The New Brazilian Agreements on Cooperation and Facilitation of Investments (ACFIs): Navigating between resistance and conformity with the global investment regime

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From March to June 2015, Brazil signed six Agreements on Investment Cooperation and Facilitation (ACFIs) with Mozambique, Angolá, Mexico, Malawi and Colombia. Although Brazil is an emerging economy and has traditionally been one of the top destinations for foreign direct investment (FDI), it has historically played a different regulatory card in a world dominated by a web of bilateral investment agreements (BITs). In this paper we argue that the ACFIs can be considered a pragmatic response to the current liberal international economic system, based on Brazil’s domestic needs and geo-economic position. The ACFI model was designed taking into consideration economic specificities of a developing country such as Brazil: a historical recipient of investment, a latecomer exporter of capital, and the current combination of both, favouring the triangulation of foreign investments abroad. This paper has two main objectives: 1) to uncover what lies behind Brazil’s shift from resisting BITs in the 1990s to construing its own investment model agreement in 2015; and 2) to explain how the main provisions of the model agreement respond to Brazil’s policy aspirations and to challenges faced by the global investment regime at the global level. The paper argues that the engineering of this new model investment agreement fluctuates between resistance and conformity with standard BITs practice, confirming Brazil’s

* This paper is the result of a joint research project developed conducted since January 2014 by the Center for Law, Globalization and Development at the School of Law in the Federal University of Rio Grande do Sul and the Center on Global Law of FGV São Paulo School of Law. We thank our students for research assistance, and to Brazilian officials, businessmen and academics that were part of our interviews. Financial support from Brazil’s Ministry of Science and Technology (CNPq) and FGV is gratefully acknowledged. Some of the ideas presented in this paper were discussed in the Law and Development Colloquium, at NYU Law School, in November 2015; and in the 2015 Law and Society Association Annual Meeting. We thank comments made to previous versions of this article, especially those from Kevin Davis, David Trubek, Sonia Rolland and Malebakeng Forere.
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ambivalence in the international order. The research is based on empirical research methods – including analysis of aggregated data, primary and secondary documents, and interviews with government officials and private sector representatives in Brazil.

Introduction

The current investment regime faces structural challenges, which are rooted in different and interrelated explanations. These include increasing discomfort about the actual effects of International Investment Agreements (IIAs) in promoting Foreign Direct Investment (FDI); the controversial nature of investment agreements that unduly protect private property at the expense of the right of host countries to regulate in the public interest; and growing debate about the previously assumed benefits of Investor State Dispute Settlement (ISDS). Countries around the world have reacted differently to these challenges. Their responses range from denouncing existing treaties to finding middle ground solutions, which include changing strategies from Bilateral Investment Treaties (BITs) to Preferential Trade Agreements (PTAs) and megaregional agreements.

Contestation to the rules of the investment regime are far from being a novelty in the history of investment regulation. In the 1960s and 1970s, 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.\(^1\) As noted by Andrew Guzman, such collective resistance was short-lived, mainly due to competition by capital within the developing world. While strongly advocating for change at the UN General Assembly, many of the same countries accepted bilateral investment treaties (BITs) containing language equivalent to what they were contesting multilaterally.\(^2\) As a result, the 1990s witnessed the emergence of BITs as the preferred form of investment regulation as a direct response

\(^1\) 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 a highly unbalanced regime, in favour of investors – traditionally from developed countries, at the expense of limitations on host countries policy space.

\(^2\) But see Alvarez, Hague lectures…
to competition for capital. For a certain period, developing country resistance to the asymmetries of the investment regime have been dismissed or significantly reduced.

Concerted dissatisfaction with the terms of the regime started to echo again at the down of the XX Century and in the beginning of the new Century. These reactions need to be put into perspective with the growing discomfort about neoliberalism as the mainstream ideology, which was increasingly being accused of not delivering the benefits it once promised.\(^3\) Deeply rooted in the neoliberal ideology, the investment regime became the center of much criticism, opening room for refueled debates.

A new wave of changes is presently taking place and it is multidirectional. Differently from 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 exporters. This change in the material circumstances in the developed world generated lobby to change regulation and construe greater flexibility to the regime. Of major concern was the limitation on the regulatory autonomy of countries in sensitive areas such as human rights and the environment. Developing countries, on their turn, became increasingly sceptical of the benefits of the regime, fuelled by several arbitral tribunals' condemnations – Argentina being one case in point.

As policymakers worldwide look for alternatives to the current regime, insufficient attention is paid to contributions originating from the developing world, which has not traditionally been viewed as a laboratory for legal innovation. In this context, this paper looks at the case of Brazil, the largest economy in South America and one of the big emerging countries in the world, exploring how this country is responding to internal and external demands for change.

Conventional wisdom holds that developing countries enter into investment agreements to secure competition for capital. As we demonstrate in this paper, Brazil does not fall into this simplistic explanation, and has traditionally played a different

\(^3\) Sornarajah, Resistance and Change in the international investment regime (2015).
game in the regulation of investment agreements. In the 1960s and 70s, the country’s participation in the movement that gave rise to the New International Economic Order was ambivalent.\textsuperscript{4} 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 arguably “competing for capital” through liberal investment agreements, Brazil resisted signing such treaties. However, internal conditions changed in the country after the years 2000. On the material side, the number of Brazilian corporation with branches abroad increased exponentially. On the normative side, several aspects help explain Brazil’s changing behavior vis-à-vis investment regulation: developing countries’ contestation movements against neoliberal economic policies and their unequal economic relations crystallized in traditional-type BITs; the search for alternatives to the hotly debated reengineering of the current international investment regime; Brazil’s foreign policy orientation towards the Global South (especially Asia, Latin America and Africa); and an attempt to create a genuinely Brazilian model investment agreement that is sensitive to internal constitutional limitations and responsive to Brazil’s aspirations as an emerging economy.

Under this framework, Brazil developed an innovative model investment agreement, known as Agreement on Cooperation and Facilitation of Investments (ACFI), which should be read as an alternative to BITs. Since March 2015, Brazil has successfully signed six such agreements with countries from the Global South: Mozambique, Angola, Mexico, Malawi, Colombia and Chile. Brazil is currently negotiating similar agreements with Algeria, Tunisia, South Africa, Morocco, Nigeria and Peru.\textsuperscript{5} On the normative side, Brazil’s attempt to create its first investment agreement should be viewed in the broader context of foreign trade reform in the country, led by the Ministry of Development, Industry and Commerce (MDIC), within the framework – and limitations – of the current Labor Party. In MDIC’s National Export Plan (2015-2018), a white paper containing Brazil’s trade strategy aimed at improving the country’s export performance and innovation, investment

\textsuperscript{4} Such behavior 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.” See Stuenkel & Taylor, 2014, p. 5. These authors also note that Brazil depicts itself “as a bridge between the Global South and the wealthy North[.]” Id., p. 8.

