Foreign investor´s rights, investment promotion and facilitation agencies: a developmental and sustainable visión

Direitos de investidores estrangeiros, agências de facilitação de investimentos: uma visão desenvolvista e sustentável

Derechos de los inversores extranjeros, promoción de inversiones y agencias de facilitación: una nueva visión desarrollista y sostenible

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Abstract

Fifty years ago, the role of foreign investors was at the center of the political debate, with host state - investors disputes showing a geographical North-Southth pattern. The end of the ISI model would signal a new era, including a new relationship with foreign investors. As part of their efforts, developing and emerging countries (DECs) liberalize foreign direct investment (FDI) national policies and to provide fiscal and other incentives to foreign investors. FDI flows were seen as always beneficial: a quantitative approach. Sooner than later, however, policy-makers became aware of the scheme's pro-investment bias. FDI quality, not quantity, became the new ideal. Latin American countries' position in the issue, however, remains quantitative objectives still dominate the investment debate. Indeed, a movement towards sustainability would come to question the natural-resource led growth model followed by the region. So, the debate around the treatment of foreign investors remains open.

Keywords: Foreign Direct Investment. Investment Protection, Promotion and Facilitation. Development and Sustainability.

Resumo

Cinquenta anos atrás o papel dos investidores estrangeiros encontrava-se no centro do debate político, onde as disputas (Inversora - Estado Soberano) mostravam um claro padrão geográfico Norte - Sul. A finalização do modelo sustitutivo marcará o início de uma nova era, a qual implicou uma nova aproximação ao investimento estrangeiro. Como parte do esforço, os países em desenvolvimento e emergentes decidem liberar suas políticas de investimento estrangeiro direta (IED). Os fluxos de IED eram vistos como beneficiosos, sempre: enfoque quantitativo. Quanto antes, no entanto, os fazedores de política

começaram a reconhecer o forte caráter pró-investidor do esquema. E a qualidade, não a quantidade, devém o novo ideal. No entanto, os países da região seguem mantendo uma visão cuantitiva. O movimento pró-sustentabilidade do desenvolvimento vem a questionar o modelo de desenvolvimento que segue a região, e baseado na exploração dos recursos naturais. Neste sentido, o debate com respeito ao tratamento dos investidores estrangeiros não só não se tem saldado: ainda não tem começado.

Palavras chave: Investimento estrangeiro direto. Proteção, Promoção e Facilitação de Investimentos. Desenvolvimento e Sustentabilidade.

Resumen

Cincuenta años atrás el rol de los inversores extranjeros se encontraba en el centro del debate político, donde las disputas (Inversionista - Estado Soberano) mostraban un claro patrón geográfico Norte - Sur. La finalización del modelo sustitutivo marcará el inicio de una nueva era, la cual conllevó una nueva aproximación a la inversión extranjera. Como parte del esfuerzo, los países en desarrollo y emergentes deciden liberalizar sus políticas de inversión extranjera directa (IED). Los flujos de IED eran vistos como beneficiosos, siempre: enfoque cuantitativo. Más temprano que pronto, sin embargo, los hacedores de política comenzaron a reconocer el fuerte carácter pro-inversor del esquema. Y la calidad, no la cantidad, deviene el nuevo ideal. Sin embargo, los países de la región siguen manteniendo una visión cuantitiva. El movimiento pro-sostenibilidad del desarrollo viene a cuestionar el modelo de desarrollo que sigue la región, y basado en la explotación de los recursos naturales. En este sentido, el debate respecto al tratamiento de los inversores extranjeros no solo no se ha saldado: aún no ha comenzado.

Palabras clave: Inversión Extranjera Directa. Protección, promoción y facilitación de inversiones. Desarrollo y sostenibilidad

Introduction

Developing and emerging countries (DECs) - foreign investors' relationship experienced important and controversial twists. A multilateral agreement on foreign investment has become a long-standing effort, whose first attempt was made in the period immediately after World War II (WWII). Initially, an International Trade Organization responsible for employment, foreign investment, international commodity agreements, restrictive business practices, and services, as well as international trade, was to have emerged from the negotiations undertaken in Havana, Cuba, in 1948 at the invitation of the United States (US) Government. That aim was dashed when President Truman did not even present the negotiated draft to the US Congress aware that it would not be approved because of the international commitments that it entailed. Since then, the articulation of the new international trade and foreign investment architecture became an exercise in provisional initiatives and second-bests, which reflected more the evolving relative negotiating strengths of the major players (the US and Europe) rather than any well-conceived master plan. However, on the other hand, the early post-WWII was, also an era of rising nationalizations, first by communist takeovers in China, Eastern Europe, and Cuba, then during the 1960s and 1970s by numerous developing countries which expropriated foreign investments in their terri-

tories, especially in the natural resource sector (mostly petroleum and mining). Resource nationalism momentum would come with the Declaration for the Establishment of a New International Economic Order, adopted by the United Nations General Assembly in 1974, and referred to a wide range of trade, financial, commodity, and debt-related issues.

