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Navigating between Resistance and Conformity with the International Investment Regime

The Brazilian Agreements on Cooperation and Facilitation of Investments (ACFIs)

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6.1 INTRODUCTION

The international investment regime faces structural challenges, which are rooted in different and interrelated explanations.[1] Countries around the world have reacted differently to these challenges. Their responses range from denouncing existing treaties, including the ICSID Convention,[2] to finding middle ground solutions, which

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1 See the introductory chapter to this volume.

2 As Venezuela, Ecuador and Bolivia did. See UNCTAD, 'Denunciation of ICSID Convention and BITs: Impact on Investor-State Claims' IIA Issues Note No. 2 (December 2010) <http://unctad.org/en/Docs/webdiaeia20106_en.pdf> accessed 11 November 2016 and Serguey Ripinsky, 'Venezuela's Withdrawal From ICSID: What it Does and Does Not Achieve' IISD Investment Treaties News (13 April 2012) <https://www.iisd.org/itn/2012/04/13/venezuelas-withdrawal-from-icsid-what-it-does-and-does-not-achieve/> accessed 11 November 2016.

include changing strategies from bilateral investment treaties (BITs) to preferential trade agreements (PTAs) and megaregional agreements. Brazil, in its turn, has proposed a new model of investment agreement, entitled "Agreement on Cooperation and Facilitation of Investments" (ACFI).[3]

Contestation to the rules of the investment regime are far from being a novelty in the history of investment regulation.[4] An example of concerted action took place in the 1960s and 1970s when a group of third world countries joined efforts at the United Nations General Assembly to issue resolutions advancing their interests: recourse to the court of the place of the investment, as opposed to international tribunals; application of national laws, as opposed to customary or other forms of international law; and alternative rules on compensation for expropriation.[5] As noted by Andrew Guzman, this collective resistance was short-lived, mainly due to competition for capital within the developing world, particularly after the strong economic crises in the 1980s affecting developing countries.[6] While strongly advocating for change at the UN General Assembly, many of the same countries accepted bilateral investment treaties (BITs) containing language equivalent to those they were contesting multilaterally.[7] As a result, the 1990s witnessed the emergence of BITs as the preferred form of investment regulation as a direct response to competition for capital. For a certain period, developing-country resistance to the asymmetries of the investment regime has been dismissed or significantly reduced.

Concerted dissatisfaction with the terms of the regime started to echo again at the end of the twentieth century and in the beginning of the twenty-first century. There

3 Translation note: certain translations have reordered the words, resulting in the acronym CFIA (Cooperation and Facilitation Investment Agreement). UNCTAD, e.g., is using the CFIA acronym in the World Invest Report. We have opted to apply the same acronym as in Portuguese original version, ACFI.

4 Distinguished authors worked on historical moments of resistance to export capital-led countries' model of regulation. Among them, we highlight M. Sornarajah, *Resistance and Change in the International Law on Foreign Investment* (CUP, Cambridge 2015) and Kate Miles, *The Origins of International Investment Law: Empire, Environment, and the Safeguarding of Capital* (CUP, Cambridge 2013).

5 See UNGA Res 1803 (XVII) (14 December 1962), UNGA Res 3171 (XXVIII) (17 December 1973), and UNGA Res 3281 (XXIX) (12 December 1974) UN Doc A/RES/29/3281. Even if legally the status of these resolutions in international law is disputable – ranging from soft law to customary international law – politically, on the other hand, they stand for third world countries' resistance to what they perceived to be an unbalanced regime, in favour of investors – traditionally from developed countries, at the expense of limitations on host countries' policy space.

6 See A. Guzman, 'Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties' (1998) 38 *VJIL* 639, 688. See also Zachary Elkins, Andrew T. Guzman and Beth A. Simmons, 'Competing for capital: The diffusion of bilateral investment treaties, 1960–2000' (2006) 60 *IO* 811, 846.

7 Contesting Guzman, see José E. Alvarez, *The Public International Law Regime Governing International Investment* (Pocketbooks of The Hague Academy of International Law, Leiden 2011) 123–143.

are material and normative factors that favoured this movement. And, such claims reverberated in domestic legislation reforms, termination of BITs and the coordinated endeavours before certain international organizations, UNCTAD being the leading example.

From the material perspective, a new wave of changes is presently taking place and it is multidirectional. Unlike the 1960 and 1970s reactions dominated by developing countries' demands for a more balanced regime, current demands for regime change come from developed and developing countries alike – even if for different reasons. Over the years, several developed countries have become major capital importers, in addition to being exporters. This change in the material circumstances in the developed world generated efforts to change regulation and design greater flexibility within the regime. Of major concern was the limitation on the regulatory autonomy of countries in sensitive areas such as safety, health and the environment. Developing countries such as Brazil, in their turn, especially those benefiting from a more vibrant economic development, gained voice as capital exporters. At this moment in history – differently from the 1960s and 1970s – a new group of developing countries gained leverage to contest the extremely restrictive policies and unbalanced institutions represented by traditional BITs. And, developing countries in general became increasingly sceptical of the benefits of the regime, fuelled by several disputable arbitral tribunals' awards against host states, such as the case of Argentina.[8]

These reactions need to be put into perspective with the growing discomfort about neoliberalism as the mainstream approach behind international economic regulation.[9] Deeply rooted in the neoliberal paradigm, the investment regime became the centre of much criticism, opening room for refuelled debates.

As policy makers worldwide look for alternatives to the current regime, insufficient attention is being devoted to contributions originating from the developing world, which has not traditionally been viewed as a laboratory for legal innovation. In this context, this chapter looks at the case of Brazil – one of the big emerging countries in the world, a major recipient of FDI and a capital-exporting country on the rise – exploring how this country is responding to internal and external demands for legal changes in investment regulation.

Conventional wisdom holds that developing countries enter into investment agreements to compete for capital.[10] As we demonstrate in this chapter, this general

[8] On the Argentina case, see Moshe Hirsch, 'Explaining Compliance and Non-Compliance with ICSID Awards: The Argentine Case Study and a Multiple Theoretical Approach' [2016] JIWL (forthcoming).

[9] See Sornarajah, *Resistance and Change in the international investment regime*. See also the introduction to this edited volume.

[10] See Elkins and others, 'Competing for capital: The diffusion of bilateral investment treaties, 1960–2000'.

explanation does hold true for Brazil, a country that has traditionally pursued a different strategy in the regulation of investment. In the 1960s and 70s, the country's participation in the movement that gave rise to the New International Economic Order (NIEO) was ambivalent.[11] Brazilian diplomacy sent mixed signals to the world and did not side with the developing or developed world. In the 1990s, when Latin American countries were 'competing for capital' through liberal investment agreements, Brazil resisted ratifying such treaties. Confident about its domestic reforms, Brazil maintained its position among the top recipients of FDI throughout the 1990s and the first decade of the 2000s.[12]

This chapter has two main objectives: 1) to offer a comprehensive explanation of Brazil's recent investment policies, capturing what justifies the country's move from resistance to BITs in the 1990s to the design of its own investment model agreement in 2015; and 2) to identify potential innovations in the main provisions of the model agreement, as well as their limits to actual implementation. We argue that the engineering of this new model investment agreement fluctuates between resistance and conformity with standard BIT practice, confirming Brazil's ambivalence towards the prevailing neoliberal international order.[13] This research is based on analysis of primary and secondary documents, and interviews with government officials and private sector representatives in Brazil.

We organized the chapter in four sections, besides this introduction. Section 6.2 describes the main provisions of Brazil's new model agreement, focusing on innovations to the international regulatory framework. Section 6.3 combines, first, an explanation about the material and normative factors that promoted resistance to the conventional BIT framework with, secondly, an analysis of the shifts in the

[11] Such behaviour seems to characterize Brazilian foreign policy in different periods. Stuenkel and Taylor find evidence of similar dynamics in contemporary Brazil to refer to institutions such as BRICS, arguing that 'they symbolize Brazil's desire to reach beyond established US-led structures, but without resorting to stale third-worldism that marked the Non-Aligned Movement during the Cold War'. These authors also note that Brazil depicts itself 'as a bridge between the Global South and the wealthy North'. See O. Stuenkel and M. Taylor, 'Brazil on the Global Stage: Origins and Consequences of Brazil's Challenge to the Global Liberal Order' in Stuenkel and Taylor (eds) *Brazil on the Global Stage – Power, Ideas, and the Liberal International Order* (Palgrave Macmillan, New York 2014) 5–6, and also Fabia Veçoso, 'Redefinindo a diplomacia num mundo em transformação' (Paper presented at 50 Encontro Nacional ABRI, 29 a 31 julho de 2015, Belo Horizonte – MG) <https://www.academia.edu/20409897/Bandung_e_o_direito_internacional_mapeando_aus%C3%AAncias> accessed 11 November 2016.

[12] According to the World Investment Report of 2016, Brazil accumulated the third position for inward foreign direct investment in the 1990–2015 period, behind China and Hong Kong. See UNCTAD, *World Investment Report 2016 – Investor Nationality: Policy Challenges* (United Nations, Geneva 2016) Annex Table 1.

[13] The ambivalent behaviour of Brazil in the international order is described in Stuenkel and Taylor, 'Brazil on the Global Stage: Origins and Consequences of Brazil's Challenge to the Global Liberal Order'.

Brazilian policy from a country not willing to ratify any BIT to designing its first investment agreement and assuming a more assertive position towards other developing countries. Section 6.4 concludes the chapter by putting into context the proposal of a new template by Brazil in relation to a changing scenario for investment regulation, its potential and its limits.

6.2 NEW RULES, NEW PATTERNS OF INTERNATIONAL INVESTMENT?

International investment agreements have been described as different sorts of agreements in state-state relations. Formal sovereignty has not been enough to grant confidence on the consensus by the parties, especially due to the economic and political asymmetry that have marked the signed agreements. As a consequence, agreements with investment provisions were severely criticized by policy makers and academics, who denounced them either as unequal treaties or, at least, as arrangements containing unbalanced obligations.[14] These agreements granted more rights to foreign investors when compared to rights granted to host states and national investors.

There are, then, three main elements that confer asymmetry in an investment agreement: i) the economic capacity of parties to sustain negotiating positions (either as source or destination of FDI) in bilateral relations; ii) the type of rules designed to grant rights and duties in the agreement; and iii) the players that may benefit from those rules. This is to highlight that the greater the asymmetries between the parties, the more rules are needed to balance them out. But, one has to be aware that law has its own limits.

In some cases, the claims for reform and innovation in the international investment regime are connected to the ideal of more balanced relations between the parties and players benefiting from the agreement. The ACFI model proposed by Brazil is motivated by that ideal. This intention encouraged Brazilian officials to revise old rules, include new ones, and even exclude those that were understood as contrary to Brazil's developing country status. Besides that, up to now, Brazil has chosen to sign ACFIs with countries to whom Brazil also exports capital and that are classified as developing or least-developed.[15] And, as we will also describe, the template, so far, has been flexible enough to adapt the rules according to its partner countries.

[14] See Miles, *The Origins of International Investment Law: Empire, Environment, and the Safeguarding of Capital* 21–41, N. Monebhurrun, 'Essays on unequal treaties and modernity through the example of bilateral investment treaties' (2014) 11 *BJIL* 202, and Sornarajah, *Resistance and Change in the International Law on Foreign Investment* 347–388.