\textsuperscript{5} Plano Nacional de Exportações 2015-2018.
agreements are characterized as a fundamental tool to further Brazil’s economic integration with its trading partners.6

This paper has two main objectives: 1) to uncover what lies behind Brazil’s shift from resisting BITs in the 1990s to construing its own investment model agreement in 2015; and 2) to explain how the main provisions of the model agreement respond to Brazil’s policy aspirations and to challenges faced by the global investment regime at the global level. The paper argues that the engineering of this new model investment agreement fluctuates between resistance and conformity with standard BITs practice, confirming Brazil’s ambivalence in the international order.7

This research is based on empirical research methods – including analysis of aggregated data, primary and secondary documents, and interviews with government officials and private sector representatives in Brazil.

Part II of the paper explains the first wave of investment agreements in the 1990. Those agreements were drafted under the framework of BITs and were, for the most part, proposed by developed countries interested in investing in Brazil. Part III of the paper explore the context under which Brazil shifts 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. Part IV examines the main provisions of the model agreement in the context of the cross-narratives that inform Brazilian policies and the global legitimacy crisis. Part V concludes the paper.

II. First attempts to regulate FDI through bilateral investment agreements: What justified resistance?

Neoliberal policies hit Brazil in the 1990s8. Fernando Collor de Mello was then Brazil’s President and initiated a process of opening up the country to international competition aimed at export markets, and implementing several of the

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7 The ambivalent behavior of Brazil in the international order is well described in Stuenkel & Taylor, 2013.
8 From 1930 to late 1980s Brazilian economic policies could be characterized as state-driven initiatives to pursue import-substitution industrialization, economic growth through state-led enterprises, economic planning, price control, administrative and regulatory authorities in core sectors, and recourse to tax and financial incentives. See Trubek, Coutinho & Schapiro, 2013, p. 282.
economic policies suggested by neoliberal institutions, such as the International Monetary Fund (IMF) and the World Bank. The interventionist State was crucified, and, in the words of Brazilian economist Bresser Pereira, “the country returned for some time to the semi colonial condition it had been before 1930” (Bresser Pereira, 2015, p. 15), losing its concept of a nation. Following Washington consensus disciplines, Brazil underwent a large-scale privatization program and opening of its market to foreign investment.

The 1990s coincided with the boom of BITs. In Latin America, many countries were convinced that FDI was an important component of a successful development policy and that signing BITs with capital exporting countries was the way to secure such development. A race to sign standardized BITs followed in the region, which certainly influenced Brazil’s decision to consider this path.

In this context, Brazil signed 14 agreements on investment promotion and protection (hereinafter BITs) with Germany (1995), Belgium-Luxemburg (1999), Chile (1994), South Korea (1995), Cuba (1997), Denmark (1995), Finland (1995), France (1995), Italy (1995), The Netherlands (1998), Portugal (1994), United Kingdom (1994), Switzerland (1994), and Venezuela (1995). Brazil’s participation in the creation of these agreements is marginal at best. The standardized type of agreements, modeled under the asymmetrical BIT model and the choice of partners – mostly developed countries – is aligned with the prevailing pattern of North-South relations. The 1990 agreements with Brazil were part of an agenda set by the IMF and the World Bank to respond to Northern countries’ demand for protection of their property in politically and economically unstable developing countries.

Brazil’s decision to consider signing BITs with a group of mostly developed countries is also coherent with the country’s foreign policy at that time. Brazilian

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9 Popular measures adopted by Collor de Mello included privatizations and drastic tariff reductions. It should be noted, however, that the government refrained from privatizing key state-owned enterprises, such as Banco do Brasil BNDES (the Brazilian Development Bank) and Petrobras (a semi-public corporation after 1997). See Trubek, Coutinho & Schapiro, 2013, p. 282-283.

10 Insert citation to each document.

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foreign policy in the 1990s, especially after Cardoso’s election in 1994 (known as autonomy through participation) is characterized by Brazil’s embracement of the global liberal game through privatization of state enterprises, and further opening up of its economy attempting to shape global governance by engaging dominant Western powers. (Daudelin, 2013, p. 212-213). It was a policy of conformity with Washington Consensus prescriptions.\textsuperscript{14}

At this point, one cannot speak of a Brazilian investment model, since Brazil was just another developing country, among several, complying with a standardized investment policy. Brazil’s behavior towards its negotiating partners can be described as passive, in the sense that the country was not actively pursuing an autonomous development policy.

Brazilian BITs started being negotiated during Collor de Mello’s term (1990-1992), and negotiations survived three neoliberal inclined presidential mandates. In the context of large-scale privatizations,\textsuperscript{15} the BITs stood for reduced political and regulatory risks to foreign investors. The Brazilian BITs had a standard structure, which included: definition of investment, investor and territory; admission of investment; investment promotion; standards of treatment; nationalization, expropriation and compensation; transfers; investor-state arbitration, and; termination of treaties.

Despite their similarities, President Collor de Mello only sent six of them to Congress for approval: Germany, Chile, France, Portugal, the United Kingdom and Switzerland.\textsuperscript{16} All of the agreements faced resistance in Congress. During this period, left-wing Labor Party (PT) was the strongest opposing voice against the ruling parties and it framed the BITs under a conservative-oriented agenda concerned with liberalizing Brazil’s economy. These agreements imprinted an economic imbalance

\textsuperscript{14} 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.

\textsuperscript{15} It is not entirely clear the criteria adopted by the executive 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 could only be explained in non-economic terms. See Morosini and Xavier Júnior [forthcoming, 2015].
between capital-importing and capital-exporting countries that Brazil’s left wing was vigorously trying to combat.