Whereas geopolitical alliances reflected a West-East political divide, economic disputes were instead following a geographical North-South pattern, and the chances for a multilateral scheme agreement were practically nill. A different route was undertaken at the bilateral level, particularly after the signature of the bilateral investment treaty between Germany and Pakistan on November 25, 1959. Bilateralism proliferated in the nineties, following DECs´ governments decided to liberalize their foreign direct investments (FDI) regimes. Institutionally the new era encompassed the signature of international investment agreements (IIAs) and the adherence to the World Bank´s International Court for the Settlement of Investment Disputes (ICSID). Tough the promotion, protection, and liberalization of foreign investment has mostly occurred under this bilateral framework, multilateral initiatives also flourished. DECs´ policy space for development was further reduced at the Uruguay Round, whose trade-related aspects of intellectual property rights agreement (TRIPS) came to prevent sovereigns from introducing technology transfer clauses. Developmental policies were also affected other two World Trade Organization (WTO) agreements: the Trade-Related Investment Measures (TRIMs) and the General Agreement on trade in services (GATS). Finally, in May 1995 the Organization for Economic Co-operation and Development (OECD) member governments launched the Multilateral Agreement on Investment (MAI) at the Annual Meeting of the OECD Council at Ministerial level[2].

2. . The MAI was a first attempt to combine in one multilateral agreement the disciplines in three critical areas of foreign direct investment rule-making – specifically, foreign investment protection, foreign investment liberalization, and dispute settlement.

The resulting emerging global legal framework rests on the twin foundations of customary international law and national laws and regulations. It relies on its substance on a multitude of IIAs and other legal instruments. Towards the same goal, some DECs governments decided to create individual offices: Investment Promotion and Facilitation Agencies (IPFAs), basically directed to administrate incentives. Leaving aside institutional differences, if any, the new legal and administrative entities started to flourish[3]. IIAs growth was astonishing, rising from 396 agreements in 1990 (MORTIMORE; STANLEY, 2009), to more than 3,300 as of 2017 (MOHAMADLEH, 2019). IPFAs have also prospered and actually counting with more than 200 IPFAs at the national level (HARDING; JARVONIC, 2012).

3. IIAs encompass bilateral investment treaties (BITs) as well as investment chapters within regional and bilateral free trade agreements (FTA). The term might also include other special schemes dealing with investment issues, as the double - taxation treaties.

Meanwhile, a significant *tectonic, geopolitical* shift emerges reconfiguring global FDI flows. Lead by China, an increasing number of Emerging joined the (formerly, a Northern exclusive) league of capital exporter countries. Meanwhile, Non-Governmental Organisations (NGOs) environmental began to plead international organizations for changing towards a more holistic perspective on growth: development should be socially inclusive and environmentally sustainable. As development moves from a narrow economic towards a more holistic vision, a new vision is required for installing a sustainable finance - development model (SCHOENMAKER, 2017). By analogy, foreign investors should now be ask [by host countries] to excel the sustainable test. Henceforth, controversies around the

role of foreign investors in long-term development is not longer a Southern countries´ issue (as observed in the sixties and seventies) but a concern being shared by affluent societies too. New claims for re-regulate foreign investments are listen, almost everywhere - even among US policy makers. Likewise, as the sustainable development debate deepens, the concern over the sovereign right to regulate is turning global.

Theoretical foundations of foreign investors' special protection involve several arguments, going back and for but always returning to the old rules versus discretion discussion. Whereas in the 1990s, those favoring rules were in the majority, nowadays, the pro-investor bias became under scrutiny. The presence of information asymmetries, on the other hand, explained IPFAs irruption and dissemination. Whereas the IA problem persists, however, IPFAs goals have changed: originally designed to attract investors (a quantitative mandate), nowadays investments are expected to match SDGs (a qualitative mandate). What explains developed countries´ transformation, from being fiercely opposed to regulating capital inflows (including FDI flows) to suddenly start advocating for more screening and control over foreign investors? Which forces explain IFPAs new qualitative appraisal? How can this ideological shift be explained? Why the change seems not to be affecting Latin America (FDI related) institutions?