[15] Brazilian officials, though, do not reject the possibility of signing an ACFI with developed countries. Interviews 2_1_2015 and 2_4_2015, dated as of 28 April 2015, and interview 3_1_2015, as of 29 April 2015. All interviews on files with the authors.

6.2.1 *ACFI's Main Features*

Brazil first published the ACFI template in March 2015. From then on, Brazil successfully signed such agreements with small to medium-sized economies: Mozambique, Angola, Mexico, Malawi, Colombia, Chile and Peru.[16] The Brazilian government has also announced that it is negotiating similar agreements with Algeria, India, Morocco, Nigeria, South Africa, Thailand and Tunisia.[17] In the recent Ministry of Development, Industry and Commerce National Export Plan (2015–2018) – a white paper containing Brazil's trade strategy aimed at improving the country's export performance and innovation – investment agreements were given a new role, featured as a fundamental tool to further Brazil's economic integration with its trading partners.[18]

The official discourse in Brazil when launching the ACFI template highlighted three main pillars of this new model of agreement: 1) investment cooperation and facilitation[19]; 2) institutional governance; and 3) risk mitigation and dispute prevention and settlement.[20] Although this structure is not entirely new to international investment agreements, the ACFI's proposal aimed at bringing new components to their content. Constant cooperation among governmental

[16] The full text of the agreements is available at UNCTAD's database: http://investmentpolicyhub.unctad.org/IIA/CountryBits/27#iiaInnerMenu, accessed 11 November 2016. Depending on the parties, the texts are in Portuguese, Spanish and/or English. The only English version is the agreement with Malawi, which fully adopts the structure of the other agreements signed with African countries. Those agreements signed with countries from Latin America are slightly different, as we will comment on.

[17] Brasil, 'Plano Nacional da Cultura Exportadora' (2015) <http://www.mdic.gov.br/comercio-exterior/pnce/838-plano-nacional-da-cultura-exportadora-pnce%E2%80%8B> accessed 11 November 2016.

[18] Brasil, 'Plano Nacional da Cultura Exportadora' 3. This movement follows the same one taken by BITs that became part of larger trade agreements. UNCTAD recently proposed renaming these agreements "'reaties with investment provision (TIPs)', qualifying it in the international investment agreements group. UNCTAD, *World Investment Report 2016 – Investor Nationality: Policy Challenges* 102. It is worth mentioning that the only ACFI containing a TIP provision was signed between Brazil and Peru, in April 2016. In this format, the parties highlight their intent in promoting trade and investment flows, while keeping regulatory safeguards by the parties. See Acordo de Ampliação Econômico-Comercial Brasil-Peru (adopted 29 April 2016) Preamble.

[19] UNCTAD has elected facilitation as one of the most important items to be considered in reforming the international investment system. The organization distinguished between promotion and facilitation in this way: 'Promotion is about marketing a location as an investment destination and is therefore often country-specific and competitive in nature. Facilitation is about making it easier for investors to establish or expand their investments and to conduct their day-to-day business'. See UNCTAD, *World Investment Report 2016 – Investor Nationality: Policy Challenges* 25.

[20] See D. Godinho and C. M. Cozendey, 'Novos acordos de investimentos no menu' *Valor Econômico* (São Paulo 24 July 2015), R. R. de Campos Souza, 'Acordos de cooperação e facilitação de investimentos' (AMCHAM's Conference *Brasil e os Acordos bilaterais de promoção de investimentos*, São Paulo 30 April 2015). On the same subject, UNCTAD, *World Investment Report 2016 – Investor Nationality: Policy Challenges* 108.

agencies, mediated by diplomatic action, deference to domestic legislation and better balanced obligations between foreign and domestic investors as well as between investor and host state can be considered the leading notions behind this model agreement.

The seven agreements signed from 2015 to 2016 kept that overall structure, but new clauses and topics were added to the model agreement. There is a clear difference in the type of rules, and the degree of flexibility and regulatory space, when comparing the three agreements signed with least-developing countries[21] and the other four signed with developing Latin American countries. In this section, we stress the structure and clauses of the ACFI and in Part C we analyse the challenges arising from such innovation and the ACFI implementation process.

It is worth noting that none of the ACFIs were ratified as of October 2016. However, the Brazilian Congress has been keen to the ratification from the Brazilian side. All seven agreements already received their first positive review in the nominated Committees of the House of Representatives (the lower house).[22] And, in a moment of severe political and economic crisis in Brazil, as well as in the world, the new model of agreement is curiously gaining momentum.

6.2.1.1 Pillar 1: Investment Cooperation and Facilitation

The main declared purpose of the ACFI is investment facilitation and cooperation. Besides the emphasis on a continuous effort by the parties to the agreement to implement their commitments, the exclusion of the notion of protection of investors from the core part of the agreement is remarkable. Daniel Godinho and Carlos Márcio Cozendey, two leading figures in the conceptualization of the ACFI, emphasized this feature of the agreement, right after first ACFI was signed:

> The Brazilian model is based on the long-term notion of States cooperation to promote reciprocal investments. (Free translation by the authors.)[23]

The notion of cooperation and facilitation of investments was regulated by three types of rules: i) those recognizing the application of domestic rules to the main

[21] The group of least-developing countries is officially recognized by the United Nations periodically. The most recent update was in May 2016, including Angola, Malawi and Mozambique. United Nations, 'List of Least Developed Countries' (as of May 2016) <http://www.un.org/en/development/desa/policy/cdp/ldc/ldc_list.pdf> accessed 11 November 2016.

[22] G. F. Soares, 'The Treaty-Making Process under the 1988 Federal Constitution of Brazil – Latin America' (1991) 67 CKLR 495. The ACFI have to be analysed by four thematic Committees in the House of Representatives, which are: the Committee on Foreign Relations and National Security; the Committee for the Constitution, Justice and Citizenship; the Committee for Economic Development, Industry, Trade and Services; and the Committee for Finance and Tax. Updates and details about their work, as well as their opinions on the agreements, may be accessed at: http://www2.camara.leg.br/atividade-legislativa/comissoes, accessed 11 November 2016 (information only available in Portuguese).

[23] See Godinho and Cozendey, 'Novos acordos de investimentos no menu'.

definitions and forms of treatment to FDI[24]; ii) those defining a thematic agenda between the parties; and finally iii) the institutional framework to promote the channels of cooperation.

Unlike BITs, the Brazilian ACFI has elected domestic regulation as the main source to govern international investment. One of the first agreements signed, namely with Angola, did not even provide for investment and investor definition. All other agreements, however, did, and exceptions made to the ACFIs signed with Malawi and Mozambique are intended to exclude portfolio investment[25]

The thematic agendas are part of all ACFIs signed to date, and they are mostly concerned with market access. They comprise programmes on money transfers, technical and environmental licenses and certifications, but they also include simple measures such as visa policy and the regularity of flights.[26] The thematic agenda is built bilaterally and may vary according to the investment partner, depending on their policy priorities and the investor's profile.

Such agendas also revive developing country claims for technology transfer, capacity building and other developmental gains from foreign investment. In addition, they express the understanding that the benefit to the home country must come not only from exporting capital, but also from the overall impact that the investment will have on the host country, such as employment of local labour. In this sense, the ACFI model aims at advancing symmetry beyond formal rules, and its design has taken into account the domestic policy needs of both capital-importing and -exporting countries. The ACFIs encourage the parties to negotiate special commitments, additional schedules and other supplementary agreements as part of the main agreement, in order to expand or detail the thematic agendas.[27]

24 This is in tune with UNCTAD's report on the increasing perception of national legislation as important vehicles to promote and facilitate foreign investment. See UNCTAD, *World Investment Report 2016 – Investor Nationality: Policy Challenges* 92.

25 E.g., the agreements with Chile and Peru, after defining 'investment', they explicitly exclude: (i) operations concerning public debts; (ii) orders and judgments issued by judicial or administrative bodies; (iii) portfolio; and (iv) financial claims originated by contracts for the sale of goods or services by an investor or credits granted to a commercial transaction. See Brazil-Chile Cooperation and Investment Facilitation Agreement (adopted 23 November 2015) art 1.4.1, and Brazil-Peru Cooperation and Investment Facilitation Agreement (adopted 28 April 2016) art 2.3(f).

26 While those may be problems for an investor from any part of the world, such barriers have been understood as more costly for investors from developing countries, to the extent that they limit capital exports in the absence of alternatives. Interviews with Brazilian officials in the Ministry of Foreign Affairs and in the Ministry of Industry, Commerce and Development, in April 2015. Interviews 2_2_2015, 2_7_2015, 3_1_2015. Interviews with representatives of the private sector confirmed that opinion, Interviews 6_1_2015 and 6_2_2015. All interviews are on file with authors.

27 For example, Angola and Brazil signed a protocol about visa facilitation in June 2015 that was taken into account in the thematic agenda of the Brazil-Angola ACFI. Also, Brazil and México signed an agreement on air transport in May 2015. These additional texts are available at: http://dai-mre.serpro.gov.br/pesquisa_ato_bil, accessed 11 November 2016. See Brazil-Angola Cooperation and Investment Facilitation Agreement (adopted 1 April 2015) Annex I, subparagraph 1.2(i).

6.2.1.2 Pillar 2: Institutional Governance and Permanent Bodies

Each ACFI creates two types of institutions to govern the agreement: a joint committee and an ombudsman (also known as ombudsperson or focal point). The joint committee, which operates at the state-to-state level, is composed of government representatives from each of the parties and they will meet annually. The attributions of the joint committee involve monitoring and discussing the implementation of the ACFI; debating and sharing investment opportunities; coordinating the implementation of the cooperation programmes; inviting private sector and civil society participation to integrate the joint committee, when applicable; managing to build consensus or settle amicably investment disputes among the parties; and designing a standard arbitration mechanism for state-to-state dispute settlement.

At the investor-state level, the ACFI institutes an ombudsman mechanism that will provide government assistance to investors from the other party, inspired by the 2010 Korean Investment Act[28]. The ombudsman is not a person but a state agency that will assume its functions according to the domestic organization of each state.[29] In the case of Brazil, the regulation of the ombudsman is linked to an interministerial body – the Chamber of Foreign Trade (CAMEX). The Brazilian ombudsman is composed by the executive secretary, the secretariat, an assistance group (the 'home doctors') and the network of Brazilian subnational focal points.[30] There is also a provision that the ombudsmen of the parties will interact between themselves.

Generally, the the ombudsman has the following functions: making efforts to adopt the recommendations of the joint committee and interacting with the counterpart's focal point; dialoguing with its government to deal with the suggestions and complaints from the other party's government and investors; acting, along

[28] Korea's Foreign Investment Promotion Act 1998, as amended by Act No. 9374, 30 January 2009 <http://legal.un.org/avl/pdf/ls/Shin_RelDocs.pdf> accessed 11 November 2016 art 15.2. The reference to the Korean experience has influenced the replication of the name ombudsman. However, there are differences in the shape and form of operation of the Brazilian ombudsman and the Korean one. Their commonalities are the role in dealing with investors' concerns and in acting as mediators in order to prevent disputes against the host state.

[29] Brazil created its focal point on 28 September 2016, by Decree No. 8.863. Other counterparts are appointing their investment promotion agency and alike – previously created in response to BITs commitments – to hold the ombudsman position in the ACFI. All counterparts to Brazilian ACFIs signed up to June 2016 have ratified BIT model agreements.