Persistent resistance to the BITs at the legislative level forced President Cardoso to withdraw them from approval. A number of factors contributed to the non-ratification of Brazilian BITs. The first is strong ideological opposition mostly from the Labor Party – PT, but not entirely.\(^{17}\) Second, multinational enterprises (MNEs) already operating in the country or state level governors who could potentially benefit from more investment in their states were not involved in the negotiations (Lemos & Campello, 2013, p. 25). A third factor that explains the non-ratification of BITs is an unresolved executive, which first did not put enough pressure to approve the agreements and later, after withdrawal of the agreements from Congress, addressed most investor’s demands through alternative channels.\(^{18}\) The only real support for the agreements came from a few Brazilian diplomats, but none from ministries representing core areas to investment policy, such as Finance, Industry and Commerce, or Casa Civil (the epicenter of presidencial policy-making).

### 1. Technical inconsistencies

The legislative history of the agreements confirms resistance suffered at different committees before they could reach floor.\(^{19}\) At the legislative stage, two clauses of the agreements came across as more problematic: compensation for expropriation and investor-State arbitration.

The BITs provided that payment for expropriation of land for purposes of agrarian reform shall be made in convertible and freely transferable currency. The Brazilian Constitution, on the other hand, provides that it should be made through agrarian reform debt securities redeemable in up to 20 years. Therefore, the obligation imposed on Brazil to freely transfer payment to the investors, regardless of the

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\(^{17}\) There were instances where members of the ruling coalition did not support the BITs either.

\(^{18}\) Campello and Lemos, 2013, p. 26; Salama.

\(^{19}\) Morosini & Xavier Junior, Brazilian Journal of International Law (forthcoming 2015).
country’s funds availability, characterized a treatment more favorable to foreigners vis-à-vis nationals.\(^{20}\)

Additionally, indirect expropriation clauses in the BITs were perceived as problematic by Brazil. The inclusion of these clauses risked limiting the regulatory space of the host country, 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.

Secondly, the investor-State arbitration clause of the BITs was challenged before the Foreign Affairs and National Defense Committee on the grounds that “these norms contravene customary international law traditionally adopted by Brazil, the principle of exhaustion of local remedies.”\(^{21}\) Direct access of foreign investor to international arbitration would place her in equal footing with the Brazilian sovereignty, and this would be equivalent to protecting the investor to the detriment of national interests.\(^{22}\) Investor-state arbitration was, then, not an option for Brazil, given the country’s trust on its neutral and efficient judiciary and skepticism towards arbitration mechanisms generally during that period.\(^{23}\)

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.\(^{24}\) The other eight BITs never made it to Congress.\(^{25}\)

2. Material and normative factors


\(^{23}\) Brazil’s arbitration act was passed in 1997, but it faced Strong opposition until 2004, when the Supreme Court ruled in favor of its constitutionality.

\(^{24}\) CAMEX, Grupos Técnicos Interministeriais, Mensagem n. 1079, de 2002.

\(^{25}\) Lemos & Campello, 2013, p. 22.
Brazil then became known as one of the few top economies without BITs or an investment agreement model. Several material and normative factors explain what came down to a constitutionally-based decision. First, by the time the texts of the agreements were sent to Congress, the failure of neoliberal policies became increasingly apparent, causing, in Brazil, a re-primarization or deindustrialization of the economy and a consequent low level of development (Bresser Pereira, 2015, p. 16). Members of the Brazilian elite realized that a successful development model required the existence of a strong and autonomous nation-state, a concept that had dissipated in the mainstream Brazilian political discourse over the 1990s. Apart from the technical problems associated with the approval of the BITs before Brazilian Congress, we trust that the lack of confidence in neoliberal policies, reflected in the BITs texts, contributed to the decision not to ratify the agreements.

Second, the threat of being left out of the competition for foreign capital was not seriously taken by Brazil. In an official communication to Legislative branch, Mensagem N. 1.083, of December 11th 2002, which 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. According to this communication, the stability of Brazil’s judicial system and the shape of its economy explain support FDI inflows without BITs. Therefore, the competition 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, challenging the dominant narrative that investment agreements attract FDI.

Third, the demand for an investment agreement to protect the Brazilian private sector abroad was inexistent. From 1960s to mid-1990s, Brazilian FDI outflow was

27 Id.
28 Insert data on Brazil as FDI recipiente, UNCTAD.
low and limited to a small number of players: Petrobras, the state oil company partly privatized in 1997; financial institutions; and major constructing companies (CNI Report, 2013, p. 15). More than half of Brazilian FDI in this period was geographically concentrated in developed countries, where risks to investors were low (CNI Report, 2013, p. 16)²⁹ In the 1990s, the privatization process turned Brazilian firms attention to the domestic market, which was also open to foreign competition. Interestingly, many of the domestic firms that were active foreign investors in the 1980s and mid-1990s were bought by foreign firms after the opening of the Brazilian economy, as a result of neoliberal ideologies then prevalent in the country. That fact should be taken into account to explain the low level of private sector lobbying for investment agreements aimed at protecting domestic investments abroad.

In sum, resistance to the mainstream regulatory model epitomized in the BITs might be explained by internal demands. In the 1990s, there were no concerted reactions from developing countries against the way investment rules were framed. And even if there were, it is unlikely that Brazil would take any leadership given its ambiguous behavior in relation to North-South debates.³⁰ It is also unlikely that Brazil was putting forward a reaction against neoliberal ideologies. Even if that ideology was under increased scrutiny in Brazil, it was still the country’s leading economic orientation. Finally, it was too early to align Brazil’s resistance to BITs to signs of dissatisfaction with the prevailing form of investment regulation of that time. Lastly, it should not be forgotten that FDI regulation might not have been a priority of 1990 Brazil a time when the country was immersed in the task of transitioning to a democracy and implementing the 1988 constitution.³¹

III. Explaining changes in Brazil’s behaviour vis-à-vis investment regulation

²⁹ In the mid-1990s, the geography of Brazilian FDI changes as a result of Mercosur’s regional integration initiative, which facilitated FDI within the member states. See CNI report, 2013, p. 16-17.
³⁰ Fabia Veçoso on Bandung (ABRI), 2015.
³¹ 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 guaranteeing justiciable rights leading to policy obligations (Trubek, Coutinho & Shapiro, 2013, p. 284).
Lula’s election in 2003 reoriented Brazilian domestic and foreign policies, affecting the course of investment regulation in the country. On the normative side, Lula’s administration reinstituted a developmental state, which had been abandoned by the neoliberal ideologies of the 1990s; and reoriented Brazil’s foreign policy to privilege the Global South, while not dismissing North-South relations. In addition, the positive economic outlook of the Brazilian economy in the beginning of the years 2000 witnessed the emergence of a new constituency, the Brazilian multinational corporations - sponsored by state-led initiatives.

