UNCTAD's Annual High-level IIA Conference (9-11 October 2017)

"Phase 2 of IIA Reform: modernizing the existing stock of old-generation treaties".

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Plenary Session

On behalf of the Brazilian government, I would like to thank UNCTAD for the invitation.

At first glance, Brazil may seem out of place in a debate regarding the reform of the international investment agreement regime and, even more, in a discussion on the modernization of the stock of old generation investment treaties. This is because until a couple of years ago Brazil did not have any investment agreements. Therefore, we had little to reform and no stock of old treaties to deal with.

So you might wonder what am I doing here. Well, the fact is that, more recently, Brazil has been taking a modern stance on investment agreements. We have been actively engaged on negotiations and discussions at different levels: bilateral, regional and multilateral.

On the bilateral level, Brazil has signed or concluded negotiations on investment agreements with 11 countries in the past two years. We call these treaties Cooperation and Facilitation Investment Agreements. Its main pillars are:

1) Risk mitigation and dispute prevention
2) Enhanced institutional governance
3) Working Agendas on investment facilitation

While ISDS is the backbone of traditional BITs, the Brazilian agreements favor mechanisms to prevent disputes between the parties and focuses on tools to mitigate investment risks – such as provisions on non-discrimination, direct expropriation, transfer of currency and transparency.

The Agreement creates a solid institutional framework for fostering bilateral cooperation and investments. Each party should appoint an Ombudsman to act as a focal point for investors of the other party and as a facilitator between them and the host country. Also, a

Joint Committee is established in order to monitor the implementation of the agreement and to solve possible disagreements in a mutually agreed manner.

The Brazilian treaty also offers working agendas for investment cooperation and facilitation that help to boost a friendlier business environment. These agendas may cover issues such as: business visas facilitation; cooperation in technical and environmental regulation; cooperation between monetary authorities; and corporate social responsibility.

The lack of a stock of old treaties allowed Brazil considerable leeway in designing the contents of its recent network of investment agreements. Nonetheless, obviously we have not started from scratch. We drew on our past experience of unratified investment agreements. Indeed, we signed 14 traditional BITs in the 1990s, none of which approved by the Brazilian Congress. The concerns raised by our Congressmen – most of them related to constitutional issues – were used as guidelines for the drafting of our current agreements.

Moreover, the process of building our agreements was influenced by several sources, such as: (i) an intense dialogue with the Brazilian private sector; (ii) studies from international organizations, such as the UNCTAD itself; and (iii) the benchmarking of international best practices, such as the Korean Ombudsman for investments.

We are very pleased to note that the core elements of the Brazilian model are in line with most – if not all – action areas of UNCTAD's Road Map for IIA reform, such as: (i) safeguarding the right to regulate; (ii) reforming investment dispute settlement; (iii) ensuring responsible investment; and (iv) promoting and facilitating investment. On this last issue, it was just as satisfying to see that our strategy reflects almost all of the 10 action lines envisioned by UNCTAD in its Global Menu for Investment Facilitation.

Moving to the regional front, I am glad to share a very recent development. Last April, Brazil, Argentina, Paraguay and Uruguay signed a cooperation and facilitation investment agreement within MERCOSUR, which sets common rules for investments for our trading block and strengthens the economic integration in the MERCOSUR region.

Finally, a word on the challenge regarding investment rules in the multilateral level. There seems to be a solid majority of countries that believe that any multilateral discussion, or perhaps negotiation, on investment will only succeed if it avoids well-known contentious issues, such as protection rules and dispute settlement clauses, in particular ISDS.

Against this background, Brazil believes that investment facilitation could be a pragmatic way to advance in the multilateral arena. Actually, we have been seeing a growing interest on that matter in several international fora, not only here at UNCTAD, but also at the OECD, at the G20 and at the WTO.

Brazil, for instance, as well as other countries, has presented contributions to an informal discussion on investment facilitation at the WTO, including a possible common multilateral framework. This proposal is restricted to the dimension of investment facilitation, which, according to UNCATD's conceptual framework, could be summarized as the set of policy measures and activities aimed at making it easier for investors to establish, maintain and expand their investments in host countries, as well as to conduct day-to-day business.

Some elements of this proposal include the creation of national and multilateral institutional arrangements in order to promote a friendlier climate for investments and to improve the global governance on this area. The designation of National Focal Points in each country would strengthen the interaction between investors and the Host state. On its turn, the establishment of Committee for Investment Facilitation at the multilateral level would support the implementation of the agreement, as well as serve to exchange best practices and to stimulate cooperation amongst parties.

Each country would also be encouraged to adopt a single electronic window for investors to submit documents and comply with requirements related to investment. This would unify electronic procedures, make them more efficient and less bureaucratic, and also improve transparency. In trade facilitation, for instance, the concept of a single window has been a success.

Another suggestion based on the WTO Trade Facilitation Agreement would be to allow for different time frames for the implementation of the obligations, as well as to provide capacity building and technical assistance, particularly for developing countries and LDCs.

In a sum, we believe that a multilateral approach on investment facilitation could spur trade, investment and development to the benefit of the whole global community and could work as a critical impulse to the necessary reform of the international investment agreement (IIA) regime.

By the way, let me conclude by congratulating UNCTAD for the great work when it comes to the reform of the IIA regime. Today's conference is a concrete example of how UNCTAD has been fundamental to this goal. Thank you very much.