[30] To be more precise about the regulation of the ombudsman figure in Brazil, the assistance group makes reference to interministerial assistance. Ministries in Brazil are of direct assistance to the president at the executive federal level. They have been called 'home doctors' as their contribution at the ombudsman level is to add the thematic knowledge that the ministry represents. On the other hand, the network of subnational focal points will provide the structure to work with different bodies of the public administration, either at the national or at the state and municipal levels and/or private bodies holding public functions that may affect investments in Brazil. See Decree No. 8863/16.

with government authorities and the private sector, to avoid disputes and facilitate its settlement; promptly providing information to the parties concerning regulatory issues related to investments, and reporting its activities to the joint committee. The creation and regulation of the focal points depend on each party's domestic regulation – and their effective functioning. In the case of Brazil, domestic law, interestingly, makes no distinction between domestic and foreign investors. The ombudsman then becomes the focal point in providing services to all investors in the country equally.

Benefiting from the work of multilateral organizations, such as the United Nations Conference on Trade and Development (UNCTAD)[31] and experiences from other countries, Brazil has strongly emphasized the prevention of disputes between the parties in its ACFI template. This is the signature feature of the agreement. Therefore, the roles of both the joint committee and the focal point are, primarily, to promote regular exchange of information and prevent disputes and, if a dispute arises, to implement the dispute settlement mechanism, based on consultations, negotiations and mediation. This mechanism aims to deter investors from judicially challenging host government measures. Further analysis on the dispute settlement system itself is conducted in Section 6.2.3.

Finally, the transparency mechanisms in the ACFIs may also serve to improve institutional governance – and to mitigate risk. Instead of establishing transparency standards, however, the ACFIs provide that each party shall employ its best efforts to publish all regulation that may affect the commitments established by the agreement and to allow a reasonable opportunity for those interested to voice their opinion about proposed measures.[32] This may still be considered a novelty to the current regime.

6.2.1.3 Pillar 3: Risk Mitigation, Dispute Prevention and Settlement

The risk mitigation dimension of the agreement comprises typical rules for investment and investor protection, but it also includes diplomatic and cooperative mechanisms for implementing, overseeing and enforcing the parties' obligations, including dispute settlement mechanisms, rules on direct expropriation and compensation, and corporate social responsibility. On this issue, we read the ACFI

[31] See UNCTAD, 'Reform of investor–state dispute settlement: In search of a roadmap' IIA Issues Note No. 2 (June 2013) 5 <http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d4_en.pdf> accessed 11 November 2016 (stating that 'ADR methods can help to save time and money, find a mutually acceptable solution, prevent escalation of the dispute and preserve a workable relationship between the disputing parties').

[32] E.g. see on this subject Brazil-Chile Cooperation and Investment Facilitation Agreement (adopted 23 November 2015) art 9 and Brazil-Peru Cooperation and Investment Facilitation Agreement (adopted 28 April 2016) art 2.9.

provisions mainly as a product of the international agenda to reform the international investment regime and of specific domestic concerns raised in Brazil on the topic.

REVIEW OF THE STANDARDS OF TREATMENT. The model investment agreement proposed by Brazil reduces the scope of investor protection to two main clauses: national treatment (NT) and most-favoured-nation (MFN). This contradicts standard BIT practice, which extends investor protection to obligations such as fair and equitable treatment,[33] full protection and security[34] and umbrella clauses.[35] On this point, the Brazilian approach should be read as an attempt to safeguard parties' right to regulate without outright violation of investors' rights.

The concern with the right to regulate is present in several of the ACFIs when dealing with MFN and NT, and providing flexibilities thereof. The ACFI with Angola states that '[e]ach Party may provide, based on laws and regulations, special formalities for investment/ investors of the other party in its territory' (Article 11.6). Similarly, the ACFI with Mexico states that NT obligation 'does not impede the adoption and implementation of new requirements or legal restrictions upon investors and their investments, provided that they are not discriminatory' (Article 5.1). In addition, all ACFIs include exceptions to MFN based on regional integration agreements (for example, ACFI Brazil-Malawi, article 10.5; ACFI Brazil-Peru, article 2.6.4), and some make reference to double taxation agreements (for example, ACFI Brazil-Mozambique, article 11.5; ACFI Brazil-Mexico, article 3).

A common limitation to MFN obligations in the Latin American agreements relates to dispute settlement provisions. The ACFIs with Mexico, Colombia, Chile and Peru expressly state that MFN obligations shall not extend to dispute settlement clauses (for example, ACFI Brazil-Chile, article 3; ACFI Brazil-Peru, article 2.6.3). These provisions safeguard Brazil from facing ISDS proceedings via MFN, relying on agreements that those countries might have with third countries.[36]

[33] UNCTAD, 'Fair and Equitable Treatment' (UNCTAD Series on Issues in International Investment Agreements II 2012) <http://unctad.org/en/Docs/unctaddiaeia2011d5_en.pdf> accessed 11 November 2016.

[34] Mahnaz Malik, 'The Full Protection and Security Standard Comes of Age: Yet another challenge for states in investment treaty arbitration?' IISD Best Practices Series (2011) <http://www.iisd.org/pdf/2011/full_protection.pdf> accessed 11 November 2016.

[35] Yannaca-Small, K., 'Interpretation of the Umbrella Clause in Investment Agreements' [2006] OWPII. <http://dx.doi.org/10.1787/415453814578> accessed 11 November 2016.

[36] Considering that those ACFIs with Latin American countries detail the ISDS clause exclusion, doubts have arisen about the previous agreements. If the ACFIs signed with Mozambique, Angola and Malawi – countries that have ISDS provisions in BITs with third countries – did not limit MFN obligations to ISDS, will Brazilian investors be able to invoke ISDS in any future dispute with Mozambique, Angola and Malawi? We hesitate to accept this interpretation, as those agreements

In general, the changes in relation to standards of treatment in the ACFI might be understood as responses to international and domestic claims. Provisions dealing with fair and equitable treatment proved highly controversial in investment arbitration. While it might be seen as an effective tool to protect investors, it can be used to limit host states' right to regulate in the public interest. In this context, the Brazilian model agreement suggests an alternative to standard international practice, by limiting the causes of action an investor may bring against a state. Additionally, it is consistent with the overall framework of the ACFIs, which is less focused on investor/investment protection than it is on building and sustaining horizontal investment cooperation between the parties.

DIRECT EXPROPRIATION, COMPENSATION AND TRANSFERS Expropriation, compensation and transfers are especially sensitive issues to developing countries while planning their policies. Taking into account BIT standard regulation on these topics and their often limited interpretation by international arbitral tribunals, proposals for the revisions of these provisions are under debate. There are two ongoing types of initiatives on reform-oriented provisions in the new IIAs: one is to circumscribe and limit their application to certain situations, and the other is to create carve-outs.[37] The Brazilian ACFI has adopted both initiatives.

In the case of expropriation, ACFIs both limit the scope of application of the agreement to direct expropriation, and confer policy powers to the host state. The first ACFIs had general standard provisions on expropriations, but since the agreement signed with Chile, a clause explicitly excluding indirect expropriation became part of the agreement (Article 7.5, ACFI Brazil-Chile). Other ACFIs have specific exclusions, such as an explicit reference to compulsory licenses not understood as expropriation (Article 7.4, ACFI Brazil-Chile; article 6.7, ACFI Brazil-Colombia), with respect to certain monopolies and the regulation of strategic sectors in the national legislation that may restrict investors' rights (Article 6.6, ACFI Brazil-Colombia).

Besides naming what does and does not constitute expropriation within the ACFI terms, the agreement template also opens up space to define general exceptions that

explicitly mention that any dispute shall be resolved by arbitration between the state parties, a mechanism that will be further detailed by the parties. In addition to that, reviews in the house of representatives in Brazil have been clear about their rejection of the investor-state arbitration mechanism, as we further describe on Part III. See e.g. Brazil-Chile Cooperation and Investment Facilitation Agreement (adopted 23 November 2015) art 15.6.

37 On the right to regulate, see European Commission, 'Commission draft text TTIP – investment' (12 September 2015) <http://trade.ec.europa.eu/doclib/docs/2015/september/tradoc_153807.pdf> accessed 11 November 2016 art 9.

influence the content of expropriation. Among those exception clauses are those concerning tax and prudential measures, national security and others referring to a broader notion of the right to regulate when dealing with environmental, health and labour policies.[38]

All ACFIs provide that the investor shall have the right to a compensation that is adequate and effective (ACFI Mozambique and ACFI Malawi), fair (ACFI Angola) and effective (ACFI Colombia). The wording of the agreements, however, does not apply the notion of 'prompt' although it invokes 'with no delay'. This detail gains relevance when read together with the provisions on transfer.

Transfers clauses are also linked to those on expropriation, given that they determine how payments will be made. In the case of the ACFI, there are two new provisions on transfers. One of them is about the possibility of payment on public debt bond, which is a specific demand from Brazil that was welcomed by other developing nations (see Annex 1).[39] This can also be read as an exception to the 'liquidity' requirement that was traditionally invoked by IIAs.

The second provision makes reference to the flexibility on the 'prompt, and adequate' compensation in cases related to balance of payment problems. This is, however, a provision that has already gained attention in the international mainstream debate. UNCTAD includes this as a 'reform-oriented provision' that has been adopted by several other model investment agreements, such as the Austria model BIT (2008), U.S. model BIT (2012) and India model BIT (2015).[40] The TPP chapter on investment has also opened up this possibility.[41]

Clauses on compensation for damages in case of civil disturbance and war, however, does not differ significantly in the ACFIs from those of traditional IIAs. They are, however, impacted by the new provisions on compensation and transfers previously described.

[38] This option has been described as a response to the international debate on the right to regulate in the public interest, given that many measures challenged as indirect expropriation are related to the environment, health and other sensitive policy issues that may indirectly affect the rights of investors as accorded by investment treaties. See, e.g., the following precedents: Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. *v* Argentine Republic, 'Award' ICSID Case No. ARB/97/3 <http://www.italaw.com/cases/309> accessed 11 November 2016, Ethyl Corporation *v* The Government of Canada, 'Award on Jurisdiction' NAFTA/UNCITRAL 24 Jun 1998 <http://www.italaw.com/cases/409> accessed 11 November 2016, and Parkerings-Compagniet AS *v* Republic of Lithuania, 'Award' ICSID Case No ARB/05/8 <http://www.italaw.com/cases/812> accesed 11 November 2016.

[39] Brazilian Federal Constitution 1988 provides that expropriation of urban and rural real properties may be – among other possibilities – compensated with public and agrarian bonds, respectively. Therefore, domestic constituencies and the Brazilian Congress pressured that any compensation to foreigners should follow the same rules as for national investors. If otherwise, it would be unconstitutional. See Brazil's Federal Constitution of 1988 arts 5, 182 and 184.

[40] UNCTAD, *World Investment Report 2016 – Investor Nationality: Policy Challenges* 111.

[41] On this subject, see Trans-Pacific Partnership (adopted 4 February 2016) Chap 9.

corporate social responsibility and other responsibilities of investors. The ACFI template has also proposed to incorporate more obligations for investors. The insertion of corporate social responsibility (CSR) clauses is one of them, aiming at encouraging foreign investors to respect human rights and environmental laws in the host state.[42] These clauses are seen also as mitigating investment risk.[43]

The first ACFIs were more vague in defining the content of CSR, and such provisions were not part of the main text of the agreement, but an annex to it (for example, ACFIs Brazil-Mozambique and Angola-Brazil). The ACFI signed with Malawi and Latin American countries moved the clause to the text of the agreement, and later added a detailed list of expected actions to be performed by the investor.[44]

The enforcement of these obligations are essentially based on domestic supervision, given that they were explicitly excluded from arbitration under certain agreements.[45] Nonetheless, the issue may be brought to the other governance mechanisms created by the agreement, namely, the ombudsperson and the joint committee. The ombudsperson in an ACFI is similar to the OECD's nation contact points for multinational corporations.[46] Therefore, the mechanism can be used not only to hear complaints from investors, but also from the other party to the agreement and from the host state itself (see, for example, article 17.4 of ACFI Brazil-Colombia).