1. Brazil’s New State Activism

Trubek coined this phase inaugurated by Lula as the New Developmental State,\(^{32}\) 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. It differs from the old developmental paradigm because the state seeks to access the global economy without taking free trade ideals indiscriminately,\(^{33}\) acting in partnership with the private sector, as part of Brazil’s state capitalism\(^{34}\) Its main tenets focused on developing a dynamic industrial policy – which had been dismissed in the 1990s – and creating social programs aimed at fighting poverty (TCS. P. 288). In Brazil, this new form of state participation in the economy was defined in the literature as New State Activism.\(^{35}\)

An important aspect of Brazil’s New State Activism started by Lula and to a great extent followed by Dilma Rousseff (2011-)\(^{36}\) is the increased emphasis on the role of the state to promote development. In that regard, the Brazilian Development Bank (BNDES), one of the most important institutions of Brazilian state capitalism,

\(^{32}\) Key features of this model included: adoption of a solid policy for manufacturing industries, through a combination of industrial policies that favoured for Brazilian enterprises in public procurement and increased state-financed activities, mainly through the Brazilian Economic and Social Development Bank (BNDES) (Bresser Pereira, 2015, p. 17)

\(^{33}\) Even after the trade opening of the 1990s, Brazilian trade policy is characterized as inward-looking. See Taylor, 2015, p. 5.

\(^{34}\) Trubek, Law State and the New Developmentalism: An Introduction, in David Trubek at al., 2013. Note that state capitalism in Brazil is much broader than the state’s role in business alone. See Taylor, 2015, p. 1.

\(^{35}\) (Trubek, Coutinho & Schapiro, 2013, p. 282).

\(^{36}\) But see Andre Singer (2015), arguing that the basis of the developmental state architected by Lula lost its way under Dilma’s mandate.
played an important role in the newly established industrial policy, financing sectors where the country was more competitive, such as aviation, mining, steal, cellulose, energy, and meat (TCS, 2013, 291). By 2010, BNDES’ lending was three times as much as the World Bank (Taylor, 2015, p. 14). Public financing from BNDES and other public funds were instrumental to increase the international competitiveness of selected firms – the “national champions,” which canalized part of these funds to pursue an internationalization strategy (Taylor, 2015, p. 14, 16). From the beginning of Lula’s term, his government decided to rely on foreign investment to maintain and increase international competitiveness (TCS, 2013, p. 303).

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 US$355 billion. It is highly doubtful these results would have been possible without public financing and other state-led initiatives. On the other hand, increased Brazilian firms investing abroad financed by BNDES and other public funds meant that the government becomes directly interested, and to some extent involved, in their performance, including in their international operations. Poor performance – due to either low managerial skills or political and economic instability in the foreign markets where the firms are located – means lower chances of public debt repayment. A model investment agreement developed by Brazil should then reflect this feature of Brazilian state capitalism by increasing the participation of the state in investment governance.

[INSERT TABLES LULA 1, LULA 2 AND DILMA 1 – total $ financed, by sector/company, country of destination].

- + the professionalization of MDIC TCS, 2013, p. 303-304 + Shaffer, Sanchez & Rosemberg)

37 The strategy to favor “national champions” has been criticized due to adverse selection problems in credit markets and undermining monetary policy. See Taylor, 2015, p. 14.
38 Source?
39 Planos Lula e Dilma (Brasil Maior, etc).
40 A notable example is that of Vale, a private-sector mining company, whose CEO was ousted at government demand for taking cost-cutting measures during a time when the government was trying to reduce negative economic effects of the global financial crisis. See Taylor, 2015, p. 16.
41 On Brazilian state capitalism, see Taylor (2015).
2. A New Foreign Policy Priority: South-South Cooperation

Another normative factor behind the reorientation of Brazilian investment policies is the concept of South-South cooperation, a legacy of the Third World movements started in the late 50s in the Bandung Conference. The election of Lula also reoriented Brazil’s foreign policy approach. Under a strategy of “autonomy through diversification”, Lula did not dismiss the achievements of Cardoso’s mandate, maintaining stable relations with developed countries. However, the new administration strengthened Brazil ties with other emerging countries and turned South-South relations into a core feature of its foreign policy (Daudelin, 2013, p. 213). In some cases, such option has constrained Brazil’s trade policy (Taylor, 2015, p. 7).

The South-South approach of Lula’s administration, which goes well beyond economic matters, reflected directly on Brazil’s investment policies. Brazil started by considering strengthening external relations with MERCOSUR and other South American countries and later became a broader policy concerning the global South: Africa, Asia, and Latin America (Stuenkel & Taylor, 2014, p. 3) To this date, Brazil has not negotiated ACFIs with developed country.

[Interview Instituto Lula]

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42 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 UN Resolution N. 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 http://ssc.undp.org/content/ssc/about/what_is_ssc.html (last visited Feb. 10, 2016)

43 See Maria Regina Soares de Lima, A política externa brasileira e os desafios da cooperaçao Sul-Sul. Rev. Bras. Polit. Int. 48(1) (2005). For a critical appraisal of South-South cooperation, arguing that the BRICS countries use it as leverage to have market access to other developing and least developed countries, see Fahimul Quadir, Rising Donors and the New Narrative of South-South Cooperation: what prospects for changing the landscape of development assistance programmes? Third World Quarterly, 34:2 (2013).

44 On the various and not so transparent instrumental uses of MERCOSUR by Brazil, see Oliver Stuenkel and Matthew M. Taylor, Brazil on the Global Stage: Origins and Consequences of Brazil’s Challenge to the Global Liberal order, in Brazil on the Global Stage, Oliver Stuenkel and Matthew M. Taylor eds., (2014), p. 3.
3. The National Export Plan – 2015-2018: Crystalizing of New State Activism and South-South Cooperation

The core elements of the New State Activism and South-South Cooperation were recently 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 for the next three years.

Such document contextualizes the new investment agreements as part of a major trade policy programme. In that context, the ACFIs are become an additional tool to increase market access of Brazilian firms and exports abroad. The Government acts in partnership with private investors, promoting government/private sector official visits to prospective host countries, opening export promotion agencies (APEX) in relevant markets, financing export promotion and internationalization of Brazilian firms, etc. These are core characteristics of the New State Activism.