The paper discusses first the economic foundations behind the [FDI] legal protection scheme, as well as those supporting the introduction of promotion and facilitation agencies. The second section turns attention to the multilateral fora, asking why an international agreement on investment facilitation could now be approved and whether it remains favorable for the DECs long-term sustainable development. The third section list a series of characteristics host countries policy toolkit could list if the government's intention is to made FDI inflows compatible with sustainable development. Thereafther, some conclusions follows.

Foreign investors treatment: what protection, promotion, and facilitation means

Foreign direct investments might present positive contributions to development, but benefits should be not taken for granted. Neither costs underestimated. Spill-overs on the local economy might relate, among others issues, to technology transfer, managerial best practices, skill developments, and research and development activities. The arrival of long-term flows might not be rewarding, and they may even be not desirable for sustainable development (CLAESSENS *et al*., 2003; GODA; TORRES, 2013; IBARRA, 2011; RAY, 2016; RAY *et al*., 2017; RODRIK; SUBRAMANIAN, 2009; SABOROWSKI, 2009; TIENHAARA, 2009).

Short of funds, however, host countries embraced neoliberalism in the nineties, including new (pro-investor) legal rules and the establishment of new offices (agencies) directed to seduce foreign investors to (and helping them after) arrival. From a policy perspective, the government duties were straight and simple: to eliminate discretion and reduce informational asymmetries, and to follow robust and straightforward rules. The rules versus discretion debate help us to understand the legal discussion; the informational bias would be introduced to delineate the agency issue.

Rules versus discretion

Discretion in the hands of DECs policy-makers was then blame as preventing the arrival of foreigners. After years of mutual mistrust, developing countries decided to take the first step and expand their legal guarantees: to fix the rules of the game. The signature of bilateral investment treaties (BITs) was an essential step in this direction, as it expanded investors´ legal guarantees and, henceforth, helped to reduce their political risks (STANLEY, 2004). In the search for investments, however, the host government started to leave away policies that, in the past, permitted them to link FDI to development.

An overwhelming majority of investment agreements concluded since 1990 were traditional. In the sense that they admitted foreign investments of the other contracting party only if such investments conformed to the host country's legislation (MORTIMORE; STANLEY, 2006, 2009). This represents the so-called "admission model", which was common in European BITs with developing countries, and emphasized investment protection. A relatively small group of investor countries, led by the USA, took advantage of the unique historical events in the 1980s and 1990s to implement a strong push towards foreign investment liberalization, particularly in developing countries and economies in transition. BITs further enlarged foreign investors' rights, whose legal challenge remained unknown by the time of the signature. Sooner than later, US BITs influence disseminate among Western allies, with the European Union (EU) introducing a new agreement template in the 2000s (STANLEY, 2018).

Unexpectedly, BITs benefits proved minimal, whereas damages for alleged breaches started to boost (CCSD, 2018; JOHNSON *et al*., 2018)[4]. The push against this type of agreement starts to go further, admitting that if "there were a link between investment treaties and FDI flows, investment agreement and their protection can potentially undermine investment and its intended benefits" (JOHNSON *et al*., 2018, p. 7).

After observing how lean benefits were, policy-makers started to interrogate on the substantial costs the scheme bring with it. The loss of flexibility would suddenly transform into a leading issue, as treaties pushed sovereigns to cede control over their policy space[5]. The government loss of flexibility arises on several clauses, for example, on those restricting the use of "performance requirement" objectives (JOHNSON *et al*., 2018)[6]. The extensive definition of investment, for instance, permitted Argentina´s bondholders to challenge the debt renegotiation process (MORTIMORE; STANLEY, 2006). The inclusion of the "indirect expropriation" concept was behind investor´s spurious claims, preventing governments to fullfil their regulatory duties. The standard of government treaty of foreign investors (e.g., "fair and equitable treatment," "national treatment") was also under question, as its wording remains vague and open to interpretation by arbitral panels (GORDON; POHL, 2015; JOHNSON *et al*., 2018; SINGH; ILGE, 2016). Finally, all the controversies around the investor-state dispute settlement (ISDS) mechanism. Initially designed to ensure a neutral, a - political forum, the mechanism would sooner than later be under criticism as it favored investors the most (CCSD, 2018; GORDON; POHL, 2015; JOHNSON *et al*.,

4. As of July 31, 2017, 817 known ISDS claims had been filed, and at least 114 states had faced formal complaints (JOHNSON et al., 2018)

5. As claims against sovereigns began to flourish, the original group of Latin America challengers (Bolivia, Ecuador, and Venezuela) enlarged. New voices were now coming from the global South (South Africa, Indonesia, India), but also high-income countries (Norway, Australia, the Netherlands). Critical voices towards the ISDS scheme were also coming from Germany, France, and Italy (VIDIGAL; STEVENS, 2018).

