at-the-wto-an-attempt-to-bring-a-controversial-issue-into-an-organization-in-crisis-sofia-balino-nathalie-osterwalder/>. Access on: 12 Oct. 2022.

<sup>69</sup> UNCTAD. *World Investment Report (2020)*. United Nations, New York and Geneva. p. 98.

<sup>70</sup> WEI, Dan. Bilateral Investment Treaties: An Empirical Analysis of the Practices of Brazil and China. *European Journal of Law and Economics*, v. 33, p. 687, 2012.

<sup>71</sup> SCHULTZ, Thomas; DUPONT, Cédric. Investment Arbitration: Promoting the Rule of Law or Over-empowering Investors? A Quantitative Empirical Study. *European Journal of International Law*, v. 25, n. 4, p. 1147-1168, 2015.

facilitation is one important part but not the whole of investment regime. While investment protection and liberalization system are essential part of business environment, it has to be recognized that BITs can't act as a substitute for domestic institutions. Only when strong domestic institutions are available can a country gain much from BITs networks. Though the Measures provide channels for handling complaints from foreign-invested companies, it is far from enough to facilitate investments by providing one-stop assistances and resolve disputes at an early stage. It is suggested that China draw some experiences from Brazil, enhancing institution governance to prevent disputes and facilitate investments.

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