In addition, it is not by accident that all of the six existing ACFIs are with countries of the Global South. The National Export Plan expressly targets investment agreements with Africa, Latin America and the Middle East. These initiatives are part of the current administration South-South cooperation strategy.

The National Export Plan, on its turn, is a pragmatic response of Brazil to the current mega-regional talks, none of which includes Brazil. It remains to be seen whether such an isolationist strategy adopted by the current administration will survive.

4. The emergence of a new constituency: Brazilian multinational corporations

Because of positive economic outlook in the beginning of the years 2000, several Brazilian companies started investing abroad as part of their strategy to

45 The National Export Plan identifies the next countries to negotiate ACFIs: South Africa, Algeria, Morocco, Peru, Dominican Republic and Tunisia. See NEP, 2015, p. 9.
increase market share and competitiveness. Such change can be explained by a combination of factors. First, the improvement of the financial situation of Brazilian firms and the appreciation of the country’s currency. Second, some firms adopted a strategy of cumulating assets to pursue a global player status.\textsuperscript{46} Third, the increased participation of the state in financing the internationalization of Brazilian firms, most notably by BNDES (CNI Report, 2013, p. 17).

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IV. The ACFIs: Resisting in conformity?

Following the failure to approve the BITs at the legislative branch, certain bodies of the executive branch, led by the Ministry of Industry, Development and Commerce (MDIC), kept the topic in their agenda, addressing alternative formats for the regulation of investments at the international level.

1) The making of the ACFIs

After the withdrawal of the agreements from Congress, the Brazilian Chamber of Foreign Trade (CAMEX) – a permanent advisory body of the Presidency in matters related to the formulation, adoption, implementation and coordination of foreign trade policies\textsuperscript{47} - created an interministerial working group, in September 2003, to offer alternatives to the investment agreements signed but not ratified by Brazil. The working group recommended the renegotiation of the agreements with strategic partners, which led, in August 2005, to the creation by CAMEX of a new interministerial group to define alternative languages to the core clauses of the bilateral investment agreements. In 2007, CAMEX Council of Ministers, approved the working group’s general guidelines for negotiation of investment agreements, which suggested: renegotiating investment agreements within MERCOSUR; prioritizing negotiation of new investment agreements with South American

\textsuperscript{46} That was the case of Vale and Petrobras.

\textsuperscript{47} CAMEX is presided by the Minister of Development, Industry and Commerce. It is also composed by the Ministers of “Casa Civil,” Foreign Relations, Economics, Agriculture, Planning, and Agrarian Development.
countries, where most of its FDI is located; and negotiating investment agreements with extra-regional countries only if accompanied by broader commercial arrangements. Negotiations in MERCOSUR followed by Brazil’s proposal stalled because of opposition from Argentina, leading the government to focus on the remaining suggestions.

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, but negotiations were discontinued.

It was only in 2012 that the Council of Ministers of Brazilian Chamber of Foreign Trade (CAMEX) granted a formal mandate to a Technical Group for Strategic Studies on Foreign Trade (GTEX) to work on—the drafting of a new investment agreement sensitive to Brazilian needs and concerns at the international economic scenario. Three subgroups were created to explore opportunities in Africa, Asia, and Latin America. 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 capacity of MDIC officials in a favourable political moment in Brazil—

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48 56.7 percent of Brazil’s FDI is in Latin America, especially other Mercosur countries, Mexico and Peru. See MDIC’s Porto Alegre presentation (on file with authors).
50 Nicolás Perrone & __, Columbia FDI Perspectives (2015).
51 GARCIA NETO, Paulo Macedo. Investment arbitration in Brazil: the landscape of investment arbitration in Brazil and why Brazil should become a more important player in the investment arbitration arena. In: LEVY, Daniel de Andrade; BORJA, Ana Gerdau de; PUCCI, Adriana Noemi. Investment protection in Brazil. Alphen aan den Rijn: Wolters Kluwer, 2013, p. 3-16, p. 6-7. O autor enumera outras iniciativas de negociação envolvendo o Brasil, registrando que “since 2011, Canada has sought to sign a BIT with Brazil, but the negotiations have not started yet. The same is the case with the EU. Moreover, during the 2000s, Brazil signed eleven memorandums of understanding regarding the promotion of commerce and investment with Chile, Suriname, Nicaragua, Korea, Singapore, Libya, Uzbekistan, Guiana, South Africa, Venezuela and Kenya”.
53 CAMEX Resolution N. 30, of April 25th, 2012. GTEX was composed by representatives of the Ministries that are part of CAMEX Council of Ministers.
54 Article 1, parágrafo único, CAMEX Resolution N. 30, of April 25th, 2012.
the right people at the right time. In 2013, CAMEX approved the draft of the ACFI to be negotiated with African countries. 55 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.56

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, 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 as 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 and Chile.57

2) The main features of the ACFIs: Resisting in conformity?

The ACFI framework was built on the revision of previous agreements by Brazilian policy makers—considering the limits of domestic regulation—and on the inputs from the Brazilian private sector based on their recent experience as capital

56 Id.
57 To corroborate with the argument that investment agreements are integrated/infused in Brazil’s trade policy, Section x, 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, and Chile. These countries are, along with Peru, 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 agreement between 12 countries, including the US. We explore this aspects of Brazilian trade policies in our new research Project: Brazil in the shadow of megaregional agreements.
While primarily a tool to advance domestic policies, Brazil’s ACFIs were conceived in the shadow of major of the legitimacy crisis of the global investment regime. The combination of those factors resulted in a model agreement structured under three main pillars: 1) investment cooperation and facilitation; 2) improved institutional governance; and 3) Risk mitigation, and dispute prevention and settlement. Although this structure is not entirely new to international investment agreements, the ACFI brought new components to their content. Constant cooperation among governmental agencies, mediated by diplomatic action, and deference to domestic legislation can be considered the leading notions behind this model agreement, which offers an alternative to the current international investment regime.