[42] For a critical approach to CSR as agents of change in investment treaties, see N. Perrone, 'The International Investment Regime after the Global Crisis of Neoliberalism: Rupture or Continuity?' (2016) 23 IJGLS (forthcoming).

[43] Brazilian human rights NGOs have complained about their low normativity, and the lack of international mechanisms to enforce the responsibility for violations in the field, see Caio Borges, 'Acordos bilaterais à brasileira' *Valor Econômico* (São Paulo 29 May 2016) <http://www.valor.com.br/opiniao/4072416/acordos-bilaterais-brasileira> accessed 11 November 2016.

[44] See Brazil-Mexico Cooperation and Investment Facilitation Agreement (adopted 26 May 2015) art 13, Brazil-Chile Cooperation and Investment Facilitation Agreement (adopted 23 November 2015) art 13, Brazil-Colômbia Cooperation and Investment Facilitation Agreement (adopted 19 October 2015) art 13, and Brazil-Peru Cooperation and Investment Facilitation Agreement (adopted 28 April 2016) art 2.13.

[45] The exclusion of CSR from arbitration is not uniform in all agreements. Those ACFIs excluding it are the ones with Colombia, Chile and Peru. See Brazil-Colombia Cooperation and Investment Facilitation Agreement (adopted 19 October 2015) art 23.3, Brazil-Chile Cooperation and Investment Facilitation Agreement (adopted 23 November 2015) art 19 and Brazil-Peru Cooperation and Investment Facilitation Agreement (adopted 28 April 2016) art 2.21.3. It is not clear then if this exclusion from arbitration as a contentious system means their exclusion from the amicable dispute prevention system also. For further clarification on dispute prevention and arbitration in the ACFI see the section on Dispute Prevention and Settlement.

[46] We make reference to the national contact points in the OECD Guidelines for Multinational Enterprises. In the case of Brazil, the OECD contact point is based in the Ministry of Economy. The decree for the creation of the ombudsman for direct investments – that is based in a different body (CAMEX) – established then the network of relevant focal points in the Brazilian public administration to coordinate actions concerning FDI (see Article 3.IV of Decree No. 8863/16). See also OECD, 'OECD Guidelines for Multinational Enterprises' (edition 2011) <http://www.oecd.org/daf/inv/mne/48004323.pdf > accessed 11 November 2016.

Level 1 - Focal points (ombudsman)

- Permanent domestic body.
- Day-to-day work.
- Consultation between parties, investors and relevant governmental and nongovernmental organizations.
- Communication with the joint committee.

Level 2 - Joint committee

- Mandatory stage.
- State party formally submits one investor claim to the joint committee.
- Coordination with the focal points.
- Participation of investors, governmental and nongovernmental interested bodies.
- Proceedings and time limits (sixty days to submit information about the case).
- A report has to be published.

Level 3 - State-to-state arbitration*

- Adjudicative process.
- Ad hoc or institutional arbitration.
- Joint committee supervises it.

FIGURE 6.1 ACFI dispute prevention and settlement flow.
* The form and content of arbitration clauses may vary substantively among the agreements.
Source: Prepared by the authors.

More recent ACFIs also include another obligation that increases investment obligations: the anticorruption clause. This provision aims at regulating the clean hands doctrine[47] that holds back the protection of the investment and other benefits deriving from cooperation between the parties in case of any suspicion of illegal acts of corruption, money laundering or financing of terrorism (see, for example, article 14 ACFI Brazil-Colombia). The enforcement of such obligations are also under the supervision of the ombudspersons and the joint committee.

DISPUTE PREVENTION AND SETTLEMENT. The main objective of the agreement, based on its core conception of cooperation, is to provide mechanisms to prevent disputes. The design of these mechanisms also brings the states to the front line in dealing with the internal challenges related to the implementation of the agreement.

By emphasizing dispute prevention, Brazil develops an innovative set of institutional mechanisms to pursue that goal. Dispute prevention and settlement in the ACFIs operate at three interrelated levels, as shown in Figure 6.1.

[47] On the clean hands doctrine, see generally Rahim Moloo and Alex Khachaturian, 'The Compliance with the Law Requirement in International Investment Law' (2011) 34 *FILJ* 1473, 1501.

In the ACFIs, the ombudsperson is conceived to be the first level of dispute prevention, as they are the permanent institutional body articulating the different constituencies, from the representatives of the parties to the private sector, as well as governmental and nongovernmental interested bodies. Any investor and/or representative of a party will bring the issue to the ombudsman level before taking a formal claim to the joint committee.[48] Besides, the ombudsman is also invoked in the prevention of disputes section during the joint committee procedures. The seven ACFIs signed up to 2016 have adopted the same approach to regulate the activities to be performed by the ombudsperson in dispute prevention.[49]

The joint committee, appointed as the second level of dispute prevention, is however the first mandatory instance for addressing an investor claim based on the ACFI commitments. The joint committee is a governance structure composed by representatives of the parties to the agreements. Accordingly, from the dispute prevention perspective, it is the forum for consultations and negotiations between the parties. The ACFIs declare that a formal notice to the joint committee is due by the submitting a claim on behalf of an investor. At this stage, representatives of the interested investor and of the governmental or nongovernmental entities involved in the measure or situation under consultation shall participate in the bilateral meetings held by the joint committee. As a result, the joint committee is expected to publish a brief report on the matter, and to keep the issue in its agenda until its resolution. The meetings of the committee during a dispute – as well as the parties' documents – are not available beyond the parties to the dispute. The chapters of the ACFIs on dispute prevention describe in detail the joint committee's role and the requirements for bringing a

[48] The commitments in the ACFIs for the exchange of information between the parties, which detail the type of information to be provided by each party to the other, are another aspect of the cooperation facet of the agreement that intends to ease misconceptions and conflicts that may arise from investors. On exchange of information, see Brazil-Angola Cooperation and Investment Facilitation Agreement (adopted 1 April 2015) art 6, Brazil-Mozambique Cooperation and Investment Facilitation Agreement (adopted 30 March 2015) art 6, Brazil-Mexico Cooperation and Investment Facilitation Agreement (adopted 26 May 2015) art 16, Brazil-Malawi Cooperation and Investment Facilitation Agreement (adopted 25 June 2015) art 5, Brazil-Colombia Cooperation and Investment Facilitation Agreement (adopted 19 October 2015) art 18, Brazil-Chile Cooperation and Investment Facilitation Agreement (adopted 23 November 2015) art 20 and Brazil-Peru Cooperation and Investment Facilitation Agreement (adopted 28 April 2016) art 2.17.

[49] See Brazil-Mozambique Cooperation and Investment Facilitation Agreement (adopted 30 March 2015) art 5, Brazil-Angola Cooperation and Investment Facilitation Agreement (adopted 1 April 2015) art 15, Brazil-Mexico Cooperation and Investment Facilitation Agreement (adopted 26 May 2015) arts 15 and 18, Brazil-Malawi Cooperation and Investment Facilitation Agreement (adopted 25 June 2015) arts 4 and 13, Brazil-Colombia Cooperation and Investment Facilitation Agreement (adopted 19 October 2015) arts 17 and 22, Brazil-Chile Cooperation and Investment Facilitation Agreement (adopted 23 November 2015) art 19, and Brazil-Peru Cooperation and Investment Facilitation Agreement (adopted 28 April 2016) art 2.16.

dispute[50], but other elements may be added in the future when the expected joint committees' rules of procedures are approved by the parties of each ACFI.

Only if the joint committee is unable to work out a mutually satisfactory solution may the affected state party submit to the other party a written request for the establishment of an arbitral tribunal. In other words, the joint committee is a mandatory step before arbitral proceedings. The clauses on arbitration mostly vary from ACFI to ACFI.[51] The reasons for this are the evolution of the template over time, and the specific results of each negotiation depending on the other parties to the agreement. The common feature between the seven ACFI signed up to the moment are state-to-state arbitration clauses, whose procedures are supervised and may be complemented by the joint committees established by the agreements.

The ACFIs signed with other developing Latin American economies provide the most detailed arbitration proceedings, when compared to the ACFIs signed with African countries. Unlike Brazil, these Latin American countries are experienced investment treaty negotiators. Along general lines, their provisions do not differ much, but some variations do exist. The first concerns the scope of application of the ACFIs. While some of them exclude national security exceptions from arbitration, others do that with measures related to security, the fight against corruption, health, the environment, labour and provisions on corporate social responsibility.[52]

[50] The agreements specify the minimum requirements for the formal notice by the affected party, and those for the final public report. See Brazil-Mozambique Cooperation and Investment Facilitation Agreement (adopted 30 March 2015) art 15, Brazil-Angola Cooperation and Investment Facilitation Agreement (adopted 1 April 2015) art 15, Brazil-Mexico Cooperation and Investment Facilitation Agreement (adopted 26 May 2015) art 18, Brazil-Malawi Cooperation and Investment Facilitation Agreement (adopted 25 June 2015) art 13, Brazil-Colombia Cooperation and Investment Facilitation Agreement (adopted 19 October 2015) art 22, Brazil-Chile Cooperation and Investment Facilitation Agreement (adopted 23 November 2015) art 24 and Brazil-Peru Cooperation and Investment Facilitation Agreement (adopted 28 April 2016) art 2.20.

[51] See Brazil-Mozambique Cooperation and Investment Facilitation Agreement (adopted 30 March 2015) art 15.5, Brazil-Angola Cooperation and Investment Facilitation Agreement (adopted 1 April 2015) art 15.6, Brazil-Mexico Cooperation and Investment Facilitation Agreement (adopted 26 May 2015) art 19, Brazil-Malawi Cooperation and Investment Facilitation Agreement (adopted 25 June 2015) art 13.6, Brazil-Colombia Cooperation and Investment Facilitation Agreement (adopted 19 October 2015) art 23, Brazil-Chile Cooperation and Investment Facilitation Agreement (adopted 23 November 2015) art 25 and Annex I, and Brazil-Peru Cooperation and Investment Facilitation Agreement (adopted 28 April 2016) art 2.21.

[52] A curious example is the CSR exception. That is because all ACFIs have provisions on CSR and on arbitration, although only three of them exclude those provisions from the arbitration mechanism (ACFIs with Colombia, Chile and Peru). It is intriguing that the ACFI with Mexico does not exclude CSR but does exclude national security exceptions. For all exclusions see Brazil-Mexico Cooperation and Investment Facilitation Agreement (adopted 26 May 2015) art 12.2, Brazil-Colombia Cooperation and Investment Facilitation Agreement (adopted 19 October 2015) arts 12.2 and 23.3, Brazil-Chile Cooperation and Investment Facilitation Agreement (adopted 23 November 2015) Annex I art 1.2 and Brazil-Peru Cooperation and Investment Facilitation Agreement (adopted 28 April 2016) art 2.21.3.