6. Whereas provisions like this were affecting many LDCs around the world, some EMEs have strategically avoided to include them in their IIAs (e.g., China)

2018; MORTIMORE; STANLEY, 2009; VAN HARTEN, 2016)[7]. There is a predominant, shared concern that the ISDS system has been use to prevent the realization of a "global" public interest (VIDIGAL; STEVENS, 2018).

Not only the IIAs pro-investor bias generated a hot political issue, but policy-makers were also called to include sustainability issues in the agenda. This reflects the emergence of a new consensus, which introduces a qualitative (not quantitative) perspective on FDI and asking development to be sustainable. This new vision certainly challenges the old, Washington Consensus approach over IIAs design as to the role played by the ICSID scheme (SAUVANT, 2019a, b). How to integrate sustainable development objectives in the IIAs, however, remains the single most relevant challenge for the IIAs system as a whole (GORDON *et al*., 2014; ZHAN, 2018)[8], as the status quo prevents countries from advancing with the necessary rebalancing of rights and obligations between partners.

7. The ISDS system involves two main forms: the United Nations Commission on International Trade Law (UNCITRAL) and the World Bank International Court for the Settlement of Investment Disputes (ICSID). Both the UN and the World Bank, have recently decided to examine the hottest issues (BERGER et al., 2018).

Information

Asymmetric information has often been blamed as another clear (contractual) disadvantage, preventing deals to be made among unknown partners. Informational asymmetries were mainly observed as "to constitute a significant obstacle to capital flows across international borders" (HARDING; JAVORICK, 2012, p. 2). By providing information, governments alleviate the burden of bureaucratic procedures as well as reduce investors´ transaction costs. IPFAs incentive the arrival and permanence of foreign investors.

8. The liberalization push has produced a massive legal transformation. As observed in the WTO - Trade-Related Investment Measures (TRIMs), affecting host countries' policies on FDI as it prevents them from introducing local content requirements. Notice that which prohibited trade-related investment measures, such as obligatory requirements of locally-acquired inputs ("local content") that were inconsistent with necessary provisions of GATT 1994 (MORTIMORE; STANLEY, 2009)

IPFA design, however, remains controversial: some insisting in separate agencies, others preferring to bring promotion and facilitation activities under the same roof. Others might conceive it as a dual process: starting with the design of the target sectors (promotional stage), then continuing with those activities directed to facilitate investors´ radication (facilitation stage) (HESS *et al*., 2018). Promotion associates with incentives, including "any measurable advantages accorded to specific enterprises or categories of enterprises by (or at the direction of) a government, to encourage them to behave in a certain manner" and include "measures…designed to increase the rate of return of a particular FDI undertaking either to reduce (or redistribute) its costs or risks" (CASS, 2007, p. 30). The facilitation stage, in turn, is mainly directed to assist investors in dealing with local rules and bureaucracy. It is usually considered to conform a continuous task and bringing assistance (at both, at the pre-establishment and after establishment), and incentivizing foreigners to expand their local operations.

Agencies´ goals have also experienced a structural transformation: from quantitative to qualitative goals (VCC - WAIPA, 2010). Highly popular in Latin America, first-generation agencies associated with liberalization and deregulation measures (SAUVANT, 2019b). A second generation continued to promote the entry, but it also started to include some other activities directed to help investors in their installation phase. Beyond the institutional scope, however, first and second-generation structures both shared a general, quantitative objective: to attract foreign direct investment. Agencies, third-generation design, start to focus actions towards some specific sectors.