2.1. Investment cooperation and facilitation

Investment facilitation provisions are mostly concerned with market access, and they prevail in the structure of the ACFIs signed to date. In this respect, simple measures such as visa policy and the regularity of flights were considered basic needs for the effective promotion of investment flows from Brazil into its counterparts (mainly other developing country economies). While those may be problems for an investor from any part of the world, such barriers are more costly for investors from developing countries, to the extent that they limit capital exports in the absence of alternatives. Brazil chose to address such problems through an investment agreement,

58 According to MDIC, in contrast to the traditional-type BIT experience, the Brazilian government’s position was: 1) to restrict the expropriation concept only to direct expropriation, and its compensation in accordance with the Brazilian Constitution (Articles 5, 182 and 184 of Brazil’s Federal Constitution of 1988 provide that expropriation of urban and rural real properties may be—among other possibilities—compensated with public and agrarian bonds, respectively); 2) to establish a dispute settlement mechanism limited to state-state disputes; 3) to admit exceptions to the free transfer obligation, aiming at safeguarding the host country’s balance of payments; 4) to limit investor protection under the agreement to productive investments, according to the International Monetary Fund’s definitions and under the conditions of the host country domestic rules; and 5) to welcome host countries’ policy spaces in the definition of exceptions to National Treatment and Most-Favoured-Nation Treatment (MFN) obligations.

59 In addition to that agenda, the Brazilian private sector voiced their position by answering a survey on investment facilitation. See CNI 2013 Report. Based on the survey and on further studies conducted by GTEX, three additional elements were added: 1) a focal point where firms could go for advice and help throughout the investment relation; 2) provisions for risk mitigation and dispute prevention; and 3) a thematic work program for investment facilitation devoted mainly to visa and licensing proceedings, among others. D. Godinho, Head of the Brazilian Foreign Trade Secretariat (SECEX), Ministry of Development, Industry and Commerce, personal communication, April 28, 2015.
including a thematic agenda for investment cooperation and facilitation as one of its core elements.

The thematic agendas comprise programs on money transfers, visa proceedings, technical and environmental licenses and certifications, as well as provisions for institutional cooperation. Such agendas also revive developing country claims to 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 capital exports, but also from the overall impact that investment from the home country 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 takes into account the domestic 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. In the opinion of Mr. Daniel Godinho, Secretary of SECEX and a key person in designing and negotiating the agreements, the existence of such thematic agendas turn the ACFIs into dynamic agreements that may evolve along with the bilateral investment relations.

2.2. Improved institutional governance

Each ACFI creates two types of institutions to govern the agreement: a Joint Committee (JC) and ombudsmen (Focal Points). The JC, 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 JC involve: monitoring and discussing the implementation of the ACFI; debating and sharing investment opportunities; coordinating the implementation of the cooperation programs; inviting private sector and civil society participation to integrate the JC, when applicable; managing to build

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60 In June 2014 Angola and Brazil had signed a Protocol about Visa Facilitation that was taken into account in the thematic agenda of the Brazil–Angola ACFI, Annex I, subparagraph 1.2(i).
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 (focal point) mechanism that will provide government assistance to investors from the other party, inspired by the 2010 Korean Investment Act. These focal points have 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 with government authorities and the private sector, to avoid disputes and facilitate its settlement; promptly provide information to the parties concerning regulatory issues related to investments, and reporting its activities to the Joint Committee.

Influenced by multilateral organizations, such as the United Nations Conference on Trade and Development (UNCTAD),61 and experiences from other countries, Brazil has strongly emphasized the prevention of disputes between the parties in its ACFI template. 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.

Additionally, 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 allow a reasonable opportunity for those interested to voice their opinion about proposed measures.”62 This may still be considered a novelty to the current regime.

2.3. Risk mitigation, dispute prevention and settlement

The risk mitigation dimension of the agreement comprises typical rules for investment and investor protection, and 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 responsibilities. On this issue, we read the ACFI provisions mainly as a product of the international agenda for reforming the investment regime and of specific domestic concerns on the topic.

2.3.1. Standards of treatment

The model investment agreement proposed by Brazil reduces the scope of investor protection to two clauses: National Treatment (NT) and Most-Favored-Nation (MFN). This contradicts standard BITs practices, which extend investor protection to much contested clauses, such as Fair and Equitable Treatment, Full Protection and Security, and Umbrella Clauses. On this point, the Brazilian approach should be read as an attempt to safeguard Parties’ right to regulate without outright violating investors’ rights, a topic highly controversial in current investment treaty practice.

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.” Similarly, the ACFI with Mexico states that NT obligations “does not impede the adoption and implementation of new requirements or legal restrictions upon investors and their

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investments, provided they are not discriminatory. 68 Similarly, all ACFIs include exceptions to MFN based on regional integration agreements. 69

A common limitation on MFN obligations in the Latin American agreements relates to dispute settlement provisions. The ACFIs with Mexico, Colombia and Chile expressly state that MFN obligations shall not extend to dispute settlement provisions that these countries have in international investment agreements with other partners. 70 These provisions safeguard Brazil from facing ISDS procedures via MFN, relying on agreements Chile, Colombia and Mexico might have with third countries. However, it leaves an open door for Brazilian investors to invoke ISDS in any future dispute with Mozambique, Angola, and Malawi, countries that did not limit MFN obligations in their ACFIs.

In general, the innovations brought by Brazil in relation to standards of treatment might be understood as responses to international and domestic claims. Provisions dealing with fair and equitable treatment proved highly controversial in investment arbitration. 71 While it might be seen as an effective way to protect investors, it limits host states’ right to regulate in the public interest. In this instance, 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 coherent 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 among the Parties.

2.3.2. Direct expropriation and compensation

One interesting innovation of the Brazilian ACFIs in relation to standard BIT practice is to limit the scope of the agreement to direct expropriation. The ACFIs are silent about indirect expropriations, but careful reading of the texts of the agreements

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suggest that this form of expropriation is outside of the scope of their scope.\textsuperscript{72} We believe that this option is a Brazilian 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 environment, health and other sensitive policy issues that may indirectly affect the rights of investors accorded by investment treaties.\textsuperscript{73}

Compensation standards do not differ much from standard BIT practice. All ACFIs provide that the investor shall have the right to a compensation\textsuperscript{74} that is: adequate and effective (ACFI Mozambique and ACFI Malawi);\textsuperscript{75} fair (ACFI Angola);\textsuperscript{76} effective (ACFI Colombia).\textsuperscript{77} In this regard, Brazil follows standard BIT practice.

2.3.4. Corporate Social Responsibility

The agreements also include corporate social responsibility (CSR) clauses, encouraging foreign investors to respect human rights and environmental laws in the host state, also in order to mitigate risk. Even though the agreements are ambiguous regarding the binding force of these CSR obligations and even more so regarding mechanisms to enforce them,\textsuperscript{78} they do innovate by addressing the protection of interests of the host state and its citizens within an international investment regulation. By including CSR clauses in the agreements, Brazil is offering an alternative to standard BIT practice that unilaterally imposes obligation upon host states and very little on the side of the investor. Therefore, in addition to acknowledging the relationship between investment and human rights, Brazil tries to strike a balance between investors and host countries obligations.

