

Brazil's comments on the draft guidelines on prevention and mitigation of international investment disputes

Brazil would like to acknowledge the importance of the document A/CN.9/WG.III/WP.235 which contains important guidelines on prevention and mitigation of international investment disputes, particularly those contained in section B (Communication with investors) and D (Coordination and cooperation with other governments).

Concerning Section B, Brazil supports that foreign investors should have easy access to information about States investment legislation and policies, whether in the pre-establishment or post-establishment phase. Furthermore, Brazil would like to emphasize the importance of establishing a one-stop online portal to facilitate communication between States and foreign investors. The single online portal expedites the communication and prevents multiple responses from different governmental agencies that might confuse the foreign investor and may lead to a dispute. Therefore, Brazil considers important the reference made to the IFD agreement in the document, notably the part which encourages the use of a single information portal and suggests “that the contact information of focal points or other appropriate mechanisms to respond to inquiries from investors and to assist them in obtaining relevant information about government measures are included in the single information portal”.

In regard Section D, Brazil considers extremely important to establish and institutionalize inter-governmental coordination with authorities of other States to ensure effective cooperation and mutual assistance in dispute prevention or mitigation. The first avenue to be pursued in this sense is through the designation of focal points or ombudspersons in each State to provide a single interstate channel to exchange information and resolve doubts, questions, complaints, or grievances about the investment framework of each State. As stated beforehand, a single channel of communication provides a fast, coherent, and consistent exchange of information which helps governmental agencies to better understand how the legal system of another State works, preventing misunderstandings about the legislation and operation of measures that might lead to conflict or a dispute. Therefore, Brazil considers relevant the reference made to the IFD Agreement in the document which states that “focal points or other mechanisms for communicating with investors may be assigned the function of responding to questions from other governments” fostering interstate cooperation to prevent potential disputes.

As stated in paragraphs 38 and 39 of the document, another important avenue of inter-governmental cooperation can be achieved through the establishment of a Joint Committee. This mechanism is an effective tool to prevent disputes that might arise out of investment agreements, considering that Joint Committees supervise and monitor the execution of such agreements, addressing any issues or differences that might come out of their application. The joint committee could also consult with the private sector and civil society to hear their views on specific issues related to its work. Therefore, a potential grievance of the investor could be resolved early on, avoiding the emergence of a dispute.

Finally, Brazil considers important to incorporate in the guidelines the Joint Committee function to mitigate a dispute under a specific agreement. If there is any grievance or dispute about the application or interpretation of any provision of the agreement, the Joint Committee may prepare a report to resolve the issue indicating if any specific measure adopted by the State was in breach of the agreement. This mechanism, since it is provided by both Parties of the agreement, could avoid a litigation about the issue. Furthermore, the private sector and other agencies can be invited to speak out in this procedure, expanding the scope of the discussion to those directly interested in resolving the dispute to achieve a fair balanced-decision making.