Targeting was explained by the fact that FDI contribution to development differs dramatically depending upon the industry (MORAN, 2010). A fourth, and latest IFPAs generation is starting to flourish, basically aiming to match investments with the host country long-term, sustainable development objectives. Modern agencies consider four, different dimensions: economic (linkages, technology transfer, training), social (labor and employment standards, community health, education, training), environmental (minimizing the adverse impacts of investments, mobilizing environmental technologies for conservation) and institutional or governance (fair and efficient negotiations, contracts). Overall, agencies should be backed by a long-term strategic vision, which is not indifferent to FDI inflows: whereas in some sectors investors´ should be wellcome, in some others the arrival might be better to deter. Investment targeting, henceforth, remains alive but conditional to the matching of long - term and sustainable development goals.

The structure of incentives, however, remains directed towards the accomplishment of a narrow economic vision disregarding social, environmental, and institutional dimensions (VCC - WAIPA, 2010). To be (strategically) useful, however, agencies should take the country specificities into account - including its economic, social, and environmental constraints. If the sovereign aims to profit from FDI for the national economy structural transformation, henceforth, a different design would be in mind. In the end, quality (not quantity) is what it counts for sustainable development: better and more professional agencies bring different levels of FDI into host countries (HARDING; JAVORICK, 2012; SAUVANT, 2019b; VCC - WAIPA, 2010). In particular, sovereigns should work in IFPA´ design and carefully target sectors of FDI attraction (HARDING; JAVORICK, 2012; MIŠKINIS; BYRKA, 2014), to induce the arrival (and permanence)[9] of those investments that they consider particularly desirable for the (long-term and sustainable) development (SAUVANT, 2019b). Agencies could also stimulate cooperation among foreign and local firms (as in the building of a local supply network or the transfer of technology), or interaction with local communities (as for the attainment of the project´s sustainability goals). In sum, agencies could be designed in order to perform both transformative and sustainability goals. The quantity towards quality goal movement, however, is far from granted. Highly ambitious objectives which, in Latin American case, few agencies might be able to undertake. Unfortunately, in the region, agencies are taught as solving some specific (i.e.: informational) market failures but specifically directed to eliminate bureaucratic norms and rules (VOLPE MARTINCUS; SZTAJEROWSKA, 2019)[10]. For multilateral organizations as the IDB or the OECD, "interested parties" basically refer to private partners and multinational firms consultation.

Promotion and facilitation activities, additionally, might compromise significant amounts of resources from the host government. Fiscal and financial incentives, both directed to seduce investors´ enter and to remain, are fund-burdensome for DECs restricted budget (CASS, 2007). This should lead host countries to carefully confront FDI costs and benefits when designing the incentive package, and certainly including the project´s expected social and environmental costs (RAY *et al*., 2017; ZARSKY; STANLEY, 2013). Moreover, negative externalities could be significant and long for

9. Facilitation activities might include, among others: a) follow-up and monitoring of development of already accomplished investment project; b) the building, maintenance, and enhancement of local supply network; and, c) Investment retention and expansion (MIŠKINIS; BYRKA, 2014).

10. The pro-market vision backed by the Inter-American Development Bank (IDB) and the Organization for the Economic Cooperation and Development (OECD), which follows an acritical analysis of how investors are being treated around the world - missing how developed OCDE countries have traditionally treated foreign investors (and are, as looking after the last announcements)

longer, particularly for those projects associated with natural resource exploitation. It implies the adoption of a new and more sophisticated approach towards FDI; a perspective aimed to induce the arrive of funds somehow alienated with the country's long-term, transformative, and sustainable development objectives (COLEMAN *et al*., 2018, SAUVANT, 2019b). By including sustainability issues, new IPFAs agencies intents to alienate with the UN´s sustainable development goals (SDGs). By screening foreign firms compromises on technology transfer or the construction of local linkages, agencies could also alienate with the developmental-transformative role.

Old constraints, new actors, and the (re) emergence of multilateralismo

In spite of accepting bilateralism, DECs´ opposition to multilateralism remained fierce and widely extended [remember their stance against the so-call Singapore issues introduced in the first WTO Ministerial Conference (1996); and the Cancun Conference collapse (2003)]. The former opposition have recently permuted to consensus, with DECs now pushing for installing investment issues at the WTO 11th Ministerial Conference at Buenos Aires (2017) (DIE, 2019; ICSID, 2018; JOSEPH, 2018). A group of countries has called for closer global cooperation "to create an efficient, transparent, and predictable environment for facilitating FDI and aim at arriving at a plurilateral 'investment facilitation agreement' (IFA)" (METHA; MANGLA, 2019, p. 7). The Joint Statement on Investment Facilitation for Development (JSIFD) was backed by 70 Member States who called for closer global cooperation to create an efficient, transparent, and predictable environment for facilitating FDI. The collective aim, to arrive at a plurilateral "Investment Facilitation Agreement" (WTO - IFAs). Investment facilitation measures deal with the application of investment policy, not about the right to regulate or about investment protection (HAMDANI, 2018).