\textsuperscript{72} None of the agreements, however, expressly exclude indirect expropriation. The closest the ACFIs get to excluding indirect expropriation is in the agreement with Chile, stating: For greater certainty, this Article only regulates direct expropriation, where an investment is nationalized or expropriated in another form by means of formal transfer of the title or the right to possess.” Brazil-Chile ACFI, Art. 7.2.5.

\textsuperscript{73} Cases.

\textsuperscript{74} Note that the ACFIs Mexico and Chile do not qualify the standards of compensation. Articles…

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\textsuperscript{78} 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 Borges, C. (2015, May 29). Acordos bilaterais à brasileira. Valor Econômico. Retrieved from http://www.valor.com.br/opiniao/4072416/acordos-bilaterais-brasileira (subscription only).
2.3.5. Dispute prevention and settlement

Brazil made a conscious decision not to include Investor-State Dispute Settlement provisions in its agreements. Instead, the focus of the agreements is on dispute prevention. State-to-state arbitration is provided, but only as a last resort. By emphasizing on dispute prevention, Brazil develops an interesting set of institutional mechanisms to pursue that goal.

Such move should be read as both a response to the generalized discontentment with ISDS, epitomized in the Argentine case;\(^79\) and to Brazilian private sector demands to create communication channels with the local government throughout the investment relation to reduce the possibility of disputes. Moreover, the unique features of Brazil’s state-supported investment policy, which makes the Brazilian government especially concerned with facilitation the investments, ensures the Brazilian government will play a central role in helping resolve disputes, and makes ISDS less important to Brazilian industry.\(^80\)

Dispute prevention in the ACFIs operates at three interrelated levels, as shown in picture 1:

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\(^79\) Alvarez, 2011.

\(^80\) We thank David Trubek for raising this point in private communication with the authors.
The first level of dispute prevention involves the ombudsperson, which manages consultations and negotiations between investors and states. Among other functions, the ombudsperson offers support for investors from the other party in its territory to: a) “interact with the relevant government authorities to assess and recommend referrals for suggestions and complaints received from the Government and investors of the other party;” and b) “mitigate conflicts and facilitate their resolution in coordination with relevant government authorities and private sector bodies.” (Brazil-Malawi ACFI, Art. 4).\(^8\) If the ombudsperson does not manage to solve the conflict, dispute prevention operates at its second level, the JC.

The JC shall resolve any issue or dispute concerning Parties’ investment in an amicable manner. A Party may submit a concern of an investor to the JC.\(^8\) Much like the first level of dispute prevention, the JC will work with the Parties to find mutually satisfactory solutions to the problem. At this stage, representatives of the interested investor and of the governmental or non-governmental entities involved in the measure or situation under consultation shall participate in the bilateral meetings held by the JC.\(^8\) Far from being a third-party arbitrator, the JC functions as a mediator, issuing a summarized report.\(^8\) If the JC is unable to work out a mutually satisfactory solution, any party to the agreements may submit to the other party – state to state – a written request to the establishment of an arbitral tribunal.\(^8\) Exhaustion of negotiations and consultations at the JC level is mandatory to initiate arbitral proceedings between States.\(^8\)

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\(^8\) In Brazil, the ombudsperson shall be in the Chamber of Foreign Trade – CAMEX.
\(^8\) Brazil-Malawi ACFI, Article 13.3: “A Party may submit a specific question of interest of an investor to the Joint Committee:

a) To initiate the procedure, the Party of the interested investor shall submit, in writing, its request to the Joint Committee, specifying the name of the interested investor and the encountered challenges and difficulties;

b) The Joint Committee shall have 60 days, extendable by mutual agreement by 60 additional days, upon justification, to submit relevant information about the presented case.”

\(^8\) Brazil-Malawi ACFI, Art. 13.3.c.
\(^8\) Brazil-Chile ACFI, Art. 24.3.g: The report of the Joint Committee shall include:

(i) Identification to the Party that adopted the measure;

(ii) Identification of the affected investor […];

(iii) Description of the measure under consultation;

(iv) Description of the activities performed by the JC;

(v) Position of the Parties concerning the measure.”

\(^8\) Brazil-Malawi ACFI, Art. 13.6; Brazil-Chile ACFI, Art. 25.
\(^8\) Brazil-Chile ACFI, Art. 25.
All of the Brazilian ACFIs include a state-to-state arbitration clause. The African ACFIs include a standard and vague arbitration clause: “If the dispute cannot be resolved, the Parties to the exclusion of the investors may resort to arbitration mechanisms between States, which needs to be agreed upon by the Joint Committee, whenever the Parties find it appropriate.” The Latin American ACFIs advance on the issue, gradually including more detailed provisions on the procedures of the arbitration. We believe that such a difference in approach between African and Latin American agreements is due to two interrelated factors: 1) Mozambique and Angola, and later Malawi, seemed to have accepted the agreement proposed by Brazil without much resistance and demands for either lack of negotiating capacity, or for truly believing that the horizontally-coordinated ACFI meets their internal demands; 2) The well-developed negotiating capacity of Mexico, Colombia and Chile in matters related to investment agreements. These countries are part of several investment agreements, including BITs, with detailed ISDS and/or state-to-state arbitration procedures. It is reasonable to believe that they would demand a similar approach in their agreements with Brazil. At the same time, the demands raised by these countries are still manageable to Brazil. They simply detailed an already-existing commitment to state-to-state arbitration, and they do not provide ISDS, an issue where Brazil is adamant to negotiate.