Another example of restriction on the scope of application is available in the ACFI Brazil-Chile, which allows parties to deny the participation of national investors in arbitration claims under the ACFI (Annex 1, article 1.3). As this is the sole ACFI with such a possibility, it raises the question if in the case of other ACFIs national investors would automatically be allowed to start arbitration proceedings under the agreements. This is a topic to be clarified in the future either by the joint committee or by the arbitration tribunals.

The terms of reference, the four ACFIs with Latin American countries offer more examples of variations around the compensation issue. The four agreements provide that the main objective of the arbitration is to bring the challenged measure into conformity with the ACFI.[53] However, only the ACFIs with Mexico and Colombia declare that the arbitration tribunal may also determine the existence of damages to the investor and the amount of compensation.[54] Here it remains to be answered which court – domestic or international – has jurisdiction over the fundamental issue of compensation to the other agreements, and which laws should it apply.

As to the structure and proceedings of the tribunal, the four Latin American ACFIs do not follow the same path. All agreements carry in common the following features: (i) they are either an ad hoc or an institutional arbitration, (ii) tribunals are composed by three members, (iii) they adopt the Understanding on the Rules and Procedures Governing the Settlement of Disputes of the WTO as the rules of conduct for the appointed arbitrators, and (iv) the term of six months to reach an arbitral award.[55]

However, the arbitration clauses vary on (i) the authority who appoints the arbitrators when parties do not reach an agreement[56], and (ii) the rules governing the

[53] See Brazil-Mexico Cooperation and Investment Facilitation Agreement (adopted 26 May 2015) art 19.2, Brazil-Colombia Cooperation and Investment Facilitation Agreement (adopted 19 October 2015) art 23.2, Brazil-Chile Cooperation and Investment Facilitation Agreement (adopted 23 November 2015) Annex I art 7.3 and Brazil-Peru Cooperation and Investment Facilitation Agreement (adopted 28 April 2016) art 2.21.2.

[54] According to ACFIs with Mexico and Colombia, the parties may request the arbitral tribunal to determine the amount to be compensated. Since the tribunal decides about the sum, the compensation shall be transmitted by the state-party to the affected investor, minus all arbitration costs. See Brazil-Mexico Cooperation and Investment Facilitation Agreement (adopted 26 May 2015) art 19.2 and Brazil-Colombia Cooperation and Investment Facilitation Agreement (adopted 19 October 2015) art 23.14.

[55] Within six months of either the nomination of the president of the tribunal (ACFI Mexico and Colombia) or of the establishment of the panel (ACFI Chile).

[56] In case the parties fail to appoint the arbitrators within the expected time (usually sixty days), the President of the International Court of Justice (ACFIs with Mexico and Peru) or the Secretary-General of the Permanent Court of Arbitration in The Hague (ACFIs with Chile and Colombia) steps in. See Brazil-Mexico Cooperation and Investment Facilitation Agreement (adopted 26 May 2015) art 19.6, Brazil-Peru Cooperation and Investment Facilitation Agreement (adopted 28 April 2016) art 2.21.7, Brazil-Chile Cooperation and Investment Facilitation Agreement (adopted 23 November 2015) Annex

arbitral procedures.[57] The impact of such variations on future negotiations – if there is any intent to propose a standard procedure – and in the implementation of the agreements themselves and in the other agreements that still do not detail the arbitration procedure is uncertain.

6.2.2 *ACFI: Reform, Adjustment, Innovation? How Far Does It Go?*

The fact that Brazil launched investment negotiations in 2015 – in a period of global attempts to reform the IIA agreements, some of which are contesting standard formulations, and others involving the most developed economies (such as TPP and TTIP) – raises questions as to the type of contribution that the ACFI can bring to the international investment regime.

Two extreme types of reaction to the ACFI template have emerged: scepticism and optimism. The sceptical raise questions about the features of the agreement itself, in promoting confidence to investors, especially due to its limited protection of investors' rights and high degree of flexibility on behalf of national legislation.[58] Some other are sceptical about the ACFI's potential to change the international investment regime.[59] Conversely, optimists focus on the particularity of the players involved in the ACFI negotiations, and how the ACFI features are aligned with past calls for IIA reform.[60] Yet, in analysing the potential of the ACFI templates in influencing the international system, the optimists have put a realistic emphasis exclusively on ACFI clauses that are in tune with the movement of reforms, disregarding the particularities of changes.[61]

I art 4.4 and Brazil-Colombia Cooperation and Investment Facilitation Agreement (adopted 19 October 2015) art 23.7.

57 In the ACFIs with Mexico (art 19.8) and Peru (art 2.21.10), the arbitral tribunal determines the procedures. If the arbitral tribunal fails to make this determination, the ACFI with Colombia resorts to the UNCITRAL arbitration rules (art 23.11). The ACFI with Chile states that arbitral procedures are to be decided by the parties (Annex I art 5.1).

58 See José Augusto Fontoura Costa, 'Os ACFIs e (a falta de) proteção dos investidores' *Valor Econômico* (Sao Paulo, 30 July 2016) <http://www.valor.com.br/opiniao/4155438/os-acfis-e-falta-de-protecao-dos-investidores> accessed 11 November 2016.

59 See concluding chapter.

60 See Nitish Monebhurrun, 'Novelty in International Investment Law: The Brazilian Agreement on Cooperation and Facilitation of Investments as a Different International Investment Agreement Model' [2016] JIDS (forthcoming) and Morosini and Badin, 'The Brazilian Agreement on Cooperation and Facilitation of Investment (ACFI): A New Formula for International Investment Agreements?' ITN, 4 August 2015 <https://www.iisd.org/itn/2015/08/04/the-brazilian-agreement-on-cooperation-and-facilitation-of-investments-acfi-a-new-formula-for-international-investment-agreements/>.

61 See UNCTAD, *World Investment Report 2015 – Reforming International Investment Governance* (United Nations, Geneva 2015) and *World Investment Report 2016 – Investor Nationality: Policy Challenges*.

6.3 NAVIGATING FROM RESISTANCE TO CONFORMITY

There is a popular saying in Brazil that states that 'Brazil is not for beginners'.[62] The idea behind this statement is that it is hard to predict what will happen next in the country. From a foreign policy perspective, this notion can be associated with the ambivalence of Brazilian foreign policy, especially in what concerns its economic relations.[63] The history of Brazil's attitude towards international investment regulation is no different. Brazil stood as an isolated sign of resistance to the standard formulation of BITs until 2015, and now the new ACFI raises questions concerning the extent to which it will stand as a viable alternative – for Brazil and for other like-minded countries. Our aim is certainly not to offer a definite prognosis, but instead to provide more details about what, at the Brazilian domestic level, lies behind resistance and conformity to international investment regulation.

In order to do that, we opt to describe the recent antagonistic developments in Brazilian domestic and foreign policies towards international investment regulation. So, we first describe Brazil's attempt to adhere to BITs during the 1990s, which led to a resistance to this movement. In a second part, we analyse the more recent movements favouring a revision of the Brazilian position on international investment regulation, culminating in the approval of the new ACFI template. There are material and normative factors, understood as both causes and responses to the international economic and political context that we address in each section.

6.3.1 *Resistance Brought by Bilateral Investment Agreements (1990–2000)*

Attempts to Adhere to the BITs Regime

From 1994 to 1999, Brazil signed fourteen BITs – with Belgium-Luxemburg, Chile, Cuba, Denmark, Finland, France, Germany, Italy, the Netherlands, Portugal, South Korea, Switzerland, the United Kingdom and Venezuela.[64] Besides the BITs, Brazil signed two protocols with very similar rules on investment in the context of Mercosur: one addressing rules on intra-Mercosur investments; and a second one,

[62] Brazilian singer and songwriter Tom Jobim stated that once. On the subject of his statement, see Laura Graziela Gomes, Livia Barbosa and José Augusto Drummond (Org), *O Brasil não é para principiantes: Carnavais, malandros e heróis, 20 anos depois* (Editora FGV, Rio de Janeiro 2001).

[63] See Stuenkel and Taylor, 'Brazil on the Global Stage: Origins and Consequences of Brazil's Challenge to the Global Liberal Order' and Luis Eslava, Michael Fakhri and Vasuki Nesiah 'Introduction: The Spirit of Bandung' in Eslava, Fakhri and Nesiah (eds), *Bandung, Global History and International Law: Critical Pasts and Pending Futures* (CUP, Cambridge forthcoming).

[64] Access to the full text of the agreements at UNCTAD's database: http://investmentpolicyhub.unctad.org/IIA/CountryBits/27#iiaInnerMenu, accessed 11 November 2016.

defining common rules of treatment in the bloc, with relation to extra-Mercosur investments.[65]

Brazil started negotiating BIT model agreements during Collor de Mello's term (1990–2), and the negotiations continued through two other presidential mandates (Franco and Cardoso).[66] In the context of large-scale privatizations, BITs stood for reduced political and regulatory risks to foreign investors in large economic sectors such as telecommunication, energy and mining.[67] Brazil's participation in the creation of these agreements was, however, marginal at best. The standardized formulation of BITs and the choice of partners – mostly developed countries – were aligned with the prevailing investment pattern from North to South.

The 1990 agreements' main focus was the protection of investors' property rights in politically and economically unstable developing countries. BITs negotiated with Brazil followed the standard structure, which included: definition of investment, investor and territory; admission of investment; investment promotion; standards of treatment (including national treatment, most favoured nation, and fair and equitable treatment); nationalization, expropriation and compensation; transfers; investor-state arbitration and termination of treaties.[68]

Brazil's decision to sign BITs with a group of mostly developed countries was consistent with the country's foreign policy prevailing at that time. Brazil and many developing countries were convinced that signing BITs with capital-exporting countries was the way to secure investments.[69] Brazilian foreign policy in the 1990s – known as 'autonomy through participation' – is characterized by Brazil's acceptance of the global liberal game through privatization of state enterprises, and the further

[65] Mercosur is a regional integration bloc created in 1991, composed in its origin by Argentina, Brazil, Paraguay and Uruguay. The protocols signed in 1994 were: Protocolo de Colonia para la Promoción y Protección Recíproca de Inversiones en el Mercosur (adopted 17 January 1994) and Protocolo sobre Promoción de Inversiones Provenientes de Estados no Partes del Mercosur (adopted 5 August 1994). Later on, in 1997 and 1999, Mercosur countries also signed joint memorandums of agreement on trade and investment with Singapore (adopted 24 September 1997), Guyana (adopted 28 June 1999) and Trinidad y Tobago (adopted 28 June 1999).

[66] United Kingdom-Ireland, Switzerland, Chile and Portugal agreements were negotiated under Collor de Mello, signed under Itamar Franco and sent to Congress by Cardoso, in 1995.

[67] Brazilian policy in the 1990s was in tune with other developing countries' policies meant to increase FDI inflow, including making national regulatory changes and signing BITs. See on this subject, UNCTAD, *World Investment Report 1998: Trends and Determinants* (United Nations, Geneva 1998) 57 table III.2.

[68] Access to the full text of the agreements at UNCTAD's database: http://investmentpolicyhub.unctad.org/IIA/CountryBits/27#iiaInnerMenu, accessed 11 November 2016.