The WTO - IFA proposal considers international trade and investment as closely interconnected and facilitating DECs development (JOSEPH, 2018). This interconnection, therefore, permits to place the IFA issue within the WTO scope. On the positive side, the WTO - IFA adopts now a balanced, pro-development perspective rather than the pro-investor bias associated with old BITs (DIE, 2019; ICSID, 2018; SAUVANT, 2019). Additionally, the initiative does not include the typical legal clauses included in IIAs (fair and equitable treatment, no discriminatory treatment, indirect expropriation) neither recognize market access, investment protection, and dispute settlement issues. The proposal might undoubtedly bring some more room for developments, but still presents some disadvantages (CUTS, 2017; GHIOTTO; GAUMÁN, 2019; HANDAMI, 2018; ICSID, 2018; JOSEPH, 2018; MANN; DIETRICH BRAUCH, 2019; SINGH, 2017; TWN, 2018). One fundamental, widely expanded dissent, relates to the fact that the proposed framework goes beyond the WTO's current mandate. Of particular interest, however, relates to the absence of obligations on home countries and investors on sustainable development issues. Host country capacity building is undoubtedly needed, particularly to guarantee long-term and sustainable investment inflows (ICSID, 2018; SAUVANT, 2019). As such, the initiative remains envisioned to complement the traditional IIAs scheme.

By being active in the proposing, a group of DECs hopes to realign themselves with the liberal order now under challenge, but also to make it work. Multilateralism is also backed by authorities in Beijing, as they realize that time has come to leave away the (defensive) bilateral stance of the past (PATHIRANA, 2018; SAUVANT, 2018; STANLEY; FERNANDEZ ALONSO, 2016; WADE, 2011). Gone are the days when China started negotiations to become a WTO member, an special arrangement which bring authorities with policy space to climb the technological ladder. Ranked as the world second-largest economy, China´s global presence goes beyond international trade to expand into investment and financial flows. Going global, in particular, means new business opportunities for Chinese SOEs firms whose long-term, strategic vision bring western governments nervous (BUCKLEY, 2018; HANEMANN; ROSEN, 2018; LE CORRE, 2019; MEUNER; MONIN, 2017). The accommodate western mood was definitively particularly affected following Xi Jinping launched two strategic, long-term plans: Made in China 2025 and the Belt and Road Initiative (BRI). Both are raising important questions for those involved in the design of an international FDI policy regime (BUCKLEY, 2018). As hosting the 2016 G20, authorities in Beijing realized the opportunity to advance with the discussion of investment issues (SAUVANT, 2018). At Shanghai, the G20 collective proposed a new template (The Guiding Principles for Global Investment Policymaking), subsequently endorsed by Head of States at the September Hangzhou meetings. Surprisingly, the G20 Guidelines include sustainable development and inclusive growth among the core principles (ZHAN, 2016). The proposed framework, however, remains envisioned on advising DECs in how to enter in global value chains (GVCs) (AKMAN *et al*., 2017)

Other proposals include the one launched by the United Nations Conference on Trade and Development - UNCTAD Global Action Menu for Investment Facilitation (the Menu). OECD Policy Framework for Investment (PFI) is the oldest one, instrumented, and on use since 2006 (NOVIK; CROMBUGGHE, 2018) being recently updated by the OECD Secretariat (OECD, 2018b). This highly ambitious proposal prioritize quality FDI flows, identifying five clusters of quality indicators: productivity-innovation, skills, job quality, gender, and carbon footprint (SAUVANT, 2019). At the regional level, the Investment Facilitation Action Plan (IFAP) introduced in 2008 by members of the Asian - Pacific Economic Cooperation (APEC). IFAP investment facilitation scope involves '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,' and 'effective investment facilitation can make a significant contribution to the sort of broader investment climate reform efforts widely practiced by APEC member economies.' A series of bilateral, regional, and continental investment - facilitation initiatives started in Africa, including the Pan-African Investment Code (2015) and the African Continental Free Trade Area (AfFTA) (MBENGUE, 2018).