In general lines, the provisions on state-to-state dispute settlement in ACFIs with Mexico, Colombia and Chile do not differ much, but some variations do exist. The first variation concerns the scope of application of the ACFIs. While the ACFI with Mexico does not limit the scope of issues and themes subject to arbitration, the ACFIs with Colombia and Chile provide that measures related to security, fight against corruption, health, environment, labor, and provisions on corporate social

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87 Brazilian public officials note that, even though state-to-state arbitration is mentioned in the agreements, it shall not be the foremost mechanism for settling disputes. See interview MDIC.
88 Brazil-Malawi ACFI, Art. 13.6.
89 For one reason, the terms of the agreement proposed by Brazil differs from standard BITs, which focus on investment protection and limit host countries policy spaces. The ACFIs offer an alternative to that form of investment regulation, cutting back on some investor protections and offering a horizontally-coordinated agreement. For countries that are historically used to and unsatisfied with BIT-type agreements, Brazil's alternative template is appealing. For an assessment dealing with the case of Angola, see Badin, Morosini & Xavier Junior, O ACFI face a determinantes históricos da regulação sobre investimentos estrangeiros em Angola e Brasil (forthcoming 2016).
responsibility are not arbitrable.\textsuperscript{90} This limitation on the jurisdiction of the arbitral tribunal might be interpreted as an attempt to safeguard parties’ policy space in sensitive regulatory issues, a hotly debated topic and source of major discontentment in the investment arbitration world.\textsuperscript{91} However, the drafters of the agreements fail to indicate which court has jurisdiction over those matters? Can it be assumed that the court of the host state shall have jurisdiction? If so, are they bound by the ACFI rules as applicable law and procedures? The agreements should clarify this issue before ratification.

The terms of reference of the three ACFIs with Latin American countries offer another example of variations around the same theme. The three agreements provide that the main objective of the arbitration is to bring the challenged measure in conformity with the ACFI. The arbitration tribunal will also determine the existence of damages to the investor and the amount of compensation due in the ACFIs with Mexico and Colombia. The ACFI with Chile, which provides the most detailed rules on dispute settlement is, however, silent on the issue of determination of damages and compensation.\textsuperscript{92} This is certainly at odds with the typical functions of an arbitration tribunal, which can only be explained by Chilean resistance, since Brazil did not oppose extending the jurisdiction of the arbitral tribunal in its agreements with Mexico and Colombia. Here again it remains to be answered which court, domestic or international, has jurisdiction over the fundamental issue of compensation, and which laws should it apply.

The ACFIs with Latin American countries accept arbitration procedures to be conducted ad hoc or by an institution.\textsuperscript{93} If conducted on an ad hoc basis, each arbitral tribunal shall be composed of three arbitrators chosen by the Parties.\textsuperscript{94} If the Parties fail to appoint the arbitrators within the expected time (usually sixty days), the President of the ICJ (ACFI Mexico) or the Secretary-General of the PCA (ACFI

\textsuperscript{90} Insert provisions. Both of these ACFIs also impose a statute of limitation of five years after the Party knew or should have known about the facts that give rise to a complaint. Insert provisions.

\textsuperscript{91} This is a particular intriguing limitation of the ACFI with Chile, given that the agreement regulates compensation for direct expropriation.

\textsuperscript{92} Neither agreement identifies which institutions shall be used.

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Colombia and Chile) step in.\textsuperscript{95} The arbitrators should base their conduct according to the Understanding on the Rules and Procedures Governing the settlement of Disputes of the WTO.\textsuperscript{96} The rules governing the arbitral procedures, on the other hand, varies across the board. In the ACFI with Mexico, the arbitral tribunal determines the procedures. If the arbitral tribunal fails to make such a determination, the ACFI with Colombia resorts to the UNCITRAL arbitration rules. The ACFI with Chile states that arbitral procedures are to be decided by the Parties. The arbitral shall issue a binding decision within 6 months of either the nomination of the President of the tribunal\textsuperscript{97} or of the establishment of the panel.\textsuperscript{98}

In sum, the dispute settlement mechanism developed by the Brazilian agreements responds to internal claims of Brazil and to the international dissatisfaction with ISDS and its several related issues. The focus on dispute prevention should be praised, given its high potential to reduce the possibility of disputes reaching arbitration. Such mechanisms shall reduce the economic and political costs of the involved parties.

In order to reap out the benefits of dispute prevention, Brazil has homework to do. It needs to further detail how the ombudsperson will function. As it provided in the agreements, CAMEX will act as Brazil’s ombudsperson. CAMEX may not be the best fit for a couple of reasons. First, it is an interministerial body with quite broad functions.\textsuperscript{99} For the sake of imagination, the ombudsperson could be a governmental body composed of a small number of officials with technical expertise on investment issues that could respond rapidly and efficiently to investors claims and concerns. To be consistent with the ACFIs initial proposition, the ombudsperson should report to CAMEX on a regular basis. As for the Joint Committee, Brazil and its ACFIs investment partners need to further detail the manner in which the JC will operate. It should start by first identifying which government officials will participate in the JC

\textsuperscript{95} ACFI Mexico and Colombia
\textsuperscript{96} ACFI Chile
\textsuperscript{97} ACFI Mexico and Colombia
\textsuperscript{98} ACFI Chile
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and, second, developing its own rules.\textsuperscript{100} The effectiveness of investment dispute prevention is in the details.

In addition, the exclusion of ISDS and the option for state-to-state arbitration, despite massive disappointment from Brazilian law firms – interested in this profitable market, should not be so promptly condemned. From the point of view of internal politics, agreements containing ISDS clauses do not stand a chance of passing Congress’ scrutiny. For that matter, it is naïve and counterproductive to keep pushing that agenda in Brazil for the time being. The country has opted for state-to-state arbitration and is progressively regulating these procedures in the agreements signed to date. On the other hand, the arbitral procedures of the existing agreements need to be harmonized, if not as a pure matter of consistency, to avoid future MFN-based claims against Brazil. On top of that, the agreements should state which courts have jurisdiction over the regulatory issues that fall outside the ACFIs jurisdiction and which law should apply to those issues.

\textbf{Conclusion}

Brazil chose to address its developing country and latecomer limitations to investment flows through an alternative model agreement, which can be seen as a first step toward more symmetry in investments agreements. The provisions on investor and investment protection are not the main focus of the ACFI. In terms of investment policy engineering, the ACFI stands for a regulatory tool that is alternative to investor and investment protection. It emphasizes constant coordination between the parties’ agencies and investment facilitation under thematic agendas for cooperation, and deference to domestic legislation. Although we identify more innovation capacity in this part of the agreement, we also recognize that new elements were brought to the scene with respect to risk mitigation and dispute prevention.

However, the ACFI itself still needs to be further regulated—particularly as to the functioning of institutional mechanisms—, and its provisions must be given a breath of life. Brazil and its counterparts have homework to do in detailing the

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framework for the ACFIs and the investment relations under the agreements. Therefore, the ACFI model and its innovative contribution will be put to test in the regulation and implementation of the concluded agreements, a challenge that highly depends on the coordination and cooperation capacity of the parties’ agencies.