[69] See generally Daniela Campello and Leany Lemos, 'The Non-Ratification of Bilateral Investment Treaties in Brazil: A Story of Conflict in a Land of Cooperation' (2016) 4 *RIPE* 1055, 1086.

opening up of its economy in an attempt to shape global governance by engaging dominant Western powers.[70]

Despite the similarities of the BITs, only six of them were sent to Congress for approval, from 1996 to 2000: these were the BITs with Germany, Chile, France, Portugal, the United Kingdom and Switzerland;[71] one of the Mercosur agreements was also sent to Congress.[72] Persistent resistance to the BITs at the legislative level forced President Cardoso to withdraw them from approval. As a result, in December 2002, just two weeks before the end of his mandate, President Cardoso (1995–2002) withdrew the six BITs from Congress, following recommendations of an inter-ministerial group instituted by CAMEX.[73] The other eight BITs never made it to Congress.[74] A number of normative and material factors contributed to the nonratification of Brazilian BITs. As a consequence, Brazil then became known as one of the few top economies without a BIT or any investment agreement model.

70 A race to sign standardized BITs followed in developing countries, which certainly influenced Brazil's decision to consider this path. See Jean Daudelin, 'Coming of Age? Recent Scholarship on Brazilian Foreign Policy' (2013) 28 *LARR* 204, 217. On the 'autonomy through participation' foreign policy, see Tullo Vigevani, Marcelo F. de Oliveira and Rodrigo Cintra, 'Política externa no período FHC: a busca de autonomia pela integração' (2003) 15 *TS* 1809, 4554. About privatization policies in that period, see Maria Hermínia Tavares de Almeida, 'Negociando a Reforma: a privatização de empresas públicas no Brasil' (1999) 42 *Dados* 421, 451.

71 It is not entirely clear what criteria were adopted by the executive branch to choose which of the treaties would be sent to Congress for ratification. The option for Germany, France, the United Kingdom and Switzerland can be explained in terms of investment presence in Brazil. However, the option of Portugal and Chile instead of countries such as Italy and the Netherlands can only be explained in noneconomic terms. See Morosini and Ely Caetano Xavier Junior, 'Regulação do Investimento Estrangeiro Direto no Brasil: Da Resistência aos Tratados Bilaterais de Investimento à Emergência de um Novo Modelo' (2015) 12 *RDI* 400, 428.

72 For further information about the agreements sent to Congress, see Déborah Bithiah de Azevedo, 'Os acordos para a promoção e a proteção recíproca de investimentos assinados pelo Brasil' (Congress opinion, Área XVIII, Direito Internacional Público, Relações Internacionais, Brasília, maio de 2001) <http://www2.camara.leg.br/documentos-e-pesquisa/publicacoes/estnottec/arquivos-pdf/pdf/102080.pdf> accessed 11 November 2016. In the case of Mercosur, the other Mercosur members ratified only the Protocolo sobre Promoción de Inversiones Provenientes de Estados no Partes del Mercosur. None of them ever ratified Protocolo de Colonia para la Promoción y Protección Recíproca de Inversiones en el Mercosur. More information is available at http://www.mre.gov.py/tratados/public_web/ConsultaMercosur.aspx, accessed 11 November 2016.

73 See CAMEX, 'Mensagem No. 1079' (Grupos Técnicos Interministeriais, 2002). CAMEX is the acronym in Portuguese for the Brazilian Chamber of Foreign Trade, a permanent advisory body of the presidency in matters related to the formulation, adoption, implementation and coordination of foreign trade policies. CAMEX is currently linked to the Presidency Chief of Staff Office due to the Decree No. 8807 of 2016. This interministerial body has moved from time to time to other ministries, such as the Ministry of Development, Industry and Trade and the Ministry of Foreign Affairs.

74 Campello and Leany Lemos, 'The Non-Ratification of Bilateral Investment Treaties in Brazil: A Story of Conflict in a Land of Cooperation' 22.

6.3.2 *Normative Factors for Resistance*

There were four types of normative discourses that challenged BITs' rationale in Brazil: first, resistance from left-wing parties to excessive protection of private interests; second, the lack of trust on the capacity of BITs to attract investments to Brazil; third, certain BIT provisions would require constitutional reform; and, fourth, the low profile that international negotiations had in the Brazilian political debate at the time.

By the time the texts of the agreements were sent to Congress, from 1996 to 2000, the agreements faced resistance by different interest groups. The strong ideological opposition at that time came mostly from the Labour Party, but not entirely – members of the ruling coalition did not support the BITs either.[75] During this period, the left-wing Labour Party (acronym in Portuguese PT) was the strongest voice opposing the ruling parties and it credited BITs as being part of a conservative-oriented agenda concerned with liberalizing Brazil's economy. It argued that these agreements imprinted an economic imbalance between capital-importing and capital-exporting countries that Brazil's left wing was vigorously trying to combat.[76] This discourse targeting investment regulation was, certainly, influenced by the resistance that the privatization policies from the beginning of the 1990s has promoted in Brazil.[77]

Besides, by the time the texts of the agreements were sent to Congress, the competitive logic that potentially makes sense to small countries that rely on foreign markets as an important component of their development strategy did not explain the Brazilian case anymore (as described in the following material factors section). The threat of being left out of the competition for foreign capital was not taken seriously by Congress. Brazilian officials started then to challenge the dominant narrative that investment agreements attract FDI.[78] An official communication to the legislative branch – *Mensagem* N. 1.083, of 11 December 2002 – asked for the withdrawal of the investment agreement with Switzerland from the docket; the executive wrote that the lack of investment agreements had not compromised Brazil's ability to attract FDI.[79]

[75] Campello and Leany Lemos, 'The Non-Ratification of Bilateral Investment Treaties in Brazil: A Story of Conflict in a Land of Cooperation' 11.

[76] This position is consolidated in Azevedo, 'Os acordos para a promoção e a proteção recíproca de investimentos assinados pelo Brasil'.

[77] The implementation of privatization policies from the 1990s increased liberalization of the domestic economy, which benefited foreign investors, either by promoting FDI or portfolio investments. A general criticism was raised against these policies as favouring foreign capital.

[78] See note 12.

[79] According to this communication, the stability of Brazil's judicial system and the shape of its economy from 1994 explained why Brazil could enjoy major FDI inflows without BITs. Brasil, 'Exposição

At the legislative stage, two clauses of the agreements came across as problematic due to technical inconsistencies with domestic regulation: compensation for expropriation and investor-state arbitration. BITs provided that payment for expropriation of land for purposes of agrarian reform should be made in convertible and freely transferable currency. The Brazilian 1988 Federal Constitution, on the other hand, provides that it shall be made through agrarian reform debt securities redeemable in up to twenty years. Therefore, the obligation imposed on Brazil to freely transfer payment to the investors, regardless of the country's funds availability, would characterize a treatment more favourable to foreigners vis-à-vis nationals.[80] Additionally, indirect expropriation clauses in the BITs were perceived as problematic. The inclusion of these clauses risked limiting Brazil's regulatory space, given their open nature. Brazil was not willing to constrain its policy space and submit the evaluation of the legitimacy of its public policies to the purview of private arbitrators.

The investor-state arbitration clause of the BITs was challenged before the Foreign Affairs and National Defence Committee on the grounds that 'these norms contravene customary international law traditionally adopted by Brazil, the principle of exhaustion of local remedies.'[81] In addition, it would grant foreign investors alone the right to challenge the state in private arbitration, whereas local investors would have to seek redress in local courts only.[82] Investor-state arbitration was, then, not an option for Brazil, given the country's trust in its neutral and efficient judiciary and scepticism towards arbitration mechanisms generally during that period.[83]

Lastly, it should not be forgotten that international negotiations were, at best, a second priority in the national agenda of Brazil in 1990 – a time when the country was immersed in the task of transitioning to a democracy and implementing the 1988 constitution.[84] In sum, normative resistance to the mainstream regulatory

de Motivos nº 401' (DSF/ARC/DE-I – MIRE – PEXT EFIN, de 5 de dezembro de 2002 Diário da Câmara dos Deputados, Brasília, 13 December 2002) 54414.

80 See André Gustavo de Miranda Pineli Alvez, 'As relações de investimento direto entre o Brasil e os países de seu entorno' In Alvez (Org), *Os BRICS e seus vizinhos: investimento direto estrangeiro* (IPEA, Brasilia 2014) 13, 169.

81 Free translation by the authors. Brasil, 'Parecer da Comissão de Relações Exteriores e Defesa Nacional [ao Projeto de Decreto Legislativo nº 367 de 1996]' (Speech by Congressman Luiz Gushiken, Diário da Câmara dos Deputados, Brasília, 4 May 2000) 21693.

82 Alvez, 'As relações de investimento direto entre o Brasil e os países de seu entorno' 13, 169.

83 Brazil's Arbitration Act was passed in 1997, but it faced strong opposition until 2004, when the Supreme Court ruled in favour of its constitutionality. See Pedro Costa Braga, 'Recognition and Enforcement of Foreign Arbitral Awards in Brazil: Legal and Practical Requirements' (2009) 26 *MIAR* 1, 11.

84 It should be noted that the 1990s were the first decade of democratic ruling in Brazil, under a new constitution. That fact alone canalized strong implementation efforts to the 1988 Constitution, a long document focused on the creation of democratic institutions, the establishment of the rule of law and the guarantee of social and economic rights leading to policy obligations. See generally David M. Trubek, Diogo R. Coutinho and Mario G. Schapiro, 'New State Activism in Brazil and the Challenge for Law' in Trubek, Helena A. Garcia, Diogo R. Coutinho and Alvaro Santos, *Law and the New*

model epitomized in the BITs might be explained by internal demands. In the 1990s, internationally, there were no concerted reactions from developing countries against the way investment rules were framed. Like India, Brazil did not have any intention to push for this debate internationally; the focus of its international action became the World Trade Organization (WTO) instead[85].

6.3.3 *Material Factors for Resistance*

The material aspects that supported resistance can be summarized in four main elements: the time-lapse for ratification of international agreements; the lack of constituencies supporting the BITs; the deficient articulation between the executive and the legislative branches at that point; and investment-friendly reforms that could be taken at the domestic level through minor reforms, instead of approving BITs that would require major constitutional reforms.

Brazil had started to sign BITs in 1994, and the first agreements were sent to Congress in 1996. Due to the lack of interested constituencies and a deficient articulation between executive and legislative branches, the first report in the lower house came only in 2001.[86] The economic scenario then had already changed, as Brazil was no longer in strong need of attracting capital to restore its public debts.[87]

The lack of constituencies advocating in favour of the ratification of the BITs before the Brazilian Congress was remarkable. In 1990, Brazil was already a relevant destination for FDI, and, although the country suffered from the economic crisis in 1980s, relevant multinational corporations were already operating in the country.[88] It is said that settled foreign corporations were already familiar with Brazilian domestic regulation and keen on the local legislation and procedures. The existence of BITs in this scenario could increase their competition from new entrants into the local market. So, multinational companies who would normally be supporters of BITs were not a group that lobbied for them at that moment in Brazil.[89] Equally, at that

Developmental State – The Brazilian Experience in Latin American Context (CUP, Cambridge 2013) 28, 61.

85 See Gregory Shafer, Michelle Sanchez-Badin and Barbara Rosenberg, 'The trials of winning at the WTO: what lies behind Brazil's success' (2008) 41 *CILJ*, 383, 502. For the Indian-related experience, see Chapter 5 in this volume.

86 See Campello and Lemos, 'The Non-Ratification of Bilateral Investment Treaties in Brazil: A Story of Conflict in a Land of Cooperation' 15, 16.

87 See BNDES, 'Desestatização e Reestruturação, 1990–2002' (BNDES's report, July 2002). <www.bndes.gov.br/publicacoes> accessed 11 November 2016.