Opinions over schemes being revised keep increasing, but a fundamental divide among policy-makers is whether proposals should alienate local rules with SDGs (re-regulate) or instead host country efforts should be directed towards the elimination of bureaucratic rules (de-regulate). Although

some might seem this as recreating the old markets versus state discussion, the solution to this old dilemma might lies somehow in the middle center. How to conciliate rights and obligations, policy space, and compromise?

Underdevelopment is by no means just a problem of governance, to put institutions right or to reduce barriers in order to seduce investors. As prestigious institutions might be, as critical foreign funds are needed, of utmost importantce for DECs is to have a plan for the long-run. Henceforth, the focus should turn on cooperation and facilitation issues employing a broader, developmental perspective that might help in the design of the answer. Besides investors and states, this expanded perspective is asking for the involvement of civil society in shaping a new investment template (BUCKLEY, 2018; RAJAN, 2019). The increasing political relevance of new issues (civil society, social and environmental claims) [cooperative, stakeholder vision] is forcing leaders around the world towards the recognition of broader social and environmental rights until recently neglected.

From this perspective, the Brazilian Cooperation and Investment Facilitation Agreement (CIFA) template might be taught as a helpful starting guide (BERNASCONI-OSTERWALDER; DIETRICH BRAUCH, 2015; HEES *et al*., 2018; HEES; ROCHA PARANHOS, 2018; PERRONE; ROJAS DE CERQUEIRA CÉSAR, 2015; VIDIGAL; STEVENS, 2018). The CIFA framework does not include the ISCD mechanism but introduces a hybrid system of dispute prevention and state-to-state arbitration. It explicitly includes substantive obligations to investors, but it brings them help in dealing with local authorities (through the establishment of national focal points or ombudsman figures). The CIFA framework, besides, recognizes local regulation preeminence over foreign investors. But the Brazilian initiative remains silent on voice: how civil society enters in the investment template discussion?

Institutional change in perspective: what lies behind the recent transformation?

As noted, once the commodity price cycle reversed, the postwar development model start to vanish and DECs´ negotiation power scale down. Whereas in the past to much weight was attach to bring incentives to investors, nowadays, an increasing number of sovereigns are demanding foreigners to share benefits and to recept investments only if they contribute to sustainable development goals.

What explains DECs transformation, from being fiercely opposed to regulating capital inflows (including FDI flows) to suddenly start advocating for more screening and control over foreign investors? Which forces explain the movement from a regime biased in investor´s favor to another aimed to share investment benefits over an equal basis? How can this ideological shift be explained?

On the one hand, civil society pressure on governments towards the implementation of social and environmental development goals. [FDI] quality (not quantity) is becoming mainstream among academic circles and, as pressured by their constituencies, mandatory for several governments around the world. On the other hand, the rise of South FDI

flows - but China, as their companies come to dispute their Western competitors' supremacy in global markets. The movement towards a qualitative approach, in this case, might be masking fears over Chinese firms' technological leapfrogging and technological catch - up but also growing protectionism amidst Western governments.

Nevertheless, the movement from quantitative to qualitative approaches should be appreciated on its own. A sizeable institutional shift, indeed. To made this happen, however, a broad coalition is undoubtedly needed - particularly among DECs, whose formal institutions are often weak and capture by entrepreneurial coalitions. To ensure a broader "sustainable" vision the voice of social actors becomes critical and, increasingly listen by global firms as the Peter Buckley (2018) comment:

> [t]he increase in shareholder activism, stakeholder pressure, the importance of confirming to (global) standards, the increase in ethical consumerism and public and social pressure, in general, requires MNEs, in particular, to pay increasing attention to moral standards in business behavior, not just in "*Corporate Social Responsibility*" or "*Shared Value*" but as a means of long term sustainability and survival (BUCKLEY, 2018, p. 10).

In a recent paper, Karl Sauvant and Howard Mann (2017) list a series of characteristics for each of four different dimensions of sustainability in order foreign direct investment in qualifying as sustainable (see table below). To be clear, the listing shows which FDI flows might qualify as sustainable according to the SDGs as to meet the challenges imposed by the climate change commitments. Whereas the indicative list might be a useful transition, however, is far from simple. It requires host countries to adopt a long - term, sustainable vision on development.