88 On the role inward FDI played in Brazil before the 1980s, see generally Peter Evans, *Dependent Development: The Alliance of Multinational, State, and Local Capital in Brazil* (PUP, Princeton 1979)

89 Campello and Lemos, 'The Non-Ratification of Bilateral Investment Treaties in Brazil: A Story of Conflict in a Land of Cooperation' 25.

point in time, there was no relevant constituency for outward investment. Brazilian outflow was low and limited,[90] and this should be taken into account to explain the low level of domestic private sector lobbying for investment agreements aimed at protecting Brazilian investments abroad.

Another missing lobby group were state level governors who could potentially benefit from more investment in their states, but who were involved neither in the negotiations nor in the ratification procedures.[91] In the same sense, the lack of articulation between the executive and the legislative branches is pointed to as a reason for nonratification of the BITs.[92] As previously mentioned, the strongest contesting voices against BIT approval came from the opposition to the government in Congress. Likewise, other economic measures undertaken by the Cardoso administration domestically favoured that reaction.

Considering that lack of support in Congress, the executive branch decided to withdraw the BITs from the House of Representatives and addressed most investors' demands through alternative channels. Most of the liberalization measures during the end of the 1990s in Brazil were adopted by administrative measures edited by the Ministry of Finance and the Central Bank.[93] These measures were then the main legal framework regulating FDI in Brazil until the emergence of the ACFI in 2015.

[90] From the 1960s to the mid-1990s, Brazilian FDI outflow was low and limited to a small number of players: Petrobras, the state oil company partly privatized in 1997; financial institutions; and major construction companies. More than half of Brazilian FDI in this period was geographically concentrated in developed countries, where risks to investors were low. In the mid-1990s, the geography of Brazilian FDI changed as a result of Mercosur's regional integration initiative, which facilitated FDI within the member states. See CNI, 'Os investimentos brasileiros no exterior: relatório 2013' (Report, Brasilia 2013) 15, 17 <http://arquivos.portaldaindustria.com.br/app/conteudo_24/2014/01/16/429/20140116145719451313i.pdf> accessed 11 November 2016. In the 1990s, the privatization process turned Brazilian firms' attention to the domestic market, which was also open to foreign competition.

[91] Campello and Lemos, 'The Non-Ratification of Bilateral Investment Treaties in Brazil: A Story of Conflict in a Land of Cooperation' 20.

[92] Almeida, 'Negociando a Reforma: a privatização de empresas públicas no Brasil', describes the profile of the executive branch during the 1990s, and its capacity of coordination of the economy and groups of interest. Other authors detail how the change in domestic regulation was in charge of promoting the reforms previously aimed at BITs to liberalize and protect FDI. On this subject, see Campello and Lemos, 'The Non-Ratification of Bilateral Investment Treaties in Brazil: A Story of Conflict in a Land of Cooperation' 26, stating that, in fact, even inside the executive branch there was weak support for the BITs. According to the authors, the only real support for the agreements came from a few Brazilian diplomats, but none from ministries representing core areas of investment policy, such as Finance, Industry and Commerce, or *Casa Civil* (Chief of Staff Office, considered the epicentre of presidential policy-making).

[93] For further detail on this, see Salama, B. M, 'Regulação cambial entre a ilegalidade e a arbitrariedade: o caso da compensação privada de créditos internacionais' (2010) 50 *RDBMC* 157, 184, who emphasises other regulatory changes.

6.4 FROM RESISTANCE TO CONFORMITY, OR SOMEWHERE IN BETWEEN? (2002–2015)

6.4.1 *The Continuum of Changes in Brazil's Investment Regulation and the ACFI Template*

The formulation of the ACFI template started far before 2015. According to Brazilian officials, after the nonratification of BITs, the issue moved back to certain bodies of the executive branch.[94] The Ministry of Development, Industry and Commerce (MDIC) incorporated the topic into its agenda, focusing on alternative formats for the international regulation of investments. The debate took place in CAMEX – a permanent advisory body of the presidency in matters related to the formulation, adoption, implementation and coordination of foreign trade policies.[95]

In September 2003, a special-purpose interministerial working group linked to CAMEX was created to explore alternatives to the BIT formula. There were two main recommendations by this group: to focus on renegotiation with strategic partners and to use alternative languages to the core clauses of the BITs.

In 2007, the CAMEX Council of Ministers approved the working group's general guidelines for negotiation of investment agreements, which suggested the following procedure: i) first, to renegotiate investment agreements within Mercosur; ii) secondly, to prioritize negotiation of new investment agreements with South American countries[96]; and then iii) to negotiate investment agreements with extraregional countries but accompanied by broader commercial arrangements.[97]

[94] Interview 2_1_2015, dated 28 April 2015, and interview_3_1_2015, dated 29 April 2015. Records on file with the authors.

[95] The Council of Ministers of CAMEX is presided over by the president of Brazil today. There are six other members: the Ministry of Foreign Affairs, the Ministry of Finance, the Ministry of Agriculture, the Ministry of Industry, Foreign Trade and Services, the Ministry of Planning, Development and Management, and the Executive Secretary of the Program for Investment Partnerships of the Presidency. Until recently, the former Ministry of Industry, Commerce and Foreign Trade used to chair CAMEX, and CAMEX was also composed of the Ministers of *Casa Civil*, Foreign Relations, Economics, Agriculture, Planning, and Agrarian Development. Decree No. 8807 of 2016 changed the composition of CAMEX.

[96] Of Brazil's FDI, 56.7 per cent is in Latin America, especially in other Mercosur countries, particularly Mexico and Peru. See MDIC's Porto Alegre presentation (on file with authors). According to the last Annual Census of Brazilian Capital Abroad, the Central Bank of Brazil declared that the Cayman Islands, Austria, the Netherlands and the British Virgin Islands accounted for 61.5 per cent of the immediate outward FDI stock in 2015. Other important immediate destinations were the United States and Spain, accounting respectively for 5.2 and 3.7 per cent of the Brazilian FDI stock abroad. See BCB, 'Brazilian Capital Abroad (CBE) Survey – Base-Year 2015'. (2016) <http://www4.bcb.gov.br//rex/CBE/Ingl/CBE2015Results.pdf.> accessed 11 November 2016.

[97] See Brasil, 'O Brasil e os acordos de promoção e proteção de investimentos: uma perspectiva histórica' (presentation prepared by the Ministry of Foreign Affairs, September 2008) sl 18, 21.

That strategy failed. Negotiations within Mercosur followed by Brazil's proposal stalled because of opposition from Argentina.[98] In 2010, the Brazilian government initiated negotiations of a new bilateral investment agreement with Chile. Brazil envisioned using the agreement with Chile as a model to approach other partners,[99] but negotiations were discontinued.

As a result, it was only in 2012 that the Council of Ministers of the Brazilian Chamber of Foreign Trade (CAMEX) granted a formal mandate to the Technical Group for Strategic Studies on Foreign Trade (GTEX)[100] to work on – among other topics – the drafting of a new investment agreement sensitive to Brazilian needs and concerns in the international economic scene. Three subgroups were created to explore opportunities in Africa, Asia and Latin America.[101]

In the context of Brazil-Africa relations, GTEX recommended the creation of a new type of investment agreement, under the leadership of MDIC's Foreign Trade Secretariat (SECEX). This gave a new push to the continuous but slow process that had started with the negotiation of the BITs in the 1990s. The GTEX mandate was the zenith of the process, and the result of the technical ability of MDIC officials in a favourable political moment in Brazil – the right people at the right time. In 2013, CAMEX approved the draft of the ACFI to be negotiated with selected African countries.[102] Mozambique and Angola were the first two countries to sign these agreements. As a result, CAMEX issued another decision to broaden ACFI's negotiating mandate with other countries interested in the Brazilian model agreement.[103]

From the beginning of the negotiation process, Brazil envisioned a different agreement from those negotiated in the 1990s. In parallel to the contestation movement in developing-country host states, even if at different paces and intensities, the drafting of the Brazilian model investment agreement was equally influenced by ongoing debates concerning the reform of the international investment regime,

[98] See Nicolás M. Perrone and Gustavo Rojas de Cerqueira César, 'Brazil's bilateral investment treaties: More than a new investment treaty model?' (Columbia FDI Perspectives, Perspectives on topical foreign direct investment issues No. 159 26 October 2015) <http://ccsi.columbia.edu/files/2013/10/No-159-Perrone-and-C%C3%A9sar-FINAL.pdf> accessed 11 November 2016.

[99] – 'Brasil busca acordos de proteção e promoção' *Veja* (São Paulo, 14 November 2010) <http://veja.abril.com.br/noticia/economia/brasil-busca-acordos-de-protecao-e-promocao> accessed 11 November 2016.

[100] By CAMEX Resolution No. 30 of 25 April 2012. GTEX was composed of representatives of the ministries that are part of the CAMEX Council of Ministers.

[101] CAMEX Resolution No. 30 of 25 April 2012 art 1, sole paragraph.

[102] Carlos Marcio Bicalho Conzendey and Pedro Mendonça Cavalcante, 'Novas Perspectivas para Acordos Internacionais de Investimentos – O Acordo de Cooperação e Facilitação de Investimentos (ACFI)' (2015) I CPE 106. Most of Brazil's FDI in Africa is concentrated in Mozambique and Angola. See MDIC's Porto Alegre presentation (on file with authors).

[103] See Conzendey and Cavalcante, 'Novas Perspectivas para Acordos Internacionais de Investimentos – O Acordo de Cooperação e Facilitação de Investimentos (ACFI)'.

lessons learned from the failure of the approval of the investment agreements negotiated in the 1990s and internal demands for market access.

A template for the new agreement – addressing all those concerns – was ready from 2013 when it was approved by CAMEX, and then proposed to states where Brazilian companies were more consistently investing. Mozambique and Angola were the first countries to react positively to Brazil's negotiating push, followed by Mexico, Malawi, Colombia, Chile and Peru.[104]

6.4.2 *Normative Factors for Conformity*

On the normative side, Lula's administration, starting in 2003, reinstituted a strong 'developmental state', sidelining neoliberal influences that were popular in the country during the 1990s and reorienting Brazil's foreign policy towards the Global South, while not dismissing North-South relations.[105]

Literature coined that phase the 'new developmental state', which can be defined as the government playing 'an active role in mobilizing resources, stimulating investment, and promoting innovation', while not in control or command of the economy.[106] Unlike the classic developmental state which focused on the domestic market, the new developmental state also seeks access to the global economy for exports and FDI, but unlike the neoliberal state, it does not accept the full panoply of free trade ideas. Its main tenets focused on developing a dynamic industrial

[104] To corroborate the argument that investment agreements are integrated/infused in Brazil's trade policy, Section 6.2, supra, and to suggest that the choice of investment partners in Latin America are part of a broader and unannounced national strategy, note that Brazil recently negotiated trade deals with Mexico, Colombia, Chile and Peru. These countries are all members of the Pacific Alliance, a new Latin American trade bloc. Peru, Mexico and Chile are members of the TPP, one of the major megaregional agreements, led by the United States. For more information on these negotiations, see Benedict Kingsbury, Paul Mertenskotter, Richard B. Stewart and Thomas Streinz, 'The Trans-Pacific Partnership (TPP) as Mega-Regulation: Prescriptions for the State, Market Scaling, Mega-Region-Building, and Geopolitical Ordering in the Asia Pacific' (2016) ASIL/IEL Conference Draft, Sep-30-Oct 1, 10.

[105] On the Reorientation of Brazil's foreign policy, see Amado Cervo and Antônio Carlos Lessa, 'The Fall: The International Insertion of Brazil' [2014] RBPI 133, 151. On Brazil's new developmental state, see generally Trubek, Helena A. Garcia, Diogo Coutinho and Alvaro Santos (eds), *Law and the New Developmental State: The Brazil Experience in Latin American Context* (CUP, New York 2013).

[106] Key features of this model included adoption of a solid policy for manufacturing industries through a combination of industrial policies that favoured Brazilian enterprises in public procurement and increased state-financed activities, mainly through the Brazilian Economic and Social Development Bank (BNDES). See generally David M. Trubek, 'Law, State, and the New Developmentalism: An Introduction' In Trubek, Helena A. Garcia, Diogo Coutinho and Alvaro Santos (eds), *Law and the New Developmental State: The Brazil Experience in Latin American Context* (CUP, New York 2013) 3, 27.

policy – which had been dismissed in the 1990s – and creating social programmes aimed at fighting poverty.[107]

Another normative factor behind the reorientation of Brazilian investment policies is the concept of South-South cooperation, a legacy of the third world movements of the Bandung Conference.[108] Under a strategy of 'autonomy through diversification', Lula did not dismiss the achievements of Cardoso's mandate, maintaining stable relations with developed countries.[109] However, the new administration strengthened Brazil's ties with other emerging countries and turned South-South relations into a core feature of its foreign policy.[110]

The core elements of the New State Activism and South-South Cooperation were combined into one single policy instrument – the 2015–2018 National Export Plan, a white paper issued by the Brazilian Ministry of Development, Industry and Commerce (MDIC), laying out the main elements of Brazil's trade policy.[111] This document contextualized investment agreements as part of larger trade policy programmes. In that context, the ACFIs became an additional tool to increase the market access of Brazilian firms and exports abroad. The National Export Plan expressly targets investment agreements with Africa, Latin America and the Middle East.[112] These initiatives are part of the South-South cooperation strategy.

[107] In Brazil, this new form of state participation in the economy was defined in the literature as 'New State Activism'. See Trubek, Coutinho and Schapiro, 'New State Activism in Brazil and the Challenge for Law'. See also Glauco Arbix and Scott B. Martin, 'Beyond Developmentalism and Market Fundamentalism in Brazil: Inclusionary State Activism without Statism' Workshop on ―States, Development, and Global Governance‖ Global Legal Studies Center and the Center for World Affairs and the Global Economy (WAGE) University of Wisconsin-Madison (12–13 March 2010) <http://law.wisc.edu/gls/documents/paper_arbix.pdf> accessed 11 November 2016, which coined the term 'new developmental state'.

[108] South-South cooperation is defined by the 'manifestation of solidarity among peoples and countries of the South that contributes to their national well-being, national and collective self-reliance and the attainment of internationally agreed development goals . . . guided by the principles of respect for national sovereignty, national ownership and independence, equality, non-conditionality, non-interference in domestic affairs and mutual benefit'. See UNGA Res No. 68/230 para. 4. Recent developments in South-South cooperation have incorporated increased South-South flows of trade and investment, technology transfers and regional integration. See UNOSSC, 'What is South-South Cooperation' (2016) <http://ssc.undp.org/content/ssc/about/what_is_ssc.html> accessed 11 November 2016.

[109] See Vigevani, Marcelo F. de Oliveira and Rodrigo Cintra, 'Política externa no período FHC: a busca de autonomia pela integração'.

[110] See Jean Daudelin, 'Coming of Age? Recent Scholarship on Brazilian Foreign Policy' 213.

[111] See Brasil, 'Plano Nacional da Cultura Exportadora'.

[112] The National Export Plan identifies the next countries to negotiate ACFIs: South Africa, Algeria, Morocco, Peru, the Dominican Republic and Tunisia. See Brasil, 'Plano Nacional da Cultura Exportadora' 9.

6.4.3 *Material Factors for Conformity*

From the material perspective, there are three new constituents that became part of the international economic policy in Brazil, and that significantly empowered the discussion and approval of the ACFI template. The first of them are the Brazilian multinational corporations interested in increasing their export of capital. The other two are part of the state apparatus supporting and promoting the private sector's interests: the Brazilian National Development Bank, the Brazilian Guarantees Agency, the Brazilian Trade and Investment Promotion Agency and the Brazilian Cooperation Agency.

Because of the positive economic outlook in the beginning of the 2000s, several Brazilian companies started investing abroad as part of their strategy to increase market share and competitiveness.[113] This change can be explained by a combination of two factors: i) the improvement of the financial situation of Brazilian firms and the appreciation of the country's currency and ii) the adoption of a strategy of cumulating assets by the firms to pursue a global player status.[114]

Considering certain adversities that companies based in developing countries face for competing at the international level – mainly lack of infrastructure and narrow access to credit[115] – the main purpose of an active state was to empower these constituencies. Thus, the Brazilian government, following the tenets of the new development activism, enlarged governmental structures to provide economic and political support to Brazilian companies. Four of them were central in the empowerment of the outward investment from Brazil: the Brazilian National Development Bank, the Brazilian Guarantees Agency, the Brazilian Trade and Investment Promotion Agency and the Brazilian Cooperation Agency.

From the economic perspective, the empowerment of the Brazilian National Development Bank (acronym in Portuguese BNDES) – one of the most important institutions of Brazilian state capitalism – played an important role in the newly established industrial policy, financing sectors where the country was more competitive, such as aviation, construction, mining, steal, cellulose, energy and meat.[116]

[113] See generally A. Fleury and M. T. Fleury, *Brazilian multinationals: competences for internationalization* (CUP, Cambridge 2011), C. Hiratuka and F. Sarti, 'Investimento direto e internacionalização de empresas brasileiras no período recente' (IPEA Discussion Paper n. 1.610, 2011) <http://www.ipea.gov.br/portal/images/stories/PDFs/TDs/td_1609.pdf.> accessed 11 November 2016, and L. Coutinho, C. Hiratuka and R. Sabbatini, 'O investimento direto como alavanca dinamizadora da economia brasileira' In O. Barros, F. Giambiagi, *Brasil globalizado* (Campus, Rio de Janeiro 2008).

[114] See CNI, 'Os investimentos brasileiros no exterior: relatório 2013' p. 17. On the same subject, Interview 6_2_2015, as of October 2015. Record on file with the authors.

[115] See generally A. Fleury and M .T. Fleury, *Brazilian multinationals: competences for internationalization* (CUP, Cambridge 2011).

[116] By 2010, BNDES' lending was three times as much as the World Bank. See Trubek, Coutinho and Schapiro, 'New State Activism in Brazil and the Challenge for Law', Mathew M. Taylor, 'The

Public financing from BNDES and other public funds were instrumental to increasing the international competitiveness of selected firms – the 'national champions', which canalized part of these funds to pursue an internationalization strategy.[117]

In addition to the access to credit lines, the Brazilian government also created the Brazilian Guarantees Agency (acronym in Portuguese ABGF), aiming to overcome market failure by guaranteeing political and economic risks not supported by the private insurance sector in Brazil. This was an important measure considering that a relevant part of Brazilian outward flows goes to developing and least-developed countries.[118]

The other two agencies are very much associated with the notions of cooperation and facilitation, core notions to the implementation of the ACFI. They are the Brazilian Trade and Investment Promotion Agency (acronym in Portuguese APEX) and the Brazilian Cooperation Agency (acronym in Portuguese ABC). APEX is an agency created to promote and facilitate Brazilian goods, services and investment abroad, identifying opportunities, and rendering the services of support to Brazilian entrepreneurs. APEX is considered part of the National Export Plan, taking actions to favour the implementation of its policies and favouring the contact between government agencies and the private sector.

The ABC is an agency affiliated with the Ministry of Foreign Affairs, and is in charge of planning, negotiating and implementing technical cooperation agreements between Brazil and other countries. The ABC, since the beginning of the 2000s, was empowered by the South-South foreign policy, linking the broad foreign

Unchanging Core of Brazilian State Capitalism, 1985–2015' (2015) School of International Service Paper No. 2015–8 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2674332&download=yes> accessed 3 November 2016, 14, and Seth Colby, 'Searching for Institutional Solutions to Industrial Policy Challenges: A Case Study of the Brazilian Development Bank' (Ph.D. dissertation, Johns Hopkins University 2013).

117 From the beginning of Lula`s term, his government decided to rely on foreign investment to maintain and increase international competitiveness. The strategy to favour 'national champions' has been criticized due to adverse selection problems in credit markets and undermining monetary policy. Such policies can be considered a success of Lula's administration. Within five years, Brazilian firms had almost doubled their investments abroad, to a record $355 billion (U.S. billion). See Trubek, Coutinho and Schapiro, 'New State Activism in Brazil and the Challenge for Law', Taylor, 'The Unchanging Core of Brazilian State Capitalism, 1985–2015' and Colby, 'Searching for Institutional Solutions to Industrial Policy Challenges: A Case Study of the Brazilian Development Bank'.

118 ABGF was created by Act No. 12,712 of 30 August 2012, and implemented by Decree No. 1,976 of 1 April 2013. It is a public agency linked to the Ministry of Finance. ABGF substituted for the Brazilian Export Credit Insurance Agency (acronym in Portuguese SBCE), which was a company of mixed capital, taking the provision of insurance to a 100 per cent public-financed agency. ABGF should operate a couple of funds that would finance its operations. However, until the end of 2015, the agency was still having difficulties in implementing its economic operations. Interview 5_3_2015, as of 12 June 2015 and Interview 5_4_2015, as of 10 November 2015.

policy agenda to technical cooperation projects, governmental agencies and the private sector, when desirable.[119]

Lastly, another important material factor for the promotion of investment related to capacity building in the MDIC. MDIC was the pivot for the creation and implementation of the new regulatory template on investments. Historically, politics change the centre of the debates according to the dynamics of power and interests. The role that MDIC played in the development of the ACFI was a direct result of the professionalization of MDIC, particularly of the foreign trade specialists.[120] Three main factors made MDIC, within the executive branch, an instrumental agent in conceptualizing and concluding the ACFI template: i) the whole set of agencies dealing with foreign trade and investment topics – BNDES and APEX, among others – were affiliated with MDIC; ii) MDIC's interconnection with other specialized ministries, especially the Ministry of Finance and the Ministry of Foreign Affairs; iii) the fact that the main interministerial body on trade and investment (CAMEX) was part of the MDIC structure; and iv) MDIC's long-lasting relationship with the private sector constituencies. It was, then, the MDIC, supported by its career foreign trade specialists, that lead the discussions of the ACFI that finally led to the conclusion of the template, after twelve years of debate inside the executive branch.

119 For more information on ABC, see –, 'Brazilian Cooperation Agency' (2016) <http://www.abc.gov.br/training/informacoes/ABC_en.aspx> accessed 11 November 2016.

120 This public office at MDIC has attracted a qualified group of young professionals in Brazil that are interested in international economic regulation and politics. For centuries the only option in the Brazilian public service to deal with trade and investment policies was a diplomatic career at the Ministry of Foreign Affairs. The reforms of the Brazilian state, with the creation of more technical careers, disseminated over other centres of excellence in the public service, beyond the Ministry of Foreign Affairs. See Shafer, Michelle Badin and Barbara Rosenberg, 'The trials of winning at the WTO: what lies behind Brazil's success'.