Table 1 - The four dimensions of sustainability FDI and their sustainable characteristics

Dimension	Characteristic	Dimension	Characteristic
Economic	• Employment • Local linkages • Technology transfer • Infrastructure • Community development • Equitable distribution of wealth • Tax accountability • Promote research & development (R&D)	Environmental	• Resource management • Pollution controls • Low carbon/greenhouse gases footprint • Waste reduction • Biodiversity protection • Climate change • Water • Renewable energy
Social	• Labor rights • Skills enhancements • Public health • Workplace safety • Non-discrimination • Fair wages • Benefits • Human rights • Indigenous rights • Gender • Resettlement • Cultural heritage protection/diversity	Governance	• Transparency • Local management • Supply chain standards • Consumer protection • Stakeholder engagement • Anti-corruption • Legal compliance • Risk management systems • Environmental management systems • Environmental impact assessment/ social impact assessment • Human rights due diligence • Corporate governance

Source: Sauvant and Mann (2017; page v)

DECs should undoubtedly be pleasant by the recognition of all these dimensions and attributions, as they collectively ensure a more balanced and sustainable development path. Sovereigns should accomplish to insert them in new, refined, and more sustainable legislation (FDI rules). Remarkably, the topics listed by Sauvant and Mann (2017) goes beyond the Millenium Developmental Goals (MDGs), including a significant number of issues [and, accompanying policies] which might allow the host country to perform a developmental, and transformative model. Consider the introduction of technology transfer clauses or specific rewards for those establishing research and development activities. Both are policies aimed to transform the local productive base, going beyond institutions and incentives to seduce investors. Development involves a sustainable, structural transformation of the national economy. Pursuing one but lifting the other side is like to envision Hamlet without the Prince of Denmark (CHANG, 2010).

Host (DECs) countries could undertake this perspective (globally either partially) when drawing their legal framework as when negotiating IIAs. What matters for BITs, and FTAs is not the presence of guarantees per se but about how investors and host states might end with sharing costs and benefits (STANLEY; 2018). In other words, the objective should go beyond the idea of attracting as much FDI as possible but to induce the arrival of investors, which could raise the standards and welfare of the country (MIŠKINIS; BYRKA, 2014; SAUVANT, 2019b). Towards this end, policy coherence is undoubtedly needed. As for matching investment legislation (protection) with agencies dealing with promotion and facilitation goals (ZHAN, 2016). Better coordination would permit, above all, to achieve the country's long-term sustainable development objectives.

Conclusions

Once antagonists, developing and developed countries, both started to move towards the center: recognizing the relevance of foreign funds for development but also claiming sovereign rights for flexibility and policy space. Whether the change in position responds to the rise of China or follows social actors' legitimate claims is beyond the scope of this paper. Independently of the source, however, the change reflects a new, more holistic vision linking development and sustainability.

As sustainability becomes a global issue, it forces sovereigns to modify old investment treaties and to advance with the necessary rebalancing of rights and obligations between partners. Legal updating, however, remains a necessary but not sufficient condition to began to transit a new era. Policy coherence is also needed between investment policies and other public areas, including those dealing with the design of promotion and facilitation agencies. IPFAs design, however, should be in line with the host country's developmental goals. In this sense, what matters for sustainability ideas to become politically accepted is how local elites and societies perceive them. Both issues start to be taken into consideration by policy-makers, and included in all revised multilateral proposals. The *"one-size-fits-all"* presciption is not longer valid, DECs have

now more room at choosing their developmental path. Even DCs have recently decide to leave old "institutional constraints" away, notably the anglo-saxons ones. At the end, what matter when chosing a particular (developmental) path are how it fits with local ellites ambitions and civil society expectations.

For countries in the region, the problem lies in matching the current export-led model with sustainability issues. The matching, however, remains hard to accomplish. Overall, the regional view on the FDI issue remains, to some extent, old-fashioned, with a quantitative perspective dominating the investment debate. The current debate is well-known among political and economic elites, but they still refuse to move away from the status quo. Take, for example, the energy transition debate. Despite leaders' environmental compromise on the Paris Agreement on climate change, governments continue to provide sweetheart loans, guarantees, and other forms of preferential financing to fossil fuel projects. Foreign funds are also, by and large benefiting the non - renewable sector. In other words, if economic growth continue to rely upon the appropiation of rents then elites would keep sustaining the model. This explains why the above mentioned quantitative paradigm remains alive at Latin America, and why elites prefer to embrace Milton Friedman motto ("the Business of Business is Business") and refuse to openly discuss environmental and social costs. Civil society, however, is starting to challenge the natural-resource growth model. To discuss externalities, and how to cope with them. The spread of social unrest movements all around the Americas is showing that the debate started. In orser to achieve this, is neccesary to bulid up new alliances and to expand the consensus for the attainment of the long-term development.

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